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MEMORANDUM

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**TO:** JUDGES TRYING CRIMINAL CASES  
**FROM:** DEBORAH SELDEN AND INTERNS DIMITRIOS GAKIDIS AND MARY MARTIN  
**SUBJECT:** 10/10/07 COURT OF CRIMINAL APPEALS OPINIONS  
**DATE:** 10/25/07  
**CC:** JACK THOMPSON

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***Clayton v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1311-05, 10/10/07].**

KEASLER, J., *delivered the opinion of the Court in which* KELLER, PRICE, WOMACK, JOHNSON, HERVEY, HOLCOMB, *and* COCHRAN, JJ., *joined*. MEYERS, J., *did not participate*.

**FACTS:** A jury convicted defendant of murder and sentenced him to thirty (30) years in prison. The Thirteenth Court of Appeals reversed. On the State's pdr, the Court of Criminal Appeals reversed and remanded. The CCA held that: 1) the evidence was legally sufficient to support defendant's conviction for murder; 2) the defendant's bloody fingerprints in victim's car were not, standing alone, sufficient to establish guilt; and 3) the evidence that murder was drug-related was not, standing alone, sufficient to establish defendant's guilt.

**LEGAL SUFFICIENCY – ELEMENTS OF THE CRIME**

When applying the legal sufficiency standard of review, the appellate court determines whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This standard of review takes into account the fact-finder's duty to: 1) resolve conflicts in the testimony, 2) weigh the evidence, and 3) draw reasonable inferences from basic facts to ultimate facts. ***Clayton v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1311-05, 10/10/07].**

**LEGAL SUFFICIENCY – REVIEW**

In analyzing legal sufficiency, a reviewing court determines whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict. Review of all of the

evidence includes evidence that was *properly* and *improperly* admitted. *Clayton v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1311-05, 10/10/07].

#### **SUFFICIENCY OF EVIDENCE – REVIEW**

When conducting a legal sufficiency review of the evidence in which the record supports conflicting inferences, the appellate court presumes that the factfinder has resolved the conflicts in favor of the prosecution and defers to that determination.

*Clayton v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1311-05, 10/10/07].

#### **SUFFICIENCY OF EVIDENCE – REVIEW**

On review for legal sufficiency of the evidence, direct and circumstantial evidence are treated equally - circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor. In fact, circumstantial evidence *alone* can be sufficient to establish guilt. *Clayton v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1311-05, 10/10/07].

#### **EVIDENCE – SUFFICIENCY – FINGERPRINTS - BURGLARY**

In burglary cases, fingerprints constitute direct evidence of the ultimate fact to be proved, that is, the defendant engaged in an illegal entry. *Clayton v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1311-05, 10/10/07].

#### **EVIDENCE - SUFFICIENCY– FINGERPRINTS - BURGLARY**

When evaluating the legal sufficiency in burglary cases, the fingerprints of an accused, which necessarily must have been made at the time of the burglary, are, without further identification evidence, sufficient to sustain a conviction. *Clayton v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1311-05, 10/10/07].

#### **ELEMENTS OF MURDER - MOTIVE**

While evidence of motive is not an element of murder, the fact-finder may properly consider it as a circumstance indicative of guilt. *Clayton v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1311-05, 10/10/07].

***Winegarner v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0807-06, 10/10/07].**

HOLCOMB, J., *delivered the opinion of the Court in which* PRICE, WOMACK, JOHNSON, *and* COCHRAN, JJ., *joined*. KELLER, P.J., *filed a dissenting opinion in which* KEASLER *and* HERVEY, JJ., *joined*. MEYERS, J., *not participating*.

**FACTS:** A jury convicted defendant of misdemeanor assault and assessed punishment at confinement for six (6) months. The court of appeals reversed and remanded for a new trial. On the State's pdr, the Court of Criminal Appeals reversed the judgment of the court of appeals and affirmed the trial court's judgment. The CCA held that the trial court acted within its discretion in concluding that the probative value of the impeachment evidence (the victim pled guilty to an assault charge 14 years earlier) was substantially outweighed by the danger of unfair prejudice or confusion of the issues.

