

No. _____

**In The
Supreme Court of the United States**

—◆—
DAVID CHRISTOPHER HESSE,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

—◆—
**On Petition For Writ Of Certiorari
To The Seventh Court Of Appeals
At Amarillo, Texas**

—◆—
PETITION FOR WRIT OF CERTIORARI
—◆—

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Dated: March 16, 2018

QUESTIONS PRESENTED

1. A judge brought contempt proceedings against an attorney for his conduct during a concluded trial. The attorney was not served with a notice of the allegations of criminal contempt against him, or with the order to appear and show cause why he should not be held in contempt. But a writ of attachment issued and the attorney was arrested and jailed for two days, for not appearing at the contempt hearing. Did this deny the attorney Due Process?

2. That attorney was not served with a notice of the allegations of criminal contempt against him, or with an order to appear and show cause why he should not be held in contempt, but a writ of attachment issued, causing him to be arrested and jailed for two days. Was the attorney thereby punished such that Double Jeopardy would prohibit any further punishment on the contempt?

3. In order to secure issuance of a writ of attachment on the attorney, a prosecutor falsely swears that an attorney has been served with notice of the allegations of criminal contempt. Thereafter, the writ of attachment issues and the attorney is arrested and jailed for two days. Does this deny the attorney Due Process of law?

4. In a civil suit, before a writ of attachment may issue against a private litigant who is alleged to be in criminal contempt, that litigant is absolutely required to be served with a notice of the allegations of criminal

QUESTIONS PRESENTED – Continued

contempt against him, as well as an order to appear and show cause why he should not be held in contempt. But, there is no requirement that an attorney who is alleged to have been in contempt during a concluded criminal case, be served with a notice of the allegations of criminal contempt against him, as well as an order to appear and show cause why he should not be held in contempt, before a writ of attachment may issue and the attorney be arrested and jailed for not appearing at the contempt hearing. Does this deprive the attorney of the equal protection of the law?

PARTIES TO THE PROCEEDING

David Christopher Hesse – Petitioner
State of Texas – Respondent

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

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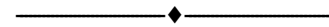
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**TO THE HONORABLE SUPREME COURT OF
THE UNITED STATES:**

Petitioner, David Christopher Hesse, respectfully petitions for a writ of certiorari to review the judgment of the Seventh Court of Appeals at Amarillo, Texas.



OPINIONS BELOW

The Order of the Texas Court of Criminal Appeals denying rehearing of the refusal of the petition for discretionary review is unpublished and is at Appendix 16. The Order of the Texas Court of Criminal Appeals refusing the petition for discretionary review is unpublished and is at Appendix 11. The Order of the Seventh Court of Appeals at Amarillo, Texas, denying the motion for rehearing is unpublished and is at Appendix 7. The Opinion of the Seventh Court of Appeals at Amarillo, Texas, denying Petitioner's Double Jeopardy and Due Process claims is unpublished and is at Appendix 1.



RELEVANT DOCUMENTS BELOW

The return of service on the writ of attachment is at Appendix 14. The Order for the writ of attachment is at Appendix 12. The application for the writ of attachment is at Appendix 18. The return of service on the Notice of Contempt is at Appendix 22. The return receipt (green card) is at Appendix 25. The Order

denying Petitioner's Double Jeopardy habeas corpus is Appendix 9. The Notice of Hearing to Show Cause is at Appendix 20.

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STATEMENT OF JURISDICTION

The Texas Court of Criminal Appeals denied Petitioner's timely-filed Motion for Rehearing of the refusal of the Petition for Discretionary Review on December 20, 2017. (Appendix 16) This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). This petition is timely filed.

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RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV.

The Fifth Amendment to the United States Constitution provides in relevant part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ." U.S. Const. Amend. V.

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV.



STATEMENT OF THE CASE

This case presents fundamental recurring questions of constitutional dimensions over which the Texas courts are at variance with prior decisions of this Honorable Court. And the decisions of the Texas Court of Criminal Appeals are at variance with decisions of the Texas Supreme Court on the same issues.

These questions arise from the Due Process requirements as to the procedure to be used should a judge attempt to have an attorney held in contempt for conduct that occurred during a trial that concluded weeks before.

