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Earl R. Waddell III

Tracy L. Abell

A NEW EVIDENTIARY STANDARD FOR CRIMINAL APPELLATE REVIEW: *CLEWIS v. STATE*

EARL R. WADDELL III†
TRACY L. ABELL‡

† B.A., 1964, University of Texas; M.A., 1966, University of Texas; J.D., 1985 University of Texas. Mr. Waddell is currently practicing in the Dallas/Fort Worth Metroplex. He served as an Associate Professor of Law for six years at Texas Wesleyan University School of Law and authored a textbook entitled "Texas Marital Property Rights."

‡ B.S., Central Missouri State University; Candidate for J.D. 1997, Texas Wesleyan University School of Law.

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I. INTRODUCTION

The United States Supreme Court recognized in *Jackson v. Virginia*[1] that "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury."[2] Because this type of error can occur in both civil and criminal trials, Texas courts[3] historically reviewed cases for both factual and legal sufficiency.[4] In 1981, the courts of civil appeals were recreated as the courts of appeals by constitutional amendment.[5] Their *civil* power of evidentiary review remained unchanged. However, the courts of appeals were given original criminal jurisdiction over non-capital criminal cases. Subsequently, the courts of appeals split as to whether they had authority to review factual sufficiency[6] in a criminal appeal.[7]

For many years, the courts of appeals uniformly held that the constitutional grant of authority excluded an evidentiary review of criminal cases under any standard other than legal sufficiency. In effect, courts of appeals performed a "no evidence" review only, refusing to review factual sufficiency unless the defendant had the burden of proof on an affirmative defense issue.[8] However, this unitary structure of criminal appellate review began to crumble in 1992 when the Austin Court of Appeals asserted both a power and a duty to review the factual sufficiency of the evidence in *Stone v. State*.[9] After the *Stone* court finally broke new ground, only the Texarkana Court of Appeals elected to join the Austin Court of Appeals.[10] The remaining

1. 443 U.S. 307 (1979).

2. *Id.* at 317.

3. These included the Texas Supreme Court, the original court of appeals and the former courts of civil appeals. The Texas Constitution of 1876, created the original court of appeals. This court of appeals had both criminal and civil appeal jurisdiction. The constitutional amendments of 1891, in addition to changing the court of appeals to the courts of civil appeals, also created the Court of Criminal Appeals. TEX. CONST. art. V, § 4 (1876, amended 1891).

4. *See In re* King's Estate, 244 S.W.2d 660, 661-62 (Tex. 1951) (per curiam) (reaffirming that the Texas Supreme Court has the constitutional power to review legal sufficiency and holding that the courts of civil appeals also have the constitutional duty to review the factual sufficiency of the evidence to support a verdict).

5. TEX. CONST. art. V, § 6 (1891, amended 1978).

6. Legal insufficiency is a question of law. In a criminal case, legal sufficiency is determined by whether the State has met the requirements of proof beyond a reasonable doubt as to the elements of the offense charged in light of the *Jackson* standard. A factual sufficiency claim, on the other hand, is a fact question. *See generally*, Justice Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361 (1960).

7. *See* Clewis v. State, 922 S.W.2d 126, 132-35 (Tex. Crim. App. 1996).

8. *See id. See also* Meraz v. State, 785 S.W.2d 146, 154 (Tex. Crim. App. 1990).

9. 823 S.W.2d 375 (Tex. App.—Austin 1992, pet. ref'd, untimely filed).

10. *See, e.g.*, White v. State, 890 S.W.2d 131, 134 (Tex. App.—Texarkana 1994, writ ref'd); Lisai v. State, 875 S.W.2d 35 (Tex. App.—Texarkana 1994, pet. ref'd); Hernandez v. State, 867 S.W.2d 900, 903 (Tex. App.—Texarkana 1993, no pet.); Lewis v.

courts of appeals either held contrary to *Stone* or refused to address the issue.[11] The issue remained unsettled until 1996.

In *Clewis v. State*,[12] the Texas Court of Criminal Appeals finally addressed the conflict regarding proper appellate review of factual sufficiency of the evidence.[13] The *Clewis* decision adopted *Stone* and established, for the first time since the 1981 amendments, the constitutional power and duty of the courts of appeals to review the factual sufficiency of the evidence in appropriate cases.[14] In attempting to predict the effect of *Clewis* on review of noncapital criminal cases in the courts of appeals and death penalty cases in the Texas Court of Criminal Appeals, this article examines the historical precedents of selected civil cases reversed for factual insufficiency.[15] Also discussed are potential conflicts and the appropriate standard for review. Although defendants after *Clewis* may raise the issue of factual sufficiency in the courts of appeals, the court in *Clewis* did not address whether the court of criminal appeals has the authority to conduct such a review.[16] Thus, there could be problems for defendants whose cases come under the Texas Court of Criminal Appeal's original jurisdiction for capital murder and habeas corpus.

State, 856 S.W.2d 271, 273 (Tex. App.—Texarkana 1993, no pet.); Williams v. State, 848 S.W.2d 915, 916 (Tex. App.—Texarkana 1993, no pet.).

11. *See, e.g.*, Blackmon v. State, 830 S.W.2d 711, 713 n.1 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd) (holding that *Meraz* only applies where the defendant has the burden of proof); Lopez v. State, 824 S.W.2d 298, 303-04 (Tex. App.—Houston [1st Dist.] 1992, no pet.) (refusing to apply *Meraz* to entrapment because it is not an affirmative defense and holding if the trier of fact believes evidence that establishes guilt beyond a reasonable doubt, the court of appeals are not in a position to reverse on sufficiency of evidence grounds); Crouch v. State, 858 S.W.2d 599, 601 (Tex. App.—Fort Worth 1993, pet. ref'd) (refusing to apply the *Stone* factual sufficiency standard); Pender v. State, 850 S.W.2d 201, 202 (Tex. App.—Fort Worth 1993, no pet.) (per curiam) (rejecting the factual sufficiency test used in *Meraz v. State*, 785 S.W.2d 146, 154 (Tex. Crim. App. 1990), which was adopted by the Austin Court of Appeals in *Stone v. State*). The Corpus Christi and San Antonio courts did not authoritatively adopt or reject the *Stone* factual sufficiency standard. *See, e.g.*, Rodriguez v. State, 888 S.W.2d 211, 215 (Tex. App.—Corpus Christi 1994, no pet.); Harris v. State, 866 S.W.2d 316, 328 (Tex. App.—San Antonio 1993, pet. ref'd).

12. 922 S.W.2d 126 (Tex. Crim. App. 1996).

13. *See id.* at 131-35.

14. *See id.* at 136.

15. Additionally, *Perkins v. State*, 940 S.W.2d 365 (Tex. App.—Waco 1997, pet. filed), the first case to reverse for factual insufficiency using the *Clewis* standard, will be discussed.

16. "This opinion is limited to the jurisdiction and proper standard of factual sufficiency review in the courts of appeals. We will not address these issues with regard to this Court since they are not properly before us in the instant case." *Clewis*, 922 S.W.2d at 129 n.3.

II. The Two Types of Evidentiary Standards for Appellate Review

A. *Legal Sufficiency*

The losing party at trial often appeals by complaining the evidence before the jury did not support the verdict. This complaint usually comes in two forms. First, the losing party often asserts that the prevailing party failed to offer any evidence on an essential element of the cause of action. As discussed below, this type of complaint is traditionally referred to as "no evidence" or legal insufficiency.[17] Strictly construed, a "no evidence" complaint has nothing to do with the type or convincing nature of the evidence. In a "no evidence" complaint, the prevailing party, who has the burden of proof, fails to offer *any* evidence on a disputed issue.[18] A "no evidence" complaint also includes instances where the party with the burden brings forth a "mere scintilla"[19] of indirect evidence which requires an inference of the facts to be proved. Because the jury decides only facts properly placed in dispute by the evidence, such a case should not be submitted to the jury.[20] Moreover, having offered no evidence or, at most, a mere scintilla, such a litigant should not prevail as a matter of law.[21] Thus, the trial judge must take the case from the jury and render judgment in favor of the opposing party.[22] If the trial judge fails to direct a verdict and the jury returns a verdict unsupported by evidence, the appellate court must reverse the case and render the correct verdict.[23]

Additionally, a losing litigant may also raise a legal sufficiency point of error after submitting evidence which is so strong as to prove the fact "as a matter of law."[24] This evidence may be more clearly referred to as *conclusive evidence* and, once established, leaves no question for the jury to decide.[25]

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17. *See* William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 Tex. L. Rev. 515, 517 (1991).

18. *See id.*

19. The Court in *Jackson* stated:

> "[A] mere modicum of evidence may satisfy a 'no evidence' standard . . . ." Any evidence that is relevant—that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence, cf. Fed. Rule Evid. 401—could be deemed a "mere modicum." But it could not seriously be argued that such a "modicum" of evidence could by itself rationally support a conviction beyond a reasonable doubt.

Jackson, 443 U. S. 307, 320 (1979) (citations omitted) (alteration in original) (omission in original).

20. *See* Powers & Ratliff, *supra* note 17, at 517.

21. *See id.* at 518.

22. *See id.* at 517.

23. *See id.* at 518.

24. *See id.*

25. *See id.*

B. *Factual Sufficiency*

When the party with the burden of proof offers some evidence on each essential element of the cause of action and successfully establishes a prima facie case, the opposing party can no longer assert a "no evidence" complaint.[26] Instead, the opposing party must then rebut at least one element of the cause of action. This second type of evidentiary complaint, "factual sufficiency" or "insufficiency of the evidence," attacks the probative character of all the evidence before the jury. Assuming that the opponent offers some evidence to dispute an element of the case, the jury must weigh all the evidence to decide the disputed issue.[27] When the jury decides in favor of one of the litigants, the losing party can challenge the verdict by asserting that the evidence is not "factually sufficient" to support the verdict.[28] Therefore, factual sufficiency complaints require a comparison of the relative weight, credibility, quality, and quantity of all the evidence offered by both parties. Thus, when weighing the evidence, courts must determine if the jury's verdict is "manifestly unjust," whether it "shocks the conscience," or "clearly demonstrates bias."[29]

The losing litigant may raise insufficiency of the evidence for the first time through a motion for a new trial.[30] If the trial court grants the new trial, the litigation begins anew. However, if the motion for new trial is denied, the losing litigant may raise a legal sufficiency, factual sufficiency, or in the appropriate case, both evidentiary issues on appeal. Further, in a criminal case the defendant may raise a "no evidence" complaint by habeas corpus to the Texas Court of Criminal Appeals.[31]

Justice McGarry's concurring opinion in the Dallas Court of Appeals' *Clewis* decision provides a hypothetical to assist in distinguishing legal and factual sufficiency: "The prosecution's sole witness, a paid informant, testifies that he saw the defendant commit a crime. Twenty nuns testify that the defendant was with them at the time, far from the scene of the crime. Twenty more nuns testify that they saw the informant commit the crime."[32] This hypothetical illustrates where the defendant, if convicted, cannot challenge the legal sufficiency of the evidence because the informant's testimony provides *some* evidence. However, under the *Clewis* decision, the defendant may now have a remedy which the evidence is not factually sufficient.

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26. *See id.*

27. *See id.* at 525.

28. *See id.* at 519.

29. *Id.* at 525-26.

30. *See id.* at 527. *See also* TEX. R. APP. P. 30; TEX. R. CIV. P. 324(b)(2).

31. *See* TEX. R. APP. P. 213.

32. Clewis v. State, 876 S.W.2d 428, 444 n.2 (Tex. App.—Dallas 1994), *vacated en banc*, 922 S.W.2d 126 (1996).

III. Historical Background of the Evidentiary Standards for Appellate Review

A. *Texas Constitutional Grant of Appellate Power*

As early as 1841, in the civil case of *Bailey v. Haddy*,[33] the Texas Supreme Court determined it had the power to review for factual and legal insufficiency under the constitutional grant of "appellate jurisdiction."[34] This power to review for factual sufficiency extended to criminal cases and was exercised by the supreme court, subject only to the constitutional right to a jury trial.[35] In *Republic v. Smith*,[36] the supreme court held: "[w]e decide, then, that the defendant in a criminal prosecution in the district court has the right of appeal to this court from the judgment or sentence of the court below, and to have the facts as well as the law, at his election, opened for re-examination."[37] The adoption of the Constitution of 1876 created the court of appeals as the intermediate appellate court. The supreme court's original appellate jurisdiction, including the power to review cases for factual and legal sufficiency, passed to the newly-created court of appeals.[38] Thus, after 1876 the supreme court no longer had the power to review criminal cases for factual and legal sufficiency. The newly created court of appeals, as the successor of the supreme court, continued to apply essentially the same standard used previously by the supreme court.[39]

In *Walker v. State*,[40] Justice Wilson outlined rules of practice governing the court of appeals when evaluating sufficiency of the evidence:

> "First. Where the evidence is conflicting, and there is sufficient, if believed, to prove the case of the State, the jury being the exclusive judges of the credibility of the testimony, their verdict will not be set aside *unless it is clearly [sic] appears to be wrong.*
> Second. Where there is no testimony to support it, the verdict will be set aside.
> Third. Where the evidence is insufficient to rebut the presumption of innocence, the verdict will be set aside.
> Fourth. Where the verdict is *contrary to the weight of the evidence* it will be set aside."[41]

33. Dallam 376, 378 (Tex. 1841).
34. *Clewis*, 922 S.W.2d 126, 137 (citing Bailey v. Haddy, Dallam 376, 378 (Tex. 1841)).
35. *See id.*; *see also* Republic v. Smith, Dallam 407, 410-11 (Tex. 1841); Missouri Pac. Ry. Co. v. Somers, 14 S.W. 779 (Tex. 1890).
36. Dallam 407 (Tex. 1841).
37. *Id.* at 410-11.
38. *See* Tex. Const. art. V, § 6.
39. *See Clewis*, 922 S.W.2d at 138 (citing Henderson v. State, 1 Tex. Ct. App. 432, 437 (1876), *comparing* Loza v. State, 1 Tex. Ct. App. 488, 489-90 (1877)).
40. 14 Tex. Ct. App. 609, 630 (1883).
41. *Clewis,* 922 S.W.2d at 139 (quoting *Walker,* 14 Tex. Ct. App. at 630 n.5).

