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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  
**SUBJECT:** 10/31/07 COURT OF CRIMINAL APPEALS OPINIONS  
**DATE:** 11/15/07  
**CC:** JACK THOMPSON

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***State v. Wooldridge*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1482-05, 10/31/07].**

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

**FACTS:** A jury found Defendant guilty of aggravated assault with a deadly weapon. Defendant had two previous convictions for third degree felony thefts, that the legislature later reclassified the offenses as state jail felonies. Finding that the reclassification of the previous offenses prevented their use in enhancement of the sentence, the trial court sentenced defendant to seven years in prison. On the State’s appeal, the appellate court held that defendant’s prior convictions could be used for enhancement purposes. However, the case could not be remanded to the trial court for resentencing because double jeopardy had attached. On the State’s appeal, the Court of Criminal Appeals reversed and remanded. The CCA held that the resentencing of the defendant as a habitual offender did not implicate double jeopardy.

**SENTENCING—ENHANCEMENT—RECLASSIFIED FELONIES**

Prior convictions for third degree felonies that have now been reclassified as state jail felonies can be used for enhancement purposes in sentencing against habitual offenders.

***State v. Wooldridge*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1482-05, 10/31/07].**

**SENTENCING—ENHANCEMENT—DOUBLE JEOPARDY**

The Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in the non-capital sentencing context.

***State v. Wooldridge*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1482-05, 10/31/07]**

**SENTENCING—ENHANCEMENT—DOUBLE JEOPARDY IN CAPITAL SENTENCING**

The rationale for the double jeopardy prohibition in resentencing is confined to the unique circumstances of capital sentencing. ***State v. Wooldridge*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1482-05, 10/31/07]**

**SENTENCING—ENHANCEMENT—DOUBLE JEOPARDY**

Non-capital sentencing proceedings that contain trial-like protections, are a matter of legislative grace, not constitutional command. *State v. Wooldridge*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1482-05, 10/31/07]

**SENTENCING—ERRORS OF LAW— CAPITAL MURDER-- DOUBLE JEOPARDY**

A trial court’s imposition of a life sentence based on incorrect findings that, as a matter of law, a robbery did not amount to an aggravating circumstance warranting the death penalty, barred the imposition of the greater sentence of death upon resentencing. *State v. Wooldridge*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1482-05, 10/31/07]

**SENTENCING—ERROR OF LAW—ACQUITTAL-- DOUBLE JEOPARDY**

Even mistaken or “egregiously erroneous” legal rulings that lead to a judgment of acquittal will raise a double jeopardy bar. *State v. Wooldridge*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1482-05, 10/31/07]

**SENTENCING—ERROR OF LAW—NON-CAPITAL SENTENCING—NO DOUBLE JEOPARDY**

The Supreme Court’s rationale in *Bullington* is confined to the unique circumstances of capital sentencing; the Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in a non-capital sentencing context. *State v. Wooldridge*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1482-05, 10/31/07]

*Stewart v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0255-07]

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

**FACTS:** Defendant, a peace officer, was convicted of tampering with physical evidence. After finding several buds of marijuana during a vehicular search, the defendant arrested the owner of the car and took her in as a possible confidential informant. When she was released, she asked the defendant to return her marijuana. The defendant returned a single bud. After the State decided to charge the car owner with possession, the defendant confessed to returning part of the marijuana to the suspect. Consequently, the defendant, was charged and convicted with tampering with evidence. On appeal, the court of appeals affirmed, holding that defendant “knew” the evidentiary value of the bud would be lost in returning it to the woman. The Court of Criminal Appeals reversed the courts below and rendered a judgment of acquittal. The CCA held that defendant lacked the requisite intent and there was insufficient evidence to sustain the conviction.

