



# TIBA TEXAS INDEPENDENT BAR ASSOCIATION

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§§ Vol. 16, No. 36, September 15, 2008

Case Name: [Christopher Vomakoyima Tita v. The State of Texas](#)

- OFFENSE: Theft by a Government Contractor (\$200,000+)
- COUNTY: Harris
- COURT OF APPEALS: Houston [14th] 2007
- C/A CITATION: 230 S.W.3d 885
- C/A RESULT: Conviction Affirmed
- CCA. CASE No. PD-1574-07 DATE OF OPINION: September 10, 2008
- DISPOSITION: Court of Appeals Reversed
- OPINION: Holcomb, J ] VOTE: 7-1-0
- TRIAL COURT: 262nd D/C; Hon. Mike Anderson
- LAWYERS: [Allen Tanner](#), [Kurt Clarke](#) (Defense); [Kevin Keating](#) (State)

**Ed Note:** (Background Facts) Appellant was charged in several different separate indictments. In March of 2005, the State obtained two indictments charging aggregated theft between April of 1999 and August of 2000 (#1); and between June 1999 and October 2000 (#1). Other than the dates, these two indictments were identical. In May of 2005, a different grand jury handed down two more indictments charging aggregated theft between April of 1999 and August of 2000 (#3), and between June of 1999 and October of 2000. As with indictments #1 and #2, indictments #3 and #4 were identical other than as to the dates. In July of 2006, a third grand jury handed down indictments charging aggregated theft between June of 1999 and October of 2000 (#5). Article 12.01(4)(A) provides for a 5 year statute limitations, with the time beginning to run "on the date of the last theft, i.e., the end date of the 'scheme or continuing course of conduct' in question." The State proceeded to trial on indictment #5. Appellant claimed that prosecution was barred by the statute of limitations. The State responded that prosecution under the July 3, 2006, indictment (#5) was not limitations-barred because the five-year statute of limitations had been tolled by the March and May 2005, indictments, which, according to the State, alleged the same criminal conduct that the July 3, 2006, indictment alleged. The State pointed out that the earlier indictments had been returned within five years of October 31, 2000, the date alleged in the July 3, 2006, indictment as the end date of Appellant's "scheme or continuing course of conduct." At the conclusion of the hearing, the trial court denied Appellant's motion to dismiss.

§§ **21.01 Charging Instruments / Statute of Limitations / Tolling Allegations:** On direct appeal, Appellant brought two points of error, arguing that the State was required to plead in an indictment a date for the commission of the alleged offense which was within the statute of limitations period. Appellant argued further that no facts tolling the five-year statute of limitations were pled in the indictment." In his second point of error, Appellant argued that "the evidence [presented at his trial] was [legally] insufficient to support [his] conviction for theft [because] the State failed to prove that the offense occurred within the applicable statute of limitations period." The Court of Appeals overruled both of Appellant's points of error and affirmed the judgment of the trial court (see §§, [Vol. 15, No. 30](#); 08/06/2007). In overruling Appellant's first point of error, the Court of Appeals explained that the trial court did not err in denying his motion to dismiss because it was

perfectly permissible for an indictment to indicate on its face that a prosecution thereunder was barred by limitations. It also agreed with the State that limitations was in the nature of a defense which did not need to be negated in the indictment.

**Holding:** It is true, as the Court of Appeals noted in its opinion, that we held in [Proctor v. State](#), 967 S.W.2d 840 (Tex.Cr.App. 1998)(see [§§](#), [Vol. 6, No. 10](#); 03/16/1998), that the statute of limitations is "in the nature of a defense." It is also true, as the Court of Appeals noted, that the Legislature has provided in Texas Penal Code § 2.03(b) that the State need not negate the existence of a defense in an indictment. Nevertheless, neither our decision in [Proctor](#) nor § 2.03(b) overrides Article 21.02(6)'s specific requirement that an indictment indicate on its face that a prosecution thereunder is not barred by the applicable statute of limitations. Indeed, we held in [Proctor](#) itself that, "before trial, a defendant may assert the statute of limitations defense by filing a motion to dismiss under Article 27.08(2)." Thus, we recognized in [Proctor](#) that an indictment must indicate on its face that a prosecution thereunder is not barred by the applicable statute of limitations and that an indictment that does not indicate such is subject to a pretrial motion to dismiss. We sustain appellant's first ground for review.

**Ed Note:** In overruling Appellant's second point of error, regarding the legal sufficiency of the evidence to prove that the prosecution was not limitations-barred, the Court of Appeals explained that "Appellant apparently never raised the [limitations] issue before the jury," and, therefore, "the State was not put to its burden of proof regarding the tolling of the limitations period." The Court held that, although Appellant had moved twice for an instructed verdict of acquittal, he never requested a jury instruction on the statute of limitations defense. Under those circumstances, the State was not obligated to prove that its prosecution was not limitations-barred.

**Concurring / Dissenting Opinions:** Judge Meyers did not participate.