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MEMORANDUM

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**TO:** JUDGES TRYING CRIMINAL CASES  
**FROM:** DEBORAH SELDEN AND INTERNS ROBERT OWEN, DIMITRIOS GAKIDIS, JENNY BRZOWSKI,  
AND ZACHARY LEE  
**SUBJECT:** 3/7/07 COURT OF CRIMINAL APPEALS OPINIONS  
**DATE:** 3/15/07  
**CC:** JACK THOMPSON

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***Teal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0689-06, 03/07/07].**

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

**FACTS:** Defendant was indicted for the offense of hindering apprehension. The indictment failed to allege that defendant knew that the person whose apprehension defendant was hindering, was a fugitive for Failure to Register as a Sex Offender. The court of appeals held that the district court never acquired subject-matter jurisdiction to try the case because the indictment alleged only a misdemeanor. The Court of Criminal Appeals vacated the judgment of the court of appeals and remanded the case to that court holding that, under *Studer v. State*, the indictment sufficed to vest jurisdiction in the district court.

**FELONIES – JURY INDICTMENT**

The Texas Constitution requires that, unless waived by the defendant, the State must obtain a grand jury indictment in a felony case. Absent an indictment or valid waiver, a district court does not have jurisdiction over that case. An indictment also provides a defendant with notice of the offense and allows him to prepare a defense. ***Teal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0689-06, 03/07/07].**

**FELONIES – INDICTMENT – COURT JURISDICTION**

An indictment, as defined by the Texas Constitution, is a written instrument presented to a court by a grand jury charging a person with the commission of an offense. The presentment of an indictment invests the court with jurisdiction of the cause. ***Teal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0689-06, 03/07/07].**

## **FELONIES – INFORMATION**

An information is a written instrument presented to a court by an attorney for the state charging a person with the commission of an offense. The presentment of an information invests the court with jurisdiction on the case. *Teal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0689-06, 03/07/07].

## **INDICTMENT – DEFECTS – WAIVER OF RIGHT TO APPEAL**

If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other postconviction proceeding. *Teal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0689-06, 03/07/07].

## **INDICTMENT – PRE-TRIAL AMENDMENT**

After notice to the defendant, a matter of form or substance in an indictment or information may be amended at any time before the date the trial on the merits commences. On the request of the defendant, the court shall allow the defendant not less than 10 days, or a shorter period if requested by the defendant, to respond to the amended indictment or information. *Teal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0689-06, 03/07/07].

## **INDICTMENT – AMENDMENT AFTER COMMENCEMENT OF TRIAL**

A matter of form or substance in an indictment or information may also be amended after the trial on the merits commences if the defendant does not object. *Teal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0689-06, 03/07/07].

## **INDICTMENT – AMENDMENT – ADDITIONAL OR DIFFERENT OFFENSE**

An indictment or information may not be amended over the defendant's objection as to form or substance if the amended indictment or information charges the defendant with an additional or different offense or if the substantial rights of the defendant are prejudiced. *Teal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0689-06, 03/07/07].

## **INDICTMENT – ERRORS AND DEFECTS – OBJECTION**

Texas law now requires the defendant to object to any error in the indictment before the day of trial and certainly before the jury is empaneled. *Teal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0689-06, 03/07/07].

## **INDICTMENT – WAIVABLE SUBSTANTIVE DEFECTS**

The 1985 constitutional amendment made the specifics of an indictment or information statutory requirements, not constitutional requirements. Thus, all substantive defects in indictments are waivable under the statutes and these defects do not render the indictment "void." *Teal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0689-06, 03/07/07].

## **INDICTMENT – TEST – CONFER JURISDICTION**

The proper test to determine if a charging instrument alleges an offense "is whether the allegations in it are clear enough that one can identify the offense alleged." If they are, then the indictment is sufficient to confer subject matter jurisdiction. *Teal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0689-06, 03/07/07].

## **INDICTMENT – CONSTITUTIONAL SUFFICIENCY TEST**

The complete test for the constitutional sufficiency of a particular charging instrument is the following: Can the district court and the defendant determine, from the face of the indictment, that the indictment intends to charge a felony or other offense for which a district court has jurisdiction? The indictment, despite whatever substantive defects it contains, must be capable of being construed as intending to charge a felony (or a misdemeanor for which the district court has jurisdiction). *Teal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0689-06, 03/07/07].

