PRESENTED AT

2022 Conference on Criminal Appeals

May 25-27, 2022
Austin, Texas

Pre-trial Mandamus, Prohibition, & Habeas Corpus

Jessica Caird
Assistant District Attorney
Harris County, Texas

Author Contact Information:
Jessica Caird
Harris County District Attorney's Office
500 Jefferson, Ste. 600
Houston, Texas 77002
caird_jesica@dao.hctx.net
713-274-5826

TABLE OF CONTENTS

TABLE OF CONTENTS ii
INDEX OF AUTHORITIES iii
I. This article assists practitioners in pretrial criminal practices. 1
II. Pretrial writs do not function as a substitute for direct appeal. 1
A. The Texas Constitution and the Texas Government Code grant some courts the ability to hear pretrial writs. 1
III. Writs of mandamus and prohibition are closely tied under the law. 1
A. When to file a writ of mandamus, a writ of prohibition, or both. 1
B. The relator must meet two prongs to show pretrial relief justified on a writ of mandamus or prohibition. 1
1. The court considers whether the relator has no adequate remedy at law. 2
2. The relator must show a clear right to relief or violation of a ministerial duty. 2
C. Filing the petition in the proper court and with the necessary support is required to have the matter heard. 4
1. Procedural pitfalls can eliminate the chances of having a petition heard and relief granted. 4
2. The practitioner must determine which appellate court has jurisdiction to hear the writ. 5
D. The courts have continued to expand upon our understanding of the discovery statutes through mandamus litigation. 6
1. Article 39.14 interpretations 6
2. Article 39.15 interpretations 8
3. Article 38.43 interpretations 8
4. Mandamus proceedings related to subpoenas 9
5. Monetary sanctions are *not* permissible against the State or defense for violations. 9
E. The court denied relief, now what? 10
F. Although mandamus or prohibition is not always the defense's final opportunity to argue the point, it is the State's, both parties should prepare and present accordingly. 11
IV. Pretrial writs of habeas corpus address allegations of illegal restraint. 11
A. Cognizability is key. 11
B. Succumbing to procedural pitfalls can prevent meaningful review. 12
C. Again, the practitioner must select the proper court in which to file a writ of habeas corpus. 13
D. Pretrial writs of habeas corpus may attack the constitutionality of a statute or be used to resolve bail matters. 13
1. Pretrial writs of habeas corpus may be used to resolve whether the State has lawful authority to prosecute the defendant for the offense alleged. 13
a. Pretrial writs of habeas corpus may be used to show the prosecution is time barred. 14
b. Double Jeopardy claims should be mounted in pretrial writs of habeas corpus. 15
c. A defendant may mount a facial challenge to the constitutionality of a statute through a pretrial writ of habeas corpus. 15
d. In very limited and unusual circumstances, a defendant may be able to mount an "as applied" constitutional challenge by pretrial writ of habeas corpus, but so far it has only worked once. 16
2. Pretrial habeas relief to resolve bail complaints. 18
a. A writ of habeas corpus may be used to require the trial court to set a bail when constitutionally required. 18
b. A writ of habeas corpus may be used along with a motion to lower bail to argue the bail set is excessive and oppressive. 19
E. When possible, it behooves the State to file a written answer to a pretrial writ of habeas corpus. 20
F. An applicant may directly appeal the denial of a pretrial writ of habeas corpus. 21
1. The appellate standards of review begin with cognizability, and proceed to abuse of discretion or de novo review, depending. 21
2. A pretrial writ of habeas corpus to set or lower bail becomes moot upon trial or conviction. 22
VI. Understanding pretrial writs serves the interests of justice for both the Defense and the State. 22

INDEX OF AUTHORITIES

Cases

Almanza v. State,
686 S.W.2d 157 (Tex. Crim. App. 1985) (op. on reh'g) 3
Bennet v. State,
818 S.W.2d 199 (Tex. App.-Houston
[14th Dist.] 1991, no pet.) 28, 29
Brady v. Maryland,
373 U.S. 83 (1963) 9
Brown v. Ohio,
432 U.S. 161 (1977) 19
Bynum v. State,
767 S.W.2d 769 (Tex. Crim. App. 1989) 21
Coleman v. State,
577 S.W.3d 623 (Tex. App.-Fort Worth 2019, no pet.) 10
DeLeon v. Aguilar,
127 S.W.3d 1 (Tex. Crim. App. 2004) (orig. proceeding) 1
Dickens v. Court of Appeals For Second Supreme Judicial Dist. of Texas,
727 S.W.2d 542 (Tex. Crim. App. 1987) 2, 6, 13
Diruzzo v. State,
581 S.W.3d 788 (Tex. Crim. App. 2019) 14
Dix v. State,
289 S.W.3d 333 (Tex. App.-Eastland 2009, pet. ref'd) 29
Druery v. State,
412 S.W.3d 523 (Tex. Crim. App. 2013) 15
Enard v. State,
513 S.W.3d 206 (Tex. App.-Houston
[14th Dist.] 2016, pet. re'd) 16
Evans v. State,
299 S.W.3d 138 (Tex. Crim. App. 2009) 19
Ex parte Ahmad,
498 S.W.3d 254 (Tex. App.-Houston
[14th Dist.] 2016, pet. ref'd) 14, 15
Ex parte Amador,
326 S.W.3d 202 (Tex. Crim. App. 2005) 19
Ex parte Arango,
518 S.W.3d 916 (Tex. App.-Houston
[1st Dist.] 2017, pet. ref'd) 14
Ex parte Barton,
No. PD-1123-19, __ S.W.3d __,
2022 WL 1021061 (Tex. Crim. App. Apr. 6, 2022) 18
Ex parte Branch,
553 S.W.2d 380 (Tex. Crim. App. 1977) 28
Ex parte Brosky,
863 S.W.2d 775 (Tex. App.-Fort Worth 1993, no pet.) 25
Ex parte Campozano,
610 S.W.3d 572 (Tex. App.-Dallas 2020, pet. ref'd) 18
Ex parte Carter,
514 S.W.3d 776 (Tex. App.-Austin 2017, pet. ref'd) 21, 22, 23
Ex parte Castellano,
321 S.W.3d 760 (Tex. App.-Fort Worth 2010, no pet.) 24
Ex parte Castillo-Lorente,
420 S.W.3d 884 (Tex. App.-Houston
[14th Dist.] 2014, no pet.) 25, 28

