May 14, 2014

TRIAL PROCEDURE
AMENDING AN INDICTMENT
ERROR PRESERVATION: MUST HAVE PAPER TRAIL ON REQUEST FOR HEARING TO PRESERVE ERROR

Perez v. State, No. PD-1380-13, Publish, Womack, 5/14/14. The day before trial the State filed a motion asking the TCT to amend the indictment by replacing the existing eleven counts with five counts in an attached exhibit. Trial counsel stated he had no objections and waived the statutorily allotted time in addition the TCT specifically questioned the appellant and he waived the same stuff on the record. The appellant was convicted on all five counts. On appeal, he objected (for the first time) to the indictment's amendment specifically that the indictment was not properly amended because there was no physical alteration (interlineations) to the actual face of the indictment. Indictment by GJ protects citizens from arbitrary accusations by the govt[1], provides a defendant with notice of the offense charged so he can prepare a defense.[2] The right to an indictment is not absolute and can be waived –either in open court or in writing. Question in this case—how the State may amend an indictment without returning to the grand jury. When the State wishes to amend a pleading it must first get the TCT's permission. The amendment is the actual physical alteration of the indictment. Only physical alteration is consistent with the right to be informed of the charges against one. See *Ward v. State*, 829 S. W. 2d 787 (Tex. Crim. App. 1992). Resolutely clinging to the notion that an amendment can be accomplished only by the physical interlineation of the original indictment provides a defendant with the opportunity to subvert a process of which he was fully aware and had affirmatively acknowledged. *Riney v. State*, 28 S. W. 3d 561, 563 (Tex. Crim. App. 2000). The TCCA moves even further away from *Ward's* strict holding than they did in *Riney* and dismisses appellant's arguments that because there was no amendment to the indictment or to a copy of the indictment that the attempt at amendment was ineffective. None of the dangers are present in this case:

- ✓ *Given actual notice*
- ✓ *Stated very clearly had no objection*
- ✓ *Did not add any new charges*
- ✓ *Or alter the language of the old charges*
- ✓ *Only eliminated six counts (possibly even to the benefit of the defendant)*
- ✓ *And reorganized the remaining counts*
- ✓ *Such alterations do not invade the province of the grand jury because the grand jury returned a true bill on all of the charges for which the appellant was tried and ultimately convicted.*

This case also contains a point on his MNT. The record contains no evidence that appellant or his attorney took steps to obtain a setting on the MNT or attempted to get a ruling on a request for a hearing. Boiler plate language in the prayer is not sufficient to put the court on notice that the appellant wants a hearing. It certainly does not qualify as obtaining a ruling.

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[1] *Really? Ever heard the expression indict a ham sandwich?*
[2] Riney v. State*, 28 S. W. 3d 561, 564 (Tex. Crim. App. 2004).*

DOUBLE JEOPARDY
AGG ROBBERY, THREAT TO INFLICT INJURY AND CAUSING THAT INJURY – MERGED JEOPARDY BAR ON ONE

Cooper v. State, No. PD-1022-12, Johnson, Keller concurrence, Cochran concurrence, Price dissent. Very long complicated difficult read by the time you get through all the opinions. Cochran's concurrence makes the most sense. Basically the double jeopardy clause is violated when a defendant is convicted of both causing the injury and threatening the injury to the same victim during the same robbery. Different victims, different robberies, different story.

THE GREAT WRIT
ACTUAL INNOCENCE
Flaky recanting CW on child sex case
Does not meet the "Herculean task"[3]

Ex parte Robert Alan Harleston, No. WR-79, 196-01, Hervey, Price concurrence, 5/14/14. Publish. CW sort of running hot and cold as to whether the applicant had sex with her, she was young enough that having sex with her would have been a crime. It is newly discovered/newly available evidence with no allegations of constitutional error at the trial.[4] To prevail in a freestanding claim of actual innocence, an applicant must prove "by clear and convincing evidence that, despite the evidence of guilt that supports the conviction that no reasonable juror could have found the applicant guilty in light of the new evidence". The habeas court[5] must assess the probably impact of the new evidence and then weigh the newly discovered evidence against the old inculpatory evidence to determine whether applicant has met the BOP necessary to unquestionably establish his innocence. The habeas court then memorializes its findings of fact and conclusions of law and recommends to this court whether relief should be granted. TCCA defers to those if supported by the record but even less so than with ordinary fact findings say like on a suppression because they are the ultimate fact finder. TCCA does not adopt habeas court's fact findings : inconsistent stories by CW cannot adopt quantum of proof necessary, new evidence not credible and contradicted. Price writes separately to once again stress his love of making fact findings from an appellate record downplaying the role of witnesses' demeanor etc.

SUBSEQUENT DEATH WRIT
ATKINS[6]

Ex parte Robert James Campbell, NO. WR-44, 551. Publish 5-8-14. Judge Per Curiam happy to execute Mr. Campbell but strong four Judge dissent—Alcala joined by Price, Johnson and Cochran. Applicant given misinformation by TDC as to his [low] IQ score and the DA had school records that also showed retardation that they did not share. Although there is nothing to suggest any impropriety of any kind by it, the Harris County District Attorney's Office was in possession of material evidence about applicant's possible, if not probable, mental retardation at time of previous writ alleging same which they kept under wraps. "This Court should not base its decisions on whether a person should live or be executed based on misinformation or wholly

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[3] Ex parte Elizondo*, 947 S. W. 2d 202, 207 (Tex. Crim. App. 1996),* Herrera v. Collins*, 506 U.S. 390 (1993).*

[4] *Probably a tactical error on the part of the writ lawyer because had perjury been alleged that is a constitutional violation and leads to the lower burden of proof by preponderance no rational juror could have found applicant guilty BRD.*

[5] *Usually , but not always, the habeas court is the trial court.*

[6] Atkins v. Virginia*, 536 U.S. 304 (2002). Eighth Amendment prohibits the execution of the retarded.*

inadequate information. By reviewing applicant's claim on the merits, this Court would fulfill its ultimate obligation to ensure that Texas abides by the constitutional prohibition against the execution of a mentally retarded person. Because the Court instead dismisses the application as subsequent without addressing these matters, I respectfully dissent."