**EVIDENCE – LOWER COURT'S RULINGS – ABUSE OF DISCRETION**

An appellate court may not disturb a trial court's evidentiary ruling absent an abuse of discretion. In other words, as long as the trial court's decision was within the zone of reasonable disagreement and was correct under any theory of law applicable to the case, it must be upheld. ***Winegarner v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0807-06, 10/10/07].**

**EVIDENCE – LOWER COURT DISCRETION**

Trial courts are usually in the best position to make the call on whether certain evidence should be admitted or excluded. ***Winegarner v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0807-06, 10/10/07].**

**WITNESS TESTIMONY – OPENING THE DOOR – IMPEACHMENT OF WITNESS**

When, on direct examination, a witness makes a blanket assertion of fact and leaves a false impression concerning his prior behavior or the extent of his prior troubles with the law, the witness 'opens the door' on his otherwise irrelevant past criminal history. Opposing counsel may then impeach the witness by exposing the falsehood. ***Winegarner v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0807-06, 10/10/07].**

**WITNESS TESTIMONY – CROSS EXAMINATION – REBUTTAL – EXTRINSIC EVIDENCE**

When a witness's blanket assertion of exemplary conduct is directly relevant to the offense charged, the opponent may both cross-examine the witness and offer extrinsic

evidence rebutting the statement. *Winegarner v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0807-06, 10/10/07].

#### **EVIDENCE - EXCLUSION – TRIAL COURT LATITUDE**

A trial court may exclude any relevant evidence if its probative value is substantially outweighed by any or all of the countervailing factors specified in Rule 403. The Rules of Evidence give the trial court considerable latitude to assess the courtroom dynamics, to judge the tone and tenor of the witness' testimony, its impact upon the jury, and to conduct the necessary balancing test to determine whether to admit the witness's testimony and / or any impeachment evidence. *Winegarner v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0807-06, 10/10/07].

#### **EVIDENCE – RELEVANCY**

A trial court has considerable discretion and may exclude any relevant evidence if its probative value is substantially outweighed by any or all of the countervailing factors specified in the rules of evidence. Otherwise relevant that evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. In other words, the rules of evidence allow different trial judges to reach different conclusions in different trials on substantially similar facts without abuse of discretion. *Winegarner v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0807-06, 10/10/07].

*Jones v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1170-06, 10/10/07].

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

**FACTS:** A jury convicted defendant of possession of 400 or more grams of methamphetamine with intent to deliver and evading arrest / detention using a vehicle. The court assessed punishment at twenty-five (25) years in prison and a \$10,000 fine for the drug offense and two years in a state jail facility for evading arrest. The court of appeals affirmed. The Court of Criminal Appeals also affirmed, holding that: 1) the bleach into which defendant's companion poured methamphetamine was added to or mixed with methamphetamine and could be added to aggregate weight of

methamphetamine, and 2) jury was free to believe or disbelieve, in whole or in part, either or both experts who disagreed on whether bleach was an adulterant or dilutant.

#### **EVIDENCE – CONTROLLED SUBSTANCE – AGGREGATE WEIGHT**

The weight of a ‘controlled substance’ includes the aggregate weight of any mixture, solution, or other substance containing the controlled substance. *Jones v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1170-06, 10/10/07].

#### **EVIDENCE – CONTROLLED SUBSTANCE**

The term “controlled substance” is defined in the Texas Controlled Substances Act as “a drug, an adulterant, and a dilutant” listed in the schedules and penalty groups of the Act. The Act lists methamphetamine as one of those controlled substances. *Jones v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1170-06, 10/10/07].

#### **EVIDENCE – CONTROLLED SUBSTANCE – ADULTERANT OR DILUTANT**

‘Adulterant or dilutant’ means any material that increases the bulk or quantity of a controlled substance, regardless of its effect on the chemical activity of the controlled substance. *Jones v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1170-06, 10/10/07].

#### **CONTROLLED SUBSTANCE –AGGREGATE WEIGHT**

The State is no longer required to determine the amount of controlled substance and the amount of adulterant and dilutant that constitutes the mixture.” The State has to prove only that the aggregate weight of the controlled substance mixture, including adulterants and dilutants, equals the alleged minimum weight. *Jones v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1170-06, 10/10/07].

*Ex Parte Zapata*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,784 10/10/07].

*Per curiam*. HERVEY, J., filed a dissenting opinion in which KELLER, P.J., and KEASLER, J., joined. MEYERS, J., dissented.

**FACTS:** On defendant’s plea of guilty, the court found him guilty of one county aggravated sexual assault and was sentenced him to fifteen years in TDCJ. On the day of sentencing, the trial court denied defendant’s motions to withdraw his plea and for a new trial. On direct appeal the court of appeals held that it lacked jurisdiction to consider the merits of defendant’s claims. Defendant filed an application for writ of habeas corpus contending that his plea was involuntary. The trial court held a hearing on the

defendant's writ and entered findings of fact and conclusions of law that: 1) the witnesses who testified were credible; 2) that defendant should be permitted to withdraw his plea; and 3) defendant's plea was not knowingly and voluntarily entered. The Court of Criminal Appeals granted habeas relief, set aside the trial court's judgment, and remanding defendant to custody of sheriff to answer the charges against him.

***Shoe v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0572-04, 10/10/07].**

*Per Curiam.*

**FACTS:** The Court of Criminal Appeals dismissed the petition for discretionary review as having been improvidently granted.