Ex parte Countryman,
226 S.W.3d 435 (Tex. Crim. App. 2007) 24
Ex parte Dickerson,
549 S.W.2d 202 (Tex. Crim. App. 1977) 18
Ex parte Doster,
303 S.W.3d 720 (Tex. Crim. App. 2010) 14, 15, 17
Ex parte Dupuy,
498 S.W.3d 220 (Tex. App.-Houston
[14th Dist.] 2016, no pet.) 26
Ex parte Edwards,
608 S.W.3d 325 (Tex. App-Houston
[1st Dist.] 2020), *rev'd by* No. PD-1092-20 (Tex. Crim. App. May 4, 2022) 18
Ex parte Edwards,
No. PD-1092-20, __ S.W.3d __ (Tex. Crim. App. May 4, 2022) 18
Ex parte Ellis,
309 S.W.3d 71 (Tex. Crim. App. 2010) 20, 21, 27, 28
Ex parte Flores,
483 S.W.3d 632 (Tex. App.-Houston
[14th Dist.] 2015, pet. ref'd) 17
Ex parte Gaither,
387 S.W.3d 643 (Tex. Crim. App. 2012) 17
Ex parte George,
913 S.W.2d 523 (Tex. Crim. App. 1995) 4
Ex parte Golden,
991 S.W.2d 859 (Tex. Crim. App. 1999) 15
Ex parte Gonzalez,
383 S.W.3d 160 (Tex. App.-San Antonio 2012, pet. ref'd) 25
Ex parte Guerrero,
99 S.W.3d 852 (Tex. App.-Houston [14th Dist.] 2003, no pet.) 29
Ex parte Irsan,
No. 01-16-00315-CR,
2017 WL 769896 (Tex. App.-Houston
[1st Dist.] Feb. 28, 2017, no pet. h.) (op. on reh'g)
(mem. op., not designated for publication) 29
Ex parte Jones,
No. 12-17-00346-CR, __ S.W.3d __,
2018 WL 2228888 (Tex. App.-Tyler May 16, 2018), rev'd by No. PD-0552-18 (Tex. Crim. App. May 26, 2021) 18
Ex parte Jones,
No. PD-0552-18 (Tex. Crim. App. May 26, 2021) (mem. op., not designated for publication) 18
Ex parte Lewis,
219 S.W.3d 335 (Tex. Crim. App. 2007) 20, 28
Ex parte Lo,
424 S.W.3d 10 (Tex. Crim. App. 2013) 17, 20, 28
Ex parte Macias,
541 S.W.3d 782 (Tex. Crim. App. 2017) 20
Ex parte Masonheimer,
220 S.W.3d 494 (Tex. Crim. App. 2007) 28
Ex parte McLendon,
356 S.W.3d 541 (Tex. App.-Texarkana 2011, no pet.) 25
Ex parte McNeil,
772 S.W.2d 488 (Tex. App-Houston
[1st Dist.] 1989, no pet.) 24
Ex parte Melartin,
464 S.W.3d 789 (Tex. App.-Houston
[14th Dist.] 2015, no pet.) 23, 28