That Due Process question is dove-tailed into whether Due Process requires that a contemnor be personally served with notice and an order to appear and show cause before he may be attached and arrested for not appearing at a hearing of which he had no notice. And this Due Process requirement is associated with the question of whether it denies a contemnor Due Process for a prosecutor to falsely swear that the contemnor was served with a Notice to Appear and Show

Cause, in order to procure the contemnor's attachment and arrest.

Those Due Process questions are coupled with the Equal Protection question that is presented by the fact that a litigant in a civil case who is to be held in criminal contempt must be served with notice and an order to appear and show cause before he may be attached and arrested. But, an attorney who is to be held in criminal contempt for his conduct during a concluded trial has no right to be served with notice and an order to appear and show cause before he is attached and arrested.

That all overlays the question of whether an attorney, who is never served with notice and an order to appear and show cause, is attached, arrested and confined in the County Jail for two days, has been punished such that the Fifth Amendment would forbid any further punishment of the attorney for the contempt alleged to have been committed.

By Memorandum Opinion, the Seventh Court of Appeals in Amarillo denied him relief. (Appendix 1) The Seventh Court of Appeals held that Petitioner's arrest was only a civil penalty, equivalent to a tax. It also held that Petitioner had no right to be personally served with notice and an order to appear and show cause before the writ of attachment could issue against him.



BACKGROUND FACTS

On November 7, 2012, Adoun Phommivong was sentenced to deferred adjudication on a Class A misdemeanor offense of attempted possession of a controlled substance. On October 17, 2013, the State of Texas filed a motion to adjudicate against Mr. Phommivong. On November 14, 2014, an amended motion to adjudicate was filed against Mr. Phommivong.

On January 21, 2016, Judge Estevez signed an Order substituting Petitioner in as counsel for Mr. Phommivong. This Order showed Petitioner's address to be 112 West 8th Avenue, Suite 311, Amarillo, Texas 79101.

On April 6, 2016, Petitioner prophylactically filed a § 21.002(d), TEX. GOV'T CODE¹ motion to be released upon his personal recognizance should he be held in contempt during proceedings in the case. The motion was bench-filed by Judge Ana Estevez on that day and filed by the District Clerk on the next day.

On April 8, 2016, during a hearing in the 251st Judicial District Court, Judge Ana Estevez held Petitioner in contempt. After being held in contempt, Petitioner was released on his personal recognizance as required by § 21.002(d), TEX. GOV'T CODE.

On April 11, 2016, Petitioner moved to withdraw as attorney for Mr. Phommivong. On the same day,

¹ This is the statute that governs the procedure in Texas courts should a judge attempt to hold an attorney in contempt, as well as the attorney's right to be released on personal recognizance.

attorney Jeffrey Hill accepted the court's appointment to represent Mr. Phommivong in the pending matters.

On June 2, 2016, Adoun Phommivong, represented by attorney Jeffrey Hill, pleaded true on the community supervision revocation. He was sentenced to six months in the Potter County Detention Facility, with the time to be served on weekends. Judge Estevez certified that Mr. Phommivong had no right of appeal, as it was a plea bargain case. This concluded the proceedings against Mr. Phommivong.

On June 14, 2016, Judge Estevez filed her Notice of Allegations of Contempt against Petitioner. This Notice was a document that bore the same cause number as the case against Adoun Phommivong (Cause No. 64,888-C) and was captioned with the style of the case against Mr. Phommivong – *State of Texas vs. Adoun Phommivong*. Effectively, this Notice of Allegations of Contempt was filed into a closed case.

Contained in the Notice of Allegations of Contempt was a Show Cause Order, setting the hearing on the contempt for July 29, 2016, at 1:30 p.m. before Judge Paul Davis, assigned judge, as required by § 21.002(d), TEX. GOV'T CODE. Judge Estevez also ordered the Clerk of the Court to cause a NOTICE OF SHOW CAUSE ORDER to be sent to the Respondent by certified mail, return receipt requested, at his current address according to the records of the District Clerk.

In the Order to Show Cause, Judge Estevez also ordered that the "Clerk of this Court shall cause a

NOTICE OF SHOW CAUSE ORDER to be sent to the Respondent by certified mail, return receipt requested, at his current address according to the records of the District Clerk.”

