

28 January 2009

HARMON L. TAYLOR
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SHARRI ROESSLER, Clerk
Tenth Court of Appeals
501 Washington Avenue, Suite 415
Waco, TX 76701

Re: TAYLOR v. STATE, No. 10-08-00208-CR, from
County Court at Law of Walker County, No. 07-1392, STATE v. TAYLOR

Dear Ms. Roessler:

This is to confirm that I have received in hand the Mandate dated 26 January 2009.

This is a fantastic step in a good direction! I had not ever expected confirmation of any perspective other than the existence of an “interlocutory” appeal. I have a greatly increased hope that at least part of the point of this “exercise” is starting to find its way into the active process of handling appeals. This happens also to be 100% consistent with the procedural rules already on the books. Certain issues simply cannot tolerate simultaneously active trial and appellate jurisdiction. Of course, I would opt that way on *all* issues brought to the appellate courts.

Looking forward, and as is consistent with the understanding already documented of Record with the Court of Criminal Appeals, I am still expecting to file a petition for certiorari with the Supreme Court, and I am still expecting the main case to remain on “stay” status in the trial court pending conclusion of the collateral order doctrine matter. I have every intention of including the trial and appellate courts in the loop on that phase of the case. That petition will include an Appendix B that is a survey of the 50+ “state” perspectives on the collateral order doctrine. That has taken a while to compile.

Should the collateral order doctrine matter remain unchanged by the Supreme Court, I will very likely then run the “interlocutory” appeal of the denial of the Special Appearance. Why? For the very same reason I’m running the collateral order doctrine appeal. As a brief preview of the petition for cert, there’s a case out of Idaho that “covers the waterfront” on a directly relevant issue. One very clear lesson from *Johnson v. Fankell*. 519 U.S. 947 (1996) (studying state appellate jurisdiction in Idaho, “denial of immunity defense” context) is that the Supreme Court cannot make a state legislature create a state (appellate) court with jurisdiction to address the issue raised on appeal. In short, if the Idaho state

legislature want to hang the state's *trial* judges out to dry by not allowing the state's *appellate* bench to intervene at the earliest possible moment where very fundamental "lack of subject matter jurisdiction" issues arise, that's Idaho's business. Thus, if the Texas state legislature want to hang the Texas state *trial* judges out to dry by not allowing the state's *appellate* bench to intervene at the earliest possible moment where very fundamental "lack of subject matter jurisdiction" issues arise, that's Texas' business.

Why does the timing of the "lack of subject matter jurisdiction" ruling matter? Because trial judges who have no subject matter jurisdiction also have no immunity defense. Why this matters more to a defendant than to the state trial bench, the state appellate bench, and the state legislature combined may never be known, but it certainly appears to be the case to this very day. And, as you already know, this status of affairs angers me to the core of my being. This systemic attitude, perspective, and demeanor dares me to file my damages suit, and while that will happen once I obtain a favorable ruling, surely efforts toward a change in policy may be initiated to minimize the future need to solve this sort of problem in a "curative solution only" manner.

If there is no change via the collateral order doctrine, and if I were not to run the appeal of the denial of the Special Appearance, then all that would remain as a theory to mitigate STATE's damages would be a concept that the Supreme Court have recently reminded all of us of in *Pearson v. Callahan*, __ U.S. __ (21 Jan 2009) (No. 07-751). Because the policy at issue in *Pearson* was not clearly established at the time of the search, those officers, acting consistently with the then-existing policy, *were* entitled to their immunity defense. The reason I would feel compelled to try again to get this trial matter terminated pre-trial, should that need arise, is that the policy issues applicable here have been made superabundantly clear for quite a while.

- **Commerce cannot be compelled.** *Griswold v. Connecticut*, 381 U.S. 479 (1965). N.B. To understand the entire point of "licensing," which is at the heart of this immediate case, is to see the "commercial" nature of a "licensed" marriage. See Taylor's Brief at 16 n.8.