Ex parte Morales,
416 S.W.3d 546 (Tex. App.-Houston
[14th Dist.] 2013, pet. ref'd) 20
Ex parte Nuncio,
No. PD-0478-19, __ S.W.3d __,
2022 WL 1021276 (Tex. Crim. App. Apr. 6, 2022) 20, 21
Ex parte Pace,
No. 03-20-00430-CR, 2021 WL 728168 (Tex. App.-Austin Feb. 25, 2021, no pet. h.)
(mem. op., not designated for publication) 25
Ex parte Paxton,
493 S.W.3d 292 (Tex. App.-Dallas 2016, pet. ref'd) 22, 23
Ex parte Perry,
483 S.W.3d 884 (Tex. Crim. App. 2016) 18, 20, 21, 22, 23, 27
Ex parte Peterson,
117 S.W.3d 804 (Tex. Crim. App. 2003) 28
Ex parte Pruitt,
233 S.W.3d 338 (Tex. Crim. App. 2007) 19
Ex parte Ragston,
402 S.W.3d 472 (Tex. App.-Houston
[14th Dist.] 2013),
aff'd by 424 S.W.3d 49 (Tex. Crim. App. 2014) 15, 23
Ex parte Robinson,
641 S.W.2d 552 (Tex. Crim. App. 1982) 2, 19
Ex parte Robles,
612 S.W.3d 142 (Tex. App-Houston [14th Dist.] 2020, no pet.) 26
Ex parte Rodriguez,
366 S.W.3d 291 (Tex. App.-Amarillo 2012, pet. ref'd) 19, 20
Ex parte Rubac,
611 S.W.2d 848 (Tex. Crim. App. 1981) 25, 26, 28
Ex parte Sanders,
No. PD-0469-19, __ S.W.3d __,
2022 WL 1021055 (Tex. Crim. App. Apr. 6, 2022) 18
Ex parte Scott,
122 S.W.3d 866 (Tex. App.-Fort Worth 2003, no pet.) 25
Ex parte Seidel,
39 S.W.3d 221 (Tex. Crim. App. 2001) 24
Ex parte Sellers,
516 S.W.2d 665 (Tex. Crim. App. 1974) 25
Ex parte Sheffield,
611 S.W.3d 630 (Tex. App.-Amarillo 2020, pet. filed) 17
Ex parte Smith,
178 S.W.3d 797 (Tex. Crim. App. 2005) 17, 18, 23, 27
Ex parte Smith,
185 S.W.3d 887 (Tex. Crim. App. 2006) 14
Ex parte Tamez,
38 S.W.3d 159 (Tex. Crim. App. 2001) 18, 22
Ex parte Thomas,
623 S.W.3d 370 (Tex. Crim. App. 2021) 14
Ex parte Tucker,
No. 03-20-00372-CR, 2020 WL 7776448 (Tex. App.—Austin Dec. 31, 2020, no pet.)
(mem. op., not designated for publication) 25
Ex parte Victorick,
453 S.W.3d 5 (Tex. App.-Beaumont 2014, pet. ref'd) 23
Ex parte Villanueva,
252 S.W.3d 391 (Tex. Crim. App. 2008) 16, 27
Ex parte Walsh,
530 S.W.3d 774 (Tex. App.-Fort Worth 2017, no pet.) 22

Ex parte Watson,
306 S.W.3d 259 (Tex. Crim. App. 2009) (op. on reh'g) 19
Ex parte Weise,
55 S.W.3d 617 (Tex. Crim. App. 2001) 1, 15, 17, 20
Ex parte Wheeler,
203 S.W.3d 317 (Tex. Crim. App. 2006) 20, 28
Ex parte Williams,
200 S.W.3d 819 (Tex. App.-Beaumont 2006, no pet.) 27
Ex parte Young,
257 S.W.3d 276 (Tex. App.-Beaumont 2008, no pet.) 27
Ex parte Zavala,
421 S.W.3d 227 (Tex. App.-San Antonio 2013, pet. ref'd) 15
FCC v. Fox Television Stations, Inc.,
567 U.S. 239 (2012) 21
Francis v. State,
428 S.W.3d 850 (Tex. Crim. App. 2014) 12
Garcia v. State,
541 S.W.3d 222 (Tex. App.-Houston
[14th Dist.] 2017), *rev'd on other grounds by* 614 S.W.3d 749 (Tex. Crim. App. 2019) 12
Garfias v. State,
424 S.W.3d 54 (Tex. Crim. App. 2014) 19
Gillenwaters v. State,
205 S.W.3d 534 (Tex. Crim. App. 2006) 21
Grayned v. City of Rockford,
408 U.S. 104 (1972) 21
Greenville v. State,
798 S.W.2d 361 (Tex. App.-Beaumont 1990, no pet.) 17
Greenwell v. Court of Appeals for the Thirteenth Judicial Dist.,
159 S.W.3d 645 (Tex. Crim. App. 2005) (orig. proceeding) 2, 16, 19, 27
Guzman v. State,
955 S.W.2d 85 (Tex. Crim. App. 1997) 28
Hall v. State,
225 S.W.3d 524 (Tex. Crim. App. 2007) 19
Hill v. State,
90 S.W.3d 308 (Tex. Crim. App. 2002) 19
Hubbard v. State,
841 S.W.2d 33 (Tex. App.-Houston
[14th Dist.] 1992, no pet.) 16
In re Fuller,
No. 11-14-00218-CR,
2014 WL 4348461 (Tex. App.-Eastland Aug. 29, 2014) (orig. proceeding)
(mem. op., not designated for publication) 5
In re Fuller,
No. WR-16,351-11,
2014 WL 6989137 (Tex. Crim. App. Dec. 10, 2014)
(mem. op., not designated for publication) 5
In re Garcia,
No. 02-20-00161-CV, 2020 WL 4907330 (Tex. App.-Fort Worth Aug. 20, 2020, orig. proceeding)
(mem. op. not designated for publication) 12
In re Harding,
563 S.W.3d 366 (Tex. App.-Texarkana 2018, orig. proceeding) 7
In re Harris,
491 S.W.3d 332 (Tex. Crim. App. 2016) 11
In re Henry,
525 S.W.3d 381 (Tex. App.-Houston
[14th Dist.] 2017, orig. proceeding) 5