A Notice of Hearing to Show Cause (Appendix 20) was prepared and mailed to 112 West 8th Street in Amarillo, Texas – a 10-story office building. No suite number or floor is shown, even though the State knew that Petitioner’s office was in Suite 311. (*See* Appendix 17) The Notice of Hearing to Show Cause bears a Certified Article Number SENDERS RECORD with number 9414 7266 9904 2034 3259 56. The Officer’s Return on the Notice of Hearing to Show Cause is blank.

The green card on the Notice of Hearing to Show Cause (Appendix 25) was signed for by someone named Cathy Bears. No suite number or floor is shown on the green card, only the street address of 112 West 8th Street in Amarillo.

Because he was not served with the Notice of Allegations of Contempt, or the Order to Show Cause, Petitioner had no notice that Judge Estevez had issued a Notice of Allegations of Contempt or Notice of a Hearing to Show Cause against him. He also had no notice that a hearing on the contempt allegations had been set for July 29, 2016, at 1:30 p.m.

Because he was not served and had no notice, Petitioner was not present in the 251st Judicial District Court on July 29, 2016, at 1:30 p.m., when Judge Estevez had scheduled the contempt hearing.

Even though the lack of service on Petitioner, of the Notice of Allegations of Contempt and of the Notice of a Hearing to Show Cause, is apparent on the face of the court's file, the prosecutor filed a sworn Application for Writ of Attachment. (Appendix 17) This Application falsely stated that Petitioner had been served with the Notice of Allegations of Contempt.

An Order commanding the arrest of Petitioner (writ of attachment) was signed on the same day. (Appendix 12) In addition to commanding that the Sheriff of Potter County take immediate custody and control of Petitioner, this Order commanded Petitioner to "appear and present before the Court instanter and that he appear before this Court to show cause why he has failed to appear as requested."

The Writ of Attachment was served on Sunday, July 31, 2016. Petitioner was arrested and taken to the Potter County Detention Facility. Petitioner was not released until late afternoon on August 1, 2016, after spending two days in jail.

Petitioner filed a Notice of Fraud on Court, a Motion to Dismiss for Selective or Vindictive Prosecution or for Prosecutorial Misconduct, a Special Plea of Double Jeopardy and a Writ of Habeas Corpus and Motion to Quash Allegations of Contempt.

The Special Plea of Double Jeopardy and Writ of Habeas Corpus and Motion to Quash Allegations of Contempt were heard on November 30, 2016. All relief was denied Petitioner.

Petitioner appealed to the Seventh Court of Appeals in Amarillo, which affirmed the denial of relief in a Memorandum Opinion.

The Texas Court of Criminal Appeals refused to hear the matter.

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PROCEDURAL HISTORY

This case comes before this Court from the denial of a Special Plea of Double Jeopardy and a Writ of Habeas Corpus.

Petitioner timely appealed the denial of his Writ. In a Memorandum Opinion, the Seventh Court of Appeals in Amarillo, Texas affirmed. Petitioner timely appealed to the Texas Court of Criminal Appeals, which refused discretionary review, thereby affirming the decision of the Amarillo Court of Appeals. The Texas Court of Criminal Appeals denied rehearing.

This proceeding results.

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REASONS FOR GRANTING THE WRIT

The Texas Legislature has codified the limits on the punishment that may be imposed for contempt of court.² And the Texas Legislature has codified part of

² TEX. GOV'T CODE § 21.002(b) (2003).

the procedure that must be followed should an officer of the court be held in contempt by a trial court.³

This Court has held that, consistent with Due Process, a court may not start off a contempt proceeding against an attorney with an order of attachment and the arrest of the attorney.⁴ Effectively, that is what happened here and the courts hereunder ignored this Court's holding on the matter. But, once again, the Texas courts of appeals and the Texas Court of Criminal Appeals have shown themselves to be unwilling or unable to follow this Court's precedent.⁵ And, in counsel's opinion, unless and until this Court shall admonish them as it did the Ninth Circuit Court of Appeals,⁶ they have no reason or incentive not to continue ignoring this Court's precedents.

