

**CATCH AND RELEASE: THE SPORT OF CONTEMPT**  
(Representing the Contemnor)

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I.  
**Trial Counsel Tips**

A. Representing Movant at trial level.

1. Be prepared to win.

a. Necessity of having proper motion. TEX. FAM. CODE ' 157.002 specifically tells you what must be included in Motion for Contempt.

b. Proper judgment of contempt. TEX. FAM. CODE ' 157.166 contains mandatory provisions of enforcement order. If seeking incarceration or fine must set out or incorporate by reference the provisions of the order being enforced and the date of each occasion when the order was violated.

c. Proper commitment order. Must have commitment language in separate order or as part of the judgment of contempt. *Ex parte Culp*, 816 S.W.2d 564 (Tex.App.-Houston [14th Dist.] 1991, orig. proceeding); *Ex parte Sinclair*, 746 S.W.2d 956 (Tex.App.-Houston [14th Dist.] 1988, orig. proceeding).

d. If incarceration is granted, must prepare contempt and commitment orders quickly, i.e. within hours on same day of hearing. *Ex parte Amaya Calvillo*, 748 S.W.2d 224 (Tex. 1988).

B. Representing contemnor at trial level.

1. Be prepared to lose.

a. Write out in detail and file all defensive and dilatory motions, e.g. motions for continuance, pleas to jurisdiction, plea in abatement, special exceptions, etc.

b. Have orders prepared denying defensive and dilatory pleas if you think such a denial gives rise to a potential due process challenge. Example: Suppose your client is facing serious charges, i.e. more than 6 months in jail and more than

\$500.00 in fines. Prepare a written request for jury and an order denying same. If the court denies your request for jury and assesses punishment in excess of 6 months or a fine in excess of \$500.00, you will only need to provide the easily obtainable certified copies of your motion and order without having to go to the time and expense of having the court reporter prepare the entire statement of facts to show that contemnor did not waive right to trial by jury.

c. Have proof of restraint letter ready to be signed by court's bailiff so no delay in waiting for contemnor to be checked into jail.

d. Have cash available for bond or bondsman prepared to post.

2. Forewarn your client.

a. 6 hours to check into jail.

b. No clocks in jail.

c. You will not accept collect calls from jail every 20 minutes (each call currently costs \$4.00 to \$5.00).

d. 8 hours to check out of jail.

4. Know your jailer.

a. Know where to get your proof of restraint from the sheriff.

b. Know what is needed from sheriff for release. (Harris County Sheriff has history of not accepting copy of habeas order faxed to him by Clerk of Supreme Court, thus requiring delivery of original from Austin.)

5. Once you have filed your petition, let the clerk know where you are at all times. On more than one occasion this practitioner has gotten word at 4:55 p.m. on a Friday that habeas relief has been granted which means you have to pick up your writ pronto before the clerk's office closes if you want your client released for the weekend.

II.  
**The Contempt Sentence - Criminal or Civil**

A. **Criminal Contempt** - The punishment assessed is for a fixed period of time, e.g. 30 days. "The sentence is not conditioned upon some promise of future performance because the contemnor is being punished for some completed act which affronted the dignity and authority of the court." *Ex parte Werblud*, 536 S.W.2d 542, 545 (Tex. 1976).

B. **Civil Contempt** (also known as **Coercive Contempt**) - The punishment assessed is not for a specific time period but rather until certain remedial measures have been performed by the contemnor, e.g. stay in jail until child support arrearage is repaid. "Civil contempt exerts the judicial authority of the Court to persuade the contemnor to obey some order of the court where such obedience will benefit an opposing litigant. Imprisonment is conditional upon disobedience and therefore, the civil contemnor 'carries the keys of prison in his own pocket'." *Ex parte Werblud*, 536 S.W.2d 542, 545 (Tex. 1976).

C. Combination of Criminal and Civil Contempt Sentence - e.g. Contemnor sentenced to 3 days in county jail and to remain there afterwards day to day until Contemnor pays child support arrearage.

**HABEAS CORPUS RELIEF AT APPELLATE LEVEL**

III.  
**Jurisdiction to grant writs.**

A. Granted to the Court of Criminal Appeals pursuant to *Texas Constitution, Article V, '5*

1. Subject to such regulations as may be prescribed by law, the Court of Criminal Appeals and the Judges thereof shall have the power to issue the writ of habeas corpus.