In re Hon, No. 09-16-00301-CR,
2016 WL 6110797 (Tex. App.-Beaumont Oct. 19, 2016, orig. proceeding)
(mem. op., not designated for publication) 9
In re Layton,
257 S.W.3d 794 (Tex. App.-Amarillo 2008, orig. proceeding) 6
In re McAfee,
53 S.W.3d 715 (Tex. App.-Houston
[1st Dist.] 2001, orig. proceeding) 6, 8
In re McCann,
422 S.W.3d 701 (Tex. Crim. App. 2013) (orig. proceeding) 6, 8
In re Medina,
475 S.W.3d 291 (Tex. Crim. App. 2015) (orig. proceeding) 1, 2, 3
In re Meyer,
482 S.W.3d 706 (Tex. App.-Texarkana 2016) (orig. proceeding) 7
In re Molina,
94 S.W.3d 885 (Tex. App.-San Antonio 2003, orig. proceeding) 6
In re Moore,
615 S.W.3d 162 (Tex. App.-Austin 2019, orig. proceeding) 9, 13
In re Shaw,
204 S.W.3d 9 (Tex. App.-Texarkana 2006, pet. ref'd) 20
In re Solis-Gonzalez,
489 S.W.3d 459 (Tex. Crim. App. 2016) (orig. proceeding) 11
In re State ex rel. Mau v. Third Court of Appeals,
560 S.W.3d 640 (Tex. Crim. App. 2018) 5
In re State ex rel. Munk,
494 S.W.3d 370 (Tex. App.-Eastland 2015, orig. proceeding) 6, 8
In re State ex rel. Ogg,
610 S.W.3d 607 (Tex. App-Houston
[1st Dist.] 2020, orig. proceeding), *rev'd by* 618 S.W.3d 361
(Tex. Crim. App. 2021) (orig. proceeding) 4
In re State ex rel. Ogg,
618 S.W.3d 361 (Tex. Crim. App. 2021) (orig. proceeding) 4, 5, 13
In re State ex rel. Skurka,
512 S.W.3d 444 (Tex. App.-Corpus Christi 2016, orig. proceeding) 8, 13
In re State ex rel. Tharp,
393 S.W.3d 751 (Tex. Crim. App. 2012) (orig. proceeding) 3, 4, 5
In re State ex rel. Tharp,
WR-86,409-01, 2017 WL 4160990 (Tex. Crim. App. Sept. 20, 2017)
(orig. proceeding) (mem. op., not designated for publication) 10
In re State ex rel. Weeks,
391 S.W.3d 117 (Tex. Crim. App. 2013) (orig. proceeding) 3, 4, 5
In re State of Texas ex rel. Best,
616 S.W.3d 594 (Tex. Crim. App. 2021) (orig. proceeding) 6, 7, 8, 11
In re State,
605 S.W.3d 721 (Tex. App.-El Paso 2020, orig. proceeding) 11, 12
In re State,
No. 08-19-00151-CR, 2020 WL 5105215 (Tex. App.-El Paso Aug. 31. 2020, orig. proceeding)
(mem. op., not designated for publication). 10
In re the State of Texas,
No. 11-17-00322-CR,
2018 WL 576153 (Tex. App.-Eastland Jan. 19, 2018, orig. proceeding)
(mem. op., not designated for publication) 9
In re Yates,
193 S.W.3d 151 (Tex. App.-Houston
[1st Dist.] 2006) (orig. proceeding) 7
Jones v. State,
803 S.W.2d 712 (Tex. Crim. App. 1991) 24, 25

