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MEMORANDUM

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**TO:** JUDGES TRYING CRIMINAL CASES  
**FROM:** DEBORAH SELDEN AND INTERNS JOSH SCHNEIDER, ELIZABETH WIEHLE, MARY MARTIN, AND PETER CHICKRIS  
**SUBJECT:** 04/30/08 COURT OF CRIMINAL APPEALS OPINIONS  
**DATE:** 07/18/08  
**CC:** JACK THOMPSON

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***Moseley v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-479-07, 04/30/08].**

JOHNSON, J., *delivered the opinion for a unanimous court.*

**FACTS:** A jury convicted defendant of murder and sentenced him to life in prison. The trial court denied defendant's motion to suppress, finding that a DVD recording of the defendant's side of telephone conversations was a not "wire communication" and was admissible as evidence. The court of appeals and Court of Criminal Appeals affirmed.

**EVIDENCE—ADMISSIBILITY—WIRETAPS**

Words spoken into a telephone receiver that can be heard in the area surrounding the speaker without electronic assistance are not "wire communications" for purposes of admissibility under the Code of Criminal Procedure. ***Moseley v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PF-479-07, 04/30/08].**

***Haynes v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1923-06, 04/30/08].**

HERVEY, J., *delivered the opinion of the Court, in which MEYERS, PRICE, JOHNSON, KEASLER, and HOLCOMB, J.J., joined.* JOHNSON, J., *filed a concurring opinion.* KELLER, P.J., *filed a dissenting opinion in which COCHRAN, J., joined.* COCHRAN, J., *filed a dissenting opinion.* WOMACK, J., *dissented.*

**FACTS:** A jury convicted defendant of felony assault of a household member and sentenced him to twenty-five years in prison. Finding the evidence insufficient to support the conviction, the appellate court entered a judgment of acquittal. The State appealed, claiming that the appellate court should have reformed the judgment to reflect a conviction for a lesser included offense. The Court of Criminal Appeals affirmed the court of appeals, holding that a judgment cannot be reformed to an unrequested lesser-included offense.

## **JUDGMENT—REFORMATION—LESSER INCLUDED OFFENSE**

When an appellate court decides that the evidence is insufficient to support the jury's guilty verdict for the greater offense, but is sufficient to support a conviction for the lesser included offense, an appellate court **may not** reform a trial court's judgment to reflect a conviction for an unrequested lesser-included offense not submitted to the jury. *Haynes v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1923-06, 04/30/08].

## **PLURALITY OPINIONS – PRECEDENTIAL VALUE**

When a fragmented appellate court decides a case and no single rationale explaining the result enjoys the assent of the majority of the judges in the lead and/or concurring opinions, the court's holding may be identified the position taken by the jurists who concurred in the judgments on the narrowest grounds. *Haynes v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1923-06, 04/30/08].

## **STARE DECISIS – CHANGE IN COURT MEMBERSHIP**

Change in court membership is not a sufficient reason to ignore *stare decisis* principles. *Haynes v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1923-06, 04/30/08].

*Ex Parte Villanueva*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1836-06, 4/30/08].

KEASLER, J., *delivered the opinion for a unanimous Court.*

**FACTS:** Defendant pled guilty to misdemeanor assault and the court assessed his punishment at a \$10,000 fine and a one year suspended sentence. Two years after he finished his sentence, defendant petitioned for a writ of a habeas corpus claiming that he received ineffective assistance of counsel and that his guilty plea was unknowing and involuntary. Without holding a hearing, the trial judge dismissed the petition as frivolous. The court of appeals rejected defendant's appeal for lack of jurisdiction because the trial court did not rule on the merits of the habeas claims. The Court of Criminal Appeals (CCA) reversed and remanded. The CCA held that that an order of a district court finding a habeas to be frivolous and summarily denying the application for writ of habeas corpus seeking relief from an order or judgment of conviction ordering community supervision in a felony or misdemeanor case, is appealable.

## **HABEAS CORPUS—RIGHT TO HABEAS CORPUS**

The Texas Constitution provides that the writ of habeas corpus is a writ of right and shall never be suspended. It is the responsibility of the legislature to enact laws to render habeas

remedies in a speedy and effectual manner. *Ex Parte Villanueva*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1836-06, 4/30/08].

#### **HABEAS CORPUS—TYPES OF HEARINGS**

A hearing held to determine whether a writ should issue or whether the merits of claims should be addressed is not the same as one that is held to resolve the merits of an applicant's allegations. Only when a hearing is held on the merits of an applicant's claims and there is a ruling on the merits of the claims may a losing party appeal. *Ex Parte Villanueva*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1836-06, 4/30/08].