B. Granted to the Supreme Court pursuant to *Texas Constitution, Article V, '3.*

1. The Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law.

C. Granted to the Supreme Court pursuant to TEX. GOV. CODE ' 22.002(e).

1. The Supreme Court or a Justice of the Supreme Court, either in term time or vacation, may issue a writ of habeas corpus when a person is restrained in his liberty by virtue of an order, process or commitment issued by a court or Judge on account of the violation of an order, judgment or decree previously made, rendered or entered by the Court or Judge in a civil case.

2. Pending the hearing of an application for writ of habeas corpus, the supreme court or a justice of the supreme court may admit to bail a person to whom the writ of habeas corpus may be so granted.

D. Granted to the Courts of Appeal pursuant to TEX. GOV. CODE ' 22.221(d).

1. Concurrently with the supreme court the court of appeals of a court of appeals district in which a person is restrained in his liberty, or a justice of the court of appeals, may issue a writ of habeas corpus when it appears that the restraint of liberty is by virtue of an order, process, or commitment issued by a court or judge because of the violation of an order, judgment, or decree previously made, rendered, or entered by the court or judge in a civil case.

2. Pending the hearing of an application for writ of habeas corpus, the court of appeals or a justice of the court of appeals may admit to bail a person to whom the writ of habeas corpus may be granted.

E. Concurrent Jurisdiction.

1. When the Supreme Court and one or more courts of appeal are authorized to exercise concurrent jurisdiction over matters of habeas corpus, the petition seeking issuance of the writ shall first be presented to a court of appeals. T.R.A.P. 52.3(e).

2. A petition for habeas corpus filed in the Supreme Court shall state the date of any presentation to a court of appeals and that court's action on the petition. T.R.A.P. 52.3(d)(5)(A)-(E).

#### IV.

### **Procedural Steps for Obtaining Habeas Relief.**

#### A. Nature of Remedy.

1. Order of contempt not subject to review by regular appeal. *Norman v. Norman*, 692 S.W.2d 655 (Tex. 1985); *Wagner v. Warnasch*, 295 S.W.2d 890, 893 (Tex. 1956).

2. Habeas corpus is a collateral attack on commitment order.

3. "In order for a court of appeals to release a contemnor, the trial court's order of commitment must be void, either because it was beyond the power of the court or because it deprived the Relator of his liberty without due process of law." *Ex parte Barnett*, 600 S.W.2d 252, 254 (Tex. 1980).

4. If trial court does not grant incarceration, but does order fine, contemnor's remedy is not habeas corpus but rather a writ of mandamus. *Rosser v. Squier*, 902 S.W.2d 962 (Tex. 1995).

#### B. Representing Contemnor on indirect or constructive contempt; whether punishment is civil, criminal or both.

1. Contents of petition. T.R.A.P. 52.3.

a. Party seeking habeas corpus relief denominated "Relator".

b. Identify all parties and persons affected. List names and addresses of all parties, their counsel of record and the trial judge.

c. Certificate of service on all interested parties.

d. "The petition must state concisely and without argument facts pertinent to the issues or points presented. The statement must be supported by references to the appendix or record." T.R.A.P. 52.3(g).

(i) A time/date chronology with references to your exhibits and any statement of facts may be appropriate.

(ii) This is not the place for a jury argument. As old Sergeant Friday says in *Dragnet*, "Just the facts, ma'am".

e. Brief must be in 13 point type or larger, double spaced with one inch margins and is limited to 50 pages at the Court of Appeals level and 15 pages at the Supreme Court level. T.R.A.P. 9.4(e) and T.R.A.P. 52.6.

f. Request oral argument when you file your Brief.

g. Proof of restraint. Usually a letter signed by the sheriff showing present incarceration. (See sample form attached hereto as Appendix "A"). "A mere judgment of contempt will not justify the granting of a writ of habeas corpus. There must be some character of restraint." *Ex parte Calhoun*, 91 S.W.2d 1047, 1048 (Tex. 1936). Probation which contains provisions for actually reporting to a probation officer has been held as sufficient restraint of liberty short of actual imprisonment on which habeas relief may be granted. *Ex parte Duncan*, 796 S.W.2d 562, 564 (Tex.App.-Houston [1st Dist. 1990] orig. proceeding); *Ex parte Conner*, 746 S.W.2d 527 (Tex.App.-Beaumont 1988, orig. proceeding). If the terms of probation do not restrain the contemnor's liberty, the contemnor is not entitled to habeas relief, e.g. sentence probated providing contemnor pays a fine and/or attorney's fees. *Ex parte Sealy*, 870 S.W.2d 663, 665-666 (Tex.App.-Houston [1st Dist.] 1994, orig. proceeding).