Until the 1891 amendments, the Texas Court of Appeals continued to reaffirm and exercise its power to review and reverse jury verdicts on factual issues.[42] The amendments of 1891 bifurcated the upper appellate judicial system to include the supreme court for civil appeals and a Texas Court of Criminal Appeals limited to criminal jurisdiction.[43] Further, the amendments created new intermediate courts of civil appeals.[44] In 1892, the new court of criminal appeals immediately asserted the power to review a criminal appeal on the facts for "legal sufficiency" and "factual sufficiency."[45]

The court of criminal appeals remained the exclusive criminal appellate court in Texas until the 1981 amendments. During the latter half of the twentieth century, the steadily increasing number of criminal appeals became more than a single appellate court could process. To solve the problem, the legislature passed and voters approved a constitutional amendment redesignating the courts of civil appeals as courts of appeals. The amendment also established the courts of appeals as the court of original jurisdiction in criminal appeals.[46]

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42. *See* Missouri Pac. Ry. Co. v. Somers, 14 S.W. 779 (Tex. 1890).

43. *See* TEX. CONST. art. V, §§ 1-6 (1876, amended 1891).

44. *See id.*

45. *Clewis*, 922 S.W.2d at 140. *See also* Rollins v. State, 20 S.W. 358 (Tex. Crim. App. 1892); Anderson v. State, 21 S.W. 358, 359 (Tex. Crim. App. 1892); Foresythe v. State, 20 S.W. 371, 373 (Tex. Crim. App. 1892).

46. Article V, sections 5 and 6 of the Texas Constitution confers appellate jurisdiction to the courts of appeals. Article V, § 5 states:

The Court of Criminal Appeals shall have final appellate jurisdiction coextensive with the limits of the state, and its determinations shall be final, in all criminal cases of whatever grade, with such exceptions and under such regulation as may be provided in this Constitution or as prescribed by law.

TEX. CONST. art. V, § 5.

Article V, section 6 adds:

> Said Courts of Appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts, which shall extend to all cases of which the district Courts of County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law. Provided, that such decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error.

Id. § 6.

Pursuant to Article V, § 6, the Texas legislature passed the following sections of the Government Code, statutorily defining the powers and duties of the courts of appeals: "(a) Each court of appeals has appellate jurisdiction of all civil cases within its district of which the district courts or county courts have jurisdiction when the amount in controversy or the judgment rendered exceeds $100, exclusive of interest and costs." TEX. GOV'T CODE ANN. § 22.220 (Vernon 1988), and

"(a) A judgment of a court of appeals is conclusive on the facts of the case in all civil cases." *Id.* § 22.225.

The power to conduct a review for a factual sufficiency is also reinforced by the legislature. "The courts of appeals or the Court of Criminal Appeals may reverse the judgment in a criminal action, as well upon the law as upon the facts." TEX. CODE CRIM. PROC. ANN. art. 44.25 (Vernon Supp. 1997). Further, "[t]his provision of the Code has remained almost identical since 1857 with each subsequent code giving the State's criminal appellate courts the power to reverse a criminal case upon the facts." Bigby v. State, 892 S.W.2d 864, 875 (Tex. Crim. App. 1994).

B. *Evidentiary Standards for Appellate Review in Civil Cases*

In *Cropper v. Caterpillar Tractor*,[47] the Supreme Court of Texas decided whether the court of appeals had the authority to review a "failure to find" by the jury in the same manner in which it reviews a jury's findings.[48] In *Cropper*, the plaintiff asserted a personal injury action for injuries received while operating a Caterpillar tractor.[49] The action was based on theories of negligence and strict liability.[50] Caterpillar contended that the plaintiff was contributorily negligent in his operation of the tractor. The jury found for the plaintiff on all issues.[51] On appeal the defendant asserted, in relevant part, that: "(1) the jury's *failure to find* contributory negligence was against the great weight and preponderance of the evidence and (2) the evidence supporting several of the jury's *findings* was factually insufficient."[52] The court stated, "[i]t is perfectly clear that regardless of which party . . . prevailed before the jury, the verdict loser had the right to assert on appeal that the jury's verdict was either not supported by the evidence or was against the great weight and preponderance of the evidence, as appropriate."[53]

Cropper demonstrates the confusion encountered in distinguishing and applying factual sufficiency and legal sufficiency. Caterpillar's terminology in the first point of error is correct. The terminology, "the verdict is against the great weight and preponderance of the evidence," is applicable in a factual sufficiency point of error in issues where the losing party in the trial court had the burden of proof. In *Cropper*, the defendant was the proponent of the evidence for the issue of contributory negligence, so the language is proper. However, the second point of error, as stated, would only apply where asserted by the opponent of the evidence. Both points of error come under the realm of "factual sufficiency."

"Texas courts customarily speak of dividing attacks on jury findings into two groups: 'insufficient evidence' points and 'no evidence' points."[54] *Cropper* points out the problem in merely dividing the issues into two categories. Two categories oversimplify the complex issues that courts and lawyers have been struggling to understand and apply for years.

In response to the confusion and complex nature of the issues of "no evidence" and "factual sufficiency," Professors Ratliff and Powers

47. 754 S.W.2d 646 (Tex. 1988).
48. *See id.* at 647.
49. *See id.*
50. *See id.*
51. *See id.*
52. *Id.* at 648.
53. *Id.* at 650.
54. Powers & Ratliff, *supra* note 17, at 517.

divided the issues, as they relate to civil cases, into five zones.[55] These zones were created to reflect "the true nature of factual sufficiency and legal sufficiency review."[56] Additionally, the division assists in determining the appropriate methods to raise and preserve errors, as well as the appropriate remedies.[57]

1. Zone 1

The proponent in a Zone 1 case has failed to bring any evidence, or no more than a "scintilla" of evidence, to meet his burden of proof.[58] When a proponent attempts to infer facts to satisfy an essential element of the case, the evidence constitutes no more than a scintilla.[59] Zone 1 cases are appropriately called "no evidence" cases and are encompassed within the "legal sufficiency" points of error.[60] When reviewing the evidence to determine if it falls into Zone 1, the court must "consider the evidence in the light most favorable to the proponent, considering only the supporting evidence and inferences and ignoring all contrary evidence and inferences."[61] Upon review of the evidence, "the court must be persuaded that reasonable minds could not differ on the matter."[62] A jury finding in favor of the proponent in a Zone 1 case will be set aside on appeal, and "ordinarily, the appellate court will render judgment in favor of the opponent."[63]

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55. *See id.*

56. *Id.* at 516.

57. *See id.*

58. *See id.* at 517-18. *See, e.g.,* North Dallas Diagnostic Center v. Dewberry, 900 S.W.2d 90, 96-97 (Tex. App.—Dallas 1995, writ denied) The court stated:

> A legal insufficiency challenge must be sustained when the record discloses one of the following: [1] a complete absence of evidence of a vital fact; [2] the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove the vital fact; [3] the evidence offered to prove a vital fact is no more than a mere scintilla of evidence; or [4] the evidence establishes the opposite of a vital fact.

See id.

59. Powers & Ratliff, *supra* note 17, at 521. *See, e.g.,* Seideneck v. Cal Bayreuther Assocs., 451 S.W.2d 752 (Tex. 1970). *Seideneck* involved a customer who tripped on a rug in the display area of a business. The plaintiff had to show that the rug presented an unreasonable risk of harm. Furthermore, the plaintiff had the burden of showing the danger should have been known to and appreciated by the defendants. There was no evidence that anyone previously tripped on the rug. The rug was not available to be admitted into evidence. There was also no evidence that the rug was defective or that the construction of the rug would have warned the defendants of danger. However, Mrs. Seideneck gave testimony that her heel got caught in the rug in the display area and her body fell backwards. The court found that although Mrs. Seideneck's testimony was "some" evidence, the evidence was "so weak as to do no more than create a mere surmise or suspicion of its existence, [therefore], such evidence is in legal effect no evidence, and it will not support a verdict or judgment." *Id.* at 755.

60. *See* Powers & Ratliff, *supra* note 17, at 518.

61. *Id.* at 522.

62. *Id.*

63. *Id.* at 518.

Mattix-Hill v. Reck[64] is an example of a "no evidence" case recently decided by the Texas Supreme Court. *Mattix-Hill* is an intentional infliction of emotional distress case where a fourteen-year old was removed from her home and placed in the care of the Texas Department of Human Services.[65] The teenager's mother, Reck, had refused to require the stepfather to leave the home after the teenager accused the stepfather of sexually molesting her.[66] The teenager was placed in foster care and the mother was eventually told that the teenager would not be returned to her. Later, the stepfather admitted molesting the child.[67] The mother then separated from the stepfather and initiated divorce proceedings.

The defendant, Mattix-Hill, a Texas Department of Human Services employee, called the teenager's mother in November of 1989 to notify her that the teenager ran away from her foster home.[68] The defendant also asked the mother to come in and sign a document for permanent placement of the teenager.[69] Between the time the teenager ran away and was returned to her mother, she was allegedly raped by one or more men.[70] "Reck testified at trial that she was very upset by Mattix-Hill's phone call, became hysterical, and had to be driven home from work."[71] Reck filed suit against the Department of Human Services, Mattix-Hill, and four other employees alleging, among other torts, intentional infliction of emotional distress. Although the jury rendered a verdict in favor of the plaintiffs for $3.5 million in damages, the trial court stepped in and granted judgment not withstanding the verdict in favor of the defendants.[72]

On appeal against the individuals, the trial court's judgment was affirmed as to all but Mattix-Hill. "The court held that there was some evidence of intentional infliction of emotional distress by Mattix-Hill because she asked if Reck would sign the placement plan during the same telephone conversation in which Reck was informed that Amy was missing."[73] The trial court's judgment in Mattix-Hill's favor was reversed by the court of appeals and a jury award of $400,000 was reinstated.[74]

However, the supreme court subsequently held that there was no evidence of conduct that would constitute intentional infliction of

64. 923 S.W.2d 596 (Tex. 1996).
65. *See id.* at 596-97.
66. *See id.*
67. *See id.* at 597.
68. *See id.*
69. *See id.*
70. *See id.*
71. *Id.*
72. *See id.*
73. *Id.*
74. *See id.*

emotional distress.[75] The supreme court found that the court of appeals erred in determining that Mattix-Hill's telephone conversation with Reck when the teenager had run away was some evidence of intentional infliction of emotional distress."[76] Mattix-Hill's conversation with Reck regarding the teenager's disappearance and the request to sign the document was part of Mattix-Hill's job, and the conversation could not be described as "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency."[77] Thus, the court found that there was no evidence of intentional infliction of emotional distress and reversed the judgment of the court of appeals as to Mattix-Hill.[78]

Under a Zone 1 analysis, the proponent, Reck, did not submit evidence creating a fact issue. Without a fact issue, the case should have never been brought before the jury. Thus, once the case was brought before the jury, the jury's verdict could not be supported and had to be corrected.

2. Zone 2

In a Zone 2 case, "there is some evidence on the issue, and consequently it must be submitted to the jury, but there is not enough evidence to support a jury finding in the proponents favor."[79] Zone 2 evidence is referred to as "insufficient evidence."[80] Zone 2 cases are encompassed within the "factually sufficiency" points of error.[81] These cases are like those referenced in *Cropper* since some evidence exists in the proponents favor, but the evidence does not support the verdict.[82]

In making the determination that the case is in Zone 2, the reviewing court "looks at all the evidence on both sides and then makes a predominantly intuitive judgment: is the evidence . . . in satisfactory harmony with the fact finding it supports?"[83] The reviewing court has very little guidance in making this determination.[84] Fact questions go before the jury when "reasonable minds could differ as to the answers."[85] However, courts are told to disturb the jury's verdict only

75. "The elements of intentional infliction of emotional distress are: (1) the defendant acted intentionally or recklessly, (2) the conduct was extreme and outrageous, (3) the defendant's actions caused the plaintiff emotional distress, and (4) the emotional distress suffered by the plaintiff was severe." *Id.* (citing Twyman v. Twyman, 855 S.W.2d 619, 621 (Tex. 1993)).

76. *Id.* at 598.

77. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)).

78. *See id.*

79. Powers & Ratliff, *supra* note 17, at 518.

80. *Id.*

81. *See id.* at 518-19.

82. *See* Cropper v. Caterpillar, 754 S.W.2d 646, 651 (Tex. 1988).

83. Powers & Ratliff, *supra* note 17, at 525.

84. *See id.*

85. *Id.* at 526.

when it is "manifestly unjust," "shocks the conscious" or "clearly demonstrates bias."[86] Zone 2 evidence is properly attacked by the opponent through a motion for a new trial.[87] If the motion is denied, the reviewing court usually sets aside the finding in the proponent's favor and orders a new trial.[88]

Cain v. Bain[89] represents a Zone 2 case where courts encountering confusion in applying and communicating the correct standard is readily apparent. In *Cain*, the Bains purchased a 20-year-old house from another couple through a real estate agent with the James Cain Company.[90] When the Bains moved into the house they noticed a bulge under a window, a crack in the wall, and a sticking door.[91] Several months later, they noticed a crack in the foundation.[92] Approximately a year after occupying the house, Mrs. Bain was told there might be a slab problem.[93] Evidence to the contrary included a consultation with a foundation expert, who found no substantial foundation defect.[94] Additionally, the Bains argued that other problems could have attributed to the difficulties other than a foundation defect.[95] When the Bains attempted to sell their house two years later, they were unable to find a buyer because of a foundation defect.[96]

The Bains sued the real estate company for violations of the Texas Deceptive Trade Practices Act.[97] The trial court rendered a take

86. *Id.* at 525-26.

87. *See id.* at 527.

88. *See id.* at 518. *But see* North Dallas Diagnostic Center v. Dewberry, 900 S.W.2d 90 (Tex. App.—Dallas 1995, writ denied). In *North Dallas Diagnostic Center*, the court acknowledged that reversal and rendition are generally required when a court sustains a no evidence point. The court goes on, however, to state that "an appellate court may remand for a new trial when the case has not been fully developed and a retrial would better serve the interest of justice." *Id.* at 97.

89. 709 S.W.2d 175 (Tex. 1986) (per curiam). *See also* McClain v. Elm Creek Watershed Auth., 925 S.W.2d 756, 757-60 (Tex. App.—Austin 1996, no writ). Elm Creek filed suit to condemn an easement owned by McClain. The trial court granted the easement, however, the court denied compensation to the landowners. McClain, appellant, argues the trial court erred in its judgment denying compensation because there was legally insufficient and factually insufficient evidence to support the jury's finding as to the value of the severed land. The only evidence in the record that indicates that the parcel has any post-taking value is a condemnor appraiser's inexact testimony. The appraiser's testimony merely says that the parcel has some value. There is no evidence of the market value, yet the jury found that the parcel was worth $40,000. The court held that there was factually insufficient evidence as to the jury finding that the land was worth $40,000. *See id.*; *see also* Texas Indus., Inc. v. Vaughan, 919 S.W.2d 798 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

90. 709 S.W.2d at 175.

