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MEMORANDUM

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**TO:** JUDGES TRYING CRIMINAL CASES  
**FROM:** DEBORAH SELDEN AND INTERNS JOSH SCHNEIDER, MARY MARTIN, AND PETER CHICKRIS  
**SUBJECT:** 06/25/08 COURT OF CRIMINAL APPEALS OPINIONS  
**DATE:** 09/09/08  
**CC:** JACK THOMPSON

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***McCarthy v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1139-07, 06/25/08].**

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

**FACTS:** A jury convicted defendant of two counts of indecency with a child and acquitted him of aggravated sexual assault. Defendant was fined \$1,000 and sentenced to ten years imprisonment on each count. During trial, defendant objected to several out of court statements as hearsay grounds. The court of appeals affirmed the trial court. The Court of Criminal Appeals affirmed the lower courts.

**EVIDENCE—REVIEW**

A trial court's decision to admit evidence will not be reversed absent a clear abuse of discretion. ***McCarthy v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1139-07, 06/25/08].**

**EVIDENCE—HEARSAY**

Hearsay statements are not admissible unless they fall within a recognized exception to the hearsay rule. ***McCarthy v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1139-07, 06/25/08].**

**EVIDENCE—HEARSAY—EXCITED UTTERANCE**

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is an exception under the hearsay rule. ***McCarthy v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1139-07, 06/25/08].**

**EVIDENCE—HEARSAY—PRESENT SENSE IMPRESSION**

A present sense impression is a statement that describes or explains an event or condition made while the declarant was perceiving the event or condition or immediately after and is an

exception to the hearsay rule. *McCarthy v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1139-07, 06/25/08].

#### **EVIDENCE—HEARSAY—EXCITED UTTERANCE**

To determine whether a statement falls under the excited utterance exception to the hearsay rule, a trial court must find, as in the “spontaneous utterance” exception, that: 1) the “exciting event” should be startling enough to evoke a truly spontaneous reaction from the declarant; 2) the reaction to the startling event should be quick enough to avoid the possibility of fabrication; and 3) the resulting statement should be sufficiently related to the startling event to ensure the reliability and trustworthiness of the statement. *McCarthy v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1139-07, 06/25/08].

#### **AUTHORITY – FAIL TO CITE TO A CASE**

The fact that an appellate court does not “utilize or rely upon” a case in deciding an apparently related case, does not mean that the court has “repudiated” the case not mentioned. *McCarthy v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1139-07, 06/25/08].

#### **EVIDENCE-EXCITED UTTERANCE-DIFFERENT EVENT**

The event producing an excited utterance need not be the event about which the utterance is made. 1) there must be an occurrence or event sufficiently startling to render inoperative the normal reflective thought processes of the observer; and 2) the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought. *McCarthy v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1139-07, 06/25/08].

*Whitehead v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-0713-07, 06/25/08].

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

**FACTS:** Defendant pled guilty before the trial court to the felony offense of indecency with a child and the court assessed punishment at imprisonment for four years, probated for four years. Later, the trial court granted the State’s motion to revoke defendant’s community supervision. While awaiting transportation to state prison, defendant wrote a letter threatening the judge who presided over his trial and several others.

A grand jury returned an indictment charging defendant with felony retaliation. A jury convicted defendant of retaliation and assessed punishment, enhanced, at imprisonment for fifteen years and a \$10,000 fine. For the first time on appeal, defendant argued that the presiding

judge was disqualified from sitting on the retaliation suit because he was one of the threatened victims. The court of appeals disagreed and affirmed the conviction. Finding that the disqualification statute was not limited to the victims listed in the indictment, the Court of Criminal Appeals reversed the trial court and remanded for further proceedings.

#### **JUDICIAL DISQUALIFICATION**

No judge or justice of the peace may preside over any case where he is an injured party, has been counsel for the state or the accused, or where the injured party is connected to the judge by consanguinity or affinity within the third degree. *Whitehead v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-0713-07, 06/25/08].