#### **HABEAS CORPUS—HEARING-APPEAL**

When a trial judge refuses to issue a writ or denies an applicant a hearing on the merits of his or her claims, there is no right to appeal. In such cases, the applicant has two remedies: first, to present the application to another trial judge with jurisdiction; or second, to file an application for a writ of mandamus. *Ex Parte Villanueva*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1836-06, 4/30/08].

#### **HABEAS CORPUS—JURISDICTION**

The Texas Constitution grants to the district courts the plenary power to grant writs of habeas corpus. *Ex Parte Villanueva*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1836-06, 4/30/08].

#### **HABEAS CORPUS—RIGHT TO APPEAL**

There is no right to appeal from the refusal to issue or grant a writ of habeas corpus. The right of appeal vests only when there is a final judgment or order. An appeal of a habeas corpus determination may only be prosecuted when a judge issues a ruling on the merits. *Ex Parte Villanueva*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1836-06, 4/30/08].

#### **HABEAS CORPUS—COMMUNITY SUPERVISION**

When a defendant is on community supervision, the Code of Criminal Procedure requires that the application for habeas corpus must attack the legal validity of: 1) the conviction or order imposing community supervision, or 2) the conditions of the community supervision. A writ of habeas corpus issues by operation of law when the application is filed. *Ex Parte Villanueva*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1836-06, 4/30/08].

#### **HABEAS CORPUS—FACIALLY FRIVOLOUS CLAIMS**

If the trial court determines from the face of an application for habeas corpus that the applicant is manifestly entitled to no relief, the court shall enter a written order denying the

application as frivolous. The trial court is required to enter findings of fact and conclusions of law with its written order when the claim is not frivolous. *Ex Parte Villanueva*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1836-06, 4/30/08].

#### **HABEAS CORPUS—SUBSEQUENT WRITS**

A trial court may only consider the merits of a subsequent application for a writ of habeas corpus if the application contains specific facts establishing that the current claims and issues were not or could not be brought in the original application. *Ex Parte Villanueva*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1836-06, 4/30/08].

#### **HABEAS CORPUS—UNAVAILABLE LEGAL BASIS**

A legal basis of a claim is unavailable if the basis was not recognized and could not have been reasonably formulated from a final decision of the U.S Supreme Court or other appellate court before the date of the application for habeas corpus. *Ex Parte Villanueva*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1836-06, 4/30/08].

#### **HABEAS CORPUS—UNAVAILABLE FACTUAL BASIS**

A factual basis of a claim in a subsequent habeas corpus was unavailable on or before the date of the original habeas if the factual basis was not ascertainable through the exercise of reasonable diligence. *Ex Parte Villanueva*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1836-06, 4/30/08].

#### **HABEAS CORPUS—APPELLATE JURISDICTION**

Article 11.072 of the Texas Code of Criminal Procedure is the exclusive remedy provided by the legislature for the courts to exercise habeas corpus jurisdiction in cases involving an individual who is either serving a term of community supervision or who has completed a term of community supervision. *Ex Parte Villanueva*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1836-06, 4/30/08].

*In re Schulman*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,911, 4/30/08].

COCHRAN, J., *delivered the opinion of the unanimous Court.*

**FACTS:** Defendant's appointed appellate attorney filed an *Anders* brief with the court of appeals that concluded that the appeal was frivolous. Instead of filing the customary motion to withdraw, however, the attorney argued that his duty to assist his client was not extinguished by filing the *Anders* brief. The court of appeals disagreed, and ordered him to reconsider his refusal to file a motion to withdraw. The attorney filed a petition for a writ of mandamus with the Court of

Criminal Appeals (CCA). Finding that the court of appeals was correct, the CCA denied mandamus relief.

#### **ANDERS BRIEF – SUPPORT WITHDRAW**

Under both Supreme Court and Texas precedent, when counsel files a motion to withdraw because he believes the appeal is frivolous, he may simultaneously file an *Anders* brief. An *Anders* brief may not be filed without a motion to withdraw, as the sole purpose of an *Anders* brief is to explain and support the motion to withdraw. *In re Schulman*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,911, 4/30/08].

#### **FRIVOLOUS APPEALS—DUTY OF ATTORNEY - WITHDRAWAL**

A criminal defense attorney has a duty to zealously represent the interest of his client on appeal. If he finds the case to be wholly frivolous after conscientious examination, however he should advise the court and request permission to withdraw. *In re Schulman*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,911, 4/30/08].

#### **APPEALS—DUTY OF ATTORNEY**

Neither paid nor appointed counsel may deliberately mislead the court with respect to either the facts or the law, or consume the time and energies of the court by advancing frivolous arguments. This constitutes an ethical obligation to refuse to prosecute a frivolous appeal. *In re Schulman*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,911, 4/30/08].