91. *See id.*

92. *See id.*

93. *See id.*

94. *See id.* at 175-76.

95. *See id.* at 176.

96. *See id.* at 175.

97. *See id.*

nothing judgment against the Bains.[98] The jury found that the Bains were on constructive notice of the foundation defect.[99] On appeal, the Bains asserted the finding of constructive notice was against the great weight and preponderance of the evidence.[100] In an unpublished opinion, the court of appeals reversed the judgment, finding for the Bains.[101]

The supreme court found that the Texarkana Court of Appeals applied the wrong standard for a factual sufficiency review.[102] The supreme court sent the case back to the court of appeals to "consider and weigh all the evidence, and . . . set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust."[103] Although the parties settled, the court of appeals issued a published opinion in response to the supreme court's opinion that the court of appeals erred in their original review. The court of appeals explained the supreme court "singularly misunderstood the purpose of [the] comment on the evidence and construed it as the application or enunciation of a standard of review in conflict with the standard established by *In re King's Estate*."[104] The court of appeals found that:

> The positive nature of the expert's testimony so far outweighs and preponderates over the equivocal inferences that the conclusion is, as in this Court's original opinion, that the probative value of the evidence tending to support the jury's answer is insufficient to do so. Further, a finding based upon such inferences that the Bains had notice that the foundation was defective . . . is so contrary to the overwhelming weight and preponderance of the evidence as to be manifestly unjust.[105]

3. Zone 3

Zone 3 cases involve enough evidence to support a jury verdict in favor of the proponent.[106] Thus, there is not enough contravening evidence that would justify interfering with a jury verdict against the opponent.[107] Therefore, a reviewing court will uphold the jury finding.[108] Since this simply involves ruling that the jury verdict is supportable, courts rarely define such a case as a Zone 3 analysis.

98. *See id.*
99. *See id.*
100. *See id.* at 176.
101. *See id.*
102. *See id.*
103. *Id.*
104. Bain v. James Cain Co., 715 S.W.2d 421, 422 (Tex. App.—Texarkana 1986, no writ) (per curiam).
105. *Id.* at 423.
106. *See* Powers & Ratliff, *supra* note 17, at 518.
107. *See id.*
108. *See id.*

Thus, any case upholding a jury verdict in the presence of some contravening evidence is an example of a Zone 3 case.

4. Zone 4

Zone 4 cases, like Zone 2 cases, involve a factual sufficiency point of error.[109] In a Zone 4 case, the jury renders a verdict in favor of the opponent. However, "the trial court will order a new trial because a jury finding against the proponent is 'contrary to the great weight a preponderance of the evidence.'"[110] This line of cases follows the second factual sufficiency issue identified in *Cropper*.[111] If the trial court denies a motion for a new trial, "a reviewing court will set aside a jury finding against the proponent and order a new trial."[112] Although Zone 2 and Zone 4 cases both involve factual insufficiency points of error, the issue must go before the jury and the jury is only allowed one finding.[113] The jury verdict in a Zone 2 case must be in favor of the opponent,[114] while Zone 4 cases must be in favor of the proponent.[115]

In re King's Estate[116] is a Zone 4 case which involved a will contest. The jury found the testatrix, Mrs. King, to lack testamentary capacity, and judgment was rendered against the proponent, Carl King, who defended the will.[117] The proponent sought a new trial on the ground that the verdict was "so contrary to the overwhelming weight of all the evidence as to be clearly wrong and unjust."[118] The proponent was denied a new trial. In affirming the trial court's judgment the Amarillo Court of Civil Appeals stated, "[i]f there is any evidence of

109. *See id.* at 519.

110. *Id.* at 519 (citing Gillespy v. Sylvia, 496 S.W.2d 234, 237 (Tex. App.—El Paso 1973, no writ). *See also In re* King's Estate, 244 S.W.2d 660, 662 (Tex. 1951) (per curiam). In describing the Courts of Civil Appeals' duty to determine if the verdict was "so contrary to the overwhelming weight of all the evidence as to be clearly wrong and unjust," the court stated:

> It is, indeed, not simple to describe the intellectual process to be followed by the Court of Civil Appeals in passing on the fact question—to specify just how a verdict may be supported by evidence of probative force and at the same time be on all the evidence so clearly unjust as to require a new trial. But Article 5, § 6 of the Constitution . . . is no more to be ignored than any other part of that document, and that provision, with the decisions, statutes and rules based upon it, requires the Court of Civil Appeals, upon proper assignment, to consider the fact question of weight and preponderance of all the evidence and to order or deny a new trial accordingly as the verdict may thus appear to it clearly unjust or otherwise.

Id.

111. *See* Cropper v. Caterpillar, 754 S.W.2d 646, 648 (Tex. 1988).

112. Powers & Ratliff, *supra* note 17, at 518.

113. *See id.* at 527.

114. *See id.* at 518.

115. *See id.*

116. 244 S.W.2d 660 (Tex. 1951) (per curiam).

117. *See id.* at 660.

118. *Id.* at 660-61.

probative force to support this finding of the jury, such finding is conclusive and binding on both the trial court and this court."[119] The Supreme Court of Texas reversed the judgment and sent it back to the appellate court reminding the court of their:

> peculiar powers under the constitution and Texas Rules of Civil Procedure Nos. 451, 453, and 455, to consider and weigh all of the evidence in the case and to set aside the verdict and remand the cause for a new trial, if it thus concludes that the verdict is so against the great weight and preponderance of the evidence as to be manifestly unjust—this, regardless of whether the record contains some "evidence of probative force" in support of the verdict. . . . It is in effect an erroneous ruling of law that the existence of "any evidence of probative force" in support of the verdict determines that the verdict is not "contrary to the overwhelming weight of all the evidence."[120]

Pool v. Ford Motor Co.[121] is another Zone 4 case which articulated procedural requirements to prevent a reviewing court from merely substituting its judgment for that of the jury in a factual sufficiency review (Zone 2 or Zone 4). In *Pool*, the court stated that courts reversing on factual insufficiency grounds should, in their opinions:

> [D]etail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust; why it shocks the conscience; or clearly demonstrates bias. Further, those courts, in their opinions, should state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict.[122]

5. Zone 5

Zone 5 evidence, like Zone 1, fails to contain a fact issue for the jury.[123] Therefore, Zone 1 and 5 are both encompassed within the "legal sufficiency" point of error.[124] Zone 5 evidence is so strong it establishes a fact "as a matter of law."[125] Zone 5 evidence is referred to as "conclusive evidence."[126] Legal sufficiency points of error (Zone 1 and 5) are properly raised by a motion for summary judgment, a motion for directed verdict, an objection to the jury charge, a motion to disregard findings, a motion for judgment n.o.v., or a motion for a

119. King v. King, 242 S.W.2d 925, 929 (Tex. Civ. App.—Amarillo 1951), *rev'd sub nom. In re* King's Estate, 244 S.W.2d 660 (Tex. 1951) (per curiam).
120. *Id.*
121. 715 S.W.2d 629 (Tex. 1986).
122. *Id.* at 635.
123. *See* Powers & Ratliff, *supra* note 17, at 518.
124. *See id.*
125. *See id.*
126. *See id.*

new trial.[127] The reviewing court, when determining if the evidence falls within Zone 5, asks "whether reasonable minds could differ about the fact determination to be made by the jury . . . . [T]he reviewing court looks to see whether some evidence, which would support the jury finding, opposes that which is urged as conclusive. If so, the inquiry stops."[128] If there is no evidence in the record opposing that which the proponent asserts is conclusive, the court looks at the entire record to see if the evidence is sufficient to support all vital facts conclusively.

The following five parts must be satisfied for an interested witness' unopposed testimony to be considered conclusive: (1) it pertains to matters reasonably capable of exact statement, (2) it is clear, direct, and positive, (3) it is internally devoid of inconsistencies, (4) it is uncontradicted either by the testimony of other witnesses or by circumstances, and (5) it is of a kind that could be readily controverted if untrue. Evidence not meeting this test and which is not an admission cannot be in Zone 5.[129] Disinterested testimony must also pass the five part test to be conclusive.[130]

City of Dallas v. Moreau,[131] a Zone 5 case, involved a police officer who was given a letter terminating him for firing his weapon without legal justification.[132] The letter was then posted by the city on a bulletin board for employees to read.[133] Moreau sued the city for libel. The City of Dallas asserted the defense of governmental immunity on a pretrial motion for judgment on the pleadings, motion for judgment on the pleadings, motion for directed verdict, objection to special issues submitting Moreau's case to the jury, and by motion for judgment n.o.v.[134]

The court of appeals found that the city's motion for judgment n.o.v. should have been granted.[135] The law supports that the City of Dallas, a municipal corporation, is immune from tort suits by its officers, agents and employees when it's performing a government function.[136] "Activities performed as part of the police power of a municipal corporation in providing for the health, safety, and general welfare of the citizens fall clearly within the governmental functions of a city. . . . The hiring and firing of city employees is . . . a government function."[137] Since no evidence was admitted to support a finding that

127. *See id.* at 520.
128. *See id.* at 523.
129. *See id.*
130. *See id.* at 524-25.
131. 718 S.W.2d 776 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).
132. *See id.* at 778.
133. *See id.*
134. *See id.*
135. *See id.*
136. *See id.* at 779.
137. *Id.* (citations omitted).

the city's activities were proprietary, the court of appeals found the City of Dallas immune from Moreau's cause of action as a matter of law.[138]

C. *Evidentiary Standards for Appellate Review of the Issue of Guilt in Criminal Cases.*[139]

The United States Supreme Court held in *In re Winship*[140] that due process imposes a constitutional duty upon the State to prove each and every element of an alleged offense beyond a reasonable doubt.[141] The Texas Court of Criminal Appeals recognized this burden of proof[142] and instructed Texas trial courts to include the appropriate definition of reasonable doubt in the written charge to the jury.[143] If the State fails to meet this burden, the presumption of innocence prevails and the trial judge should direct a verdict in the accused's favor. As a practical matter, directed verdicts are extremely rare.[144] Trial judges routinely deny the accused's motion for directed verdict and submit the overwhelming majority of cases to the jury. Occasionally, a trial judge will erroneously submit a "no evidence" case to a jury. If a jury returns a verdict of guilty when no evidence exists to prove each and every element of the offense, the resulting judgment is clearly an unjust violation of the accused's right to due process.[145]

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138. *See id.*

139. This section discusses the applicability of the Zone classifications from *Powers and Ratliff* with respect to the issue of guilt or innocence only. The prosecution is the proponent of the evidence on the issue of guilt or innocence in a criminal trial. Criminal issues such as affirmative defenses or the existence of probable cause to arrest could be classified as Zones 1 through 5.

140. 397 U.S. 358 (1970).

141. *Id.*

142. "The constitutionally required burden of proof in criminal cases is that the State establish all elements of the offense beyond a reasonable doubt." Crocker v. State, 573 S.W.2d 190, 207 (Tex. Crim. App. [Panel Op.] 1978). *See also* Mullaney v. Wilbur, 421 U.S. 684 (1970).

143. A reasonable doubt is:

> a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person hesitate to act in the most important of his own affairs. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

Geesa v. State, 820 S.W.2d 154, 162 (Tex. Crim. App. 1991).

144. The most famous directed verdict in Texas jurisprudence occurred in the prosecution of United States Senator Kay Bailey Hutchison for felonies alleged during her tenure as State Comptroller. Judge Onion, the former chief justice of the Court of Criminal Appeals, sitting as a visiting judge, ordered the jury to return a verdict of "not guilty" when the Travis County District Attorney refused to offer any evidence to support the charges. GEORGE E. DIX & ROBERT O. DAWSON, *Texas Criminal Procedure*, § 10.04(C) (1996).

145. The Texas Court of Criminal Appeals restated the standard in *Alvarado v. State*:

The trial judge has the first opportunity to correct a no evidence or legal insufficiency error through a motion for new trial.[146] The trial judge sits in the same position as a member of the jury. Having heard the evidence and seen the witnesses, the judge has a duty to correct an obvious failure by the prosecution to offer proof on each element of the offense as charged. However, the trial judge does not sit as 13th juror if the ground asserted by the defense motion for a new trial is a no evidence point. Because a no evidence complaint implies a failure of proof as a matter of law, the court is not required to usurp the power of the jury as the ultimate fact finder.

The existence or non-existence of evidence is a legal decision that does not require balancing of conflicting facts. When properly brought to the court's attention by a motion for new trial, the issue demands a thorough examination of the reporter's trial notes. The trial judge must investigate the record to determine if the evidence exists. If the court decides that the prosecution failed to offer evidence on one or more elements of the offense, the judge should grant a new trial. However, if the trial court erroneously fails to grant a new trial or the defense files no motion for new trial in the appropriate

> Consistent with the Fourteenth Amendment guarantee of due process of law, no person may be convicted of a criminal offense and denied his liberty unless his criminal responsibility for the offense is proved beyond a reasonable doubt. Our state statutory law has the same requirement. Because the jury is the sole judge of the weight and credibility of the evidence at a criminal trial, our task as an appellate court is to consider all the record evidence in the light most favorable to the jury's verdict, and to determine whether, based on that evidence and all reasonable inferences therefrom, any rational jury could have found the defendant guilty beyond a reasonable doubt. If, given all the evidence, a rational jury would necessarily entertain a reasonable doubt as to the defendant's guilt, the due process guarantee requires that we reverse and order a judgment of acquittal. Appellate judges are not factfinders, however; we may not re-evaluate the weight and credibility of the record evidence. Rather, we act only "as a final, due process safeguard ensuring . . . the rationality of the fact finder."

Alvarado v. State, 912 S.W.2d 199, 206-07 (Tex. Crim. App. 1995) (citations omitted) (omission in original).

146. Texas Rule of Appellate Procedure 30 provides that a new trial in a criminal action should be granted if the evidence is insufficient to meet the State's burden of proof:

> (a) Definition. A "new trial" is the rehearing of a criminal action after a finding or verdict of guilt has been set aside upon motion of an accused. Except to adduce facts of a matter not otherwise shown on the record, a motion for new trial is not a requisite to presenting a point of error on appeal.
>
> (b) Grounds. A new trial shall be granted an accused for the following reasons:
>
> . . . (9) Where the verdict is contrary to the law and evidence.