Long v. State,
931 S.W.2d 285 (Tex. Crim. App. 1996) 21
Martinez v. State,
826 S.W.2d 620 (Tex. Crim. App. 1992) 28
Metzger v. Sebek,
892 S.W.2d 20 (Tex. App.-Houston
[1st Dist.] 1994, writ denied) 6
Montalvo v. State,
315 S.W.3d 588 (Tex. App.-Houston
[1st Dist.] 2010, no pet.) 26, 28
Neuenschwander v. State, 784 S.W.2d 418 (Tex. Crim. App. 1990) 28
New York State Club Ass'n v. City of New York,
487 U.S. 1 (1988) 20
Padieu v. Court of Appeals of TX., Fifth Dist.,
392 S.W.3d 115 (Tex. Crim. App. 2013) 13
Padilla v. McDaniel,
122 S.W.3d 805 (Tex. Crim. App. 2003) 6
Pennsylvania v. Ritchie,
480 U.S. 39 (1987) 9
Pharris v. State,
165 S.W.3d 681 (Tex. Crim. App. 2005) 28
Pope v. State,
207 S.W.3d 352 (Tex. Crim. App. 2006) 8, 10
Powell v. Hocker,
516 S.W.3d 488 (Tex. Crim. App. 2017) (orig. proceeding) 7, 8
Rojas v. State,
404 S.W.2d 30 (Tex. Crim. App. 1966) 3
Ross v. State,
133 S.W.3d 618 (Tex. Crim. App. 2004) 8
Rouse v. State,
300 S.W.3d 754 (Tex. Crim. App. 2009) 15
Sandifer v. State,
233 S.W.3d 1 (Tex. App.-Houston
[1st Dist.] 2007, no pet.) 28
Saucedo v. State,
795 S.W.2d 8 (Tex. App.-Houston
[14th Dist.] 1990, no pet.) 29
Schroeder v. State,
307 S.W.3d 578 (Tex. App.-Beaumont 2010, pet. ref'd) 24
Simon v. Levario,
306 S.W.3d 318 (Tex. Crim. App. 2009) (orig. proceeding) 2, 3, 4
Skinner v. State,
484 S.W.3d 434 (Tex. Crim. App. 2016) 15
Smith v. Flack,
728 S.W.2d 784 (Tex. Crim. App. 1987) (orig. proceeding) 2
Smith v. Gohmert,
962 S.W.2d 590 (Tex. Crim. App. 1998) 14
Smith v. State,
829 S.W.2d 885 (Tex. App.-Houston
[1st Dist.] 1992, pet. ref'd) 25
State ex rel. Healey v. McMeans,
884 S.W.2d 772 (Tex. Crim. App. 1994) (orig. proceeding) 2
State ex rel. Lykos v. Fine,
330 S.W.3d 904 (Tex. Crim. App. 2011) (orig. proceeding) 1, 4, 6, 13, 20, 21
State ex rel. Rodriquez v. Onion,
741 S.W.2d 433 (Tex. Crim. App. 1987) 16

State ex rel. Rosenthal v. Poe,
98 S.W.3d 194 (Tex. Crim. App. 2003) 3
State ex rel. Wade v. Mays,
689 S.W.2d 893 (Tex. Crim. App. 1985) (orig. proceeding) 2, 3
State ex rel. Watkins v. Creuzot,
352 S.W.3d 493 (Tex. Crim. App. 2011) 4
State ex rel. Young v. Sixth Judicial Dist. Court of Appeals,
236 S.W.3d 207 (Tex. Crim. App. 2007) (orig. proceeding) 2, 3, 13
State v. Doyal,
589 S.W.2d 136 (Tex. Crim. App. 2019) 21
State v. Holcombe,
187 S.W.3d 496 (Tex. Crim. App. 2006) 21
State v. Patrick,
86 S.W.3d 592 (Tex. Crim. App. 2002) 3
State v. Rosseau,
396 S.W.3d 550 (Tex. Crim. App. 2013) 20
Stoner v. Massey,
586 S.W.2d 843 (Tex. 1979) 6
Thomas v. State,
837 S.W.2d 106 (Tex. Crim. App. 1992) 9
United States v. Nixon,
418 U.S. 683 (1974) 9
United States v. Williams,
553 U.S. 285 (2008) 21
Vill. Of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,
455 U.S. 489 (1982) 21
Wagner v. State,
539 S.W.3d 298 (Tex. Crim. App. 2018) 21
Walker v. Packer,
827 S.W.2d 833 (Tex. 1992) 5
Walker v. State,
629 S.W.2d 199 (Tex. App.-Corpus Christi 1982, pet. dism'd) 23
Watkins v. State,
619 S.W.3d 265 (Tex. Crim. App. 2021) 9

Statutes

TEX. CODE CRIM. P. art. 1.14(b)
(West 2017) 13
TEX. CODE CRIM. P. art. 11.01
(West 2015) 12
TEX. CODE CRIM. P. art. 11.05
(West 2011) 1, 13
TEX. CODE CRIM. P. art. 11.08
(West 2015) 13
TEX. CODE CRIM. P. art. 11.09
(West 2015) 13
TEX. CODE CRIM. P. art. 11.12
(West 2015) 12
TEX. CODE CRIM. P. art. 11.13
(West 2015) 12
TEX. CODE CRIM. P. art. 11.15
(West 2015) 12, 20
TEX. CODE CRIM. P. art. 11.22
(West 2015) 12
TEX. CODE CRIM. P. art. 11.24
(West 2022) 18

