IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

EX PARTE:	§	
RANDY ATTORNEY	§	**NO. __________**
Applicant	§	

APPLICATION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS OF TEXAS:

NOW COMES RANDY ATTORNEY, Applicant herein, and moves the court to discharge him from an unlawful restraint of his liberty, and in support of this application would show the court the following:

I.

Applicant is illegally restrained in his liberty by the order of the Honorable Judge George Walker, sitting by designation of the Presiding Judge of the First Administrative Judicial District for the District Court of Rains County, Texas, 8th Judicial District and the Honorable Richard Wilson, Sheriff of Rains County, Courthouse, 100 Quitman Street, Emory, Texas, 75440, (214) 473-2621. The nature of this restraint is an order signed by the Honorable Judge Walker on January 27, 1990 in a case styled Ex Parte Randy ATTORNEY, #5878, in the District Court of Rains County, Texas, 8th Judicial District. A copy of the actual order signed will be forwarded to this Court of Criminal Appeals as soon as a certified copy can be obtained. A preliminary copy of the order is attached to this writ as EXHIBIT A. The order requires Applicant ATTORNEY to pay a fine of $500.00 within five days of January 27, 1990 or be imprisoned in the county jail of Rains County, Texas until said fine is paid. The purpose of the fine is to enforce a finding that Applicant ATTORNEY was guilty of contempt of court.

The nature of the contempt was based on the following:

"that during the trial of the Defendant Tommy Haynes the said Randy ATTORNEY did audibly willingly or intentionally or recklessly speak and utter the following language during the examination of a witness:

Question by Randy ATTORNEY:

> All right. Since Mr. Hagood was kind enough to let us use his side of the table here to be closer to the jury, whenever I get to something that you don' t consider to be a legitimate toiletry item and lay it out here on this table -- this yellow pen here, that's mine, and this over here, from here on over, that's Mr. Hagood's and Mr Chapman's. Whenever I get to something you don't consider a

from Goranson Contempt CLE paper

legitimate toiletry item you give me a holler, will you please?

Answer by Witness:

Would it be any distinction whether it's a man's toiletry item or a lady's toiletry item?

By Randy ATTORNEY:

I don't know. Just toiletry items, okay, or maybe somebody that might go both ways, you know what I mean?

Answer By Witness:

I think I do.

II.

Applicant shows that such restraint or confinement is illegal for the following reasons:

1. THERE WAS NO EVIDENCE TO SHOW THAT THE ALLEGED CONDUCT WAS INDIGNANT OR INTERFERED WITH THE ORDERLY PRESENTATION AND CONDUCT OF THE TRIAL.

2. THE NOTICE GIVEN TO MR. ATTORNEY WAS INSUFFICIENT TO COMPLY WITH DUE PROCESS OF LAW.

3. THERE WAS SUCH AN UNREASONABLE DELAY BETWEEN THE ALLEGED ACT OF CONTEMPT (MARCH 7, 1988) AND THE FINDING THAT MR. ATTORNEY WAS IN CONTEMPT (NOVEMBER 6, 1989) SO AS TO VIOLATE MR. ATTORNEY'S RIGHTS TO DUE PROCESS OF LAW AND DUE COURSE OF LAW, AS PROTECTED BY ARTICLE 1, §§ 10 AND 19 OF THE TEXAS CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

IV. REASONS FOR GRANTING WRIT

A.

THERE WAS NO EVIDENCE TO SHOW THAT THE ALLEGED CONDUCT WAS INDIGNANT OR INTERFERED WITH THE ORDERLY PRESENTATION AND CONDUCT OF THE TRIAL

The evidentiary hearing [5] on January 15 and 16, 1990 showed that Mr. ATTORNEY was the attorney for two defendants in a trial that began in the first week of January, 1988. [6] A hearing on pre-trial motions was held on January 4, 1988. The jury was selected in the second week of January and the trial proceeded, concluding during the first week in May, 1988. On March 3, 1988, the following occurred during a cross-examination of one of the law enforcement officers making the search of the property where the defendants were found:

Question by Randy ATTORNEY:

> All right. Since Mr. Hagood was kind enough to let us use his side of the table here to be closer to the jury, whenever I get to something that you don' t consider to be a legitimate toiletry item and lay it out here on this table -- this yellow pen here, that's mine, and this over here, from here on over, that's Mr. Hagood's and Mr Chapman's. Whenever I get to something you don't consider a legitimate toiletry item you give me a holler, will you please?

Answer by Witness:

> Would it be any distinction whether it's a man's toiletry item or a lady's toiletry item?

By Randy ATTORNEY:

> I don't know. Just toiletry items, okay, or maybe somebody that might go both ways, you know what I mean?

Answer By Witness:

> I think I do.