TEX. R. APP. P. 30.

case, the appellate court has the duty to review the record for legal sufficiency of the evidence.[147]

The United States Supreme Court established the standard for appellate review of legal sufficiency for Zone 1 criminal cases in *Jackson v. Virginia*.[148] After considering only the evidence in favor of the verdict, an appellate court that reverses a conviction under the *Jackson* standard cannot remand the case for a new trial. Like most civil cases,[149] the appellate court has no discretion and must render judgment for the criminal defendant. Legal insufficiency in Zone 1 always results in an acquittal. No retrial is possible, as a result of constitutional double jeopardy protection.[150]

On the guilt or innocence issue, constitutional rights to a jury trial, the presumption of innocence,[151] and double jeopardy, prevent a criminal case from entering Zone 5, Zone 4, or Zone 3. In Zone 5, the concept of conclusive evidence has no application to a criminal trial. The defendant's constitutional right to a jury verdict precludes judicial intervention in favor of the prosecution. No trial court or appellate court can direct or render a verdict for the prosecution. The State has no right to move for a directed verdict or to appeal a "not guilty" verdict.[152] No matter how compelling or overwhelming the State's case may be, the trial court must submit the case to the jury and be

147. *See Ex parte* Ashcraft, 565 S.W.2d 926 (Tex. Crim. App. [Panel Op.] 1978); *Ex parte* Dunn, 571 S.W.2d 928 (Tex. Crim. App. [Panel Op.] 1978); *Ex parte* Taylor, 480 S.W.2d 692 (Tex. Crim. App. 1971); *Ex parte* Lyles, 323 S.W.2d 950 (Tex. Crim. App. 1959).

148. "[T]he relevant question is 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." Jackson v. Virginia, 443 U.S. 307 (1979) (citing Johnson v. Louisiana, 406 U.S. 356, 362 (1972)).

149. The Texas Supreme Court is not required to render a verdict in a Zone 1 case as a matter of law. Even though the proponent of the evidence cannot recover based upon the findings of fact at the trial court, the trial may have proceeded in a good faith reliance upon an incorrect interpretation of the law. The supreme court has broad discretion to remand a "no evidence" case for retrial in the interest of justice. *See* Twyman v. Twyman, 855 S.W.2d 619, 626 (Tex. 1993) (citing Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1993)).

150. *See* Greene v. Massey, 437 U.S. 19, 25 (1978) (citing Burks v. United States, 437 U.S. 1 (1978)).

151. TEXAS PENAL CODE ANN. § 2.01 (Vernon 1994), codifies the presumption of innocence. After the enactment of § 2.01 in 1974, the following jury charge on presumption of innocence and reasonable doubt was standard practice:

> All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined or indicted for, or otherwise charged with the offense, gives rise to no inference of guilt at this trial. In case you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit him and say by your verdict "not guilty."

Id. See also Carr v. State, 600 S.W.2d 816, 818 (Tex. Crim. App. [Panel Op.] 1980).

152. The state has a limited right of appeal. However, the state has no authority to appeal a verdict of acquittal. TEX. CODE CRIM. PROC. art. 44.01 (Vernon Supp. 1997).

bound by a jury verdict of "not guilty." A jury verdict in favor of the accused remains inviolate no matter the strength of the opposing evidence.[153]

Constitutional protections also prevent a criminal appeal from falling into Zone 4. As explained above, civil cases are placed in Zone 4 when the party with the burden of proof loses after presenting extremely strong evidence, yet not conclusive evidence. A civil court can correct a Zone 4 error by granting a new trial. However, no matter how strong the prosecution's case may be, if the jury votes "not guilty" the accused must be immediately discharged. Double jeopardy is a complete bar to reprosecution in a Zone 4 case.[154]

Similarly, a criminal case can never fall into Zone 3. Even if the prosecution offers sufficiently convincing evidence that by a fair analysis should have produced a verdict of guilty, neither a trial court nor an appellate court can ignore a jury verdict in favor of the accused. A "not guilty" verdict cannot be appealed no matter how convincing the State's evidence seems. For a criminal case, Zone 3 is just as empty as Zones 4 and 5 because the jury decision for acquittal remains inviolate.

Zone 2 is the only remaining zone of contention for a criminal case. Until the legislature created the courts of appeals in 1981 with criminal appellate jurisdiction, the possibility of a criminal appeal entering Zone 2 never arose at the intermediate appellate level. The 1981 amendment to Article V of the Texas Constitution created the courts of appeals and divided jurisdiction to review sufficiency of the evidence in a criminal case between the courts of appeals and the court of criminal appeals. Additionally, the courts of appeals received a constitutional grant of general jurisdiction in all noncapital cases. Article V, Section 6 of the Texas constitution allows that "the decision of said courts shall be conclusive on all questions of fact" brought before

153. The O.J. Simpson criminal trial is an example of the State of California's inability to bring the issue of overwhelming evidence of guilt before an appellate court. Even though members of the larger Court of Public Opinion, composed of television viewers who followed the trial closely, may have been stunned by the "not guilty" verdict, the people of California have no recourse to appellate litigation. The prosecution of O.J. Simpson for murder must terminate. No Zone 5 or Zone 4 appeal is possible.

154. A defendant's only special plea is that he has already been prosecuted for the same or a different offense arising out of the same criminal episode that was or should have been consolidated into one trial, and that the former prosecution:

(1) *resulted in acquittal*;
(2) resulted in conviction;
(3) was improperly terminated; or
(4) was terminated by a final order or judgment for the defendant that has not been reversed, set aside, or vacated and that necessarily required a determination inconsistent with a fact that must be established to secure conviction in the subsequent prosecution.

TEX. CODE CRIM. PROC. art. 27.05 (Vernon Supp. 1997) (emphasis added).

them on appeal or error.[155] Said courts "shall have such other jurisdiction, original and appellate, as may be prescribed by law."[156] However, the Texas Court of Criminal Appeals retained exclusive jurisdiction in death penalty appeals.[157]

For approximately 10 years thereafter, the courts of appeals consistently declined to review criminal cases for factual sufficiency of the evidence. Contributing to this refusal, the court of criminal appeals rendered several opinions that seemed to hold appellate courts had no

155. TEX. CONST. art. V, § 6. "A judgment of a court of appeals is conclusive on the facts of the case in all civil cases." TEX. GOV'T CODE ANN. § 22.225(a) (Vernon 1988).

156. TEX. CONST. art. V, § 6; TEX. GOV'T CODE ANN. § 22.220 (Vernon 1988):

> (a) Each court of appeals has appellate jurisdiction of all civil cases within its district of which the district courts or county courts have jurisdiction when the amount in controversy or the judgment rendered exceeds $100, exclusive of interest and costs.
>
> (b) If a court of appeals having jurisdiction in a case, matter, or controversy that requires immediate action is unable to take immediate action because the illness, absence, or unavailability of the justices causes fewer than three members of the court to be present, the nearest available court of appeals, under rules prescribed by the supreme court, may take the action required in the case, matter, or controversy.
>
> (c) Each court of appeals may, on affidavit or otherwise, as the court may determine, ascertain the matters of fact that are necessary to the proper exercise of its jurisdiction.

Id.

157. TEX. CONST. art. V, § 5:

> The Court of Criminal Appeals shall have final appellate jurisdiction coextensive with the limits of the state, and its determinations shall be final, in all criminal cases of whatever grade, with such exceptions and under such regulations as may be provided in this Constitution or as prescribed by law.
>
> The appeal of all cases in which the death penalty has been assessed shall be to the Court of Criminal Appeals. The appeal of all other criminal cases shall be to the Courts of Appeal as prescribed by law. In addition, the Court of Criminal Appeals may, on its own motion, review a decision of a Court of Appeals in a criminal case as provided by law. Discretionary review by the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion.

Id.

Article V, Section 6 created the courts of appeals:

> The state shall be divided into courts of appeals districts, with each district having a Chief Justice, two or more other Justices, and such other officials as may be provided by law. The Justices shall have the qualifications prescribed for Justices of the Supreme Court. The Court of Appeals may sit in sections as authorized by law. The concurrence of a majority of the judges sitting in a section is necessary to decide a case. Said Court of Appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts, which shall extend to all cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law. Provided, that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error. Said courts shall have such other jurisdiction, original and appellate, as may be prescribed by law.

TEX. CONST. art. V, § 6 (1891, amended 1978).

power to review the factual sufficiency of the evidence.[158] However, in 1990, the Texas Court of Criminal Appeals reversed course in *Meraz v. State*,[159] and rediscovered the historical power and duty of Texas appellate courts to review factual sufficiency of the evidence.[160]

Meraz was a Zone 4 appeal. The defendant had the burden of proof on an insanity defense.[161] The jury found against Meraz and he appealed the decision as against the great weight and preponderance of the evidence. In *Meraz* the court held that the Texas Constitution gives the courts of appeals conclusive authority[162] to determine the factual sufficiency of an affirmative defense.[163] Until *Meraz*, no court had reviewed the factual sufficiency of the evidence in any criminal case. Yet *Meraz* was limited specifically to a factual sufficiency review on an issue in which the defendant has the burden of proof.

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158. *See* White v. State, 591 S.W.2d 851, 855 (Tex. Crim. App. 1979) (en banc); Van Guilder v. State, 709 S.W.2d 178 (Tex. Crim. App. 1985), *overruled by* Meraz v. State, 785 S.W.2d 146, 153 (Tex. Crim. App. 1990); Schuessler v. State, 719 S.W.2d 320 (Tex. Crim. App. 1988); Arnold v. State, 719 S.W.2d 590 (Tex. Crim. App. 1986). In *Combs v. State*, 643 S.W.2d 709 (Tex. Crim. App. 1982) (en banc), the court stated, "We perceive no other standard may be utilized by the Court of Appeals in reviewing criminal convictions other than the sufficiency of the evidence to support the conviction." *Id.* at 716 n.1.

159. 785 S.W.2d 146, 154-55 (Tex. Crim. App. 1990).

160. The *Meraz* court offered the following authority for the power to review factual sufficiency of the evidence:

> Since Art. V, § 6, supra [Texas Constitution], originated the courts of civil appeals in 1891 and granted them jurisdiction to examine the facts of a case, the Texas Supreme Court has consistently and continually interpreted that language, as it did in *Choate v. San Antonio A.P. Ry. Co.*, to mean that the courts of civil appeals, and later the courts of appeals, had the power and responsibility to review the judgments in civil cases and determine whether they were supported by adequate evidence, including "great weight." Further, if the great weight and preponderance of the evidence did not support a judgment then the court of civil appeals was obligated to reverse the judgment and remand the case for a new trial. The Supreme Court has also consistently and continually conceded that it did not have the jurisdiction to make a similar review of the evidence.

Id. at 149-50 (citations and footnote omitted).

161. *See id.* at 147.

162. The court stated:

> The "factual conclusivity clause," within Art. V, Sec. 6, operates to limit our jurisdiction and confers conclusive jurisdiction on the courts of appeals to resolve questions of weight and preponderance of the evidence adequate to prove a matter that the defendant must prove. Moreover, when the courts of appeals are called upon to exercise their fact jurisdiction, that is examine whether [the defendant] proved his affirmative defense or other fact issue where the law has designated that the defendant has the burden of proof by a preponderance of the evidence, the correct standard of review is whether after considering all the evidence relevant to the issue at hand, the judgment is so against the great weight and preponderance of the evidence so as to be manifestly unjust.

Id. at 154-55 n.5.

163. *See also Schuessler*, 846 S.W.2d at 850 (following *Meraz* and perhaps anticipating the *Clewis* opinion).

Relying on the court of criminal appeals' opinion in *Meraz*, the Austin Court of Appeals finally broke ranks in 1992 with its *Stone v. State*[164] opinion. In *Stone*, the appellant requested a factual review of the evidence on the issue of his guilt or innocence.[165] The court of appeals complied, holding that a court of appeals had both the power and duty to provide a factual review of all the evidence when properly requested.[166] However, the court found that the verdict did not conflict with the evidence and denied relief.[167] Having prevailed on the issue of guilt, the Travis County Attorney did not petition the court of criminal appeals for review of the Austin Court of Appeals' assertion of the power to perform a Zone 2 review.

The Texarkana Court of Appeals followed *Stone* in *Williams v. State*,[168] *Harvey v. State*,[169] and *Nielsen v. State*.[170] However, both the Fort Worth Court of Appeals and the Houston First District Court of Appeals declined to assert appellate power to consider factual sufficiency.[171] Here the impasse remained, until the Court of Criminal Appeals granted a petition for discretionary review from the Dallas Court of Appeals in *Clewis v. State*.

IV. *CLEWIS V. STATE*

A. *Statement of the Facts*

Clewis was convicted of burglary in the Criminal District Court No. 2 of Dallas County.[172] Seven Dallas police officers staked out a Dallas clothing store in anticipation of a burglary because the building had been burglarized on three previous Monday evenings.[173] At approximately 10:00 p.m., the officers saw three men approach the building.[174] Two of the men pried a door off and entered the building.[175] Clewis remained on the porch as a lookout for a brief time and then followed the men into the building.[176] Officers saw the three men leave the building carrying clothing.[177]

164. 823 S.W.2d 375, 377 (Tex. App.—Austin 1992, pet. ref'd, untimely filed).
165. *See id.* at 376.
166. *See id.* at 377.
167. *See id.* at 381.
168. 848 S.W.2d 915 (Tex. App.—Texarkana 1993, no pet.).
169. 847 S.W.2d 365 (Tex. App.—Texarkana 1993, no pet.).
170. 836 S.W.2d 245 (Tex. App.—Texarkana 1992, pet. ref'd).
171. *See* Pender v. State, 850 S.W.2d 201, 203 (Tex. App.—Fort Worth 1993, no pet.).
172. *See* Clewis v. State, 876 S.W.2d 428, 429 (Tex. App.—Dallas 1994), *vacated en banc*, 922 S.W.2d 126 (Tex. Crim. App. 1996).
173. *See id.* at 439.
174. *See id.*
175. *See id.*
176. *See id.*
177. *See id.*

As officers approached, the three men dropped the clothing and fled.[178] Clewis was arrested as he ran around the corner of the building.[179] Subsequently, officers took photographs at the scene.[180] A photograph of Clewis at the scene was introduced at trial.[181] In his defense, Clewis offered evidence that he was extremely intoxicated at the time of the offense.[182] Clewis argued that he was so intoxicated that he entered the building involuntarily.[183]

B. *Dallas Court of Appeals*

In his sole ground for review to the Dallas Court of Appeals, Clewis contended that the trial court erred in refusing to review the factual sufficiency of the evidence.[184] Clewis claimed that the evidence was factually insufficient to prove that he knowingly or intentionally entered a building.[185] The court of appeals affirmed the conviction.[186] In doing so, the Dallas Court of Appeals held courts of appeals did have the authority to review for factual insufficiency.[187] The court then held that the appropriate standard to be applied was the *Jackson v. Virginia* standard.[188] The court of appeals stated that application of this standard included a review of all of the evidence adduced at trial to determine the sufficiency of the evidence to prove the elements of the offense.[189] Additionally, the court found that the *Jackson* standard, previously used to review for legal sufficiency, was also appropriate to review evidence for factual sufficiency in a noncapital defendant's case.[190]

