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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:** 06/18/08 COURT OF CRIMINAL APPEALS OPINIONS  
**DATE:** 08/29/08  
**CC:** JACK THOMPSON

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***De La Paz v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1168-07, 06/18/08].**

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

**FACTS:** A jury convicted defendant of two counts of aggravated sexual assault of a child under fourteen years of age. At trial, the State introduced evidence of handwritten notations of the treating medical personnel describing statements made by the victim implicating defendant. Finding the statements to be non-testimonial, the court of appeals held that the evidence was admissible. The Court of Criminal Appeals (CCA) reversed the court of appeals. The CCA found that (1) under *Crawford*, once defendant objected to the admission of handwritten notes, the State had burden of establishing that notes were admissible, and (2) the State failed to carry its burden, and the admission of the handwritten notes violated defendant's right of confrontation.

**SIXTH AMENDMENT—CONFRONTATION CLAUSE**

The Sixth Amendment to the U.S. Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. This bedrock procedural guarantee applies to both federal and state prosecutions. ***De La Paz v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1168-07, 06/18/08].**

**SIXTH AMENDMENT—CONFRONTATION CLAUSE**

Consistent with the Confrontation Clause guarantee, a testimonial hearsay statement may be admitted in evidence against a defendant only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine. The Crawford rule reflects the Framers' preferred mechanism of cross-examination for ensuring that inaccurate out-of-court testimonial statements are not used to convict an accused. ***De La Paz v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1168-07, 06/18/08].**

#### **EVIDENCE— TESTIMONIAL / NON-TESTIMONIAL DETERMINATION**

The primary focus in determining whether a hearsay statement is “testimonial” is upon the objective purpose of the interview or interrogation, not upon the declarant's expectations.

*De La Paz v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1168-07, 06/18/08].

#### **EVIDENCE— TESTIMONIAL HEARSAY**

A hearsay statement is “testimonial” when the surrounding circumstances objectively indicate that the primary purpose of the interview or interrogation is to establish or revue past events that are potentially relevant to the later criminal prosecution.

*De La Paz v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1168-07, 06/18/08].

#### **EVIDENCE—TESTIMONIAL HEARSAY**

To insure that inaccurate out of court testimonial statements are not used to convict a defendant, testimonial hearsay statements may be admitted in evidence against a defendant only where the declarant is unavailable and when the defendant has had a prior opportunity to cross-examine. *De La Paz v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1168-07, 06/18/08].

#### **EVIDENCE— STATEMENT—NON-GOVERNMENTAL EMPLOYEE**

Whether a statement may be testimonial if made to a non-governmental employee has not yet been resolved by the U.S. Supreme Court. *De La Paz v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1168-07, 06/18/08].

#### **EVIDENCE—TESTIMONIAL HEARSAY**

Whether a statement is testimonial is a matter of law. A hearsay statement is generally considered to be testimonial when the surrounding circumstances objectively indicate that the primary purpose of the interview or interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *De La Paz v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1168-07, 06/18/08].

#### **EVIDENCE—TESTIMONIAL HEARSAY**

If a defendant objects to the admission of non-testimonial hearsay, the State, as the proponent of that evidence, has the burden to establish the statements are admissible under *Crawford*. The State is obligated to establish either: 1) that the notes did not contain testimonial hearsay statements, or 2) that the notes did contain testimonial hearsay statements but that such statements were nevertheless admissible. *De La Paz v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1168-07, 06/18/08].

***Jordan v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-973-06, 06/18/08].**

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

**FACTS:** A jury convicted defendant of possession of cocaine with the intent to deliver. During sentencing, the state introduced evidence of two prior convictions and defendant was sentenced to life imprisonment under the repeat offender statute. The court of appeals reversed and the State filed a petition for discretionary review. Finding that the evidence was insufficient to support the enhancement, and that a harm analysis is not appropriate for sentencing enhancement grounds, the Court of Criminal Appeals affirmed the court of appeals.