On this point, let's reflect on some very exciting developments in New York regarding the on-going feud between the Indians and STATE OF NEW YORK regarding the "cigarette tax."

http://www.syracuse.com/news/index.ssf/2009/01/court_cayugas_can_not_be_charg.html

<http://www.newsday.com/news/local/wire/newyork/ny-bc-ny--indiancigarettes0122jan22,0,580806.story>

What leaps from the page is that the appellate bench in New York have exercised jurisdiction sounding in equity to stop a criminal trial cold in its tracks early in the pre-trial stage. That simply “never” happens. Thus, at least New York recognizes the value in *preventative* remedies. New York, both legislatively and judicially, has expressed a well-respected concern for the members of the trial bench; hence, a pre-trial, *preventative* remedy exists!

What’s the connection between a “cigarette tax” case in New York and a “no driver’s license” ticket case in Texas? In the “tax” case, the law burdens the “tax” claimant with the need to prove its underlying commercial nexus. In the “no driver’s license” ticket case, the law *also* burdens the claimant of the charge with the need to prove up its underlying commercial nexus.

We see the commercial nexus problem, subtle though it may be to a casual observer, by the mere existence of the pre-trial temporary injunction stopping that criminal case. On the one hand, the Cayuga tribe is quite errant in thinking that the reason it may sell cigarettes “tax free” has anything in the slightest to do with some alleged “sovereign right” to do so. On the other hand, New York is even more errant in thinking that just because the language is published in a statute book that it’s instantly applicable. When it comes to commerce-based issues, whether a “tax” issue, or a “licensing” issue, either there is a commercial nexus or there isn’t. Thus, key is that the threshold burden is on New York to prove that a duty to pay that “tax” even exists. To establish its *criminal* case, New York must first have a *civil* case. To have that *civil* case, New York has to prove that the Cayuga tribe voluntarily entered into an agreement to collect and pay over that “cigarette tax.” New York clearly has no civil case, as proved by the mere existence of a temporary injunction stopping the *criminal* case.

A very logical reason for equitable intervention so early in that criminal case is the cessation of what amounts to extortion by STATE OF NEW YORK. So, at least in New York, it is still the case that criminal conduct under color is subject to *prevention*, as the timing may avail itself. The extortion angle arises this way. For New York to use “color of law and office” to try to compel the Cayuga tribe to pay over money that is not due or owing is no different at all from the mob’s compelling a business to pay “protection money.” Where we realize instantly that the latter is extortion, it is a very short step to realize that the same statute applies where the “force” used is “color of law and office.” It seems self-apparent that STATE OF NEW YORK has no commercial nexus with the Cayuga tribe on the issue of “cigarette taxes.” Thus, STATE OF NEW YORK is committing extortion by applying the full force of its criminal prosecution system to try to coerce the Cayuga tribe into that fundamentally necessary commercial relationship. The temporary injunction stopped cold, in its tracks, that criminal activity engaged in and by officials acting under color of law and office in the name of STATE OF NEW YORK.

To make clear the connection, where STATE OF TEXAS charges criminally a traveler for not having a “driver’s license,” where the traveler is engaging in no commercial activity whatsoever, as is confessed on the face of the ticket issued at the time, STATE OF TEXAS commits extortion, among other crimes, at the instant that ticket is issued. Prosecutors and judges who perpetuate the crime “aid and abet” that extortion, among other crimes. STATE OF TEXAS has no commercial nexus with a traveler but rather only with “operators” who have volunteered to be “licensed” for whatever reason or purpose. There being no commercial nexus from the outset, the traveler is not engaging in criminal activity by having no “license.” **STATE** is the one engaging in the criminal activity, which starts the instant the ticket is issued. And it’s not merely criminal activity, but also criminal activity engaged, under color of law and office, by an organization of three people or more.