#### **JUDICIAL DISQUALIFICATION- JUDGE AS A VICTIM**

A trial court judge who was a victim of the defendant might be biased against him or at least appear to be so, and allowing such a judge to preside over the defendant's trial would threaten the fair administration of justice and bring disrepute upon the judiciary. The legislators may also have been trying to avoid the spectacle of having a trial court judge preside over a trial in which he, as a victim, might be called as a witness. *Whitehead v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-0713-07, 06/25/08].

#### **STATUTORY INTERPRETATION—LEGISLATIVE INTENT**

The courts must interpret a statute in a way to give effect to the apparent intent of the legislators. This is done by inquiring as to how an ordinary legislator would have understood the text. *Whitehead v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-0713-07, 06/25/08].

#### **JUDICIAL DISQUALIFICATION—INJURED PARTY**

A trial court judge may be an “injured party” in any particular criminal prosecution, if the evidence shows that the judge was among the victims in the criminal transaction at issue, and if a reasonable person would harbor doubts as to the judge’s impartiality. *Whitehead v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-0713-07, 06/25/08].

#### **RETALIATION - ELEMENTS**

A person commits the offense of retaliation if he intentionally or knowingly harms or threatens to harm another by an unlawful act in retaliation for or on account of the service or status of another as a public servant, witness, prospective witness, or informant.” It is no defense to prosecution under this statute that the party threatened was not present when the threat was made. *Whitehead v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-0713-07, 06/25/08].

***Ex Parte Lave*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75912, 06/25/08].**

*Per Curiam*. KELLER, P.J., and PRICE, J., *not participating*.

**FACTS:** A jury convicted defendant of capital murder and sentenced him to death. The Court of Criminal Appeals affirmed his conviction on appeal and denied his petition for writ of habeas corpus. Defendant filed a subsequent petition for a writ of habeas corpus asking for relief because the U.S. Supreme Court's Crawford decision was entered after his judgment had become final. The Court of Criminal Appeals denied the writ, finding that Crawford was not retroactive.

**CRIMINAL PROCEDURE—SUBSEQUENT SUPREME COURT DECISIONS**

New constitutional rules announced by the court of Criminal Appeals that place certain kinds of conduct beyond what the State may proscribe and certain “watershed” rules of criminal procedure must be applied in all future trials, all cases pending on direct review, and all federal habeas corpus proceedings. ***Ex Parte Lave*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75912, 06/25/08].**

**CRIMINAL PROCEDURE—SUBSEQUENT SUPREME COURT DECISIONS**

New, non-watershed rules of criminal procedure must be applied in future trials and in cases pending on direct appeal; however, they do not provide a basis for a federal collateral attack on a state court conviction. ***Ex Parte Lave*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75912, 06/25/08].**

**CRIMINAL PROCEDURE—SUBSEQUENT SUPREME COURT DECISIONS**

Federal law does not require nor prohibit state courts from applying the holding in *Crawford v. Washington* to cases that were final when the Supreme Court decided the case. ***Ex Parte Lave*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75912, 06/25/08].**

***Wooley v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-0861-07, 06/25/08].**

HERVEY, J., delivered the opinion of the Court in which PRICE, WOMACK, KEASLER, and HOLCOMB, J.J., joined. MEYERS, J., filed a concurring opinion. KELLER, P.J., concurred. JOHNSON and COCHRAN, J.J., dissented to point of error two, but otherwise joined point of error one.

**FACTS:** A jury convicted defendant of murder and sentenced him to life imprisonment. The jury charge contained separate provisions allowing the jury to convict the defendant either as the principal or as a party, based on whether they found he fired the fatal shot. The State did not object to the charge because they believed that they could not convict defendant as a party unless the actual shooter was named in the indictment. The court of appeals affirmed the trial court,

finding that the evidence was sufficient to support the verdict. Finding that the court of appeals applied the wrong evidentiary standard, the Court of Criminal Appeals reversed the court of appeals and remanded to the trial court.

#### **APPELLATE REVIEW—EVIDENTIARY SUFFICIENCY**

To analyze the factual evidentiary sufficiency of a jury charge, the court measures the harm against the elements of the offense as defined by a hypothetically correct jury charge for the case. *Wooley v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-0861-07, 06/25/08].

