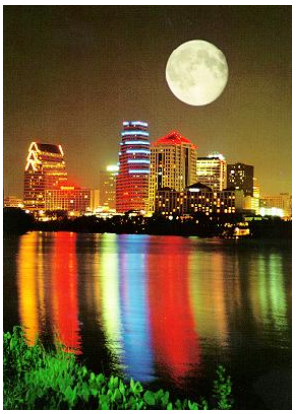
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Vol. 30, No. 46 - December 12, 2022

Case Name: ***Ex parte Jorge Favian Dominguez-Ortiz***

- **NATURE OF CASE**: Pre-Trial *Habeas Corpus*
- **COUNTY**: Kinney
- **C/A CASE No**. 04-22-00260-CR
- **DATE OF OPINION**: December 7, 2022 **OPINION**: Chief Justice Rebecca Martinez
- **DISPOSITION**: Trial Court Affirmed
- **TRIAL COURT**: CC; Hon. Roland Andrade
- **LAWYERS**: Kristen Etter, Jerome Wesevich, Billy Pavord, and & Rachel Garza (Defense); Brent Smith, Tony Hackebeil, & David Schulman (State)

Ed Note: As per TIBA's long standing policy that commentators do not summarize or comment on cases in which they were involved, this summary was prepared by attorney Rob Daniel, of Austin.

(**Background Facts**): This appeal relates to Operation Lone Star ("OLS"), which comprises several state initiatives related to border security. Appellant is a noncitizen who was arrested in Kinney County, on August 28, 2021, for trespassing on private property. On September 27, 2021, he was charged with criminal trespass, and on October 1, 2021, he was released on a personal bond in the amount of $1,500. On April 14, 2022, the trial court issued a notice of setting for a pretrial hearing on April 29, 2022, and for a jury trial on May 9, 2022. The notice states: "Failure to appear may result in Bond Forfeiture and a Warrant of Arrest."

[114 ***Habeas Corpus* at Trial Court Level / Cognizability of Issues**]: Appellant filed an application for a writ of *habeas corpus*, arguing for dismissal of charges for purported violations of his Fifth Amendment due process protections and his Sixth Amendment right to the assistance of counsel. On April 29, 2022, the trial court held a hearing on Appellant's application. Appellant appeared by Zoom video conference and, after being sworn in, testified that he was located in Cardenas, Mexico. The trial court admitted a document from the Val Verde Temporary Processing Center, which indicates that Appellant was released to United States Immigration and Customs Enforcement on October 2, 2021. The trial court denied *habeas* relief, and Appellant appealed.

The Court of Appeals stayed the trial setting pending final resolution. On appeal, Appellant asserts: "[T]*he State takes an active role in facilitating OLS defendant*[s]*' expulsion[s] or deportation[s] from the United States*," and he argues: "[B]*ecause* [Appellant] *has been removed from the United States, he is unable to prepare or return to his May 9, 2022 in-person jury trial without federal authorization, implicating his underlying rights under the Fifth Amendment right to Due Process and Sixth Amendment right to access counsel.* [Appellant]'s *underlying rights would not just be effectively undermined, but would be wholly violated to proceed with his May 9, 2022 jury trial without his presence*."