C. *The Texas Court of Criminal Appeals*

On appeal, the Texas Court of Criminal Appeals agreed with the court of appeals' holding that the courts of appeals have the authority under the Texas Constitution to review lower courts for factual insufficiency.[191] The court supported Justice Clinton who concluded in his concurring opinion, "from the beginning, 'appellate jurisdiction' included the power to examine 'factual sufficiency,' and further, that

178. *See id.*
179. *See id.*
180. *See id.*
181. *See id.*
182. *See id.* at 440.
183. *See id.*
184. *See id.*
185. *See id.*
186. *See id.*
187. *See id.*
188. *See id.*
189. *See id.*
190. *See id.*
191. Clewis v. State, 922 S.W.2d 126, 128 (Tex. Crim. App. 1996).

every appellate court with criminal jurisdiction recognized, acknowledged and utilized that power."[192]

The Texas Court of Criminal Appeals also noted that TEX. CODE CRIM. PROC. ANN. art. 44.25 provides: "The courts of appeals or the court of criminal appeals may reverse the judgment in a criminal action, as well upon the law as upon the facts."[193] The Texas Court of Criminal Appeals interpreted article 44.25 of the Texas Code of Criminal Procedure to support their finding that appellate review included the power of review for factual sufficiency.[194]

Although the court of criminal appeals agreed with the court of appeals on their power to review for factual sufficiency, the court of criminal appeals found that the court of appeals applied the wrong standard for review.[195] The *Jackson* standard, although appropriate for review of legal sufficiency, does not include a review for factual sufficiency.[196] The *Jackson* standard requires the reviewing court to ask "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."[197] Additionally, the court of criminal appeals found the court of appeals erroneously *applied* the *Jackson* standard.[198] In the correct application of the *Jackson* standard, the reviewing court only considers the evidence that supports the verdict, whereas the court of appeals stated the reviewing court is to look at all of the evidence adduced at trial.[199]

The Texas Court of Criminal Appeals held the appropriate review for courts of appeals reviewing for factual sufficiency should be the *Stone v. State* standard.[200] However, the *Stone* standard can only be applied after an initial finding that the evidence is legally sufficient under *Jackson*.[201] The court of criminal appeals held the correct standard is that the courts of appeals "'views all the evidence without the prism of 'in the light most favorable to the prosecution.' . . . [and] set[s] aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.' This holding harmonizes the criminal and civil jurisprudence of this State with regard to appellate review of questions of factual sufficiency."[202]

192. *Id.* at 131 (omission in original).
193. *Id.* at 130 n.7 (citing TEX. CODE CRIM. PROC. ANN. art. 44.25 (Vernon Supp. 1997)).
194. *See id.* at 130-31.
195. *See id.* at 129.
196. *See id.*
197. *Id.* at 128-29.
198. *See id.* at 132 n.10.
199. *See id.*
200. *See id.* at 129.
201. *See id.* at 132-33.
202. *Id.* at 129 (footnotes omitted) (alterations in original).

The Texas Court of Criminal Appeals determined that the proper standard for the courts of appeals to apply when conducting a factual sufficiency review is to "consider all the evidence and determine whether the judgment is so against the great weight and preponderance of the evidence as to be manifestly unjust."[203] This standard is consistent with the *Meraz* decision, addressing factual sufficiency reviews in cases where the defendant has asserted an affirmative defense or otherwise has the burden of proof on an issue.[204]

V. ANALYSIS

A. *Recent Application of* Clewis

On February 26, 1997, the Waco Court of Appeals, with one judge dissenting, applied the *Clewis* standard to reverse a conviction for driving while intoxicated in *Perkins v. State.*[205] This first case to be reversed under *Clewis* may provide some insight to the developing standard of review. In this instance the evidence of intoxication was hotly contested with both sides presenting clearly conflicting versions of the facts.

According to the State's evidence, the accused, Calvin Perkins, was discovered by Farrell, a Dallas fireman, slumped behind the steering wheel in a parked car in the middle of a roadway around 11:00 at night.[206] Officer Johnson, a Dallas police officer, testified that Perkins had a strong smell of alcohol on his breath, slurred his speech, and exhibited a very unsteady stance.[207] According to Johnson, Perkins appeared disoriented and could not recite the alphabet nor count backward.[208] Johnson arrested Perkins because, in Johnson's opinion, Perkins did not have the normal use of his physical faculties.[209] After arrest, Perkins refused to submit to a breath or blood test.[210] Farrell testified that he saw several cans of beer in the back seat of Perkins' car, however Officer Johnson could not recall seeing any beer cans.[211]

Perkins denied that he was intoxicated.[212] He testified that he spent the day producing a talent show for children at a neighborhood recreation center and left around 9:00 p.m. with a friend.[213] Perkins further testified that after leaving the center he washed his car and drank a beer at a the car wash, and was on his way to a friend's house but had

203. *Clewis*, 922 S.W.2d at 132.
204. *See id.* at 131.
205. 940 S.W.2d 365 (Tex. App.—Waco 1997, pet. filed).
206. *See id.* at 365.
207. *See id.* at 366.
208. *See id.*
209. *See id.*
210. *See id.*
211. *See id.* at 365-66.
212. *See id.* at 366.
213. *See id.*

stopped and leaned forward to check his map when the fire fighter opened his driver's door and asked if he was drunk.[214] Perkins stated that when the police officer arrived he told the officer that he had only one beer.[215] Perkins testified that after a long day of work that he was weary; he was ill; and that he had consumed Nyquil that evening.[216] He disputed his lack of performance on the alphabet and backward counting.[217]

Thompson, Perkins' witness, testified that he had been with Perkins until 9:45 p.m.; that Perkins drank only one beer; and that Perkins was not intoxicated.[218] Thompson also stated that Perkins took some medication that evening and that Perkins' nose was running.[219] Directly contradicting both Farrell and Johnson, Thompson stated that Perkins was not "woozy."[220]

The Waco Court of Appeals' opinion clearly detailed the conflict in the evidence. The court noted that Perkins accounted for the smell of alcohol by admitting to drinking one beer.[221] Commenting that Thompson substantiated Perkins' limited consumption of alcohol, the opinion states: "Consumption of alcohol alone does not mandate a conclusion of intoxication."[222] The court also noted the inconsistency in the State's evidence concerning the presence of beer cans.[223] In an obvious reference to a lack of evidence, the court stated that because Perkins' car was impounded, the State had total control and could have searched and photographed the interior of the vehicle to document the cans.[224]

Finally, the court turned to the State's video tape evidence. Within forty minutes of his arrest, the court found that Perkins appeared on video tape as cooperative, speaking clearly, and able to follow directions.[225] Perkins did not appear unsteady or disoriented and he was able to recite the alphabet without error and made only one error while counting backwards from 38 to 22.[226] The court stated: "The video tape demonstrated that Appellant was not intoxicated."[227] After reviewing the evidence, the court was convinced that the verdict was clearly wrong and unjust.[228]

214. *Perkins*, 940 S.W.2d at 366.
215. *See id.*
216. *See id.* at 367.
217. *See id.*
218. *See id.* at 366.
219. *See id.*
220. *See id.*
221. *See id.* at 367.
222. *Id.*
223. *See id.*
224. *See id.*
225. *See id.*
226. *See id.*
227. *Id.*
228. *See id.*

Like the hotly contested evidence in *Tibbs v. State*,[229] the *Perkins* case presented the reviewing court with two starkly contrasting versions of the facts. The police officer's and the fireman's interests obviously lay with law enforcement just as Perkins actively sought an acquittal. Johnson, as a friend, compares favorably as a disinterested witness similar to the salvation army officers who testified for the defense in *Tibbs*. Yet, if the *Perkins* case contained no more evidence than a swearing match between defense and prosecution witnesses, it would be difficult to justify a reversal of a jury verdict. Without more, the court of appeals would simply be substituting its determination of credibility for that of the individual jurors. As the first grant of appellate relief under the *Clewis* standard, *Perkins* must turn upon more than mere disputed testimony. As the opinion plainly states, the *Perkins* court was convinced by the video tape as controverting physical evidence upon which no reasonable minds could differ. Thus, *Perkins* requires both a combination of hotly disputed testimony coupled with convincing physical evidence in favor of the defense provided by video tape. Does this suggest *Perkins* stands for the adage that "seeing is believing?" Is *Clewis* relief necessarily limited to only those rare cases where overwhelming physical evidence may exist for the defense?

B. *Predicting Future Application in Criminal Cases*

As the courts of appeals face new challenges under *Clewis*, several theoretical and practical issues will necessarily arise. First, what type of case properly belongs in Zone 2? Or is the distinction between "no evidence" and "factually insufficient evidence" so slight that any case that should be reversed will naturally slip into Zone 1? An example of the difficulty in distinguishing a case that should be reversed and retried in Zone 2 from a case that would result in acquittal under Zone 1 is *Loza v. State*.[230] The facts, uniquely Texan, regarding an alleged horse theft read as if they came straight out of a western novel. Quoting Justice White:

> About eight o'clock on Sunday morning one Nazarion Rodrigues, a servant of the owner of the animal alleged to have been stolen, was riding the horse from the river, where he had taken him to water, and was passing along one of the public streets in the city of Brownsville. Defendant met him, and, drawing a pistol, told Rodrigues to get off the horse. Rodrigues did so, and then defendant mounted the horse and told Rodrigues to get up behind him, which he also did, and both parties rode off in that manner upon the horse. Several parties saw them on the streets at different points. About ten o'clock Rodrigues complained to the chief of police of the city that the horse had been taken from him by defendant, whom he

229. 337 So. 2d 788 (Fla. 1976). *See infra* text accompanying notes 253-268.
230. 1 Tex. Ct. App. 488 (1877).

> found on Washington street, drunk, standing at the door of a house, talking to a woman, and the horse was standing near by in the street.[231]

As is frequently the case in such old opinions, the narrative does not identify the witnesses. However, because the court reversed for insufficiency of the evidence to prove Loza's intent to steal the horse, it is unlikely that Loza testified in his own defense. From the record it also appears that Loza may have been too intoxicated to remember the events. In any event, the opinion clearly states: "This is in substance the extent to which the evidence went, as adduced at trial."[232]

An essential element of the offense of horse theft, or any theft, required the State to prove that Loza intended to "permanently . . . deprive the owner of the value of the property, and to appropriate it to the use or benefit of the taker."[233] Finding such proof lacking, the court held: "[T]his court is of the opinion that the evidence was insufficient to warrant the conviction."[234] The court also stated that the jury should have been instructed on the difference between trespass and theft.[235] At the close of the opinion the court reversed the case and suggested: "With a view . . . to any subsequent trial . . . the evidence, if it could establish a case of guilt at all, would perhaps fix the crime as one of robbery, rather than of theft."[236]

Is *Loza* a Zone 1 or Zone 2 case? If the act of commandeering a horse at the point of a pistol is more than "no evidence" of an intent to steal, then *Loza* falls squarely in Zone 2. How should such a case be decided today? The *Loza* court compared Loza's act to a joyride. Is it conceivable in today's era of armed car jacking that facts such as *Loza* could be considered insufficient to prove theft?

Next, consider the requirement for preservation of *Clewis* error for appeal. Rule 52, Texas Rules of Appellate Procedure, requires the appellant to:

> [H]ave presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling he desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling . . . .[237]

However, Rule 30 specifically states that "a motion for new trial is not a requisite to presenting a point of error on appeal."[238] Are these rules in conflict with respect to factual sufficiency error? The courts of

231. *Id.* at 489.
232. *Id.*
233. *Id.* at 491.
234. *Id.* at 492.
235. *See id.*
236. *Id.* at 494.
237. TEX. R. APP. P. 52(a).
238. TEX. R. APP. P. 30.

appeals may treat Zone 2 cases similar to Zone 1 cases and hold that the constitutional nature of evidentiary insufficiency mandates that it can be raised upon appeal without complying with Rule 52 of the Texas Rules of Appellate Procedure. However, the courts of appeals could hold that Zone 2 cases raise only a fact issue and thus the trial judge must be given an opportunity to correct the error prior to appeal. If so, by what method should the defendant raise the error? It is certain the error can be raised by a motion for new trial. Additionally, it seems a motion for a mistrial could include a complaint of factually insufficient evidence.

Lastly, must a defendant present controverting evidence at trial to preserve the issue of factual insufficiency? Constitutionally, the presumption of innocence and the State's burden of proof imply that the accused has no duty to offer evidence at trial. In spite of this fact, would an appellate complaint of factually insufficient evidence fail as a matter of law if the record contains no controverting evidence? In a recent unpublished opinion, the San Antonio Court of Appeals didn't perform a *Clewis* review because the court could not "balance evidence against conjecture."[239] The San Antonio court may be correct, but how can the *Loza* decision then be distinguished? Under the facts quoted from *Loza* no controverting evidence is apparent. It seems the courts of appeals will be required to develop a threshold test that an appellant must meet to gain a *Clewis* factual sufficiency review.

C. Clewis *Application to Capital Murder Cases*[240]

The Texas Code of Criminal Procedure, rather than the Government Code, grants capital murder appellate authority to the court of criminal appeals. Article 4.04, Section 2 provides:

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239. Garcia v. State, No. 04-95-00569-CR, 1996 WL 334389, at *2 (Tex. App.—San Antonio June 19, 1996) (not designated for publication).

240. TEX. PENAL CODE ANN. § 19.03 (Vernon 1994), defines capital murder as:

(a) A person commits an offense if he commits murder as defined under Section 19.02(b)(1) and:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, or obstruction or retaliation;

(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) the person commits the murder while escaping or attempting to escape from a penal institution;

(5) the person, while incarcerated in a penal institution, murders another:

(A) who is employed in the operation of the penal institution; or

(B) with the intent to establish, maintain, or participate in a combination or in the profits of a combination;

(6) the person:

> The Court of Criminal Appeals shall have, and is hereby given, final appellate and review jurisdiction in criminal cases coextensive with the limits of the state, and its determinations shall be final. The appeal of all cases in which the death penalty has been assessed shall be to the Court of Criminal Appeals. In addition, the Court of Criminal Appeals may, on its own motion, with or without a petition for such discretionary review being filed by one of the parties, review any decision of a court of appeals in a criminal case. Discretionary review by the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion.[241]

After *Clewis* it is unclear whether the Texas Court of Criminal Appeals has authority to review the factual sufficiency in a capital murder case. However, the court may have answered this in *Bigby v. State*.[242] In *Bigby*, the accused was tried for the capital murder of a close friend and his infant son.[243] Bigby admitted the killings but asserted an insanity defense before the jury.[244] After a battle of the prosecution and defense expert psychologists, the jury rejected Bigby's claim of insanity.[245] Similar to the issue in *Meraz v. State*,[246] the court of criminal appeals was again faced in *Bigby* with the issue of weighing the evidence in favor of and against the defendant's affirmative defense.[247] Thus, the court did not need to address sufficiency of the evidence to prove or disprove elements of the offense.