**REVIEW—STRUCTURAL V. HARMLESS ERROR ANALYSIS**

Except for certain federal constitutional errors labeled by the U.S. Supreme Court as “structural,” no error, whether it relates to jurisdiction, voluntariness of a plea, or any other non-mandatory requirement, is categorically immune to harmless error analysis. ***Jordan v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-973-06, 06/18/08].**

**SENTENCING—FELONY ENHANCEMENT**

The Penal Code dictates that if a defendant has been finally convicted of two felony offenses (other than a state jail felony), with one felony occurring after the previous felony has become final, and is convicted of another non-state jail felony, he shall be imprisoned for life or for 99 years. ***Jordan v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-973-06, 06/18/08].**

**SENTENCING—FELONY ENHANCEMENT**

The timeline for a felony enhancement must show that: (1) the first conviction becomes final; (2) the offense leading to a later conviction is committed; (3) the later conviction becomes final; and (4) the presently charged offense is committed. ***Jordan v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-973-06, 06/18/08].**

**SENTENCING—FELONY ENHANCEMENT**

The State has the burden of proving beyond a reasonable doubt that a defendant’s second previous felony conviction was committed after the first felony conviction became final. ***Jordan v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-973-06, 06/18/08].**

#### **SENTENCING—HABITUAL OFFENDER ENHANCEMENT**

When there is no evidence to show that the offenses were committed and became final in the proper sequence, the defendant’s sentence may not be enhanced under the habitual offender statute. *Jordan v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-973-06, 06/18/08].

#### **SENTENCING—FELONY ENHANCEMENT**

During sentencing, neither party has the burden of proving what punishment should be assessed within the statutorily applicable range. The fact finder’s decision of what particular sentence to assess is a normative, discretionary function that does not depend on the resolution of specific facts. However, if the defendant enters a plea of not true to the other convictions, the state has the burden of proof when seeking to enhance the sentence for the primary offense. *Jordan v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-973-06, 06/18/08].

#### **RETRIAL—ENHANCEMENT EVIDENCE—NO DOUBLE JEOPARDY**

When a reviewing court determines that the state’s evidence fails to show that an enhancement allegation is true, the Double Jeopardy Clause does not bar the use of the enhancement conviction during a retrial on punishment. *Jordan v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-973-06, 06/18/08].

#### **SENTENCING—FELONY ENHANCEMENT**

When a defendant denies a prior conviction as “not true,” the fact finder must decide whether the state has met its burden in proving the prior conviction. The fact finder must: (1) determine whether the state has proved its allegation as true by a deductive, discrete fact-finding process and (2) decide what particular punishment to assess within the range presented by law by considering all the evidence admitted at trial, engage in a normative process uninhibited by any required, specific fact determinations. *Jordan v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-973-06, 06/18/08].

#### **SENTENCING—FELONY ENHANCEMENT**

The failure of the State to meet its burden in proving an enhancing felony does not require a harm analysis because such deficiencies are never considered harmless. *Jordan v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-973-06, 06/18/08].

***Landers v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1065-07, 06/18/08].**

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

**FACTS:** Defendant pleaded guilty to intoxication manslaughter and a jury sentenced her to 99 years in prison. Although the prosecutor at trial had previously represented defendant on a similar charge, the trial court concluded that there was no violation of due process based on conflict of interest. The court of appeals affirmed the trial court. Affirming, the Court of Criminal Appeals found no evidence in the record to suggest that the prosecutor used unique and confidential information, and no due process violations.

**DISQUALIFICATION—CONFLICT OF INTEREST**

Disqualification of a prosecutor is a discretionary decision by the trial court. ***Landers v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1065-07, 06/18/08].**

**STANDARD OF REVIEW—ABUSE OF DISCRETION**

A trial court abuses its discretion only when the decision lies outside the zone of reasonable disagreement. A reviewing court should afford almost total deference to a trial court’s determination of the historical facts, especially regarding credibility and demeanor evaluations. ***Landers v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1065-07, 06/18/08].**

**DISQUALIFICATION—CONFLICT OF INTEREST**

In Texas, the elected district or county attorney is required to represent the state in all criminal cases in the district courts of his district and those on appeal, except in cases where he had been adversely employed before his election. A trial court may not disqualify a district attorney or his staff on the basis of a conflict of interest that does not rise to the level of a due process violation. ***Landers v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1065-07, 06/18/08].**

**OFFICE OF DISTRICT ATTORNEY—PROTECTED POWERS**

The office of a district attorney is constitutionally created. Accordingly, the district attorney’s power cannot be abridged or taken away. ***Landers v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1065-07, 06/18/08].**

**DISQUALIFICATION—CONFLICT OF INTEREST--PROSECUTOR**

If a prosecuting attorney has formerly represented a defendant in the “same” criminal matter that is being prosecuted, he is statutorily disqualified. The Legislature has decreed that

this conflict of interest is both obvious and actual. For a prosecutor to switch sides in the same criminal case is an actual conflict of interest and constitutes a due process violation, even without a specific showing of prejudice. This has been called a “hard and fast rule of disqualification.” *Landers v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1065-07, 06/18/08].