## **INDICTMENT – CONSTITUTIONAL SUFFICIENCY TEST**

The misdemeanor offense of hindering apprehension becomes a felony when the person who is being harbored is under arrest for, charged with, or convicted of a felony and the person charged under this section knew that the person they harbored is under arrest for, charged with, or convicted of a felony. *Teal v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0689-06, 03/07/07].

*Few v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0866-06, 03/07/07].

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

**FACTS:** Defendant was indicted for solicitation to commit capital murder. He was eventually re-indicted under a different cause number. After a jury convicted him, defendant filed a timely notice of appeal, citing the original cause number instead of the new one. The court of appeals dismissed his appeal for lack of jurisdiction. The Court of Criminal Appeals reversed the judgment of the court of appeals and remanded the case to that court, holding that defendant's

notice was sufficient to show his desire to appeal from the judgment for solicitation to commit capital murder.

#### **NOTICE OF APPEAL – DEFECTS – AMENDMENT**

Defective notices of appeal may be amended at any time before the appealing party's brief is filed. *Few v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0866-06, 03/07/07].

#### **NOTICE OF APPEAL – PERFECTION – SUFFICIENCY OF NOTICE – AMENDMENT**

In a criminal case, appeal is perfected by timely filing a sufficient notice of appeal. Notice is sufficient if it shows the party's desire to appeal from the judgment or other appealable order. The Rules of Appellate Procedure retain the requirement of notice of appeal, but they permit amendment to cure apparently any defects in notices of appeal. *Few v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0866-06, 03/07/07].

#### **RIGHT TO APPEAL**

A person's right to appeal a civil or criminal judgment should not depend upon tracking through a trail of technicalities. *Few v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0866-06, 03/07/07].

*Ex Parte Blue*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75, 254, 03/07/07].

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

**FACTS:** Applicant was convicted on capital murder and sentenced to death. In his initial post-conviction application for writ of habeas corpus, submitted almost one year after the Supreme Court decided *Atkins v. Virginia* – which held unconstitutional the execution of the mentally retarded – applicant failed to raise the issue of mental retardation. In a subsequent application for writ of habeas corpus applicant alleged that he was mentally retarded and therefore the state was barred from executing him. He argued that the Court of Criminal Appeals could reach his claim of mental retardation under two alternative theories: 1) that he was entitled to a review on the merits if he could show that, but for a violation of the United States Constitution, no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial; and 2) because the Eighth Amendment to the United States Constitution absolutely prohibits the execution of the mentally retarded, the Court of Criminal Appeals should suspend all notions of waiver, forfeiture, procedural default, and abuse of the writ, and abandon any otherwise-valid interest the State has in the finality of

the judgment. Further, the court should permit applicant to proceed with his claim, notwithstanding whatever statutory impediments exist to his raising the claim in a subsequent writ application. The Court of Criminal Appeals held that after an applicant for writ of habeas corpus has one opportunity to raise an *Atkins* claim in a post-conviction setting, the Texas Legislature may legitimately limit any second chance it may afford him to raise those claims again, notwithstanding the absolute nature of the prohibition against executing the mentally retarded. Leave to file application for habeas corpus denied.

#### **ABSOLUTE REQUIREMENTS AND PROHIBITIONS**

Absolute requirements and prohibitions, like rights which are waivable only, are to be observed even without partisan request. But unlike waivable rights, they cannot lawfully be avoided even with partisan consent. Accordingly, any party *entitled to appeal* is authorized to complain that an absolute requirement or prohibition is violated, and the merits of his complaint on appeal are not affected by the existence of a waiver or a forfeiture at trial. *Ex Parte Blue*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75, 254, 03/07/07].

#### **STATE DUTY TO PROVIDE WRIT OF HABEAS CORPUS**

States have no obligation to provide the post-conviction writ of habeas corpus. Texas law does provide such writs, but what state law may withhold altogether, it may withhold in part. *Ex Parte Blue*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75, 254, 03/07/07].

#### **REGULATION – WRIT OF HABEAS CORPUS**

Subject only to the state constitutional mandate that the writ of habeas corpus shall never be suspended, it is well established that the Legislature may regulate the right to the writ of habeas corpus, and that such regulation legitimately may include imposing limitations on the ability of a post conviction habeas applicant to file multiple writ applications challenging the same capital murder conviction. *Ex Parte Blue*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75, 254, 03/07/07].