(A) while incarcerated for an offense under this section or Section 19.02, murders another; or

(B) while serving a sentence of life imprisonment or a term of 99 years for an offense under Section 20.04, 22.021, or 29.03, murders another;

(7) the person murders more than one person:

(A) during the same criminal transaction; or

(B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct; or

(8) the person murders an individual under six years of age.

TEX. PENAL CODE ANN. § 19.03 (Vernon 1994).

241. TEX. CODE CRIM. PROC. ANN. art. 4.04 (Vernon Supp. 1997).

242. 892 S.W.2d 864 (Tex. Crim. App. 1994). The *Clewis* court cited *Bigby* for the proposition that the Texas Court of Criminal Appeals had the constitutional power and duty to review insufficient evidence in a death penalty case.

243. *Bigby*, 892 S.W.2d at 870.

244. *See id.* at 884.

245. *See id.* at 877-78.

246. 785 S.W.2d 146 (Tex. Crim. App. 1990).

247. Concerning an affirmative defense, the court in *Meraz v. State* noted:

> At the foundation of every affirmative defense is the practical, if not technical, necessity of the defendant acknowledging he committed the otherwise illegal conduct. This State recognizes only four affirmative defenses: Defense to Criminal Responsibility of Corporation or Association (Sec. 7.24 *Tex. Penal Code*), Insanity (Sec. 8.01 *Tex. Penal Code*), Mistake of Law (Sec. 8.03 *Tex. Penal Code*), and Duress (Sec. 8.05 *Tex. Penal Code*). In every instance it is inevitable that the defendant would have to at least, by implication, concede the commission of the act in order to avail himself of the affirmative defense. For example, in a case in which the defendant claims insanity, as a practical matter, he is necessarily conceding he committed the offense. Similarly, if a defendant is claiming he is incompetent to stand trial

Justice Meyer's well reasoned opinion argued that the court of criminal appeals had always exercised the power to review factual sufficiency of the evidence in both capital and noncapital cases. Only after the 1981 constitutional amendments did the court no longer retain original jurisdiction of noncapital cases. However, the constitutional delegation of original power to review death penalty cases remained with the court of criminal appeals, as it had for more than one hundred years. Based on the continuation of original jurisdiction, the *Bigby* court held that the court of criminal appeals retained the constitutional power and duty to decide the factual issues of a capital case.[248] Having thus determined the jurisdictional issue in Bigby's favor, the court analyzed the evidence offered. Affirming the verdict of death, the court did not believe "that the jury's implicit finding was so against the great weight and preponderance of the evidence that it was manifestly unjust."[249]

The holding in *Bigby* falls squarely into a Zone 4 insufficiency category. The accused, as the proponent of the insanity theory, had the burden of proof on the issue. Since the jury found against Bigby's theory based on the prosecution's controverting evidence, Bigby was required to argue on appeal that the verdict was against the great weight and preponderance of the evidence. To decide the *Bigby* case, the court considered all the evidence and adopted the *Meraz* standard of review for the Texas Court of Criminal Appeals as "so against the great weight and preponderance of the evidence that it was manifestly unjust."[250]

Although *Bigby* and *Meraz* are both Zone 4 cases that precede the *Clewis* decision by two years, the *Clewis* court declined to follow the same language. Instead, the *Clewis* opinion adopted the *Stone* standard to reverse a Zone 2 case if the evidence is "so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust."[251] Is this new language for a Zone 2 case both a change from "great weight and preponderance" to "overwhelming weight" and a change from "manifestly unjust" to "clearly wrong" or is it merely a restatement of the same standard?[252] Further, what standard will the

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> the facts relating to his guilt are irrelevant. It is apparent therefore that a review of the facts relative to proof of an affirmative defense does not inexorably lead to a review of facts relative to proof of the elements of the offense.

Meraz, 785 S.W.2d at 153.

248. *See Bigby*, 892 S.W.2d at 874.

249. *Id.* at 878.

250. *Id.* In *Meraz*, decided two years before *Bigby*, the Texas Court of Criminal Appeals held that the courts of appeals must apply the identical standard: "the judgment is so against the great weight and preponderance of the evidence so as to be manifestly unjust." *Meraz*, 785 S.W.2d at 155.

251. *Clewis*, 922 S.W.2d at 129.

252. Consider the language of *In re King's Estate*, 244 S.W.2d 660, 665-66 (Tex. 1951) (per curiam), where the supreme court referred to the insufficient standard in a

court apply to the first capital murder case to raise a factual sufficiency challenge to the elements of the offense or to the affirmative findings necessary for the death penalty?

In predicting the standard to be used, it may be useful to look at other jurisdictions. Although the Texas Court of Criminal Appeals has yet to hear a capital murder appeal in Zone 2, the Florida Supreme Court has found evidence factually insufficient to support a finding of capital murder in *Tibbs v. State*.[253] Tibbs had been accused of raping a female hitchhiker and the murder of her male companion. According to the opinion, Nadeau, the State's chief trial witness testified

> that she and Milroy were hitchhiking from St. Petersburg to Marathon, Fla., on February 3, 1974. A man in a green truck picked them up near Fort Myers and, after driving a short way, turned off the highway into a field. He asked Milroy to help him siphon gas from some farm machinery, and Milroy agreed. When Nadeau stepped out of the truck a few minutes later, she discovered the driver holding a gun on Milroy. The driver told Milroy that he wished to have sex with Nadeau, and ordered her to strip. After forcing Nadeau to engage in sodomy, the driver agreed that Milroy could leave. As Milroy started to walk away, however, the assailant shot him in the shoulder. When Milroy fell to the ground, pleading for his life, the gunman walked over and taunted, "Does it hurt, boy? You in pain? Does it hurt, boy?" Then, with a shot to the head, he killed Milroy.
>
> This deed finished, the killer raped Nadeau. Fearing for her life, she suggested that they should leave together and that she "would be his old lady." The killer seemed to agree and they returned to the highway in the truck. After driving a short distance, he stopped the truck and ordered Nadeau to walk directly in front of it. As soon as her feet hit the ground, however, she ran in the opposite direction. The killer fled with the truck, frightened perhaps by an approaching car. When Nadeau reached a nearby house, the occupants let her in and called the police.
>
> That night, Nadeau gave the police a detailed description of the assailant and his truck. Several days later a patrolman stopped Tibbs, who was hitchhiking near Ocala, Fla., because his appearance matched Nadeau's description. The Ocala Police Department photographed Tibbs and relayed the pictures to the Fort Myers police. When Nadeau examined these photos, she identified Tibbs as the assailant. Nadeau subsequently picked Tibbs out of a lineup and positively identified him at trial as the man who murdered Milroy and raped her.[254]

Zone 4 case as both "against the great weight and preponderance of the evidence as to be manifestly unjust" and a duty "to consider the fact question of weight and preponderance of all the evidence and to order or deny a new trial according as the verdict may appear . . . clearly unjust or otherwise."

253. 337 So. 2d 788 (Fla. 1976).

254. Tibbs v. Florida, 457 U.S. 31, 32-33 (1982) (citations and footnotes omitted).

A prisoner sentenced to life imprisonment for rape testified for the State. The prisoner testified

> that he had met Tibbs while Tibbs was in jail awaiting trial and that Tibbs had confessed the crime to him. The defense substantially discredited this witness on cross-examination, revealing inconsistencies in his testimony and suggesting that he had testified in the hope of obtaining leniency from the State.[255]

Considerable evidence contradicted the State's witnesses and placed Nadeau's identification and version of the facts in doubt. Police officers the conceded that, at the time of photographic identification, Nadeau saw only photographs of Tibbs; she did not have the opportunity to pick his picture out of a photographic array containing similar suspects.[256]

Nadeau admitted to drug use and to using marihuana shortly before the crime.[257] There was also evidence demonstrating her confusion regarding the time of day the events occurred.[258] In his defense, Tibbs explained that he had been hitchhiking through Florida.[259] He offered testimony that he was in Daytona Beach from February 1 through the morning of February 6.[260] Additionally, he denied owning a truck or committing any of the crimes.[261] Bolstering his testimony, Tibbs also produced witnesses and a card signed and dated February 1st showing he spent the night at the Daytona Beach Salvation Army Transit Lodge.[262] Neither witness however, could testify to seeing Tibbs after the morning of February 2nd.[263] The State produced a card similar to the one introduced by Tibbs showing he spent the night of February 4 in Orlando, thus contradicting his testimony of staying in Daytona until February 6.[264] In response, Tibbs denied being in Orlando and questioned the authenticity of the signature on the second card.[265]

Tibbs is clearly a Zone 2 case. Both the State and the defense offered evidence on which reasonable minds might differ. Nadeau's testimony as the sole eyewitness to survive the crime is sufficient to sustain the verdict against a no evidence challenge of legal sufficiency. Similarly, the testimony of the convicted rapist who stated that Tibbs confessed to him is also legally sufficient. Tibbs made no challenge to

255. *Id.* at 34 n.3.
256. *See id.* at 33 n.2 (citing Neil v. Biggers, 409 U.S. 188, 189 (1972); Simmons v. United States, 390 U.S. 377, 383 (1968)).
257. *See id.* at 34.
258. *See id.*
259. *See id.*
260. *See id.*
261. *See id.* at 34-35.
262. *See id.* at 35.
263. *See id.*
264. *See id.*
265. *See id.*

legal sufficiency. Rather, Tibbs relied, both at trial and on appeal, upon the traditional alibi defense: "It wasn't me. I wasn't there."

Fundamentally, every alibi defense is a direct attack upon the credibility of the prosecution's identification witnesses—both eyewitnesses and witnesses who relate the accused's confessions. Defense evidence placing the accused at some location other than at the scene of the crime necessarily contradicts the credibility of any witness who identifies the accused as the criminal actor. Simply stated, Tibbs' claim he was in Daytona Beach and not in Fort Meyers necessarily implied that neither Nadeau nor the convicted rapist were credible. Because the Florida Supreme Court held in Tibbs' favor, the plurality necessarily found that the weight of the evidence undermined both Nadeau's identification and the convicted rapist's version of Tibbs' confession. In fact, the court summarily discounted the convicted rapist and concluded the testimony appeared "to be the product of purely selfish considerations."[266]

As for Nadeau's testimony, the court in *Tibbs I* must have reweighed the evidence to justify overturning the jury's finding. This is the necessary conclusion despite the fact that Chief Justice Sundberg, in *Tibbs II*,[267] stated that the Florida Supreme Court lacked authority to reweigh the evidence. Setting the question of the Florida Supreme Court's power of review aside, the Texas Court of Criminal Appeals certainly has the power and duty to reweigh the evidence in a death penalty appeal. However, it is unclear whether the Texas Court of Criminal Appeals would reverse a jury's sentence of death on facts similar to *Tibbs*.

In *Clewis*, the Texas Court of Criminal Appeals carefully structured the standard of factual sufficiency review to avoid the usurpation of the jury as the sole fact finder.[268] The court approved the holding in *Meraz* that adopted the safeguards established by the Texas Supreme Court in *Pool v. Ford Motor Co.*[269] In *Pool*, the supreme court imposed the following safeguards to secure the sanctity of the jury trial when the court of appeals exercises its conclusive factual authority:

266. Tibbs v. State, 337 So. 2d 788, 790 (Fla. 1976).

267. Tibbs v. State, 397 So. 2d 1120, 1127 (Fla. 1981).

268. The Texas Code of Criminal Procedure contains two articles that define the jury's role as exclusive judge of the facts. "Unless otherwise provided in this Code, the jury is the exclusive judge of the facts, but it is bound to receive the law from the court and be governed thereby." TEX. CODE CRIM. PROC. ANN. art. 36.13 (Vernon 1977). Article 38.04 states: "The jury, in all cases, is the exclusive judge of the facts proved, and of the weight to be given to the testimony . . . ." TEX. CODE CRIM. PROC. ANN. art. 38.04 (Vernon 1977). The *Clewis* opinion saw no conflict between Articles 36.13 and 38.04 and the Article 44.25 grant of appellate power: "The courts of appeals or the Court of Criminal Appeals may reverse the judgment in a criminal action, as well upon the law as upon the facts."

269. 715 S.W.2d at 635.

> In order that this court may in the future determine if a correct standard of review of factual insufficiency points has been utilized, courts of appeals, when reversing on insufficiency [great weight and preponderance of the evidence] grounds, should, in their opinions, detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust; why it shocks the conscience; or clearly demonstrates bias. Further, those courts, in their opinions, should state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict. It is only in this way that we will be able to determine if the requirements of *In re King's Estate* have been satisfied.[270]

The *Pool* safeguards are only a means for the superior court to review the court of appeals decision. The safeguards are not intended to influence the lower court's decision making process. Thus, the *Pool* safeguards offer no guidance or insight into the proper method of analysis for overturning a death sentence that is clearly unjust.

The *Pool* court cautioned that the Texas Constitution had not "ever intended to substitute the judgment of the appellate courts upon the facts of a case in place of that of the jury, and to make the determination of these courts final."[271] Both the Texas Supreme Court and the Court of Criminal Appeals avoid the constitutional conflict between the jury's exclusive fact finding power and the appellate court's duty to review the factual sufficiency of the evidence. This is accomplished by holding appellate courts do not find facts but, instead, merely unfind facts. Thus, when "unfinding" a fact, a court of appeals does not usurp the jury. This begs the question: How does "unfinding" a fact differ from failing to find a fact? In an alibi case similar to *Tibbs*, if a jury fails to find for the accused, the jury necessarily fails to find the facts asserted by the defensive evidence. When the jury failed to believe Tibbs' alibi, was this any different than the Florida Supreme Court's failure to believe the convicted rapist who related Tibbs' confession? If the constitutional mandate in *Clewis* allows appellate courts to "unfind" a fact, then the power to "unfind" implies the inherent power to "find" the converse—that the fact did not exist. In *Tibbs,* the "unfound" facts were that Nadeau was, in fact, mistaken and that the convicted rapist lied.[272]

Because a Texas jury has the exclusive power to determine the credibility of the witnesses, does the Texas Court of Criminal Appeals pos-

270. *Id.* at 635. *See also* Cropper v. Caterpillar Tractor Co., 754 S.W.2d 646, 652-53 (Tex. 1988).