#### **DISQUALIFICATION—CONFLICT OF INTEREST—DISTRICT ATTORNEY**

A district attorney is not automatically disqualified from prosecuting a person who he has previously represented, even if it is the same type of offense. A defendant must show a due process violation by establishing actual prejudice, not just the threat of possible prejudice to his rights by virtue of the district attorney’s prior representation. Actual prejudice occurs when: (1) the prosecuting attorney has personally represented the defendant in a substantially related matter; and (2) the prosecuting attorney obtained confidential information by virtue of the prior representation and used the information to the defendant’s disadvantage. *Landers v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1065-07, 06/18/08].

#### **DISCIPLINARY RULE VIOLATIONS**

The disciplinary rules: 1) do not grant a different standing or some systemic right to complain about an opposing party’s alleged disciplinary rule violations that do not result in “actual prejudice” to the defendant, and 2) cannot be turned into a tactical weapon to disqualify opposing counsel unless the defendant can show that the alleged rule violations deprived him of a fair trial or otherwise affected his substantial rights. *Landers v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1065-07, 06/18/08].

#### **DISQUALIFICATION—SUBSTANTIALLY RELATED MATTERS**

Prosecution for the same type of offense does not automatically make two proceedings substantially related. To be substantially related, the same facts, circumstances, or legal questions must be the same at issue in both proceedings. This disqualification rule is somewhat different in civil cases in which private attorneys may be disqualified merely upon a showing that the attorney had previously represented the adverse party in a substantially related matter. *Landers v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1065-07, 06/18/08].

#### **DISQUALIFICATION—CIVIL ATTORNEYS VS. DISTRICT ATTORNEYS**

With civil law firms, there is no constitutional or statutory authority mandating that a particular attorney represent a particular client as is true for a district attorney. A district

attorney shall represent the State in all criminal matters in his jurisdiction except in cases where he has been, before his election, employed adversely. *Landers v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1065-07, 06/18/08].

**DISQUALIFICATION—JUDICIAL AUTHORITY**

A trial court is without legal authority to disqualify an elected district attorney solely on the basis of a violation of the Texas Disciplinary Rules. *Landers v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1065-07, 06/18/08].

**DISQUALIFICATION—DISTRICT ATTORNEY**

A district attorney may be disqualified for a violation of the defendant's due process rights, not for violations of the disciplinary rules of professional conduct alone. *Landers v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1065-07, 06/18/08].

**MOTION FOR NEW TRIAL—FINDINGS OF FACT**

In ruling on a motion for a new trial, a trial court may make oral or written findings of fact. The rationale for the change in the rule was to ensure that appellate courts would not need to speculate as to possible factual findings supporting a trial judge's ruling if the judge will articulate them. *Landers v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1065-07, 06/18/08].

**DISQUALIFICATION—CONFIDENTIAL MATTERS—FORMER ATTORNEY/CLIENT**

Confidential communications includes both privileged client information which the prosecutor learned by virtue of the former attorney-client relationship. It excludes information that is generally known or is a matter of public record. *Landers v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1065-07, 06/18/08].

**DISQUALIFICATION—CONFIDENTIAL MATTERS—PUBLIC RECORD**

If a matter is generally known to other people or a matter of public record, the expectation of harm resulting from the prosecution's subsequent use of the material is small. *Landers v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1065-07, 06/18/08].

**DISQUALIFICATION—CONFIDENTIAL MATTERS—ELECTED PUBLIC OFFICIAL**

It is inappropriate, as a policy matter, to disqualify an elected public official for obtaining publically available information from a client rather than other public sources. A prosecutor is obliged to see that any sentence imposed is based on all unprivileged information known to the prosecutor. *Landers v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1065-07, 06/18/08].

## **CONFIDENTIAL INFORMATION—DEFINITION**

The Texas Rules of Evidence define “confidential information” as information that is intended to not be disclosed to third persons, other than those to whom disclosure is made, in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. If information conveyed to the attorney is also made known to others or is discovered by a third person through independent means, it is not confidential information. *Landers v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [PD-1065-07, 06/18/08].

*Routier v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,617, 06/18/08].

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

**FACTS:** Defendant was found guilty of capital murder and sentenced to death. On direct appeal, the Court of Criminal Appeals affirmed. In a post-conviction habeas corpus proceeding, she sought post-conviction DNA testing of materials to bolster her previous alibi claim. The trial court denied the motion. The Court of Criminal Appeals disagreed, vacated the ruling, and remanded the case to the trial court for limited DNA testing.