#### **FINALITY VS. ABSOLUTE PROHIBITIONS**

The Supreme Court has never identified a constitutional prohibition it regarded as so absolute that it would *wholly* nullify the State's otherwise legitimate interest in finality of judgments upon the mere *allegation* that the prohibition applies. *Ex Parte Blue*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75, 254, 03/07/07].

## **SUCCESSIVE HABEAS APPLICATIONS – FEDERAL LAW**

A petitioner is allowed to proceed to the merits of a claim in a successive or abusive writ if he can demonstrate “cause” for the failure to raise the claim in a prior writ or writs, and “prejudice” that he would suffer should the federal courts decline to hear it. If a petition can not demonstrate the requisite cause and prejudice, he would still be permitted to proceed with his successive or abusive claim if he can show that a “fundamental miscarriage of justice” would result from the failure to entertain the claim. *Ex Parte Blue*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75, 254, 03/07/07].

## **SUCCESSIVE HABEAS APPLICATIONS – FUNDAMENTAL MISCARRIAGE OF JUSTICE**

Fundamental miscarriage of justice means one of two things: 1) actual innocence, or 2) actual innocence of the death penalty. *Ex Parte Blue*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75, 254, 03/07/07].

## **EIGHTH AMENDMENT - SCOPE**

The Eighth Amendment does not erect an absolute bar to the execution of the mentally retarded. If an applicant for writ of habeas corpus fails to raise the issue of his own mental retardation after he has had the opportunity to do so in an earlier application for the writ, he must do more than make a bare allegation of mental retardation. He must meet the express requirements to proceed under Article 11.071, Section 5(a)(3) of the Texas Code of Criminal Procedure. *Ex Parte Blue*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75, 254, 03/07/07].

## **SUBSEQUENT HABEAS APPLICATIONS – REQUITES**

If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that – 1) by clear and convincing evidence, 2) but for a violation of the United States Constitution 3) no rational juror would have answered in the state’s favor one or more of the statutory special issues submitted to the jury in the applicant’s trial. *Ex Parte Blue*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75, 254, 03/07/07].

## **FUNDAMENTAL MISCARRIAGE OF JUSTICE - LIMITS**

The Supreme Court has limited the application of innocence in the context of fundamental miscarriage of justice to constitutional error that affects the habeas petitioner’s eligibility for the death penalty under state law. Constitutional error that affects only the jury’s discretion whether to impose a death sentence on a defendant who is unquestionably eligible

for such a sentence under state law is not sufficiently fundamental to excuse the defendant's failure to raise such error in prior state or federal proceedings. *Ex Parte Blue*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75, 254, 03/07/07].

#### **SUBSEQUENT APPLICATIONS – HABEAS STANDARD – CLEAR / CONVINCING**

A state habeas applicant alleging mental retardation for the first time in a subsequent writ application will be allowed to proceed to the merits of his application if he presents evidence of a sufficiently clear and convincing character that no rational fact-finder would fail to find that he is, in fact, mentally retarded. *Ex Parte Blue*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75, 254, 03/07/07].

#### **INITIAL APPLICATION – HABEAS – STANDARD – PREPONDERANCE**

In an initial post-conviction writ application, the state habeas applicant who alleges mental retardation must prove it by a preponderance of the evidence in order to obtain relief on his claim. *Ex Parte Blue*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75, 254, 03/07/07].

#### **SUBSEQUENT APPLICATION – HABEAS – STANDARD – RELIEF**

Post *Atkins* applicants for habeas relief who bypassed their first opportunity to raise a claim of mental retardation at trial or in an initial writ must include specific facts in their application that, if true, would establish by clear and convincing evidence that no rational fact-finder would fail to find him mentally retarded. The Code of Criminal Procedure requires a threshold showing of evidence that would be at least sufficient to support an ultimate conclusion, by clear and convincing evidence, that no rational fact-finder would fail to find mental retardation. *Ex Parte Blue*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75, 254, 03/07/07].

#### **MENTAL RETARDATION – DEFINED**

Mental retardation is essentially defined in accordance with the criteria adopted by the American Association on Mental Retardation: 1) significant sub-average general intellectual functioning, usually evidence by an IQ score below 70, that is accompanied by, 2) related limitations in adaptive functioning, 3) the onset of which occurs prior to the age of 18. *Ex Parte Blue*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75, 254, 03/07/07].