#### **DUE PROCESS—EVIDENTIARY SUFFICIENCY**

Due process prevents an appellate court from affirming a conviction based upon legal and factual grounds that were not submitted to the jury. *Wooley v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-0861-07, 06/25/08].

#### **DUE PROCESS- NOTICE OF CHARGE-INDICTMENT**

No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard at trial of the issues raised by that charge, if desired. To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. *Wooley v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-0861-07, 06/25/08].

#### **DUE PROCESS—EVIDENTIARY SUFFICIENCY**

The right to a jury trial is not satisfied when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to the jury. Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury. *Wooley v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-0861-07, 06/25/08].

*Grotti v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-134-07, 06/25/08].

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

**FACTS:** Defendant was a doctor indicted for murder by using her finger to obstruct a patient's breathing tube. A jury convicted her of the lesser included offense of criminally negligence homicide, and the trial court sentenced her to two years imprisonment. Finding the evidence factually insufficient to support defendant's conviction because the term "death" was not sufficiently defined in the jury charge, the court of appeals reversed the conviction and remanded

for a new trial. On the State's PDR, the Court of Criminal Appeals found that the trial court incorrectly applied the evidentiary sufficiency standards and affirmed the court of appeals.

**EVIDENTIARY SUFFICIENCY—STANDARD OF REVIEW**

The Texas Constitution grants appellate courts (on direct appeal) and the Court of Criminal Appeals (in capital cases) the authority to review claims of factual sufficiency. This authority allows the appellate courts to reverse criminal cases and remand them to the trial court for a new trial if the reviewing court finds that the evidence is factually insufficient. *Grotti v. State*, \_\_ S.W.3d \_\_ (Tex. Crim. App. 2008) [PD-134-07, 06/25/08].

**EVIDENTIARY SUFFICIENCY—STANDARD OF REVIEW**

When reviewing factual sufficiency, the court may not merely substitute its judgment for that of the finder of fact. The verdict may only be set aside if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Grotti v. State*, \_\_ S.W.3d \_\_ (Tex. Crim. App. 2008) [PD-134-07, 06/25/08].

**EVIDENTIARY SUFFICIENCY—STANDARD OF REVIEW**

To address a factual sufficiency challenge, the appellate court must 1) review the evidence in a neutral light; 2) include a discussion of the evidence in its opinion, and 3) if the court reverses, it must clearly state the reason for the factual insufficiency finding. *Grotti v. State*, \_\_ S.W.3d \_\_ (Tex. Crim. App. 2008) [PD-134-07, 06/25/08].

**EVIDENTIARY SUFFICIENCY—STANDARD OF REVIEW**

The factual conclusivity clause of Texas Constitution makes an intermediate court's factual sufficiency decision conclusive and restricts the power of the Court of Criminal Appeals to review direct-appeal determinations of factual sufficiency to determining only whether the direct-appeal court properly applied "rules of law." *Grotti v. State*, \_\_ S.W.3d \_\_ (Tex. Crim. App. 2008) [PD-134-07, 06/25/08].

**EVIDENTIARY SUFFICIENCY—HYPOTHETICALLY CORRECT CHARGE**

Factual sufficiency is not measured by the charge actually given to the jury. Instead, it is measured by the elements of the offense as defined by the hypothetically correct jury charge for the case. Such a charge would accurately reflect the law, is authorized by the indictment, does not unnecessarily increase the state's burden of proof, does not restrict the state's theories of liability, and adequately describes the particular offense for which the defendant was tried. *Grotti v. State*, \_\_ S.W.3d \_\_ (Tex. Crim. App. 2008) [PD-134-07, 06/25/08].

### **JURY CHARGE—DEFINITIONS – COMMON TERMS**

Common terms do not need to be defined in the jury charge if they are not statutorily defined and if the jurors understand them to have any meaning that is acceptable in common parlance. *Grotti v. State*, \_\_ S.W.3d \_\_ (Tex. Crim. App. 2008) [PD-134-07, 06/25/08].

