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MEMORANDUM

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**TO:** JUDGES TRYING CRIMINAL CASES  
**FROM:** DEBORAH SELDEN AND INTERNS JOSH SCHNEIDER, ELIZABETH WIEHLE, AND MARY MARTIN  
**SUBJECT:** 12/12/07 COURT OF CRIMINAL APPEALS OPINIONS  
**DATE:** 01/09/08  
**CC:** JACK THOMPSON

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**Ex Parte Ramirez, \_ S.W.3d \_ (Tex. Crim. App. 2007) [WR-25, 057-06, 12/12/07].**  
*Per Curiam.*

**FACTS:** A jury convicted defendant of two counts of burglary of a habitation and sentenced him to eighty-one years' imprisonment. The court of appeals rejected defendant's claims that his trial counsel was ineffective for failing to 1) call two witnesses at trial, 2) review a surveillance video, and 3) submit the video into evidence at trial. On defendant's petition for writ of habeas corpus, the trial court recommended that the Court of Criminal Appeals (CCA) grant the writ because of defense counsel's failure to review the surveillance video. The CCA disagreed and denied the defendant's writ of habeas corpus.

**HABEAS - INEFFECTIVE COUNSEL**

To be entitled to habeas relief because of ineffective assistance of counsel, a defendant must establish, by a preponderance of evidence, that: 1) the counsel's performance was deficient because it fell below an objective standard of reasonableness and 2) that the deficient performance resulted in prejudice to the defendant. **Ex Parte Ramirez, \_ S.W.3d \_ (Tex. Crim. App. 2007) [WR-25, 057-06, 12/12/07].**

**HABEAS - INEFFECTIVE COUNSEL - PREJUDICE**

To establish prejudice because of counsel's deficient performance, a defendant must show the reasonable probability that the outcome of the proceeding would have been different without counsel's "unprofessional errors". **Ex Parte Ramirez, \_ S.W.3d \_ (Tex. Crim. App. 2007) [WR-25, 057-06, 12/12/07].**

**HABEAS - INEFFECTIVE COUNSEL – FAILURE TO CALL WITNESS**

In challenging an attorney's failure to call a witness, the defendant must show that the witness was available to testify and that the testimony would have been of some benefit to the

defendant's defense. A defendant is not deemed to have suffered a prejudicial harm when a witness's testimony would not have benefited the defendant's defense. **Ex Parte Ramirez, \_ S.W.3d \_ (Tex. Crim. App. 2007) [WR-25, 057-06, 12/12/07].**

**Hicks v. State, \_ S.W.3d \_ (Tex. Crim. App. 2007) [PD-0154-06, 12/12/07].**

Keasler, J., *delivered the opinion of the Court in which* Keller, P.J., *and* Price, Womack, Johnson, Hervey, *and* Cochran, JJ., *joined*. Holcomb, J., *concurred*. Meyers, J., *did not participate*.

**FACTS:** During an argument at a party, defendant knocked a forty-two year old mentally retarded man unconscious and subsequently left him on the side of a country road. The victim suffered a subarachnoid hemorrhage and was hospitalized for a week. Defendant was charged with three counts of injury to a disabled individual. A jury acquitted defendant of the first two counts, but convicted him of injury to a disabled person by omission and assessed his punishment at three years imprisonment. The trial judge probated the sentence, placed the defendant on ten years' community service and ordered defendant to serve sixty days in the county jail. On appeal, defendant 1) challenged the legal and factual sufficiency of the evidence supporting his conviction, and 2) argued that the "care, custody, or control" element of the crime requires an actor to accept responsibility for the victim's protection, food, shelter, and medical care. The appellate court affirmed. The Court of Criminal Appeals (CCA) reversed the appellate court. The CCA held that mere possession was not sufficient to constitute the required element of 'care, custody, or control' over a disabled person and that the jury's finding that there was sufficient evidence that defendant owed a duty to the victim, was in error.

#### **INJURY TO A DISABLED PERSON - ELEMENTS**

A person commits an offense if he ... intentionally, knowingly, or recklessly by omission, causes to a disabled individual: (1) serious bodily injury; (2) serious mental deficiency, impairment, or injury; or (3) bodily injury. **Hicks v. State, \_ S.W.3d \_ (Tex. Crim. App. 2007) [PD-0154-06, 12/12/07].**

#### **INJURY TO A DISABLED PERSON - ELEMENTS OMISSION**

A conviction of injury to a disabled person by omission requires a showing that the "actor has a legal or statutory duty to act; or the actor has assumed care, custody or control of

a disabled individual.” **Hicks v. State, \_ S.W.3d \_ (Tex. Crim. App. 2007) [PD-0154-06, 12/12/07].**

**INJURY TO A DISABLED PERSON BY OMISSION**

Mere possession of an individual’s body does not rise to the level of “care, custody or control” as defined in Section 22.04(d) of the Penal Code. **Hicks v. State, \_ S.W.3d \_ (Tex. Crim. App. 2007) [PD-0154-06, 12/12/07].**

**INJURY TO A DISABLED PERSON BY OMISSION**

Under subsection 22.04(d) of the Penal Code, an actor assumes the “care, custody or control” of a disabled individual when their acts, words, or course of conduct cause a reasonable person to conclude that they have accepted responsibility for protection, food, shelter, and medical care for a disabled individual. **Hicks v. State, \_ S.W.3d \_ (Tex. Crim. App. 2007) [PD-0154-06, 12/12/07].**

**INJURY TO A DISABLED PERSON BY OMISSION**

The meaning of “care, custody or control” under Section 22.04(d) of the Penal Code is not ambiguous, and therefore, any search outside the statutory language for a meaning violates the principles of statutory construction. **Hicks v. State, \_ S.W.3d \_ (Tex. Crim. App. 2007) [PD-0154-06, 12/12/07].**