TEX. CODE CRIM. P. art. 17.15 (West 1977) 17, 18, 19
TEX. CODE CRIM. P. art. 17.151
(West 2015) 18
TEX. CODE CRIM. P. art. 17.152
(West 2015) 18
TEX. CODE CRIM. P. art. 17.153
(West 2015) 18
TEX. CODE CRIM. P. art. 38.43(l)
(West Supp. 2015) 8
TEX. CODE CRIM. P. art. 39.14
(West 2014) 6
TEX. CODE CRIM. P. arts. 11.06
(West 2015) 13
TEX. CODE CRIM. P. arts. 11.23
(West 2015) 12
TEX. CODE CRIM. P. arts. 11.24
(West 2015) 12
TEX. CODE CRIM. PROC. ANN. art. 1.13
(West 2020) 4
TEX. CODE CRIM. PROC. ANN. art. 16.16
(West 2019) 20
TEX. CODE CRIM. PROC. ANN. art. 24.01
(West 2020) 9
TEX. CODE CRIM. PROC. ANN. art. 24.02
(West 2020) 9
TEX. CODE CRIM. PROC. ANN. art. 32.01
(West 2022) 18
Tex. Code Crim. Proc. Ann. art. 38.43
(West 2020) 8
TEX. CODE CRIM. PROC. ANN. art. 39.14
(West 2020) 6, 7, 8, 9, 10
TEX. CODE CRIM. PROC. ANN. art. 39.15
(West 2020) 8, 10
TEX. CRIM. PROC. CODE ANN. art. 44.01
(West 2016) 11
TEX. FAM. CODE ANN. §58.007
(West 2016) 7
TEX. GOV'T CODE ANN. §21.001
(West 2020) 10
TEX. GOV'T CODE ANN. §21.009
(West 2011) 5
TEX. GOV'T CODE ANN. §22.0035
(West 2020) 4
TEX. GOV'T CODE ANN. §22.221
(West 2015) 1, 5
TEX. GOV'T CODE ANN. §22.221
(West 2019) 5
TEX. PEN. CODE ANN. §46.02(a-1)(2)(C)
(West 2014) 13
TEX. PEN. CODE ANN. §71.01(d)
(West 2014) 13
TEX. PENAL CODE ANN. §33.021(b)
(West 2011) 14
Tex. Penal Code Ann. §43.261
(West 2020) 8

Other Authorities

Act of Apr. 19, 2017,
85th Leg., R.S., ch. 740, §1,
2017 Tex. Sess. Law Serv. Ch. 740 (S.B. 1233) 5
Act of Sept. 17, 2021,
87th Leg., 2nd C.S., ch. 11 (S.B. 6), §10(a) (effective Dec. 2, 2021) 18

Rules

TEX. R. APP. P. 33.1 11
TEX. R. APP. P. 31 1
TEX. R. APP. P. 52 ..... 1, 4, 5
TEX. R. APP. P. 52.3(k) 4, 11
TEX. R. APP. P. 52.7 ..... 4, 11
TEX. R. APP. P. 52.7(a) 4
TEX. R. APP. P. 72 ..... 1, 4, 5, 10
TEX. R. APP. P. 77.3 8
TEX. R. EVID. 101(e)(3)(C) 19
TEX. R. EVID. 501 19
TEX. R. EVID. 503(b)(1) 6
TEX. R. EVID. 513 19

Treatises

BRYAN GARNER, BLACK'S LAW DICTIONARY, 1845
(11th ed. 2019) 1
John Stride,
Expediting Pretrial Habeas Writs,
The Prosecutor
(July-August 2011, Vol. 41, No. 4),
http://www.tdcaa.com/journal/expediting-pretrial-habeas-writs
(last viewed Apr. 18, 2022) 20
John Stride,
Expediting Pretrial Habeas Writs,
The Prosecutor
(July-August 2011, Vol. 41, No. 4),
http://www.tdcaa.com/journal/expediting-pretrial-habeas-writs
(last viewed Arp. 18, 2022) 20

Constitutional Provisions

TEX. CONST. art. I, §11 18
TEX. CONST. art. I, §11a 18
TEX. CONST. art. I, §11b 18
TEX. CONST. art. I, §11c 18
TEX. CONST. ART. I, §12 ..... 1, 12
TEX. CONST. art. I, §13 ..... 18, 19
TEX. CONST. ART. V, §5(c) 1, 13
U.S. CONST. AMEND. V. 14
U.S. CONST. AMEND. VIII 18

I. This article assists practitioners in pretrial criminal practices.

This paper functions as a guide to filing and responding to pretrial writs of mandamus, prohibition, and habeas corpus. It addresses when to file a motion versus a pretrial writ, the legal standards, and when courts permit appellate review pretrial, along with preservation requirements for direct appeal.

II. Pretrial writs do not function as a substitute for direct appeal.

Writs of mandamus, prohibition, and habeas corpus are considered extraordinary writs. BRYAN GARNER, BLACK'S LAW DICTIONARY, 1845 (11th ed. 2019) ("extraordinary writ"). Particularly in the pretrial context, they request extraordinary judicial relief that when granted, results from the unique or extreme circumstances of the situation. *See DeLeon v. Aguilar*, 127 S.W.3d 1 (Tex. Crim. App. 2004) (orig. proceeding). They do not act as a substitute for a post-conviction appeal, but instead they seek to provide relief to the proponent from a wrongful act by anticipating and superseding the ordinary course of legal procedure. *See In re Medina*, 475 S.W.3d 291, 305 (Tex. Crim. App. 2015) (orig. proceeding) (stating that mandamus or prohibition are not a substitute for appeal); *Ex parte Weise*, 55 S.W.3d 617, 620 (Tex. Crim. App. 2001) ("Pretrial habeas should be reserved for situations in which the protection of the applicant's substantive rights or the conservation of judicial resources would be better served by interlocutory review.").