h. Appendices usually include certified or true and correct copy of:

(i) Order which contemnor allegedly violated

(ii) Motion for contempt

(iii) Judgment of contempt; and

(iv) Order of commitment.

i. Statement of Facts. Not always necessary if you can show that order of commitment is void on its face. Even if statement of facts will be helpful, you can file Petition and Brief with the Court of Appeals and seek immediate release conditioned on posting of a bond and request additional time in which to get court reporter to prepare statement of facts.

j. Prayer. Not specifically mentioned in the Rules but certainly assumed anytime you are required to file a "petition". Besides asking for unconditional release, it is best to specifically ask for immediate release conditioned on posting of a bond. No need to ask for expedited or emergency treatment as all habeas corpus proceedings are automatically treated as an emergency.

k. Verification of petition is mandatory. Rules require "all factual statements in the petition must be verified by affidavit made on personal knowledge by an affiant competent to testify to the matters stated." T.R.A.P. 52.3.

2. Where to File. Initially file directly with clerk of Court of Appeals. The filing fee is \$75.00 and the Houston courts of appeal require the original and 4 copies of your Petition and Brief. You only need to supply one set of exhibits though it is helpful if you can supply more copies so more than one member of the court can be looking at your exhibits at any given time.

3. Petition Without Merit. If Court of Appeals feels that habeas petition is without merit, the Court will issue one line order summarily denying relief without writing an opinion or other explanation of why the relief is being denied. Relator's only recourse is to file a Motion for Rehearing with the Court of Appeals or go directly to the Supreme Court to start the process anew.

4. Petition with Tentative Merit. If the Court of Appeals tentatively feels that habeas petition has merit, Court will issue order releasing contemnor conditioned on the posting of a cash bond (usually \$500 to \$1,000) to be posted with the sheriff in

the same manner as bail would be made for an individual charged with a criminal offense. Also, at that time the Court will require payment of an additional filing fee of \$30.00 and set the time for other interested parties to file a response brief (usually not more than 10 days) and schedule oral argument (usually for the week following the filing of the response brief).

5. Oral Argument. Argument is discretionary with the Court. When allowed, Relator's counsel is usually allotted 10 minutes to argue followed by 15 minutes for counsel for the real party with an additional 5 minutes given to Relator's counsel for the purpose of rebuttal.

6. Opinion. Usually 4 to 7 weeks after oral argument the Court will issue a written opinion and conclude either:

a. Relator is entitled to unconditional release and the surety is released from all obligations arising out of the bond previously posted to gain Relator's conditional release; or

b. Relator's relief is denied and Relator's bond is revoked and Relator is remanded back to the custody of the sheriff.

7. When Remanded to Custody. If the Court of Appeals has previously set Relator free on bond but subsequently denies habeas relief, Court of Appeals must issue *capias* in order to have Relator returned to jail. The trial court is without jurisdiction to revoke or forfeit bond set by Court of Appeals because once Court of Appeals sets bonds and conditionally grants habeas relief, Court of Appeals has exclusive jurisdiction over Relator. *Ex parte Barnett*, 600 S.W.2d 252, 256-257 (Tex. 1980, orig. proceeding).

"Once the writ of habeas corpus was granted by this [appellate] court and delivered to the restraining officer, the applicant was no longer held under the original commitment, but under the direction and authority of this court or the judge issuing the writ. Thereafter, no valid order could be entered in the matter by the court making the original commitment, since this [appellate] court had obtained jurisdiction of the prisoner by

proceedings in habeas corpus." *Ex parte Spencer*, 508 S.W.2d 698, 700 (Tex.Civ.App.-Texarkana, 1974 orig. proceeding).

Must have *capias* as the sheriff will not reincarcerate Relator solely with the appellate opinion.

8. Rehearing for Unsuccessful Relator. If Relator is ordered back to jail, he may file Motion for Rehearing with the Court of Appeals though not a jurisdictional necessity to proceed on to the Supreme Court.

9. Rehearing When Relator is Unconditionally Released. The Court of Appeals unconditionally releases Relator from his order of commitment, the parties opposing such release can file a motion for rehearing and if same is denied, has no automatic right for further review. It can only be assumed that the moving party's only remedy would be to seek a mandamus with the Supreme Court if the Movant could show that Relator's release was a clear abuse of discretion on the part of the Court of Appeals. This author knows of no cases in which the Supreme Court has mandamus a Court of Appeals for granting unwarranted habeas relief.