271. 715 S.W.2d at 634 (citing Choate v. San Antonio & A.P. Ry. Co., 44 S.W. 69, 70 (Tex. 1898)).

272. The rejection of the rapist's testimony is fundamentally different than Nadeau's identification. To find that Nadeau made a mistake, the court was not required to infer "intent to deceive." However, the determination that the convicted rapist lied required the court to find a malicious intent to send an innocent man to his death. This was perjury at its worst. The rapist could not possibly have been mistaken.

sess a converse right to "unfind" credibility?[273] If so, how likely is the court to assert such a power to attack the credibility of a witness? What type and weight of contrary evidence is sufficient to establish the fact of incredibility at the appellate court? Unless clear proof of perjury exists in the record, the Texas Court of Criminal Appeals and the courts of appeals must identify an incredible witness solely by examination of sterile printed pages. Unlike the trial judge, who viewed the witness and heard the live testimony from the witness stand, the appellate court is not in the same position as the trial judge who must rule on a motion for new trial. The trial judge has all the facts that were available to the jury. The appellate judges do not. Yet, if the *Clewis* opinion is to have any real application in a hotly contested case like *Tibbs*, the Texas Court of Criminal Appeals must construct a framework for the evaluation of the credibility of a witness from the perspective of the appellate bench.

Perhaps *Tibbs* again provides some guidance. First, as a practical rule easily applied, the Texas Court of Criminal Appeals could require the record to demonstrate the existence of controverting physical evidence, upon which no reasonable minds could differ, before an appellate court could "unfind" the credibility of a witness. Examples are: Tibbs' room receipts from a distant city, telephone records of remote calls, meal receipts from distant restaurants, and evidence found at the scene of the crime which is inconsistent with a witness' testimony. However, strict application of this requirement for physical evidence would eliminate the hypothetical testimony of twenty nuns, who each testified that the accused was with them at mass at the time of the alleged offense, from consideration by the appellate court.[274] Perhaps the loss on appeal of "twenty nuns" type testimony is not too high a price to pay considering that no jury is ever likely to convict if twenty nuns actually take the stand in defense of an innocent person. Alternatively, a harsh rule demanding the existence of physical evidence favorable to the defense might be required only when the State has offered physical evidence tending to prove that the accused committed the crime. In any event, controverting physical evidence favorable to the defense should be considered under the *Clewis* standard of review.

Secondly, the hypothetical twenty nuns suggest another standard for appellate review; an analysis of the inherent credibility of disinterested witnesses as opposed to witnesses who have a stake in the result of their testimonies. Considered from another perspective, could an appellate court ever allow a jury composed of reasonable minds to reject the identical exculpatory testimony of twenty nuns? On the

273. Bigby v. State, 892 S.W.2d 864, 878 (Tex. Crim. App. 1994) (citing Graham v. State, 566 S.W.2d 941, 952 (Tex. Crim. App. 1978) (en banc)).

274. Of course the nuns' testimony would be conclusive if the defendant had a video tape of the church service depicting him in the pews.

other hand, should an appellate court ignore obvious bias or incentives to lie? Because actual witnesses in a real trial will never possess the moral credibility of twenty nuns, the *Clewis* standard should allow the appellate court to properly weigh the relative interests and disinterests of the witnesses in the outcome of the trial. Perhaps the Florida Supreme Court performed such a balancing of inherent credibility by comparing the credibility of the Salvation Army officers who testified for Tibbs against the motives of the convicted rapist who benefited by relating Tibbs' supposed confession. However, the *Tibbs* opinion gives no indication of how or why the court decided to completely discredit the rapist's testimony. In *Tibbs*, on the ultimate issue of Tibbs' guilt, the reader cannot escape feeling that the Florida Court subjectively rejected the rapist's testimony. To avoid substituting the appellate court's judgment for that of the jury members, Texas appellate courts and the Texas Court of Criminal Appeals must construct an objective test of credibility to satisfy the *Clewis* standard on the issue of guilt or innocence. However, in a capital murder case, once the issue of guilt is established beyond a reasonable doubt, the question of the death penalty remains.

In Texas, following a conviction for capital murder, the prosecution must convince each member of the jury beyond a reasonable doubt that death is the appropriate sentence.[275] Texas statues place the responsibility to assess the death penalty on the jury. Thus, in contrast to Florida law that allowed the trial judge to sentence Tibbs to death, a trial judge in Texas cannot impose death unless the prosecution meets its burden of proof under the death penalty statutes.[276] Although the Texas Court of Criminal Appeals balanced the factual sufficiency of the evidence concerning the defense of insanity in *Bigby*, the court has yet to apply the *Clewis* standard to the punishment phase of a capital murder trial. After *Clewis*, if the Texas Court of Criminal Appeals decides to comply with the duty imposed by the Texas constitution to review the factual sufficiency of the evidence to

275. The appellate record for the punishment phase of a capital murder trial will surely contain conflicting testimony from opposing expert psychologists, members of the community, and family and friends of the victim and the defendant. During this phase the prosecution may call the victim's family and friends to testify concerning the impact of the crime on their lives. Such adversely affected witnesses are expected to support, if not demand, the death penalty. Additionally the state may introduce evidence of the defendant's reputation for criminal behavior including prior convictions to prove that the accused is a continuing threat to society. Members of the community may also testify to the defendant's reputation and character for either the prosecution or defense. To mitigate the punishment, members of the defendant's family and the defendant's friends are expected to testify favorably for the defense. While most capital murder trials include such lay witnesses, the punishment phase often revolves around a "battle of the experts." Both the prosecution and defense usually rely heavily upon expert psychological testimony to determine the ultimate issue of the proper punishment—life imprisonment or death.

276. *See* TEX. CRIM. PROC. CODE ANN. art. 37.071 (Vernon Supp. 1997).

support a death penalty, the court will be required to reconsider the recent holding in *Chambers v. State*:[277]

> [O]ur task is to consider all of the record evidence and reasonable inferences therefrom in the light most favorable to the jury's verdict and to determine whether . . . a rational jury could have found [the issue] beyond a reasonable doubt . . . . Thus, our review is a very limited one. We do not act as a thirteenth juror re-evaluating the weight and credibility of the evidence. Rather, we act only "as a final, due process safeguard ensuring . . . the rationality of the fact finder."[278]

As support for its refusal to balance the evidence, the court referred to its 1994 decision in *Wilkerson v. State*.[279] In *Wilkerson*, the accused offered extensive mitigating evidence to the jury. Despite the evidence that Wilkerson was not a continuing threat to society, the jury voted for a death sentence. The court of criminal appeals refused to balance the mitigating evidence supporting a life sentence and affirmed the verdict of death. If *Clewis* is to apply to capital murder, the court's continuing refusal to consider both sides of the death penalty issue, as demonstrated by *Wilkerson* and *Chambers* must be abandoned.[280] In support of such a change, Justice Baird's dissent in *Wilkerson* provides a forceful argument that the court has a duty, both under the United States Constitution and United States Supreme Court opinions, to weigh the factual sufficiency of the evidence.[281] In the wake of the *Clewis* holding that such a historical power and duty has always existed under the Texas Constitution, the court should now adopt Justice Baird's view.

Justice Baird based his argument on a nonexclusive list of eight factors that the court traditionally uses to review the legal sufficiency of evidence supporting the jury's death penalty sentence:[282]

> 1. the circumstances of the capital offense, including the defendant's state of mind and whether he was working alone or in concert with other parties;
> 2. the calculated nature of the defendant's actions;
> 3. the forethought and deliberateness exhibited by the crime's execution;
> 4. the existence of a prior criminal record and the severity of the prior offenses;

277. 903 S.W.2d 21 (Tex. Crim. App. 1995).

278. *Chambers*, 903 S.W.2d at 25 (citing Moreno v. State, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988) (citations omitted) (third omission in original).

279. 881 S.W.2d 321, 324 (Tex. Crim. App.), *cert. denied*, 513 U.S. 1060 (1994).

280. *See also* Burns v. State, 761 S.W.2d 353, 356 n.4 (Tex. Crim. App. 1988) (stating "we abandoned any pretense of this Court balancing mitigating and aggravating evidence").

281. 881 S.W.2d at 328.

282. *See* Keeton v. State, 724 S.W.2d 58, 61 (Tex. Crim. App. 1987).

5. the defendant's age and personal circumstances at the time of the commission of the offense;

6. whether the defendant was acting under duress or intoxication or under the domination of another at the time of the commission of the offense;

7. the lack of psychiatric evidence[283] concerning future dangerousness; and,

8. any relevant character evidence.[284]

Because the death penalty is such an individualized penalty,[285] the jury must weigh and evaluate both the aggravating and mitigation factors of the crime and the individual defendant.[286] While the first three factors focus on the criminal act and the remaining five focus on the history and character of the accused, each factor can be the subject of mitigating evidence in the appropriate case. Justice Baird argued that if the court of criminal appeals did not also perform a balancing review of the evidence, the affirmation of a death sentence would "wantonly" and "freakishly" impose a death sentence, in violation of the United States Constitution.[287]

A comprehensive review of the sufficiency of the evidence must be more than a recital of the reasons that the defendant should die. Moreover, application of the *Clewis* standard, supports the United States Supreme Court holding that the constitutionality of our State's capital sentencing scheme depends upon whether the jury has considered all the relevant evidence in making "an individualized assessment of the appropriateness of the death penalty."[288] Such a review necessarily involves a balancing between the aggravating and mitigating evi-

283. If the court adopts the *Clewis* standard of review, the court should consider the relative qualifications of each expert witness and the financial stake that the expert may have in the outcome of the trial. Moreover, an expert may be biased if the result of the trial could effect future employment or the expert's professional reputation.

284. "Of course, no one factor is dispositive, and the jury's affirmative answer to special issue two may withstand a sufficiency challenge notwithstanding the lack of evidence relating to one or more of these factors." Vuong v. State, 830 S.W.2d 929, 935 (Tex. Crim. App. 1992).

285. "[D]eath is a punishment different from all other sanctions in kind rather than degree." Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976). Because of the uniqueness of the death penalty, "fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* at 304 (citation omitted).

286. The constitutionality of the Texas capital sentencing scheme depends upon the sentence's ability to consider both the aggravating and the mitigating circumstances of a crime. *See* Penry v. Lynaugh, 492 U.S. 302, 316 (1989); California v. Brown, 479 U.S. 538, 541 (1987); Jurek v. Texas, 428 U.S. 262, 271 (1976).

287. *See Jurek*, 428 U.S. at 276; *Keeton*, 724 S.W.2d at 64.

288. *Penry*, 492 U.S. at 319. *See also Jurek*, 428 U.S. at 276.

dence presented at trial.[289] Under *Clewis*, the Texas Court of Criminal Appeals should adopt Judge Baird's view that "while the absence of certain aggravating evidence might not render the evidence insufficient to support an affirmative answer to the second punishment issue, the overwhelming presence of mitigating evidence may."[290]

D. Clewis *Application to a Petition for Writ of Habeas Corpus*[291]

Article 11.05, Texas Code of Criminal Procedure, grants exclusive jurisdiction for habeas corpus petitions in criminal cases to the Court of Criminal Appeals, District Courts and County Courts.[292] Traditionally, the Court of Criminal Appeals has limited the extraordinary remedy of habeas corpus to those cases when there is no other adequate remedy at law.[293] The court consistently refuses to allow the Great Writ to be used to litigate matters which should have been raised on appeal. As a general rule, the court grants relief only in cases in which there was a defect in the trial court proceedings that renders the judgment void. Such cases include trial errors that deny fundamental or constitutional rights.[294]

Prior to the *Clewis* decision, factual insufficiency of the evidence, in contrast to "no evidence," was held not to render the judgment constitutionally void. Thus, the Court of Criminal Appeals has repeatedly declined to perform a *Clewis* type factual sufficiency review for post conviction relief under habeas corpus.[295] However, the court has recognized the limited exception for petitions that assert legal insuffi-

289. *See* Lane v. State, 743 S.W.2d 617, 630 (Tex. Crim. App. 1987); *see also* Lackey v. State, 819 S.W.2d 111, 123-28 (Tex. Crim. App. 1989) (Teague, J., dissenting).

290. *See supra* notes 281-284 and accompanying text.

291. "The writ of habeas corpus is a writ of right, and shall never be suspended. The Legislature shall enact laws to render the remedy speedy and effectual." TEX. CONST. art. I, § 12. When any person is restrained in his liberty, the writ of habeas corpus is the remedy to be used. *See* TEX. CRIM. PROC. CODE ANN. art. 11.01 (Vernon 1977). To make it speedy and effectual the legislature has enacted, inter alia, the provisions of Chapter Eleven of the Code of Criminal Procedure.

292. *See* TEX. CODE CRIM. PROC. ANN. art 11.05 (Vernon 1977). The Texas Government Code, establishes the writ power of the courts of appeals to issue the writ of habeas corpus in *civil* cases only. Factual insufficiency of the evidence cannot be raised by petition for writ of habeas corpus to the court of appeals. *See* TEX. CODE CRIM. PROC. ANN. art. 22.221 (Vernon 1988 & Supp. 1997) Thus, *Clewis* error may be raised in the courts of appeals by direct appeal only.

293. *See Ex parte* Groves, 571 S.W.2d 888, 889 (Tex. Crim. App. 1978) (en banc); *Ex parte* Wilcox, 79 S.W.2d 321 (Tex. Crim. App. 1935). *See also Ex parte* Rathmell, 717 S.W.2d 33, 49 (Tex. Crim. App. 1986) (Onion, P.J., dissenting).

294. *See* Holmes v. Third Court of Appeals, 860 S.W.2d 873, 876 (Tex. Crim. App. 1994); *Ex parte* Sadberry, 864 S.W.2d 541, 542 (Tex. Crim. App. 1993); *Ex parte* Goodman, 816 S.W.2d 383, 385 (Tex. Crim. App. 1991); *Ex parte* Russell, 738 S.W.2d 644 (Tex. Crim. App. 1987); *Ex parte* Watson, 601 S.W.2d 350 (Tex. Crim. App. 1980) (en banc); *Ex parte* Clark, 597 S.W.2d 760 (Tex. Crim. App. 1979) (en banc).

