

**Ex parte Ortiz, No. 04-22-00260-CR (Tex. App.-San Antonio, Dec. 7, 2022)**

**Attorneys.** Rachel Garza (appellate), Kristin Etter (appellate), Billy Pavord (appellate)

**Issue & Answer.** Kinney County is holding undocumented immigrants for purported misdemeanor offenses without charging them or allowing release on bail. The result (likely intended) is that they are ultimately deported after being held for inappropriate lengths of time. If this conduct results in the effective denial of counsel and inability to return to the U.S. to defend oneself on the date of trial, are the Fifth and Sixth Amendment violations cognizable in a pretrial writ of habeas corpus? **No.**

**Facts.** This is another Operation Lone Star case involving District Attorney Brent Smith and the corruption of our judicial system in Kinney County. The gist of the scandal is this: Hispanics are collected by law enforcement and vigilantes for sometimes meritorious and sometimes trumped-up criminal trespass charges. They are held in jail without the ability to post bond, Brent Smith won't file charges and the courts won't let them go when the law requires it. Eventually some defendants are picked up and deported by federal authorities during their illegal confinement. Here, the defendant requested the court dismiss charges through the filing a writ of habeas corpus. The defendant contends that Brent Smith and the Kinney County judiciary held him in order to implement the objectives of Operation Lone Star and facilitate his deportation. He asserted that his inability to return and defend himself from the charges levied against him is now an impossibility because of the government's improper conduct.

**Analysis.** It is true that the defendant is sufficiently restrained to justify the exercise of the trial court's habeas jurisdiction-"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." However, here, the relief requested is not cognizable in a pretrial writ of habeas corpus. The Court of Criminal Appeals does not provide clear guidance on this issue but this much can be gleaned from case law.

A non-exhaustive list of issues that are cognizable in pretrial habeas includes:

- Double jeopardy
- Bail
- Statute of limitations (in most cases when shown on face of indictment)
- Facial constitutional challenges to a statute
- As-applied separation of powers claims involving government officials

A non-exhaustive list of issues that are not cognizable in pretrial habeas includes:

- Speedy trial
- Collateral estoppel not involving double jeopardy
- Challenging a denial of a motion to suppress
- Statute of limitations (if the indictment is subject to repair)

Because the instant case does not fit neatly in either list, the court must consider the following factors:

- Can the development of a trial record aid the resolution of the claim?
- Does the defect bring into question the trial court's power to proceed?
- Would the resolution of the claim result in immediate release?
- Would protections be undermined if the issues were not cognizable?
- Is the issue better addressed by a post-conviction appeal?
- Would the protection of substantive rights be better served?
- Would judicial resources be conserved?

Here the issue would benefit from a record at trial. The State's role in the defendant's removal is disputed. Whether the State or the defendant can secure the defendant's attendance in the US for trial is disputed. Actual, if any, impediments to attorney-client communication are not apparent in the record. Moreover, a Sixth Amendment violation cannot occur absent a trial, thus any infringement on the Sixth Amendment right to counsel must be remedied on direct appeal after a trial is conducted.

**Comment.** There are certainly some factors the Fourth Court could have hung its hat on had it wanted to reach a different outcome.