10. Bond Refund. Once Relator has been returned to jail or unconditionally released, the surety may file motion with Court of Appeals to release bond. Article 22.16 TX. CODE OF CRIM. PROCEDURE. *Peacock v. State*, 44 Tex. 11, 13-14 (1875); *Morris v. State*, 823 S.W.2d 695, 696 (Tex.App.-El Paso, 1992, no writ).

11. Filing with Supreme Court. In order to attempt to obtain habeas relief from the Supreme Court the unsuccessful Relator must:

a. if conditionally released on bond by the Court of Appeals return to jail; and

b. file with clerk of Supreme Court in Austin original and 11 copies of the Petition and Brief along with \$75.00 filing fee. Requirements of petition are the same as for the filing in the court of appeals. T.R.A.P. 52.3, i.e. must contain certified copy of order violated, contempt order, commitment order and proof of restraint. (See discussion of requirements of Petition in paragraph 2 above). Additionally, Petition to

Supreme Court "shall state the date of any presentation to a court of appeals and that court's action on the Petition". T.R.A.P. 52.3(d)(5)(A)-(E).. Probably a good idea to make a copy of the court of appeals order and/or opinion denying Relator's habeas relief as one of the exhibits to petition to the Supreme Court.

### C. Direct Contempt.

1. Where to File. File with Texas Court of Criminal Appeals in Austin which has exclusive jurisdiction to grant habeas relief from direct contempts. *Tex. Const. Art. V, '5*. "Since the acts of contempt committed by the Relator were, in fact, criminal in nature, and did not arise from a violation of an order, judgment or decree in a civil case, the court of appeals does not have the power to issue a Writ of Habeas Corpus in this case nor to inquire into the punishment assessed against Relator." *Ex parte Powell*, 883 S.W.2d 775 (Tex.App.- Beaumont 1994, orig. proceeding). See also *Ex parte Hawkins*, 885 S.W.2d 586 (Tex.App.-El Paso 1994 orig. proceeding).

2. Motion for Leave. Separate written Motion for Leave is required by Rules. T.R.A.P. 72.1.

3. Petition. Nothing in the Rules of Appellate Procedure specifies as to what is to be contained in a Petition to the Court of Criminal Appeals to set aside a commitment order based on direct contempt. However, would seem to logically follow, to the extent possible, that Relator's petition would contain the same information as required by T.R.A.P. 52.3 when seeking habeas relief from a commitment based on indirect contempt.

4. Number of Copies. Rules require an original and 11 copies of both the Motion for Leave and the Petition.

5. No Fee. There is no fee for filing a Motion for Leave and Petition for Writ of Habeas Corpus with the Court of Criminal Appeals.

V.  
**Tips for Brief Writing.**

A. Must show Order to be void. Remember, a habeas proceeding is not a regular appeal complaining merely of harmful error. The only way you are entitled to habeas relief is if the trial court's order of commitment is found void because:

1. it deprives contemnor of his liberty without due process of law; or
2. it is beyond the power of the Court. *Ex parte Barnett*, 600 S.W.2d 252, 254 (Tex. 1980).

B. If you are not proficient in criminal law let a criminal lawyer look at your commitment order and discuss with him or her your potential arguments.

C. Be specific. Waiving the flag and Constitution in general terms will not get it done.

D. Be Concise. Do not let your good points get overshadowed or lost with superfluous points or argument.

**BAILIFF, \_\_\_\_\_ DISTRICT COURT  
FAMILY LAW CENTER  
1115 CONGRESS  
HOUSTON, TEXAS 77002**

November 5, 2003

To Whom It May Concern:

\_\_\_\_\_ (name) \_\_\_\_\_, a \_\_\_\_\_ (race) \_\_\_\_\_ (fe)male whose date of birth is \_\_\_\_\_, is currently in the custody of the Bailiff of the \_\_\_\_\_ District Court as a result of being sentenced to incarceration in the in the Harris County Jail pursuant to a Commitment Order of \_\_\_\_\_ (date) \_\_\_\_\_ signed by the Honorable \_\_\_\_\_, Judge Presiding of the \_\_\_\_\_ District Court.

Sincerely,

\_\_\_\_\_  
Bailiff, \_\_\_\_\_ District Court

**Appendix "A"**