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Mandamus Law and Practice in Texas Criminal Cases

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I. Introduction.

This paper focuses on mandamus and prohibition law and practice in Texas criminal cases. The cases discussed are almost exclusively from the Texas Court of Criminal Appeals.

It is intended as a starting place for understanding contemporary extraordinary writ practice. My hope is that it is of some use in your practice, should you find yourself in a tough spot and in need of an extraordinary remedy, or having to evaluate an opponent's plea for writ intervention.

The paper is primarily focused on the use of mandamus for appellate review of judicial decisions. Beginning with a broad overview of mandamus and prohibition, the paper addresses which courts have mandamus jurisdiction, then discusses the two prongs of the mandamus test in some detail before focusing on specific issues relating to the Court of Criminal Appeals's mandamus jurisdiction. The paper ends with practical concerns inherent in litigating mandamus actions and a review of noteworthy recent mandamus decisions from the Court of Criminal Appeals.

The opinions and legal judgments expressed in this paper are mine alone, and not necessarily those of the Court of Criminal Appeals, any of its judges (past or present), the General Counsel, or any of my colleagues.

II. What the writs are and the traditional standard of review.

Like habeas corpus, writs of mandamus and prohibition come from the English common law tradition, where they evolved over the years at the King's (and, sometimes, Queen's) Bench. *See generally* EDITH G. HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW, CERTIORARI AND MANDAMUS IN THE SEVENTEENTH CENTURY, Chapter II (Harvard Univ. Press 1963). Mandamus and prohibition are two sides of the same coin and are governed by the same standard. Mandamus looks retrospectively, undoing an act that has been done, while prohibition looks forward, preventing an actor from taking a future action.

Black's translates "mandamus" from Latin as "we command," and defines it as "[a] writ issued by a court to compel performance of a particular act by a lower court or a governmental officer or body, usually to correct a prior action or failure to act." *Mandamus*, BLACK'S LAW DICTIONARY (10th ed. 2014). The Court of Criminal Appeals has explained that, "[a] writ of mandamus, or prohibition, may be the proper relief to set aside an improper order. Prohibition is proper to restrain enforcement of a future act and not to undo an act already performed. The line between mandamus and prohibition is a thin one and, therefore, this Court looks not to the nomenclature or form of the relief sought, but to its substance." *Ex parte Gray*, 649 S.W.2d 640, 642 (Tex. Crim. App. 1983) (internal citations omitted).[1] The writ of prohibition "will not be

[1] As suggested, the Court does not take a formalistic view in this field, and does not strictly construe pleadings by their titles. It has said that, "in determining the nature of the extraordinary remedy sought this Court will not be limited by the denomination of petitioner's pleadings, but will look to the essence of the pleadings, including the prayers, as well as the record before us." *Garcia v. Dial*, 596 S.W.2d 524, 529 (Tex. Crim. App. 1980) (citing *Vance v. Clawson*, 465 S.W.2d 164 (Tex. Crim. App. 1971)).

granted when the act sought to be prevented is already done, but will lie when such act is not a full, complete, and accomplished judicial act." *Garcia v. Dial*, 596 S.W.2d 524, 529 (Tex. Crim. App. 1980) (citing *Vance v. Clawson*, 465 S.W.2d 164, 168 (Tex. Crim. App. 1971)).

Most of the published cases involve mandamus (rather than prohibition), but the legal principles apply equally to both writs.[2]

III. Terminology.

Words for parties and even instruments filed in extraordinary writs in Texas courts can be inconsistent. However, the Rules of Appellate Procedure provide some clear guidance.

"The party seeking the relief is the **relator**. In original proceedings other than habeas corpus, the person against whom relief is sought—whether a judge, court, tribunal, officer, or other person—is the **respondent**. A person whose interest would be directly affected by the relief sought is a **real party in interest** and a party to the case." TEX. R. APP. P. 52.2. Strictly speaking, this designation of parties rule applies only in the courts of appeals and the Texas Supreme Court. However, the Court of Criminal Appeals generally uses these terms as well, except in habeas corpus cases.

The actual pleading requesting extraordinary writ relief is the **petition**, and this is so in all Texas courts. TEX. R. APP. P. 52.2; 72.1. However, in the older cases, the Court of Criminal Appeals refers to **applications** for writs of mandamus and **applicants**, rather than relators. To this day, though the Court nearly uniformly refers to the proponent as the relator, it still regularly refers to *applications* for writs of mandamus, prohibition, certiorari, and other extraordinary writs. This is likely because habeas corpus is initiated by filing an application. TEX. R. APP. P. 73.

IV. Traditional Test.

The traditional test requires both that the relator prove that the respondent must undertake a ministerial act, and that the relator has no other adequate remedy at law by which to compel that act. These two prongs, "ministerial duty" and "adequate remedy at law," constitute the test that comes to mind for most criminal practitioners when they consider mandamus or prohibition, and frame how most lawyers think about these writs. The notion of the "ministerial duty" looms large, reinforcing the traditional notion that the writs are used to compel other actors to simply perform a task that requires no deliberation and is not subject to discretion or an exercise of legal judgment. But, as will be discussed, like the Texas Supreme Court, the Court of Criminal Appeals has built increasing flexibility into the test. Though the Court of Criminal Appeals has not explicitly loosened the standard to the same degree of its sister court, the criminal mandamus test has more flexibility than many criminal law practitioners may assume.

[2] Only the Court of Criminal Appeals has been granted specific jurisdiction to issue the writ of prohibition. Differing grants of jurisdiction are addressed in detail later in the paper.

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