A. The Texas Constitution and the Texas Government Code grant some courts the ability to hear pretrial writs.

Trial and appellate courts have the authority to issue these writs based primarily on the Texas Constitution and Texas Government Code, but the Texas Code of Criminal Procedure and the Texas Rules of Appellate Procedure govern the procedural aspects of the claims. *See* TEX. CONST. ART. I, §12 (governing writs of habeas corpus); TEX. CONST. ART. V, §5(c) (authorizing the Court of Criminal Appeals to issue writs of habeas corpus, mandamus, procedendo, prohibition and certiorari); TEX. GOV'T CODE ANN. §22.221 (West 2019) (granting district, county, and court of appeals judges the jurisdiction to issue writs necessary to enforce the court's own jurisdiction, expressly permitting courts of appeals to issue writs of mandamus "agreeable to the principles of law regulating those writs" against district and county courts, and giving courts of appeals concurrent authority to issue writs of habeas corpus in civil cases); TEX. CODE CRIM. P. art. 11.05 (West 2011) (authorizing the Court of Criminal Appeals, District Courts, the County Courts, and any judges of said courts the power to issue a writ of habeas corpus and a duty to grant it under the rules prescribed by law); TEX. R. APP. P. 31 (entitled "Appeals in Habeas Corpus, Bail and Extradition Proceedings in Criminal Cases"); TEX. R. APP. P. 52 (entitled "Original Proceedings in the Courts of Appeals" which govern mandamus and prohibition); TEX. R. APP. P. 72 (entitled "Extraordinary Matters" with rules governing writs of habeas corpus, mandamus and prohibition or other extraordinary writs before the Court of Criminal Appeals).

III. Writs of mandamus and prohibition are closely tied under the law.

A. When to file a writ of mandamus, a writ of prohibition, or both.

There is a distinction between writs of mandamus and writs of prohibition. Depending on where filed, there may be times and situations that call for filing both types of writs. *See State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 907 (Tex. Crim. App. 2011) (orig. proceeding) (conditionally granting State's motion for writ of mandamus and writ of prohibition). A writ of mandamus operates to undo an act already performed or to compel a ministerial act. *See Medina*, 475 S.W.3d at 297 (defining the difference between writs of mandamus and prohibition). A writ of prohibition, on the other hand, operates to prevent the commission of a future act unauthorized by law. *See Medina*, 475 S.W.3d at 297. There are occasions when the trial court has already committed an unauthorized act and seeks to commit another, thereby necessitating a writ of mandamus and prohibition. *See Lykos*, 330 S.W.3d at 907 (conditionally granting relief on mandamus and prohibition when the trial court was in the process of holding a pretrial hearing to determine the constitutionality of an as-applied challenge to the death penalty because the trial court had no basis under Texas law to conduct a pretrial evidentiary hearing on that matter or to issue a pretrial declaratory judgment). Because mandamus and prohibition are similarly used, the tests and standards are essentially indistinguishable.

However, which courts can hear which type of writ differs. Article V, Section 5 gives the Court of Criminal Appeals extensive jurisdiction over writs of mandamus, procedendo, prohibition, and certiorari in all criminal law matters. *See Dickens v. Court of Appeals for Second Supreme Judicial Dist. of Texas*, 727 S.W.2d 542, 545 (Tex. Crim. App. 1987) (citing TEX. CONST. Art. V, §5). The intermediate appellate courts, though, have more limited jurisdiction. Their jurisdiction to issue writs derives from Texas Government Code Section 22.221, which grants them the ability to issue writs of mandamus "agreeable to the principles of law", but restricts writs of prohibition to those "necessary to enforce the jurisdiction of the court."

B. The relator must meet two prongs to show pretrial relief justified on a writ of mandamus or prohibition.

To obtain extraordinary relief by way of mandamus or prohibition, the relator must establish both that he has no adequate remedy at law and that the act he seeks to have done, undone, or prohibited is not a discretionary one. *Simon v. Levario*, 306 S.W.3d 318, 320 (Tex. Crim. App. 2009) (orig. proceeding). The petitioner must establish both prongs

for the reviewing court to grant mandamus or prohibition relief. *See id*. This is because mandamus and prohibition do not lie to compel a trial court to issue a particular ruling when it exercises its judicial discretion. *See id*. at 321. Therefore, the law upon which the petitioner invokes relief must be "definite, unambiguous, and unquestionably apply[ ] to the indisputable facts of the case." *See id*. (quoting *State ex rel. Wade v. Mays*, 689 S.W.2d 893, 898 (Tex. Crim. App. 1985) (orig. proceeding)).

1. The court considers whether the relator has no adequate remedy at law.

First, the reviewing court looks to whether an adequate remedy at law exists outside of mandamus or prohibition. *See Medina*, 475 S.W.3d at 297 (citing *State ex rel. Young v. Sixth Judicial Dist. Court of Appeals*, 236 S.W.3d 207, 210 (Tex. Crim. App. 2007) (orig. proceeding)). Writs of mandamus and prohibition are not a substitute for direct appeal, and a relator may not use them to circumvent or prematurely resolve issues that courts would otherwise consider on direct appeal. *See In re Medina*, 475 S.W.3d 291, 308 (Tex. Crim. App. 2015) (orig. proceeding) (citing *State ex rel. Healey v. McMeans*, 884 S.W.2d 772, 774 (Tex. Crim. App. 1994) (orig. proceeding)).