#### **ANDERS BRIEF – PROCEDURE**

Although the defense attorney is required to file a motion to withdraw at the same time he files an *Anders* brief, the court will not grant the motion until: 1) the attorney has sent a copy of the *Anders* brief to his client along with a letter explaining that the defendant has the right to file a *pro se* brief within thirty days, and he has ensured that his client has been informed of his right to file a *pro se* petition for discretionary review; (2) the attorney has informed the court of appeals that he has performed the above duties; (3) the defendant has had time in which to file a *pro se* response; and (4) the court of appeals has reviewed the record, the *Anders* brief, and any *pro se* brief. *In re Schulman*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,911, 4/30/08].

#### **ANDERS BRIEF-PROCEDURE**

If after an *Anders* brief has been filed, the court of appeals decides that there are any colorable claims for appeal, it will: 1) grant the original attorney's motion to withdraw; and 2) abate the case and require the trial court to appoint a new attorney to file a merits brief. *In re Schulman*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,911, 4/30/08].

## **ANDERS BRIEF - PROCEDURE**

*Anders* brief procedures are prophylactic and the states are free to create their own procedures. To be valid, a state's *Anders* procedures must adequately safeguard a defendant's right to appellate counsel. *In re Schulman*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,911, 4/30/08].

## **ANDERS PROCEDURES - WITHDRAWAL**

Motions to withdraw filed with *Anders* briefs cannot be granted until the appellate court decides whether: 1) the appeal is, in fact, wholly frivolous, or 2) there are any arguable claims of merit. An attorney's duties to his client are not extinguished until that time. *In re Schulman*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,911, 4/30/08].

## **ANDERS BRIEF—REQUISITES**

A motion to withdraw is required to be filed with an *Anders* brief. Otherwise, the court of appeals cannot proceed to rule on the *Anders*. *In re Schulman*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,911, 4/30/08].

## **ANDERS BRIEF—REQUISITES**

An *Anders* brief: 1) reflects the fact that the appointed attorney has adequately researched the case before requesting to withdraw from further representation; 2) sets out the attorney's due diligence investigation on behalf of his client; 3) provides appellate courts with a roadmap for their review of the record, because the court itself must be assured that the attorney has made a legally correct determination that the appeal is frivolous; 4) provides the defendant with appropriate citations to the record if he wishes to exercise his right to file a *pro se* brief; and 5) protects the appointed attorney from the constantly increasing charge that he was ineffective and had not handled the case with that diligence to which an indigent defendant is entitled. *In re Schulman*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,911, 4/30/08].

*Fuller v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-74980, 04/30/08].

PRICE, J., delivered the opinion of the Court in which KELLER, P.J., and WOMACK, JOHNSON, KEASLER, HERVEY, HOLCOMB, and COCHRAN, J.J., joined. MEYERS, J., filed an opinion in which he concurred in the result as to points of error ten and eleven and otherwise joined the opinion of the Court.

**FACTS:** Defendant pled guilty of capital murder to a jury and was sentenced to death. The Court of Criminal Appeals affirmed.

#### **JURY TRIAL—WAIVER—NON-CAPITAL OFFENSES**

To waive a jury trial in non-capital cases, the Code of Criminal Procedure requires the defendant to execute a written waiver of his right to jury trial in open court with the consent and approval of the court and the prosecution. *Fuller v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-74980, 04/30/08].

#### **JURY TRIAL—WAIVER—NON-DEATH CAPITAL OFFENSES**

In capital cases, defendant may waive his right to jury trial only if the prosecution consents to waiver in open court and the prosecution notifies the court and the defendant that it will not seek the death penalty. *Fuller v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-74980, 04/30/08].

#### **JURY TRIAL—WAIVER—NON-DEATH CAPITAL OFFENSES**

A plea of guilty to a capital murder charge in front of the jury is not an illegal waiver of a jury trial, but rather a trial by jury that essentially becomes a trial on punishment only. In all cases where a defendant enters a plea of guilty before the jury, no issue of the defendant's guilt is submitted to the jury. *Fuller v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-74980, 04/30/08].

#### **GUILTY PLEA – SUBSTITUTE FOR JURY VERDICT**

U. S. Supreme Court has long held that a plea of guilty substitutes for a jury verdict of guilt. The plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury, it is conclusive and more is not required. After receiving a guilty plea, the court has nothing to do but give judgment and sentence. *Fuller v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-74980, 04/30/08].

#### **GUILTY PLEA – UNITARY PUNISHMENT HEARING**

When a defendant pleads guilty to a jury, the jury need not return any verdict of guilty. The case simply proceeds with a unitary punishment hearing. *Fuller v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-74980, 04/30/08].

