the Jasuta / Schulman report

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Case Name: ***Ex parte Luis Alfredo Aparicio***

- **NATURE OF CASE**: Pre-Trial *Habeas Corpus*
- **COUNTY**: Maverick
- **C/A CASE No**. 04-22-00623-CR
- **DATE OF OPINION**: June 21, 2023 **OPINION**: Justice Liza Rodriguez
- **DISPOSITION**: Trial Court Reversed
- **TRIAL COURT**: CC; Hon. Mark Luitjen (Ret.)
- **LAWYERS**: Douglas Keller & Kathy Starling (Defense); Jaime Iracheta & Luis Gurrola-Villarreal (State)

(**Background Facts**): As part of "Operation Lone Star" ("OLS") Luis Alfredo Aparicio, a noncitizen, was arrested for trespassing on private property in Maverick County. Appellant was with a group of people when he was arrested in Maverick County for criminal trespass. According to Appellant, there were six people in his group: two females and four males (one of whom was seventeen years old). The two females and the minor male were separated from his group. Appellant and the remaining men were arrested and transported to a detention facility in Val Verde County.

[114 **Pre-Trial *Habeas Corpus* / Cognizability of Issues**]: Appellant filed an application for writ of *habeas corpus* seeking dismissal of the criminal charge, arguing the State's selective prosecution of him violated the Constitution's Equal Protection Clause and the Texas Constitution's Equal Rights Amendment. The State argued that the claim was not cognizable in a pre-trial *habeas corpus* proceeding.

Holding: "Neither a trial court nor an Appellate court should entertain an application for writ of *habeas corpus* when there is an adequate remedy by appeal." ***Ex parte Weise***, 55 S.W.3d 617 (Tex.Cr.App. 2001)(Tex.Cr.App. 2001)(see , Vol. 9, No. 38; 09/24/2001). *** "Pretrial *habeas*, followed by an interlocutory appeal, is an extraordinary remedy" that is "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.'" ***Ex parte Ingram,*** 533 S.W.3d 887 (Tex.Cr.App. 2017)(see , Vol. 25, No. 25; 07/03/2017). *** In holding a claim involving double jeopardy is cognizable in a pretrial *habeas* proceeding, the Court of Criminal Appeals explained

that "the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense." ***Ex parte Robinson***, 641 S.W.2d 552 (Tex.Cr.App. 1982). *** In contrast, the Court of Criminal Appeals has disallowed the use of a pretrial writ to assert "constitutional rights to a speedy trial, challenge a denial of a pretrial motion to suppress, or make a collateral estoppel claim that does not allege a double jeopardy violation." The Court reasoned "[t]hese issues are better addressed by a post-conviction appeal." *** Recently, in ***Ex parte Dominguez Ortiz*** (see ¶¶, Vol. 30, No. 46; 12/12/2022; and Vol. 31, No. 3; 02/06/2023), we considered whether a noncitizen, who was arrested for trespassing on private property pursuant to OLS and charged with criminal trespass, had brought a cognizable pretrial *habeas* claim. *** In holding that the Appellant's pretrial habeas claim was not cognizable, we reasoned that his claims were "as-applied challenges with unresolved factual matters" that would be aided by development of a record. *** Our holding in ***Ex parte Dominguez Ortiz*** rested on "important facts [being] in dispute or undeveloped." Here, however, the facts are undisputed. The testimony was consistent that the State, for purposes of OLS, had not built detention centers to hold females. *** Thus, even though [Appellant]'s selective-prosecution claim required development of a record, his claim is more appropriate in a pretrial setting from a standpoint of judicial efficiency. *** Indeed, we note the Court of Criminal Appeals has allowed claims to be brought through pretrial *habeas* even though those claims give rise to evidentiary records. ***Ex parte Perry***, 483 S.W.3d 884 (Tex.Cr.App. 2016)(see ¶¶, Vol. 24, No. 9; 02/29/2016). *** Finally, we note that [Appellant]'s selective-prosecution claim is also similar to another claim that the Court of Criminal Appeals has determined defendants can raise in a pretrial writ: a facial vagueness challenge to a statute. ***Ex parte Nuncio***, 662 S.W.3d 903 (Tex.Cr.App. 2022)(see ¶¶, Vol. 30, No. 13; 04/11/2022). *** For the above reasons, we conclude [Appellant]'s selective-prosecution claim on the basis of equal protection is the type of claim "in which the protection of the applicant's substantive rights or the conservation of judicial resources would be better served by interlocutory review."

