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Pretrial Writs: Tips from Both Sides of the Aisle

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PRETRIAL WRITS:
TIPS FROM BOTH SIDES OF THE AISLE

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Writs are weapons.

In many ways, pretrial writs are the nuclear option. The party deploying the pretrial writ signals an intent to abandon the ordinary operation of criminal procedure. The relief sought is important, immediate, and incapable of resolution through normal process. When successful, the pretrial writ obliterates the landscape of the criminal case.

But unlike Senate confirmation hearings, there is little benefit in the *threat* of filing a writ. In this way, a pretrial writ is more aptly analogized as a sniper rifle rather than a nuclear weapon. While both have a limited scope in extreme situations, and both are fatal in their execution, anybody can push the red launch button. It takes skill and precision and accuracy required to a use a sniper rifle.

And now we're reached the point where this analogy is getting far too graphic.

Pretrial writs are powerful tools that can be used by both prosecution and defense. Generally, the defense's preferred writ is habeas corpus; the prosecution's tools are typically mandamus and prohibition. The best return on investment to understand how to effectively use and defend against writs is to study the constellation of six cases: *Tharp*, *Lykos*, *Lo*, *Weise*, *Boetscher* and *Perry*.

This handout is not a summary of these cases. Instead, it is *the* cases – and the presentation will be using these materials to deconstruct a brilliant piece of advocacy included in this handout: David Botsford's writ in *State v. Perry*.

To alleviate the need for taking notes during the presentation, the following outline is provided for your convenience:

I. Using Pretrial Writs as an Offensive Weapon

A. Habeas Corpus
    a. Bail
    b. Extradition
B. Constitutional Challenge
    a. Facial Challenge
    b. As-Applied Challenge
C. Mandamus
D. Prohibition

II. Defending Against a Pretrial Writ

A. Procedural Defects
B. Burden of Proof
C. Written response – no need for hearing
D. Evidence at the hearing
E. Why trial should remain the central focus

393 S.W.3d 751
Court of Criminal Appeals of Texas.

In re the STATE of Texas ex rel. Jennifer THARP, Relator.

No. AP–76,916.
|
Nov. 14, 2012.
|
Rehearing Denied Feb. 6, 2013.
|
Dissenting Opinion on Denial of Rehearing Feb. 27, 2013.

Synopsis

Background: Defendant was charged with felony driving while intoxicated (DWI). After jury was sworn, defendant entered plea of guilty before jury. The 433rd District Court, Comal County, Dib Waldrip, J., ruled that it, and not jury, would assess punishment. State filed petition for writ of mandamus with Austin Court of Appeals, which denied relief. State filed application for emergency stay of proceedings, motion for leave to file petition for a writ of mandamus, and petition for writ of mandamus.

[Holding:] The Court of Criminal Appeals, Keller, P.J., held that once defendant entered plea of guilty before jury, trial became unitary proceeding in which jury, not trial court, was to assess punishment.

Writ petition conditionally granted; rehearing denied.

Price, J., filed dissenting opinion in which Johnson, J., joined.

Meyers, J., filed dissenting opinion on denial of rehearing.

West Headnotes (6)

[1] **Mandamus**
Remedy at Law
Mandamus
Nature of acts to be commanded

250Mandamus
250INature and Grounds in General
250k3Existence and Adequacy of Other Remedy in General
250k3(2)Remedy at Law
250k3(2.1)In general
250Mandamus
250INature and Grounds in General
250k12Nature of acts to be commanded

To be entitled to mandamus relief, the relator must show that: (1) he has no adequate remedy at law, and (2) what he seeks to compel is a ministerial act.

10 Cases that cite this headnote

[2] **Mandamus**
Nature and existence of rights to be protected or enforced

250Mandamus
250INature and Grounds in General
250k10Nature and existence of rights to be protected or enforced

In order to obtain a writ of mandamus, the relator must show a clear right to the relief sought.

10 Cases that cite this headnote

[3] **Mandamus**
Nature and existence of rights to be protected or enforced

250Mandamus
250INature and Grounds in General
250k10Nature and existence of rights to be protected or enforced

A "clear right to the relief sought," as required to obtain mandamus relief, is shown when the facts and circumstances dictate but one rational decision under unequivocal, well-settled, i.e., from extant statutory, constitutional, or case law sources, and clearly controlling legal principles.

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Also available as part of the eCourse
[Answer Bar: How to Survive a Criminal Appeal]

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