## **OFFENSES—TAMPERING WITH EVIDENCE**

A person commits the offense of tampering with evidence if he knows that an investigation or official proceeding is pending or in progress and he alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding. *Stewart v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0255-07]

## **MENS REA—INTENT V. KNOWLEDGE**

Intent and knowledge are two different culpable mental states. *Stewart v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0255-07]

## **TAMPERING WITH EVIDENCE—INTENT REQUIRED**

The tampering with evidence statute requires intent as to a particular result, namely impairing a thing's availability as evidence. *Stewart v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0255-07]

## **TAMPERING WITH EVIDENCE—INTENT REQUIRED**

Under the statute, it is not enough that defendant knew that his action would impair the availability of the evidence- he must have *intended* to impair the availability of the evidence. Defendant's intent must be his conscious objective or desire to cause the evidence to become unavailable. *Stewart v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0255-07]

## **EVIDENCE—SUFFICIENCY—MISSING EVIDENCE**

If a portion of evidence is missing, and the remaining evidence is sufficient to sustain a conviction, and the lack of evidence does not change the category of the offense, the evidence is sufficient. *Stewart v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0255-07]

*Shaw v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0211-06]

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

**FACTS:** A jury convicted the defendant with recklessly injuring a child and assessed a punishment of twenty years in prison and a \$10,000 dollar fine. Defendant was taking care of her grandson when she found him with stressed breathing. She called 911 and applied CPR. The treating physicians concluded that the child had died from shaking. Defendant argued that the trial court had erred in not allowing a jury instruction on the "Good Samaritan" defense. The court of appeals and the Court of Criminal Appeals affirmed.

**DEFENSES— JURY SUBMISSION**

A trial court should not submit a defense to a jury unless evidence is admitted supporting that defense. *Shaw v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0211-06]

**DEFENSES— JURY SUBMISSION**

Before a defense can be submitted to a jury, it must be raised by the evidence. A defense is supported or raised by the evidence if there is evidence, from any source, on each element of the defense that, if believed by the jury, would support a rational inference that that element is true. *Shaw v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0211-06]

**DEFENSES—RATIONAL BASIS FOR INCLUSION**

To determine whether the evidence supports the submission of a defense, a court must rely on its own judgment, formed in the light of its own common sense and experience, as to the limits of rational inference from the facts proven. *Shaw v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0211-06]

**DEFENSES-- INSTRUCTION**

If a defense is supported by the evidence, then the defendant is entitled to an instruction on that defense. Even if the evidence supporting the defense is weak or contradicted, or even if the trial court is of the opinion that the evidence is not credible, defendant is still entitled to an instruction on that defense. The evidence, however, must be such that it will support a rational jury finding as to each element of the defense. *Shaw v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0211-06]

**DEFENSES—PRIMA FACIE CASE—DEFENDANT’S BURDEN**

A defense is raise if there is evidence in the record making a *prima facie* case for the defense. A *prima facie* case is that “minimum quantum of evidence necessary to support a rational inference that [an] allegation of fact is true.” The defendant “bears the burden of production” with respect to a defense. *Shaw v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0211-06]

**DEFENSES—REVIEW FOR INTRODUCTION**

Whether a defense is supported by the evidence is a sufficiency question reviewable on appeal as a question of law. *Shaw v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0211-06]

**JURY FINDING-- DEFENSES—RATIONALE**

The requirement that the evidence must rationally support a jury finding before a defensive instruction is required, serves to preserve the integrity of the jury as the factfinder by

ensuring that it is instructed as to a defense *only* when, given the evidence, that defense is a rational alternative to criminal liability. If a jury were instructed as to a defense, even though the evidence did not rationally support it, then the instructions would constitute an invitation to the jury to return a verdict based on speculation. *Shaw v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0211-06]

#### **DEFENSES—RATIONAL BASIS FOR INCLUSION**

Courts are only required to submit defensive theories of cases when the theories are supported by some testimony of sufficient substance to make it appear, at least with some degree of likelihood, that there could be a finding by the jury in response to such suggested issue. *Shaw v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0211-06]

#### **DEFENSES—GOOD SAMARITAN DEFENSE**

The Good Samaritan defense is, on its face, a confession-and-avoidance or "justification" type of defense. *Shaw v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0211-06]

#### **DEFENSES—GOOD SAMARITAN DEFENSE**

The Good Samaritan defense operates as a particularized example of the justification of necessity, applicable specifically in prosecutions for injury to a child. It is a defense to criminal responsibility if the criminal "conduct" is "justified." This justification, by definition, does not negate any element of the offense, including culpable intent; it only excuses what would otherwise constitute criminal conduct. *Shaw v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0211-06]