In order for the conduct to constitute contempt, there must be some evidence that the conduct was indignant or interfered with the orderly presentation and conduct of the trial. No one has testified that this case was any different than any other hotly contested trial. The record of the proceedings clearly shows that Mr. ATTORNEY was not indignant when he made the complained of statements. Further, there was no evidence from any source that the complained of conduct disrupted the proceedings in a manner any different than any other objection in a multi-defendant trial that is granted and the trial court made a jury instruction to

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5 A transcript of the evidentiary hearing is being prepared and will be filed with this Court as soon as it is available.

6 The State of Texas vs. Tommy Charles Haynes, et al, Cause Number 2749 et al, in the District Court of Rains County, Texas, 8th Judicial District, Honorable Lanny Ramsay presiding. The case is currently on direct appeal to the court of appeals at Tyler, Texas.

disregard.

In *Ex parte Jacobs*, 664 S.W.2d 360, 363, 364 (Tex.Cr.App.1984), the Court of Criminal Appeals wrote:

> "The court's authority to regulate trials, and accordingly, to punish for contempt, is broad and plenary. Ex parte Jones, 331 S.W.2d 202 (Tex.Cr.App. 1960). See also 13 Tex.Jur.3rd, Contempt, § 34, p. 226. However, the power to punish for contempt should only be exercised with caution, and contempt is not to be presumed, but on the contrary, is presumed not to exist. Ex parte Arnold, 503 S.W.2d 529, 534 (Tex.Cr.Ap. 1974), and cases there cited. See also Ex parte White, 274 S.W.2d 542 (Tex. 1955); Deramus v. Thornton, 160 Tex. 494, 333 S.W.2d 824 (1960); Ex parte Rogers, 633 S.W.2d 666 (Tex.App.-7th Dist.-1982).
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> * * *
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> "The fact that counsel pursues a method at variance with that which the court deems correct, with no intended disrespect to the court, should not be subject to a penalty for contempt. *See* Ex parte Heidingsfelder, 206 S.W. 351 (Tex.Cr.App. 1918). To establish 'contempt' of court, it is not the purpose or intent to act which controls, but the act itself must be such as amounts to contempt of court. Ex parte Bailey 142 Tex.Cr.R. 582, 155 S.W.2d 927 (1941); Ex parte Dowdle, 165 Tex.Cr.R. 536, 309 S.W.2d 458 (1958).
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> "The essence of 'contempt' is that the conduct obstructs or tends to obstruct the proper administration of justice. Ex parte Salfen, 618 S.W.2d 766 (Tex.Cr.App. 1981)." See also Ex parte Rose, 704 S.W.2d 751, 757 (Tex.Cr.App. 1984).

In *Ex Parte Pink*, 746 S.W.2d 758 (Tex. Cr. App. 1988), the court also stated, after citing the above quote from *Jacobs*:

> While the conduct of the applicant as attorney may not have been commendable, and while it might have been irritating or even exasperating to the trial judge, it did not hinder the forward progress of the trial or obstruct or tend to obstruct the administration of justice. We cannot conclude, given all the circumstances, that the [the comment of counsel] constituted disrespect for the trial court such as to support a judgment of contempt. Deramus v. Thornton, [330 S.W.2d 824 (1960)]. See also 13 Tex.Jur.3rd, Contempt, 57, p. 262.
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> It should be observed that the original contempt order and the show cause order were based on the actual language used, and did not include any reference to the attitude, demeanor or expression of the applicant Pink when using the language noted. Cf. Ex parte Sentell, 266 S.W.2d 365 (Tex.Cr.Ap. 1954). This is not a case where the attorney was held in contempt for failing to obey an order of the court to take his seat or not to approach the witness stand. Cf. Ex parte Crenshaw, 259 S.W.2d 587 (Tex.Cr.App. 1924).

"Trial courts . . . must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice." Brown v. United States, 356 U.S. 148, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958). "Contempt is strong medicine. Use it cautiously and only as a last resort." Willson v. Johnston, 404 S.W.2d 870 (Tex.Civ.App.-Amarillo 1966, no writ).

B.

THE NOTICE GIVEN TO MR. ATTORNEY WAS INSUFFICIENT TO COMPLY WITH DUE PROCESS OF LAW

Notice was given to Mr. ATTORNEY in the Show Cause Order [7] as follows:

"that during the trial of the Defendant Tommy Haynes the said Randy ATTORNEY did audibly willingly or intentionally or recklessly speak and utter the following language during the examination of a witness:

> [the complaint continued with the portions of the trial transcript that are reproduced above]

There are no factual allegations in the pleadings that the above described conduct hindered the forward administration of the trial, or obstructed or tended to obstruct the proper administration of justice or that the action of counsel constituted disrespect for the trial court.

