

PRESENTED AT

The 2023 Dawson Conference on Criminal Appeals

May 10-12, 2023

Austin, Texas

Appellate Practice 101

Britt Houston Lindsey and Hon. Jeff Propst

Author Contact Information:

Britt Houston Lindsey
Taylor County CDA Office
Abilene, Texas

Britt.Lindsey@taylorcounty.texas.gov
(325) 674-1360

TABLE OF CONTENTS

I. Introduction 1

II. Pre-trial Habeas Corpus 2

III. Motion for New Trial 3

IV. Perfecting Appeal and Other Deadlines 7

V. Technical Requisites for Briefs11

VI. Substantive Considerations for Briefs17

 A. Preservation of Error.....18

 B. Harm Analysis21

VII. Opinions, Rehearing, and Mandate28

VIII. Petitions for Discretionary Review32

IX. Conclusion.....34

I. Introduction

There comes a moment in each appellate practitioner's career where they say to themselves "oh, crap, I agreed to present at a conference and now I have to write a paper."

When Judge Propst and I agreed to present "Appellate 101," I was daunted because the topic is so broad. The more I ruminated on it, though, the more the idea coalesced and the more excited I became. When asked to submit a topic description I hit upon a quote by Michael Jordan: "Get the fundamentals down and the level of everything will rise." Mastery always comes back to fundamentals. The founder of Shotokan Karate, Gichin Funakoshi, was asked at the age of eighty to teach at a seminar. He astounded those present by warming up with a basic block taught to first day students, saying "I am finally beginning to understand this technique." If you want to be a top-ranked boxer, practice your jab.

Focusing and refocusing on the fundamentals has a number of benefits: it makes a good appellate practitioner better, and it helps to demystify the criminal appellate practice for the newly initiated. Criminal appellate law can look like a terrifying journey into minutiae, and I've seen newer attorneys frozen to incapacitation at the prospect of appealing an intimidating case with a lengthy record. By backing away from that a bit and refocusing on the fundamentals of the practice, that intimidating record looks manageable and you see that your task is within your capabilities. You can do this.

I also thought about how the criminal appellate board certification exam basically tests the fundamentals, and that when I was studying for the exam there was very little in the way of study guides or materials. I compiled lengthy notes of my own, and much of what I've written here is taken from those notes, cleaned up and made readable. It's not everything one will need for that exam but it's a good chunk of it.

II. Pre-trial Habeas Corpus ¹

Pretrial habeas is a separate and distinct proceeding from the main criminal action, and its purpose is different. ² Habeas corpus is by definition an extraordinary writ in which the restraint of one's liberty is challenged as illegal. ³ While most pretrial rulings are not immediately appealable, a ruling on a written application for pretrial habeas corpus may be appealed by perfecting with a written notice of appeal within 30 days of the date the appealable order is entered,⁴ so long as the issue is cognizable on pretrial habeas. The Court of Criminal Appeals has permitted pretrial writs for:

- double jeopardy; ⁵
- excessive bail; ⁶
- statute of limitations as a bar to prosecution **if** established by the face of an indictment that would not be subject to repair; ⁷
- facial constitutional challenges to the validity of a statute (i.e., vague in all applications); ⁸
- as-applied separation of powers claim that alleged the infringement of a government official's own power as a government official. ⁹

¹ John Stride's article "Expediting Pretrial Habeas Writs" in the July-August 2011 issue of the Texas Prosecutor was an invaluable resource in this section, as well as when I was studying for my board certification exam.

² *Saucedo v. State*, 795 S.W.2d 8, 9 (Tex. App.--Houston [14th Dist.] 1990, no pet.); *Green v. State*, 999 S.W.2d 474, 477 (Tex. App.—Fort Worth 1999, pet. ref'd)

³ *Green*, 999 S.W.2d at 477.

⁴ Tex. R. App. P. 26.2(a)(1).

⁵ *Ex parte Robinson*, 641 S.W.2d 552 (Tex. Crim. App. 1982).

⁶ *Ex parte Keller*, 595 S.W.2d 531, 532-33 (Tex. Crim. App. 1980).

⁷ *Ex parte Dickerson*, 549 S.W.2d 202, 203 (Tex. Crim. App. 1977); *Ex parte Weise*, 55 S.W.3d 617, 620 (Tex. Crim. App. 2001).

⁸ *Ex parte Weise*, 55 S.W.3d at 620.

⁹ *Ex parte Perry*, 483 S.W.3d 884 (Tex. Crim. App. 2016). *Ex Parte Perry* is notable for being the only Court of Criminal Appeals case to date to quote Omar Little from "The Wire." See *Perry* at 922 ("Come at the king, you best not miss.") (Newell, J., concurring).

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Appellate Practice 101

Also available as part of the eCourse

[Hooked on CLE: October 2023](#)

First appeared as part of the conference materials for the
2023 Robert O. Dawson Conference on Criminal Appeals session
"Appellate Practice 101"