#### **DEFENSES—GOOD SAMARITAN DEFENSE—MENS REA**

For defenses such as necessity and self defense, when the defensive evidence merely negates the necessary culpable mental state, it will not suffice to entitle the defendant to a defensive instruction. Rather, a defensive instruction is only appropriate when the defendant's defensive evidence essentially admits to every element of the offense *including* the culpable mental state, but interposes the justification to excuse the otherwise criminal conduct. *Shaw v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0211-06]

#### **DEFENSES—NECESSITY**

In order to raise necessity, a defendant must admit to violating the statute under which he is charged and then offers necessity as a justification which weighs against imposing a criminal punishment for the act or acts which violated the statute. *Shaw v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0211-06]

***Curtis v. State*, \_\_\_S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1820-06]**

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

**FACTS:** A jury convicted defendant of driving while intoxicated and, with enhancements, sentenced him to ninety days in county jail and a \$2500 fine. Defendant appealed on arguing that the trial court erred in denying his motion to suppress the officer's search. The court of appeals reversed the conviction. On the State's PDR, the Court of Criminal Appeals reversed the court of appeals and remanded to consider defendant's remaining points of error. The CCA held that traffic violations can be used as a standard in determining whether the officer's suspicion to stop defendant's vehicle was reasonable for DWI.

**SEARCH / SEIZURE—SUSPICION OF CRIMINAL ACTIVITY**

If circumstances are consistent with criminal activity, a police officer has a duty to investigate those circumstances. ***Curtis v. State*, \_\_\_S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1820-06]**

**SEARCH / SEIZURE-- SUSPICION OF CRIMINAL ACTIVITY**

The possibility of an innocent explanation does not deprive an officer of the capacity to entertain reasonable suspicion of criminal conduct. ***Curtis v. State*, \_\_\_S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1820-06]**

**SEARCH / SEIZURE-- INVESTIGATIONS**

The principal function of a police investigation is to resolve the ambiguity between innocent and criminal activity. ***Curtis v. State*, \_\_\_S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1820-06]**

**SEARCH AND SEIZURE—REASONABLE SUSPICION—STANDARD OF REVIEW**

Determining reasonable suspicion requires the court to look at the totality of the circumstances. ***Curtis v. State*, \_\_\_S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1820-06]**

**SEARCH AND SEIZURE—TEMPORARY DETENTION—STANDARD OF REVIEW**

The reasonableness of a temporary detention must be examined in terms of the totality of the circumstances and will be justified when the detaining officer has specific articulable facts, which *taken together with rational inferences* from those facts, lead him to conclude that the person detained actually is, has been, or will be engaged in criminal activity. ***Curtis v. State*, \_\_\_S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1820-06]**

## **REASONABLE SUSPICION— TOTALITY OF THE CIRCUMSTANCES**

There may be instances when a person's conduct, viewed in a vacuum, appears purely innocent, yet when viewed in light of the totality of the circumstances, those actions give rise to reasonable suspicion. When making a traffic stop, some of those circumstances may include the lateness of the hour, the field officer's training and experience, multiple lane changes over a brief period of time, and other factors that a trained officer can articulate. *Curtis v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1820-06]

*St. George v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-998-06, 10/31/07].

MEYERS, J., DELIVERED THE OPINION OF THE COURT, IN WHICH PRICE, WOMACK, JOHNSON, KEASLER, HERVEY, HOLCOMB, AND COCHRAN, JJ., JOINED. KELLER, P. J., DISSENTED.

**FACTS:** After the trial, the court denied two pre-trial motions to suppress, defendant pleaded guilty to possession of marijuana and failure to identify him self as a fugitive. On appeal, defendant argued that his continued detention, questioning and investigation by the police were pursued without a warrant and without probable cause or reasonable suspicion. The Court of Appeals reversed the trial court's denial of defendant's motions to suppress the evidence of his statements and the marijuana. On the state's PDR, the Criminal Court of Appeals affirmed the court of appeal's reversal.

## **REASONABLENESS OF SEARCH AND SEIZURE – REVIEW**

Whether a specific search of seizure was reasonable is a mixed question of law and fact, which an appellate court reviews *de novo*. *St. George v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-998-06, 10/31/07].