Further, there are no factual allegations to support the alleged culpable mental state of acting "recklessly". Further, Mr. ATTORNEY contends that an alleged act of contempt cannot be accomplished by "reckless" conduct. Therefore, the complaint and show cause order is fundamentally vague and indefinite for alleging a supposed act of contempt that cannot be legally committed. In addition, the Show Cause Order failed to allege sufficient facts so as to comply with the statutory definition of recklessness as provided in §6.03(c), Tex. Pen Code Ann. (1974) which defines the mental state as when the actor "is aware of but consciously disregards a substantial and unjustifiable risk"

The Preliminary Order of Contempt alleged that the alleged conduct was "against the dignity of this court ... and "this court interrupted the proceedings, and announced that he was holding the said Mr. ATTORNEY in contempt of court for such utterance..." However, when the Show Cause Order was issued, it alleged that the alleged conduct was "against the dignity of this Court, and that after said utterance, this court had to interrupt the proceedings, *therefore causing a delay in the trial* and said utterance was against the dignity of the Court and *impaired the orderly administration of justice*" and "*Said comment being in direct contradiction of the order given to Randy ATTORNEY, and causing the Court to stop the then on going proceedings and therefore delaying the trial, and said comment was disruptive and*

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7 The Show Cause Order is attached as Exhibit B and the Preliminary Order of Contempt is attached as Exhibit C.

interfered with the orderly administration of justice." Mr. ATTORNEY alleges that the addition of other grounds of contempt that were not included in the Preliminary Order of Contempt fatally changed the allegations and deprives the contemnor of due process of law in that he was now charged with an alleged act different than that originally noted by the trial court

The Show Cause Order and the Preliminary Order of Contempt fail to meet the minimum due process requirements of Article 1, §§10 and 19 of the Texas Constitution and the 5th and 14th Amendments of the United States Constitution. *cf* Ex parte Dugas, 587 S.W.2d 735 (Tex. Crim. App. 1979), which reversed an order of contempt pursuant to a contention that the order was void for lack of certainty as to the act or acts of contempt and the order violated.

C.

THERE WAS SUCH AN UNREASONABLE DELAY BETWEEN THE ALLEGED ACT OF CONTEMPT (MARCH 3, 1988) AND THE FINDING THAT MR. ATTORNEY WAS IN CONTEMPT (NOVEMBER 6, 1989) SO AS TO VIOLATE MR. ATTORNEY'S RIGHTS TO DUE PROCESS OF LAW AND DUE COURSE OF LAW, AS PROTECTED BY ARTICLE 1, §§ 10 AND 19 OF THE TEXAS CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Mr. ATTORNEY would further move to dismiss the contempt because of an impermissible delay in the bringing of these proceedings, said delay violating Mr. ATTORNEY's due process right to a speedy disposition of alleged trial misconduct. In this regard, counsel would show the court that the alleged act of contempt occurred on March, 3, 1988 and the trial court "took under advisement" holding Mr. ATTORNEY in contempt, but no Preliminary Order of Contempt was issued until more than 19 months later (November 6, 1989) and counsel was not served with this show cause order until shortly after December 21, 1989, almost 21 months after the alleged conduct was committed. In addition to due process "speedy trial" rights, counsel contends that the unreasoned and inexcusable delay creates an unconscionable chilling effect on the right to counsel preserved by the 6th Amendment to the United States Constitution and Article 1, Sections 10 and 19 of the Texas Constitution.

CONCLUSION

" '... The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty.

"While we appreciate the necessity for a judge to have the power to protect himself from actual obstruction in the courtroom, or even from conduct so near to the court as actually to obstruct justice, it is also essential to a fair administration of justice that lawyers be able to make honest good faith efforts to present their clients' cases. An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice. To preserve the kind of trials that our system envisages, Congress has limited the summary contempt power vested in courts to the least possible power adequate to prevent actual obstruction of justice, and we think that power did not extend to this case.' 370 U.S. at 236." Ex parte Curtis, 568

S.W.2d 363 (Tex. Crim. App. 1978) citing Faretta v. California, 422 U.S. 806, 835, n.46 (1975).

WHEREFORE, Applicant prays that a writ of habeas corpus be granted, that the court ascertain the facts, and that Applicant be discharged from the illegal restraint complained of in this application and for such other relief to which Applicant is entitled.

Respectfully submitted,

RONALD L. GORANSON

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ATTORNEY FOR APPLICANT

AFFIDAVIT

STATE OF TEXAS
COUNTY OF ________________

BEFORE ME, the undersigned authority, on this day personally appeared RONALD L. GORANSON , who upon being duly sworn did depose and state:

> My name is Ronald L. Goranson and I am counsel for Applicant Randy ATTORNEY. I have read the above application for writ of habeas corpus and the allegations therein are true according to my belief.

____
RONALD L. GORANSON

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, by RONALD L. GORANSON, the Counsel for Applicant on this ___ day of JANUARY, 1990.

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NOTARY PUBLIC IN AND FOR
____________ COUNTY, TEXAS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above Application for Writ of Habeas Corpus has been sent to opposing counsel, Mr. PROSECUTOR, Assistant District Attorney, Sulphur Springs, Texas.

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RONALD L. GORANSON