## **POST CONVICTION RELIEF—DNA TESTING**

The Code of Criminal Procedure allows a convicted person to request forensic DNA testing of evidence containing biological material if it was in the State’s possession during trial if the evidence: (1) was not previously subjected to DNA testing because it was unavailable; (2) was not previously subjected to DNA testing because, while it was available, the technology was not capable of providing probative results; (3) was not previously subjected to DNA testing and, through no fault of the convicted person, the interests of justice requires the testing; or (4) was previously subjected to DNA testing, but can be subjected to new techniques that provide a reasonable likelihood of results that are more accurate and probative than the previous test. *Routier v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,617, 06/18/08].

## **POST CONVICTION RELIEF—DNA TESTING**

If a defendant requests post-conviction DNA testing that meets any of the criteria of Article 64.01(b), the court may order testing only if the defendant satisfies other statutory predicates, including a showing by a preponderance that the defendant would not have been

convicted if exculpatory results had been obtained from the DNA testing. *Routier v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,617, 06/18/08].

#### **POST CONVICTION RELIEF—DNA TESTING**

In reviewing a post-conviction DNA petition, the appellate courts give almost total deference to the trial court’s resolution of historical facts and determinations that rely on witness demeanor, but all other questions of law are reviewed *de novo*. *Routier v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,617, 06/18/08].

#### **POST CONVICTION RELIEF—DNA TESTING—STATE’S POSSESSION**

A simple showing that the State was in possession of the DNA evidence is not enough to eliminate fault on the part of the defendant. The defendant must make a more particularized showing of absence of fault to receive post-conviction DNA testing. *Routier v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,617, 06/18/08].

#### **POST CONVICTION RELIEF—DNA TESTING—BIOLOGICAL MATTER**

“Evidence containing biological matter” are individual samples of biological material, even if taken from the same object or source, that may have discrete and independent probative value of the particular issues at trial. A defendant may be able to obtain DNA testing if he can demonstrate that the incremental probative value of testing a discrete item of biological material was not reasonably apparent at the time of trial, that the failure to seek DNA testing at the time of trial was not his fault, and that the interest of justice now require post-conviction testing. *Routier v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,617, 06/18/08].

#### **POST CONVICTION RELIEF—DNA TESTING—51% CHANCE OF ACQUITTAL**

Recent amendments to the Code of Criminal Procedure require that the defendant prove that had the results of the DNA test been available at trial, there is at least a 51% chance that the defendant would not have been convicted. *Routier v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,617, 06/18/08].

*Neal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,406, 06/18/08].

Keller, P.J., delivered the opinion of the Court in which Womack, Keasler, Hervey, and Holcomb, J.J., joined. Meyers, J., filed a concurring opinion. Price, and Johnson, J.J., concurred. Cochran, J., concurred in points of error 18, 24, 25, and otherwise joined the opinion of the Court.

**FACTS:** Jury convicted defendant of capital murder and sentenced him to death. The Court of Criminal Appeals affirmed.

#### **DEATH PENALTY—MENTAL RETARDATION**

The execution of a mentally retarded person violates the Eight Amendment's prohibition on cruel and unusual punishment. If a state has not enacted a comprehensive scheme to determine mental retardation, the state courts may create temporary judicial guidelines. *Neal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,406, 06/18/08].

#### **MENTAL RETARDATION--DEFINITION**

In Texas, mental retardation is defined as: (1) significant sub-average general intellectual functioning, usually evidenced by an IQ score below 70; accompanied by (2) related limitations in adaptive functioning; (3) the onset of which occurs prior to age 18. *Neal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,406, 06/18/08].

#### **DEATH PENALTY—MENTAL RETARDATION—GOVERNMENTAL BRANCH**

The Supreme Court's opinion in *Atkins v. Virginia* never specified how the states should ensure that the death penalty not be imposed on mentally retarded defendants, nor did it specify that this task be performed exclusively by the state legislatures rather than any other governmental entity. *Neal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,406, 06/18/08].

#### **MENTAL RETARDATION—DEFENDANT'S BURDEN**

When the affirmative defense of mental retardation is raised at trial, the defendant bears the burden of proof to show retardation beyond a preponderance of the evidence. The reviewing court examines whether the finding is so against the great weight and preponderance of the evidence so as to be manifestly unjust. *Neal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,406, 06/18/08].

#### **EVIDENCE—FACTUAL SUFFICIENCY—NEUTRAL REVIEW**

When determining factual sufficiency, the court reviews the evidence in a neutral light rather than the light most favorable to the verdict. Evidence is factually insufficient if the evidence supporting the verdict is so weak that the verdict clearly seems wrong and manifestly unjust or if 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. The court will not reverse if the greater weight and preponderance of the evidence favors conviction. *Neal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,406, 06/18/08].