### **JURY CHARGE—DEFINITIONS – TECHNICAL TERMS – TERMS OF ART**

Terms and phrases that have a technical or legal meaning may require an explicit definition when 1) there is a risk that the jurors may arbitrarily apply an inaccurate definition to the term, or 2) where an express definition of the term is required to assure a fair understanding of the evidence. *Grotti v. State*, \_\_ S.W.3d \_\_ (Tex. Crim. App. 2008) [PD-134-07, 06/25/08].

### **JURY CHARGE—DEFINITIONS – CANONS OF CONSTRUCTION**

The canons of construction dictate that words and phrases possessing a technical meaning are considered as having been used in their technical sense. This is applicable to those terms that have a known and established legal meaning or that acquired a peculiar and appropriate meaning in the law. *Grotti v. State*, \_\_ S.W.3d \_\_ (Tex. Crim. App. 2008) [PD-134-07, 06/25/08].

### **JURY CHARGE—DEFINITIONS**

The Texas Penal Code requires courts to construe its provisions according to the fair import of their terms, to promote justice, and effect the objectives of the code. The Penal Code also references the Code Construction Act which states that words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, must be construed accordingly. *Grotti v. State*, \_\_ S.W.3d \_\_ (Tex. Crim. App. 2008) [PD-134-07, 06/25/08].

### **HOMICIDE—DEFINITION**

Under the Texas Penal Code, a person commits a criminal homicide if he intentionally, knowingly, recklessly, or with criminal negligence causes the death of an individual. *Grotti v. State*, \_\_ S.W.3d \_\_ (Tex. Crim. App. 2008) [PD-134-07, 06/25/08].

### **JURY CHARGE—DEFINITIONS—DEATH – PENAL CODE**

The Texas Penal Code only defines the term “death” as it relates to an unborn child not being born alive. *Grotti v. State*, \_\_ S.W.3d \_\_ (Tex. Crim. App. 2008) [PD-134-07, 06/25/08].

### **JURY CHARGE—DEFINITIONS—DEATH – HEALTH & SAFETY CODE**

The Texas Health and Safety Code defines “death” as when, according to ordinary standards of medical practice, there is irreversible cessation of the person’s spontaneous respiratory and circulatory functions. If artificial means of support preclude a determination of a person’s spontaneous respiratory and circulatory functions have ceased, the person is dead when, in the announced opinion of a physician according to ordinary standards of medical practice, there is irreversible cessation of all spontaneous brain function. Death occurs when these functions cease. *Grotti v. State*, \_\_ S.W.3d \_\_ (Tex. Crim. App. 2008) [PD-134-07, 06/25/08].

### **EVIDENTIARY SUFFICIENCY—FACTUAL SUFFICIENCY**

In a factual-sufficiency review, the evidence is reviewed in a neutral light. The only question to be answered is whether the jury was rationally justified in finding guilt beyond a reasonable doubt. *Grotti v. State*, \_\_ S.W.3d \_\_ (Tex. Crim. App. 2008) [PD-134-07, 06/25/08].

### **EVIDENTIARY SUFFICIENCY—FACTUAL SUFFICIENCY - CIRCUMSTANCES**

Evidence can only be factually insufficient in two circumstances: 1) when the evidence supporting the verdict is so weak that the verdict seems clearly wrong and manifestly unjust; and 2) when the supporting evidence is outweighed by the great weight and preponderance of the contrary evidence so as to render the verdict clearly wrong and manifestly unjust. *Grotti v. State*, \_\_ S.W.3d \_\_ (Tex. Crim. App. 2008) [PD-134-07, 06/25/08].

### **EVIDENTIARY SUFFICIENCY—FACTUAL SUFFICIENCY - REVERSAL**

A reversal for factual insufficiency cannot occur when the greater weight and preponderance of the evidence actually favors conviction. *Grotti v. State*, \_\_ S.W.3d \_\_ (Tex. Crim. App. 2008) [PD-134-07, 06/25/08].