[¶¶ **118 Pre-Trial *Habeas Corpus* / Entitlement to Relief**]: At the *habeas corpus* hearing, several witnesses testified about OLS and its implementation. The *habeas* court heard testimony indicating that, as of three days before the hearing, 470 people had been arrested in Maverick County for misdemeanor offenses and none of the 470 individuals arrested were female. There was also testimony indicating that in five counties that are part of OLS (Webb, Kinney, Maverick, Jim Hogg, and Val Verde), 4,076 people had been arrested for misdemeanor offenses as part of OLS and none of the people arrested for misdemeanor offenses were female. During the hearing, there was testimony indicating that the policy was the result of a lack of facilities which would accept women charged with misdemeanors. Also during the hearing a DPS trooper confirmed Appellant's story about the group with which he was traveling, who was arrested and who was not. Finding that the central processing units "do not take women," and that Appellant did not meet his *prima facie* burden, the trial court denied *habeas corpus*. On appeal, Appellant argues that the trial court erred in denying his relief because the State's practice of prosecuting men, and

not women, for criminal trespass as part of Operation Lone Star violated his federal and state constitutional rights to equal protection.

Holding: [To] establish a *prima facie* case of selective prosecution, [Appellant] must show "the prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose." ***United States v. Armstrong***, 517 U.S. 456 (1996). To establish a discriminatory effect in a case based on gender discrimination, [Appellant] had to show similarly situated individuals of the opposite sex were not prosecuted for the same conduct. *** [Appellant] met this burden. As noted, the undisputed evidence at the habeas hearing showed that [Appellant] was found with a group of men and women and that the women were not charged with criminal trespass while the men were so charged. The evidence was also undisputed that state troopers in Maverick County have been routinely charging men with criminal trespass as part of OLS and not charging women found in the exact same circumstances. We therefore hold that [Appellant] has shown a discriminatory effect. *** To demonstrate that the prosecution was motivated by a discriminatory purpose, [Appellant] had to show that the State's selection of him for prosecution was based on an impermissible consideration like gender. ***Wayte v. United States***, 470 U.S. 598 (1985); ***Lovill v. State***, 287 S.W.3d 65 (Tex.App. - Corpus Christi 2008)(see ☙, Vol. 17, No. 1; 01/12/2009). "'Discriminatory purpose' . . . implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *** The evidence was undisputed in this case that the decision to prosecute [Appellant], and not the women found allegedly trespassing with him on private property, was motivated by his sex. *** We hold [Appellant] has met his burden of showing that his gender was a motivating factor in his arrest. *** As [Appellant] met his burden of showing a prima facie claim for selective prosecution on the basis of gender discrimination, the burden shifts to the State to justify the discriminatory treatment. See ***Ex parte Quintana***, 346 S.W.3d 681 (Tex.App. - - El Paso 2009)(see ☙, Vol. 17, No. 41; 10/12/2009). *** In its brief, the State argues "the emergency situation on Texas's southern border" justifies its discriminatory actions. However, it is clear from the record that the trial court never reached the merits of this issue. The trial court stated on the record that it had determined [Appellant] had not met his prima facie burden. Thus, the State was not required at the hearing to justify its discriminatory actions. As the trial court has not had an opportunity to determine whether the State's discriminatory classification was justified under intermediate scrutiny ([Appellant]'s federal claim) and strict scrutiny ([Appellant]'s state claim), we reverse the trial court's denial of [Appellant]'s petition for writ of habeas corpus and remand the cause to the trial court.