Holding: Pretrial *habeas corpus* proceedings are separate criminal actions from criminal prosecutions. ***Greenwell v. Court of Appeals for Thirteenth Jud. Dist.***, 159 S.W.3d 645 (Tex.Cr.App. 2005)(see ☙, Vol. 13, No. 6; 02/14/2005). When a trial court denies *habeas* relief, the applicant has the right to appeal. However, "[c]ertain claims may not be cognizable on *habeas corpus*, i.e., they may not be proper grounds for *habeas corpus* relief." ***Ex parte McCullough***, 966 S.W.2d 529, 531 (Tex.Cr.App. 1998)(see ☙, Vol. 6, No. 15; 04/20/1998). "If we conclude the grounds on appeal are not cognizable, then we must affirm the trial court's denial of *habeas corpus* relief." ***Ex parte Gutierrez***, 989 S.W.2d 55, 56 (Tex.App. - San Antonio 1998)(see ☙, Vol. 7, No. 1; 01/11/1999). *** The Texas Court of Criminal Appeals's case law in the area of cognizability has received "fair criticism" that it has been "'somewhat difficult to extract from the case law any general principles indicating what issues are properly raised pretrial by means of the writ.'" ***Ex parte Perry***, 483 S.W.3d 884 (Tex.Cr.App. 2016)(see ☙, Vol. 24, No. 9; 02/29/2016). *** Nevertheless, from the Court of Criminal Appeals's case law we can determine (1) Appellant's claims do not fit into any categories for which the Court of Criminal Appeals has allowed a challenge by a pretrial writ of *habeas corpus*, (2) Appellant's claims do not satisfy the factors previously recognized for exceptions to the general rule that as-applied challenges are not cognizable, and (3) Appellant's claims are more similar to claims held to be not cognizable than to those held to be cognizable. Therefore, we hold Appellant's claims are not cognizable in a pretrial writ of *habeas corpus*, and the trial court properly denied relief.

Holding (**Unlawful Restraint**): We disagree with the State that physical custody or presence within the United States is dispositive. Instead, we hold Appellant is "restrained" because he is subject to the trial court's threats of bond forfeiture and a warrant for his arrest if he does not appear for trial as directed.

Holding (**Cognizability of Appellant's Claims: Category-of-the-Claim Approach**): Appellant's Sixth Amendment claim concerns deprivation of his right to counsel. The Court of Criminal Appeals has not discussed cognizability for claims asserting this protection; however, the court has expressly precluded cognizability for claims asserting the Sixth Amendment right to a speedy trial. ***Ex parte Weise***, 55 S.W.3d 617 (Tex.Cr.App. 2001)(see ☙, Vol. 9, No. 38; 09/24/2001). In short, precedent does not specifically preclude or establish whether Appellant's Fifth Amendment due process claim and Sixth Amendment right to counsel claim are cognizable by a pretrial writ of *habeas corpus*.

Holding (**Cognizability of Appellant's Claims: Consideration of Factors**): [The Court of Criminal Appeals] has said that "pretrial *habeas* is unavailable 'when the resolution of a claim may be aided

by the development of a record at trial.'" ***Ex parte Doster***, 303 S.W.3d 720 (Tex.Cr.App. 2010-Waco 2008)(see ☙, Vol. 17, No. 1; 01/12/2009; Vol. 17, No. 6; 02/16/2009). *** [The] State's role in Appellant's removal from the country is disputed. Regardless of who is correct, the dispute itself highlights the need for record development. *** Putting aside the distinction between "voluntary return" and "deportation," there also is a factual dispute about the role the State played in facilitating Appellant's return to Mexico. *** Appellant's pivot to a speedy-trial analysis highlights the aid of further record development in resolving Appellant's Sixth Amendment claim, which cuts against allowing cognizability on a pretrial writ. *** Appellant's claims are as-applied challenges with unresolved factual matters. *** Along similar lines, factual development may be needed to determine appropriate relief if Appellant prevails on his claims, and appropriate relief may fall short of dismissal of charges. Anything short of dismissal would weigh against cognizability because resolution of the claims would not result in Appellant's "immediate release" or "a right to avoid trial." ***Ex parte Ingram***, 533 S.W.3d 887 (Tex.Cr.App. 2017)(see ☙, Vol. 25, No. 25; 07/03/2017). Thus, even as to remedy, further record development may be necessary, and a tailored remedy may show *habeas* relief to be improper.

Holding (**Conclusion**): We hold that Appellant's claims are not cognizable by pretrial writ of *habeas corpus*, and we affirm the trial court's order denying *habeas* relief.

Sidebars

(**Rob Daniel**) The Court of Appeals' reasoning is correct, as is the result, but why is this issue even being litigated? These are nonviolent misdemeanors in which the accused has been removed from the United States. What does the State of Texas gain by holding onto these cases? Perhaps one of the defendants will return, a jury will find the defendant guilty and return a $10.00 punishment verdict, and the prosecutor can go home happy knowing that "justice" has finally been achieved.