295. *See Ex parte* Williams, 703 S.W.2d 674 (Tex. Crim. App. 1986).

ciency or "no evidence" claims. In *Ex parte Moffett*,[296] the court held that if an order revoking probation is based on no evidence, rather than merely insufficient evidence, there is a violation of the due process clause of the United States Constitution and a collateral habeas corpus attack on the order of revocation would be proper.[297]

Although the Texas Court of Criminal Appeals has, heretofore, based habeas corpus relief for insufficiency of the evidence on the due process clause of the Fourteenth Amendment, continuing the limitation of habeas corpus review to a "no evidence" claim does not protect the due process right to factually sufficient proof beyond a reasonable doubt guaranteed by the Texas Constitution. The *Clewis* decision, by rejuvenating the court's duty to review a case both on the law and the evidence, shifted the emphasis to due process under the Texas Constitution.[298] The constitutional imperatives of *Clewis*, underscored by elements of fairness and equity, should also apply to the historically unique nature of habeas corpus relief.[299]

If factual sufficiency of the evidence is not cognizable on habeas corpus, the court of criminal appeals will be required to distinguish *Clewis* type convictions that are void because the prosecution failed to meet the burden of proof from other constitutionally void convictions that are reviewed on habeas corpus although based on less severe error. For example, the court allows habeas corpus review of unconstitutional exclusion of prospective jurors[300] and claims of ineffective assistance of counsel.[301] In addition, the Texas Court of Criminal Appeals grants habeas corpus relief for failure of the trial court to properly admonish a defendant before accepting a plea of guilty.[302]

Justice Clinton, dissenting in *Ex Parte Drake*,[303] provides a framework for mandatory application of *Clewis* in habeas corpus cases. Initially, factual sufficiency of the evidence under *Clewis* is held to be an historical constitutional and statutory right. The right is "so fundamental to the fair operation of the system as to be 1) immune from

296. 542 S.W.2d 184 (Tex. Crim. App. 1976).

297. *See Ex parte* Lyles, 323 S.W.2d 950 (Tex. 1959); *Ex parte* Taylor, 480 S.W.2d 692 (Tex. Crim. App. 1971); Owens v. State, 540 S.W.2d 324 (Tex. Crim. App. 1976). *See also Ex parte* Ashcraft, 565 S.W.2d 926 (Tex. Crim. App. [Panel Op.] 1978); *Ex parte* Dunn, 571 S.W.2d 928 (Tex. Crim. App. [Panel Op.] 1978).

298. In fairness, it should be noted that the State has no duty to provide the same habeas corpus relief as the federal courts. *See Ex parte* Crispen, 777 S.W.2d 103, 106 (Tex. Crim. App. 1989) (Clinton, J., dissenting).

299. *See Ex parte* Eureste, 725 S.W.2d 214, 217 (Tex. Crim. App. 1987) (Clinton, J., dissenting); *Ex parte* Banks, 769 S.W.2d 539 (Tex. Crim. App. 1989).

300. *See Ex parte* Bravo, 702 S.W.2d 189 (Tex. Crim. App. 1982) (en banc).

301. *See Ex parte* Murphy, 917 S.W.2d 28 (Tex. Crim. App. 1996).

302. *See Ex parte* Cervantes, 762 S.W.2d 577 (Tex. Crim. App. 1988) (reversing the trial court's failure to admonish under Article 26.13(a)(4), Texas Code of Criminal Procedure).

303. 883 S.W.2d 213, 216 (Tex. Crim. App. 1994).

procedural default, 2) not subject to a harm analysis, and 3) fully retroactive in application."[304]

Nearly 20 years ago in *Ex parte Young*,[305] the Texas Court of Criminal Appeals explained: "A judgment of conviction obtained in violation of due process of law is void for want of jurisdiction of the court to enter such judgment."[306] As Justice Clinton noted in his concurring opinion in *Ex parte Crispen*:

> Later cases, though ultimately deriving from the holding of Ex parte Young, supra, have not expressly retained the language of "voidness," observing simply "that habeas corpus will lie only to review jurisdictional defects or denials of fundamental or constitutional rights." At work in these decisions, nevertheless, is the notion that, like a defect of jurisdiction, denial of a "fundamental or constitutional" right will void a judgment of conviction.[307]

As discussed in *Clewis*, the Texas Court of Criminal Appeals' interest in rectifying the defect in proof is based upon a fundamental right under the Texas Constitution. Under the logic of *Young*, factual insufficiency of the evidence is also a jurisdictional defect denying the court's power to enter a judgment. Such a defect is sufficient to defeat the State's otherwise legitimate interest in the finality of its convictions.[308] Finally, factual sufficiency must be reviewable by habeas corpus even though the defect may not have been raised on direct appeal. If not, a defendant against whom there was but one slender bit of evidence will be denied due process.[309] Protection of the Texas constitutional right to due process by writ of habeas corpus is consistent with the court of criminal appeals' commitment to the public policy of defining Texan's rights with respect to the Constitution of Texas.[310]

VI. CONCLUSION

In the views of the dissenting judges, *Clewis* is either (1) nothing more than a decision that appellate courts can substitute their judgment for the jury's, (2) a radical assault of the jury system by an out of control activist court, (3) or a well reasoned but mistaken standard of

304. *Ex parte* Sadberry, 864 S.W.2d 541, 545 (Tex. Crim. App. 1993) (Clinton, J., dissenting).

305. 418 S.W.2d 824 (Tex. Crim. App. 1967).

306. *Id.* at 826 (citing Fay v. Noia, 372 U.S. 391 (1963)).

307. 777 S.W.2d 103, 108 n.4 (Tex. Crim. App. 1989) (Clinton, J., concurring).

308. Assuming that the issues are raised for the first time by writ of habeas corpus, Justice Clinton further assumes that the Texas Court of Criminal Appeals would hold that any appellate court failing to reverse a conviction on the basis of such a genuinely "fundamental" defect will, from the vantage of post-conviction habeas review, invariably appear to be "clearly erroneous." *See Ex parte* Granger, 850 S.W.2d 513, 523 (Tex. Crim. App. 1993) (Clinton, J., dissenting).

309. *Jackson*, 443 U.S. at 320.

310. *See* Heitman v. State, 815 S.W.2d 681 (Tex. Crim. App. 1991).

appellate review. Presiding Judge McCormick described the issue in *Clewis* as:

> What this case boils down to is whether in criminal cases the appellate courts can substitute their judgment for the jury's on questions of credibility and weight of the evidence. Because the majority does not leave these matters to be resolved at the local level of the jury, I dissent.[311]

Judge White began his dissent in *Clewis* with a ringing cry of alarm: "Law-abiding Texans, hold on to your hats. We have another 'runaway train' and it is again driven by a reckless, careless, and mischievous driver . . . . "[312] In Judge White's view, the *Clewis* decision is more than a mere usurpation of the role of the jury; it is "a breach of faith by a majority of this Court."[313] Judge White explained his condemnation:

> However, from this day forward, the decision by the majority will permit on some occasions as few as three judges of a mid-level appellate court to substitute their own personal judgment of the evidence for the decision of the twelve citizens of a jury who observed the witnesses and determined their credibility and truthfulness, personally listened to the presentation of testimony and physical exhibits, assessed the weight and credibility of all the evidence and rendered a verdict beyond a reasonable doubt based upon all of this under the direction and instructions of an experienced trial court. This decision is no less than an usurpation of the jury's role as the finder of fact in criminal cases.[314]

Finally, Judge Mansfield's dissent in *Clewis* "acknowledge[s] at the beginning that the opinion of the majority is well-written and is based on generally sound reasoning."[315] However, Judge Mansfield argued that the *Jackson v. Virginia* standard adequately insures the proper review of the evidence on appeal.

In the extreme, the dissents present an alarmist view of *Clewis*. According to Judge White, law abiding citizens may conjure visions of legions of convicted felons capriciously freed by activist judges on a legal technicality. At a minimum, each dissenting judge considers *Clewis* to be an usurpation of the jury's determination. Each dissent advocates strict adherence to the *Jackson* "no evidence" standard of

311. Clewis v. State, 922 S.W.2d 127, 151 (Tex. Crim. App. 1996) (en banc) (McCormick, P.J., dissenting. Keller, J., joins). The dissent would hold that the 1981 legislative changes to the Code of Criminal Procedure in Article 44.25 combined with Article 38.04 "prescribe" reviewing courts from applying a factual sufficiency standard in criminal cases. In McCormick's view the court had no need to consider the constitutional issues. *See id.*

312. *Clewis*, 922 S.W.2d at 158 (White, J., dissenting).

313. *Id.* at 158-59.

314. *Id.* at 159. Judge White concluded his dissent with a lengthy appeal to the legislature to immediately overrule *Clewis.*

315. *Id.* at 163.

review without acknowledging that a reversal for legal insufficiency also usurps the jury completely. Curiously, allegiance to the *Jackson* standard sanctions a reversal and court ordered acquittal on the theory that a properly instructed jury, after considering and weighing all the evidence, somehow completely ignores a lack of evidence on an essential element of the offense. The focus on jury usurpation is misplaced. A legal theory resulting in acquittal of an otherwise guilty defendant should not be based on the fiction that a properly constituted jury will ignore a lack of evidence. To the contrary, the logically consistent explanation is that because the prosecution failed to present convincing evidence of an essential element of the offense, the court had no jurisdiction to enter a judgment of conviction. A jury composed of lay citizens may be forgiven for overlooking a fine legal distinction of evidentiary sufficiency. An accused criminal is before them, a victim either testifies or is dead, experienced prosecutors demand a conviction, and a learned jurist provides instructions to guide the jury toward conviction. Faced with an emotional duty to assign criminal liability for a heinous act, a jury rarely convicts because of an oversight. Rather, individual jurors should assume that the case is properly submitted for their determination. Legally insufficient and factually insufficient cases have one factor in common. While the former is erroneously submitted to the jury, both require an appellate decision against the proponent of the evidence. Strangely enough, doctrinal difficulty in favor of the sanctity of jury verdicts arises only when a reviewing court must justify a reversal of the latter. However, it makes little or no sense to deny a reviewing court the power to weigh all the evidence in a factually insufficient case merely to preserve the sanctity of a jury decision that never should have occurred. Constitutionally erroneous judgments based on less than sufficient evidence should not be allowed to stand merely because they exist as a result of a jury verdict.

The *Clewis* decision, as a reaffirmation of the historical power and duty of a reviewing court under the Texas Constitution, cannot be regarded as a radical departure from accepted jurisprudence. Rather, the decision recognizes that reviewing courts in Texas have always possessed the constitutional power and associated duty to review both civil and criminal cases for sufficiency of the evidence. As Judge Meyers pointed out in his concurring opinion:

> In the final analysis, our opinion today only validates a long-standing truth of Texas constitutional law, that the courts of appeals in this state have authority to require a new trial whenever a verdict of guilty is so clearly against the evidence as to be manifestly unjust. The public can be assured that the reversal of criminal convictions on this basis will be most uncommon in practice and that, with few exceptions, there will be no good reason to resent the ones that do occur.

. . . .

> . . . Just because we acknowledge the authority of appellate courts to review jury verdicts on their facts does not mean, therefore, that those courts will perform factual evaluations in an unreasonable, insensitive, or unjust manner. Those who are inclined to be alarmed by our lead opinion should withhold judgment until they see how it actually works in practice.[316]

We agree with Judge Meyers that few cases will be reversed under *Clewis*. Although many appellants may raise a *Clewis* error,[317] as a practical matter, experienced prosecutors are extremely hesitant to bring a factually weak case to trial. Ultimate reversal under *Clewis* depends upon a weak case. But weak cases, assuming that indictments are returned by the grand jury, are routinely disposed of by plea bargain or a reduction to a lesser included offense. Now that *Clewis* exists, a prosecutor must also assess the case for factually sufficient evidence. In the relatively rare event that a prosecutor doubts the factual sufficiency of the case, the decision to try the case may be abandoned in return for a plea of guilty and a negotiated sentence. The reluctance to prosecute a weak case is even stronger in potential cases of capital murder. Prosecutors rarely expend the resources necessary for a capital murder trial if the evidence to justify a death penalty is weak or subject to differing interpretation. For this reason, a publicly and politically unpopular reversal of a death sentence is unlikely. Regardless of the reasons for the prosecutor's decision, weak cases are rarely tried to a jury. Because weak cases are rare, reversals for factually insufficient evidence should be even more rare. Given the courts of appeals natural reluctance to overturn a jury verdict, the practicing bar and judiciary may wait a considerable time period for the first significant reversal under the *Clewis* standard.

We can only speculate on the nature of the cases which will be reversed under *Clewis*. Perhaps a sexual assault case resulting from "date rape" could contain legally persuasive evidence that the victim consented to the act.[318] An occasional theft case might be reversed on the issue of fair market value.[319] Whatever initial cases may be reversed under *Clewis*, we can be sure that the reviewing courts will no doubt be aware that the cases will be examined and discussed in detail. Thus, the deficiency in the proof for these first cases will be selected to insure the maximum, if not universal, agreement, and support. In Judge Meyers' words "there will be no good reason to resent the ones that do occur."

316. *Clewis*, 922 S.W.2d at 150-51. (Meyers, J., concurring).

317. To date, the LEXIS database contains 197 opinions from the various Texas courts of appeals citing *Clewis*. So far only one reverses for factual insufficiency of the evidence. *See* Perkins v. State, 940 S.W.2d 365 (Tex. App.—Waco 1997).

318. TEX. PENAL CODE ANN. § 22.011 (Vernon Supp. 1996).

319. *Id.* § 31.03.

Finally, should the application of the *Clewis* standard be retroactive, prospective, or a hybrid combination?[320] We answer that the standard should be fully retrospective based on the court of criminal appeals' holding in *Clewis* that the standard is of constitutional dimension:

> "The court of appeals is therefore constitutionally given the authority to determine if a jury finding is against the great weight and preponderance of the evidence and if this is improper it is up to the people of the State of Texas to amend the Constitution."[321]

A person convicted on factually insufficient evidence has been denied the constitutional right to proof beyond a reasonable doubt. Such a conviction should be reviewable retrospectively at any time under the same rules that apply to a "no evidence" challenge under *Jackson*. Of course, the issue of retroactive or prospective application will be of little practical effect if the Texas Court of Criminal Appeals decides to deny review by writ of habeas corpus. In closing, we join with Judge Meyers and ask those readers who are concerned about the potentially adverse effect of *Clewis* to "withhold judgment until they see how it actually works in practice."[322]

320. See Geesa v. State, 820 S.W.2d 154, 163-65 (Tex. Crim. App. 1991) for an extensive discussion of the application of new court created rules and constitutional rules to pending and past cases.

321. Clewis v State 922 S.W.2d at 132 (quoting Meraz v. State, 785 S.W.2d 146, 154 (Tex. Crim App. 1990) (en banc)).

322. *Id.* at 151 (Meyers, J., concurring)