#### **JURY TRIAL—SUBMISSION OF VERDICT**

A verdict is a written declaration by a jury of its decision of the issue submitted. If a defendant has pleaded guilty before a jury, the issue of guilt is not submitted to the jury and it does not return a verdict of guilt. *Fuller v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-74980, 04/30/08].

### **JURY TRIAL—WAIVER—CAPITAL OFFENSES**

A plea of guilty made to a jury is the functional equivalent of a jury verdict. This applies equally to both non-death capital and non-capital trials. *Fuller v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-74980, 04/30/08].

### **COMPETENCY--DEFINITION**

A defendant is incompetent to stand trial if he does not have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or a rational and factual understanding of the proceeding against him. *Fuller v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-74980, 04/30/08].

### **COMPETENCY—SUA SPONTE HEARING**

Where the evidence raises a bona fide doubt as to a defendant's competence to stand trial, the judge must *sua sponte* impanel a jury and conduct a sanity hearing. *Fuller v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-74980, 04/30/08].

### **COMPETENCY—BONA FIDE DOUBT**

Bona fide doubt is a real doubt in the judge's mind as to a defendant's competency. The evidence supporting bona fide doubt need not be sufficient to support a finding of incompetence and is qualitatively different from such evidence. Evidence is sufficient to create a bona fide doubt if it simply shows severe mental illness, moderate retardation, or truly bizarre acts by a defendant. *Fuller v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-74980, 04/30/08].

### **COMPETENCY—SUA SPONTE HEARING**

If any evidence suggests the defendant may be incompetent to stand trial, the trial court shall *sua sponte* suggest that the defendant may be incompetent and then determine by informal inquiry whether there is some evidence from any source that would support a finding that the defendant may be incompetent to stand trial. *Fuller v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-74980, 04/30/08].

### **GUILTY PLEA—KNOWING, VOLUNTARY, INTELLIGENT WAIVER**

It is a violation of due process for a trial court to accept a guilty plea without an affirmative showing on the record that the plea was intelligently and knowingly made. The record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily. *Fuller v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-74980, 04/30/08].

#### **GUILTY PLEA—SPECIFIC ADMONISHMENTS**

The specific admonishments set out in Article 26.13(a) of the Code of Criminal Procedure are constitutionally required. Their purpose and function is to assist the trial court in determining that a guilty plea is entered knowingly and voluntarily. *Fuller v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-74980, 04/30/08].

#### **RIGHT TO COUNSEL—ACTIONS NOT KNOWN TO DEFENDANT**

The U. S. Supreme Court has held that it is immaterial whether an attorney has attempted to intervene on behalf of an accused if the accused is unaware of the attorney's actions. Officials are under no duty to cease an interview because an attorney asks them to inform the accused. If events are happening outside of the appellant's presence and are completely unknown to him, those events can have no bearing on his capacity to comprehend and knowingly waive his rights. *Fuller v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-74980, 04/30/08].

#### **FACTUAL SUFFICIENCY—FUTURE DANGEROUSNESS**

Appellate reviews of factual sufficiency with regard to jury determinations of future dangerousness are not permitted. *Fuller v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-74980, 04/30/08].

#### **LEGAL SUFFICIENCY—FUTURE DANGEROUSNESS**

Juries may consider a variety of factors when determining whether a defendant will pose a continuing threat to society. Considerations of the legal sufficiency of a future dangerousness finding must be viewed in the light most favorable to the jury and determine whether a rational jury could have found beyond a reasonable doubt that future dangerousness exists. *Fuller v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-74980, 04/30/08].

#### **ERROR PRESERVATION—PROCEDURE**

To preserve error for appellate review, a party must make a timely and specific objection or motion at trial and the trial court must make an adverse ruling on the objection. Failure to preserve error forfeits assertion of the error on appeal. *Fuller v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-74980, 04/30/08].

#### **ERROR PRESERVATION—FORFEITURE OF COMPLAINT**

Failure to object in a timely and specific manner during trial forfeits complaints about the admissibility of evidence. This forfeiture applies even if the error may concern a constitutional right of a defendant. *Fuller v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-74980, 04/30/08].

#### **ERROR —MOTIONS *IN LIMINE***

A motion *in limine* is a preliminary matter and preserves nothing for appellate review. Errors raised in a motion *in limine* can only be preserved if an objection is raised at the time the subject is raised during trial. **Fuller v. State, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-74980, 04/30/08].**

#### **JURY CHARGE—IRRELEVANT FACTORS**

An instruction that prohibits a jury from basing its sentencing decision on factors that are irrelevant to the issues at trial is constitutional. **Fuller v. State, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-74980, 04/30/08].**

#### **JURY CHARGE—STATUTORILY DEFINED WORDS**

Words that are not statutorily defined are to be given their usual meanings and no specific jury instructions are required. **Fuller v. State, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-74980, 04/30/08].**