## **DENIAL- SUPPRESSION OF EVIDENCE MOTION – REVIEW**

An appellate court reviews a trial court's ruling on a motion to suppress evidence under a bifurcated standard of review. *St. George v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-998-06, 10/31/07].

## **FACTUAL REVIEW – DEFERENCE - TRIAL COURT**

The appellate court does not engage in its own factual review, but defers to the trial judge as the sole trier of fact and judge of witness credibility and the weight to be given to their testimony. In fact, trial courts are given almost complete deference in determining historical facts. *St. George v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-998-06, 10/31/07].

#### **EVIDENCE – MOTION TO SUPPRESS – REVIEW**

A reviewing court reviews the record and determines whether the trial court’s ruling is supported by the record and is correct under some theory of law applicable to the case. *St. George v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-998-06, 10/31/07].

#### **EVIDENCE – MOTION TO SUPPRESS – REVIEW**

An appellate court views the evidence in the light most favorable to the trial court’s ruling on a motion to suppress. When the trial court does not make explicit findings of fact, the reviewing court assumes the trial court made implicit findings of fact supported by the record. *St. George v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-998-06, 10/31/07].

#### **EVIDENCE - SUFFICIENCY –REVIEW**

The court conducts a *de novo* review of the evidence when the resolution of mixed questions of law and fact do not turn on an evaluation of credibility and demeanor. *St. George v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-998-06, 10/31/07].

#### **DETENTION/INVESTIGATION- REVIEW**

Appellate courts apply the reasonableness standard in reviewing the sufficiency of a continued detention and investigation of the passenger during a traffic stop. *St. George v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-998-06, 10/31/07].

#### **DETENTION/INVESTIGATION- TRAFFIC STOP**

A continued detention and investigation is reasonable if, during the traffic stop, the officers developed reasonable suspicion that the passenger was engaged in criminal activity. *St. George v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-998-06, 10/31/07].

#### **TRAFFIC STOP - QUESTIONING A PASSENGER**

During a traffic stop, officers may question passengers and request passengers’ identification without separate reasonable suspicion that the passengers are involved in criminal activity. Officers, however, *may not* compel passengers to answer or imply that the passengers’ compliance with the request is required. *St. George v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-998-06, 10/31/07].

#### **REASONABLE SUSPICION— TRAFFIC STOP**

During a traffic stop, absent reasonable suspicion, an officer may conduct only consensual questioning of passengers in a vehicle. *St. George v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-998-06, 10/31/07].

## **TRAFFIC STOP - QUESTIONING A PASSENGER- AFTER CITATION**

During a non-consensual encounter such as a traffic stop, once a warning citation is issued to the driver, an officer may not question passengers unless the officer has a separate reasonable suspicion to believe the passengers were involved in criminal activity. *St. George v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-998-06, 10/31/07].

## **INVESTIGATE DETENTION- JUSTIFICATION**

An officer's actions during an investigative detention must be justified at its inception and must be reasonably related in scope to the circumstances that justified the interference in the first place. *St. George v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-998-06, 10/31/07].

## **INSUFFICIENT CIRCUMSTANCES - REASONABLE DETENTION**

Giving a false name when officers do not know it is false at the time does not give them reasonable suspicion to investigate further. *St. George v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-998-06, 10/31/07].

## **INSUFFICIENT CIRCUMSTANCES- REASONABLE DETENTION**

Without more, any single trait exhibited by an individual, including nervousness, is not enough to amount to reasonable suspicion for continued investigative detention. *St. George v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-998-06, 10/31/07].

## **SUSPICION - CRIMINAL ACTIVITY.**

Suspicion of criminal act is not raised merely because a dispatcher cannot find a record of an individual based on the information provided by that person. *St. George v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-998-06, 10/31/07].

## **4TH AMENDMENT VIOLATION - CONTINUED DETENTION OF PASSENGER**

Police officers violate a defendant's rights if they continue to detain a passenger without articulable facts arising during the initial traffic stop. These facts must be sufficient to support a reasonable suspicion that will justify the continued detention and investigation of the passenger. *St. George v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-998-06, 10/31/07].

## **EVIDENCE - SUPPRESSION**

Evidence gained by a continued detention and investigation without support of reasonable suspicion will be suppressed under "fruits of the poisonous tree" doctrine. *St. George v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-998-06, 10/31/07].