

# the Jasuta / Schulman report

Volume 31, Number 26 ~ Monday, August 7, 2023 (Report No. 1,475)

eMail: [officemanager@texindbar.org](mailto:officemanager@texindbar.org)

Published By  
Texas Independent Bar Association  
1801 E. 51st St., Ste. 365-474  
Austin, Texas 78723  
Tel. 512-850-6544

Web Page: [www.texindbar.org](http://www.texindbar.org)

Copyright © 2023 Texas Independent Bar Association; KLS Legal Services; John G. Jasuta; and David A. Schulman

## Case Name: [The State of Texas v. Josue del Campo-Chavez](#)

- **NATURE OF CASE:** Pre-Trial *Habeas Corpus*
- **COUNTY:** Zapata
- **C/A CASE No.** 04-22-00737-CR
- **DATE OF OPINION:** August 2, 2023     **OPINION:** [Justice Patricia Alvarez](#)
- **DISPOSITION:** Trial Court Affirmed
- **TRIAL COURT:** 49th D/C; Hon. Joe Lopez
- **LAWYERS:** [Neha Dubey](#) & [Doug Keller](#) (Defense); [David Reuthinger](#) & [Daniel Elizondo](#) (State)

**[§§ 114 Pre-Trial Habeas Corpus / Cognizability of Issues]:** “As part of Operation Lone Star,” Appellee, a non-citizen, was arrested for trespassing on private property in Zapata County. He filed an application for writ of *habeas corpus* seeking dismissal of the criminal charge based on a violation of his state and federal rights to equal protection. In an evidentiary hearing on his writ application, Appellee demonstrated that women were not been prosecuted for misdemeanor trespass as part of OLS. The evidence showed that in Zapata County, the only OLS cases charging women have been felony human smuggling cases. The trial court then granted Appellee’s requested relief. The State appealed, arguing that the trial court lacked jurisdiction to grant dismissal of the underlying charges, when Applicant brought an as-applied constitutional challenge to Operation Lone Star rather than a facial challenge to a particular law or order.

**Holding:** In a recent opinion, [Ex parte Aparicio](#), No. 04-22-00623-CR (see [§§](#), [Vol. 31, No. 30](#); 06/26/2023), we considered the argument that male defendants charged with misdemeanor trespass as part of OLS were being selectively prosecuted along gender lines in violation of their federal and state constitutional rights to equal protection. We concluded that the Appellee had raised a cognizable issue by pretrial writ of *habeas corpus* and met his burden of showing a *prima facie* claim for selective prosecution on the basis of gender discrimination. We reversed and remanded for the State to justify the gender discrimination. The claims the State asserts in this case mirror the issues we addressed in [Ex parte Aparicio](#), and we apply its precedent. \*\*\* The State has argued that as-applied constitutional challenges are not cognizable for pretrial *habeas corpus* relief, citing [Ex parte Perry](#), 483 S.W.3d 884 (Tex.Cr.App. 2016)(see [§§](#), [Vol. 24, No. 9](#); 02/29/2016). The State concedes three important exceptions to this general rule: double jeopardy, bail, and separation of powers. [Ex parte Weise](#), 55 S.W.3d 617 (Tex.Cr.App.

2001)(Tex.Cr.App. 2001)(see ¶¶, [Vol. 9, No. 38](#); 09/24/2001). The reasoning underlying these exceptions directly applies to our conclusion in this and other equal protection appeals that have resulted from OLS cases: “[C]ertain types of as-applied claims may be raised by pretrial *habeas* because the particular constitutional right at issue in the as-applied challenge is the type that would be effectively undermined if not vindicated prior to trial.” \*\*\* In [Ex parte Aparicio](#), we concluded that the Appellee’s equal protection claim represented the type of as-applied challenge that would be effectively undermined if not vindicated prior to trial. \*\*\* Based on our holding in [Ex parte Aparicio](#), we overrule the State’s first issue.

[¶¶ 207 [Trial Courts / Jurisdiction](#)]: The State argues that the trial court had no jurisdiction over the merits of Appellee’s application for *habeas corpus* relief if it did not first explicitly issue a writ. Appellee argues that the State failed to preserve the issue and that it is not jurisdictional, i.e., not able to be raised for the first time on appeal.

**Holding:** We agree that there is no jurisdictional requirement for the trial court to explicitly issue a writ before ruling on the merits of a petitioner’s request for *habeas corpus* relief. See [Ex parte Hargett](#), 819 S.W.2d 866 (Tex.Cr.App. 1991); [Ex parte Villanueva](#), 252 S.W.3d 391 (Tex.Cr.App. 2008)(see ¶¶, [Vol. 16, No. 17](#); 05/05/2008); [Ex parte Jagneaux](#), 315 S.W.3d 155 (Tex.App. - Beaumont 2010)(see ¶¶, [Vol. 18, No. 21](#); 06/07/2010). In determining that there is no jurisdictional requirement for the trial court to explicitly issue a writ, we have reached and dispelled the crux of the State’s argument. \*\*\* Accordingly, we need not address [Appellee]’s waiver argument.

---

#### Sidebars

---

([David A. Schulman](#)) Although the Court gets to correct result on this issue, it’s clear they don’t understand [Hargett](#), [Villanueva](#), or [Jagneaux](#). First, [Hargett](#) was a post-conviction constitutional writ proceeding which would now be cognizable under Article 11.072, C.Cr.P. [Villanueva](#) (John’s case), was a proceeding under Art. 11.072, which contains a provision (§ 8) which governs appeals. As to [Jagneaux](#), it demonstrates that it is not the “issuance” of the writ which would provide the Court of Appeals, but the order “reaching the merits.” The Court of Criminal Appeals not only said that in [Villanueva](#), it has said that for more than 70 years. See [Nichlos v. State](#), 255 S.W.2d 522 (Tex.Cr.App. 1952).

[¶¶ 118 [Habeas Corpus at Trial Court Level / Entitlement to Relief](#)]: The State argues that Appellee was required to demonstrate improper prosecutorial motive and failed to do so.

**Holding:** As we noted in [Ex parte Aparicio](#), [Appellee] carried the burden of demonstrating that his prosecution was motivated by a discriminatory purpose, meaning that “the government’s selection of the defendant for prosecution was based on an impermissible consideration . . .” We noted that “[s]electing a defendant for prosecution on the basis of sex is an impermissible consideration.” Here, contrary to the State’s argument, [Appellee] met his burden by showing that the State only prosecuted men for misdemeanor trespass under OLS. Based on [Ex parte Aparicio](#), we overrule the State’s third issue.