STATE OF TEXAS has no commercial “transportation” relationship with me to enforce. That isn’t going to change, not even when STATE OF TEXAS brings its full criminal enforcement machinery to bear in an effort to coerce me into an agreement I have no desire to make. It is no less an act of extortion for STATE OF TEXAS to charge me criminally for exercising my prerogative not to engage in commerce regarding “transportation” than it is an act of extortion for STATE OF NEW YORK to charge the Cayuga tribe criminally for their exercise of their prerogative not to engage in commerce regarding the “cigarette tax.” How do we know? Because commerce cannot be compelled.

The chief difference between these cases is that the New York legislature and judiciary have put **preventative** remedies in place to address the “lack of subject matter jurisdiction” (via lack of standing, no ‘actual grievance,’ no “case or controversy”) issue “immediately” with an eye toward mutual mitigation of damages. They have **not** put their trial bench out to dry. The collateral order doctrine is a **preventative** remedy, the value of which has apparently not yet been fully realized in Texas, where they **do** hang their trial bench out to dry.

- **Choice of law cannot be compelled.** “Choice of law” is just one more element of an agreement. *Ogden v. Saunders*, 25 U.S. 213 (1827). See Taylor’s Brief starting at 11.
- **Political/religious affiliation cannot be compelled. Has this very court not fully and 100% judicially recognized this limitation?!** *Scott v. State*, 80 S.W.3d 184 (Tex. App.—Waco 2002, pet. ref’d). Has this very court not fully and 100% judicially recognized TEX. CONST. Art. I, § 6?! *Id.* Has that recognition not been made state-wide via the “petition refused” ruling?! So, what defense does a trial judge, or a prosecutor, in Walker County **possibly** have?!

See also TEX. PENAL CODE § 39.03(a)(1), (2); *Holberg v. State*, 38 S.W.3d 137 (Tex. Crim. App. 2000) (capital murder statute does not establish a religion); *Flores v. State*, 245 S.W.3d 432 (Tex. Crim. App. 2008) (deadly conduct charge, here “abortion via boyfriend,” does not violate Establishment Clause); *Olliff v. State*, 161 Tex. Crim. 336, 276 S.W.2d 839 (1954) (religious affiliation issue in voir dire; no prejudice established of Record); *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1 (Tex. 2008) (recent judicial recognition of TEX. CONST. Art. I, § 6) (fundamental understanding that compels the ruling: **church membership is consensual, as in voluntary**; hence, no tort liability is attributable to that church when it acts within the scope of church practices—“But religious practices that might offend the rights or sensibilities of a non-believer outside the church are entitled to greater latitude **when applied to an adherent within the church;**” *id.* at 12 (emphasis added); “The ‘laying of hands’ and the presence of demons are part of the church’s belief system and accepted as such by its adherents. These practices are not normally dangerous or unusual and apparently arise in the church with some regularity. **They are thus to be expected [NOTICE TO] and are accepted by [CONSENT BY] those in the church;**” *id.* at 12-13 (emphasis added) [COMMENTS ADDED].).

See also 18 U.S.C. §§ 241, 242; *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (discussion of the tension between the two Religion Clauses, namely the Establishment Clause and the Free Exercise Clause); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (declaring void the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U.S.C. §§ 2000bb et seq.) (note that the analysis focuses on the limits of the “14th Amendment” rather than on either of the Religion Clauses); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (Free Speech issue); *Board of Education of Kiryas Joel Village School v. Grumet*, 512 U.S. 687 (1994) (confirmation that no state may establish a religion) (*accord McCollum v. Board of Ed.*, 333 U.S. 203 (1948), which, as we are reminded in the recent *Heller* case, is the first ruling in the Religion Clause cases).

In its dual purpose/use, a “driver’s license” is also an ID card for membership in STATE OF _____. As I have stated from the outset, I have no desire to be a member of “church of STATE OF TEXAS,” which is what it was established to be, namely a God-hating, America-hating, Texas-hating commercial enterprise.

In closing, and again, the mere existence of the Mandate suggests that the concept of simultaneous trial and appellate jurisdiction, even where the view of the matter is an “interlocutory” appeal, has been considered inappropriate, and it’s a fantastic step in a good direction.

Submitted by,

/s/ Harmon Taylor
Harmon L. Taylor

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