Yet, there are exceptions to every rule, and the Court of Criminal Appeals carved out such an exception in *Smith v. Flack* that it later reiterated in *Greenwell v. Court of Appeals for the Thirteenth Judicial District*. *Smith v. Flack*, 728 S.W.2d 784, 792 (Tex. Crim. App. 1987) (orig. proceeding); *see also Greenwell v. Court of Appeals for the Thirteenth Judicial Dist*., 159 S.W.3d 645, 648-9 (Tex. Crim. App. 2005) (orig. proceeding). In some circumstances, even if the legal remedy may be technically available on direct appeal, the results may be "so uncertain, tedious, burdensome, slow, inconvenient, inappropriate or ineffective as to be deemed inadequate." *See Smith*, 728 S.W.2d at 792. Thus, the test developed from "no remedy at law" to "no ***adequate*** remedy." *See Smith*, 728 S.W.2d at 792; *see also Greenwell*, 159 S.W.3d at 648-9. When no adequate remedy at law exists, the first prong may be met. *See id*.

The Court of Criminal Appeals noted that "potential review at a later time is not always or automatically an adequate remedy[.]" *Greenwell*, 159 S.W.3d at 648. Eventual relief through direct appeal may be inadequate when delay would only aggravate the harm, would most likely result in a new trial, and thus would compel a second trip through the justice system. *See id*. at 649 (citing *Ex parte Robinson*, 641 S.W.2d 552, 555 (Tex. Crim. App. 1982)) (equating mandamus relief with pretrial habeas on double jeopardy grounds because the court of appeals' order to the trial court to issue a certification of the right to appeal with a particular, and according the trial judge inaccurate, reason necessitated mandamus relief for the State to avoid needless delay through the appellate process before dismissal of the appeal inevitably occurred).

Showing no adequate remedy by appeal is often easier to establish from the State's perspective, rather than from the defendant's. The State's limited ability to appeal often disposes of the first prong of the test; whereas, the defendant is far more likely to have a direct appeal on issues occurring before and during the trial. *Compare In re State ex rel. Tharp*, 393 S.W.3d 751, 754 (Tex. Crim. App. 2012) (orig. proceeding) (finding that the State had no adequate remedy at law when the trial court denied it a right to a jury trial after the defendant pled guilty and elected sentencing by the judge); *In re State ex rel. Weeks*, 391 S.W.3d 117, 119 (Tex. Crim. App. 2013) (orig. proceeding) (finding that the State had no adequate remedy at law when the trial court inserted a manner-and-means exclusion in the parties charge of the jury instructions). Whereas, for issues like jury charge error and failure to give the defendant a jury trial when he timely demanded one, the defendant may have an adequate remedy post-conviction. *See Rojas v. State*, 404 S.W.2d 30, 31 (Tex. Crim. App. 1966) (reversing and remanding because of the trial court's refusal to submit a punishment question to the jury when the defendant had not waived that right); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g) (holding a new trial may be granted even on unobjected-to jury charge error when appellant shows egregious harm resulted).

2. The relator must show a clear right to relief or violation of a ministerial duty.

The second prong of the mandamus/prohibition analysis asks whether the act that the relator seeks to have done, undone, or prohibited is a ministerial one. *See In re State ex rel. Weeks*, 391 S.W.3d 117, 122 (Tex. Crim. App. 2013); *Simon v. Levario*, 306 S.W.3d 318, 320 (Tex. Crim. App. 2009). In other words, the act the petitioner seeks to compel or prohibit must not involve any discretionary or judicial decisions, otherwise mandamus and prohibition are not viable remedies. *See Simon*, 306 S.W.3d at 320 (holding the issue of whether the trial court could order the defendant to undergo a psychiatric evaluation was an unsettled legal question, and thus was not subject to the extraordinary remedy of prohibition).

Yet, Court of Criminal Appeals' precedent often considers synonymous a violation of a "ministerial duty" with whether the relator can demonstrate "a clear right to the relief sought." *See Weeks*, 391 S.W.3d at 122 ("Although no case specifically holds that the State need not prove that the defendant should have anticipated the particular method by which a murder was committed to show liability under § 7.02(b) in a capital-murder case, the combined weight of our precedents clearly establishes that proposition."); *see also Simon*, 306 S.W.3d at 320 ("[The Court of Criminal Appeals] ha[s] said that it is satisfied if the relator can show he has 'a clear right to the relief sought'—that is to say, '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.") (*quoting State ex rel. Wade v.*

Title search: Pretrial Writs

Also available as part of the eCourse
2022 Robert O. Dawson eConference on Criminal Appeals

First appeared as part of the conference materials for the
2022 Robert O. Dawson Conference on Criminal Appeals session
"Pretrial Writs"