#### **EVIDENCE—CORROBORATION—ACCOMPLICE WITNESS**

A conviction cannot be based upon the uncorroborated testimony of an accomplice witness. Corroboration is not sufficient if it merely shows that an offense was committed.

*Neal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,406, 06/18/08].

#### **JURY CHARGE—UNOBJECTED –TO ERROR—EGREGIOUS HARM**

A conviction should only be reversed for an unobjected-to jury charge error if it results in egregious harm. Egregious harm exists when it deprives a defendant of a fair and impartial trial. *Neal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,406, 06/18/08].

#### **ERROR PRESERVATION—TIMELY OBJECTION**

To preserve a complaint for appellate review, a specific and timely objection, motion, or request must be made to the trial court. The complaint is only timely if the party makes the complaint as soon as the grounds for it become apparent. An adequately specific objection must let the trial judge know what the defendant wants and why he is entitled to it. *Neal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,406, 06/18/08].

#### **EVIDENCE—PRESERVATION—BAD FAITH**

The government's failure to preserve potentially useful evidence does not violate due process unless the defendant shows that the loss of the evidence resulted from bad faith on the part of the police. *Neal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,406, 06/18/08].

#### **EVIDENCE—MITIGATION—BURDEN OF PROOF**

The defendant has the burden to prove by a preponderance of the evidence that he is mentally retarded, but neither side bears the burden of proof with respect to mitigation. *Neal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,406, 06/18/08].

#### **INFORMANT—NOT NECESSARY STATE AGENT**

The government's acceptance of an informant's offer of information after the informant receives the information does not convert the informant into a state agent. *Neal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,406, 06/18/08].

#### **ARREST—REASONABLE SUSPICION**

A police officer may lawfully conduct a temporary detention if there is reasonable suspicion to believe that the detained person is violating the law. Reasonable suspicion exists if the officer has specific, articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably suspect that a particular person has engaged in

criminal activity. In making this determination, the reviewing court considers the totality of the circumstances. *Neal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,406, 06/18/08].

#### **ARREST—VALIDITY—PROBABLE CAUSE**

Under Texas law, an arrest is valid if the arresting officer had probable cause with respect to the person being arrested, as well as the statutory authority to make the arrest. If the officer does not have a warrant, he still has the statutory authority to make the arrest where it is shown that, upon the representations of a credible person, that a felony has been or will soon be committed and the offender is about to escape without time to procure a warrant. *Neal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,406, 06/18/08].

#### **FOURTH AMENDMENT —SUPPRESSION—WARRANT REQUIREMENTS**

Evidence seized by the police without a warrant may only be admitted to evidence if an exception to the Fourth Amendment’s warrant requirement applies. A defendant challenging the admission of evidence seized without a warrant bears the initial burden to prove that the search was conducted without a warrant. If met, the burden falls to the state to show an exception applies. *Neal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,406, 06/18/08].

#### **FOURTH AMENDMENT—AUTOMOBILE EXCEPTION**

Police may lawfully search every part of an automobile if they have probable cause to believe that the vehicle contains evidence of a crime. Probable cause to search exists when there is a fair probability of finding inculpatory evidence at the location being searched. *Neal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,406, 06/18/08].

#### **SEARCH —RESIDENCE—EXIGENT CIRCUMSTANCES EXCEPTION**

The police may search a defendant’s residence without satisfying the Fourth Amendment’s general warrant requirements if they have exigent circumstances and probable cause to search the residence. *Neal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,406, 06/18/08].

#### **APPELLATE REVIEW —HARM ANALYSIS**

If an appellate court finds, beyond a reasonable doubt, that a constitutional error did not contribute to the verdict, then that error is harmless and the reviewing court will not reverse the verdict. The court makes its determination by calculating, as near as possible, the probable impact of the error on the jury in the light of other evidence. An error is not harmless

if there is a reasonable likelihood that the error materially affected the jury's deliberations. *Neal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,406, 06/18/08].

**FIFTH AMENDMENT — THIRD PERSON CONFESSIONS**

A defendant does not have standing to raise a constitutional challenge to another person's confession. *Neal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,406, 06/18/08].

**APPELLATE REVIEW—NON-CONSTITUTIONAL ERROR**

An appellate court will not reverse a ruling based on non-constitutional error that does not affect substantial rights. *Neal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2008) [AP-75,406, 06/18/08].