The Texas Supreme Court has held that notice of the contempt must issue and be served on the contemnor in order for the court to acquire jurisdiction over the case and over the contemnor.⁷ The Texas Court of

³ TEX. GOV'T CODE § 21.002(d) (2003). When first codified in 1985, this statute was merely a re-codification of Art. 1911a, V.T.C.S. See also *Ex parte Pink*, 645 S.W.2d 262, 263-264 (Tex. Crim. App. 1982).

⁴ See *Cooke v. United States*, 267 U.S. 517, 537 (1925).

⁵ See, e.g., Docket No. 17-5095, *Lockhart v. Texas* (declined to follow *Florida v. Jardines*, 133 S.Ct. 1409 (2013)); Docket No. 16-5891, *Lockhart v. Texas* (same).

⁶ See *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983).

⁷ *Ex parte Testard*, 106 S.W. 319, 320 (Tex. 1908).

Criminal Appeals has never addressed this jurisdictional issue.

Consistent with Due Process requirements, the Texas Court of Criminal Appeals⁸ and the Texas Supreme Court⁹ hold that an alleged contemnor is entitled to notice of an alleged contempt. But, while the Supreme Court of Texas holds that an alleged contemnor must be personally served with the notice of the allegations of contempt and an order to appear and show cause,¹⁰ the Texas Court of Criminal Appeals has never addressed this threshold requirement.

And the Amarillo Court of Appeals has now dispensed with the requirement of personal service of the Notice of the Allegations of Contempt and an Order to Appear and Show Cause before an attorney may be attached and arrested for failing to appear at the hearing – of which he had no notice.

To compound the gravity of its error, the Amarillo Court of Appeals inserted language into the Order for Writ of Attachment (Appendix 12) that was not in the Order.¹¹ The Amarillo Court of Appeals also ignored

⁸ See *Ex parte Pink*, 645 S.W.2d 262 (Tex. Crim. App. 1982).

⁹ See *Ex parte Blanchard*, 736 S.W.2d 642, 643 (Tex. 1987), citing *Ex parte Herring*, 438 S.W.2d 801, 803 (Tex. 1969).

¹⁰ See, e.g., *Ex parte Adell*, 769 S.W.2d 521, 522 (Tex. 1989), citing *Ex parte Blanchard*, 736 S.W.2d 642, 643 (Tex. 1987); *Ex parte Gordon*, 584 S.W.2d 686, 690 (Tex. 1979); *Ex parte Edgerly*, 441 S.W.2d 514, 516 (Tex. 1969).

¹¹ On page 4 of the Opinion (Appendix 12), the Court of Appeals said that the Order “directed the local sheriff to take Hesse into custody and bring him to the 251st District Court to show

the fact that the Order for Attachment was actually a Show Cause Order and held that when an attorney is attached and arrested for failing to appear at the hearing, of which he had no notice, there was no violation of his Due Process rights and his subsequent two-day incarceration did not constitute punishment for Fifth Amendment double jeopardy purposes.

This presents constitutional questions of broad implication – questions that merit addressing by this Honorable Court.

I. Fourteenth Amendment Due Process Requirements.

This case presents three separate, but related Due Process violations. The first Due Process violation arises from the failure to serve Petitioner with the Notice of Hearing to Show Cause, followed by his arrest and incarceration for not appearing at the hearing of which he had no notice. The second Due Process violation arises from the trial court's use of a writ of attachment to arrest and incarcerate Petitioner when he had never been served with anything. The third Due Process violation arises from Petitioner's arrest in order to compel him to show cause as to why he did not appear at the hearing, of which he had no notice.

cause why he has failed to appear as requested [by] 'said Court, said person having disobeyed a court order.'" But there is nothing in that Order (Appendix 12) about Hesse "having disobeyed a court order."

A. Procedural Due Process:

“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendments. . . . The fundamental requirement of Due Process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”¹² Indeed, “[t]he fundamental requirements of procedural due process are notice and an opportunity to be heard before the government may deprive a person of a protected liberty or property interest.”¹³

Stated another way, “[f]ailure to give notice violates ‘the most rudimentary demands of due process of law.’”¹⁴ And criminal contempt proceedings require additional Due Process protections.¹⁵ Those additional Due Process protections include the requirement that notice of the contempt issue and be served on the contemnor in order for the court to acquire jurisdiction over the case and over contemnor.¹⁶ Indeed, this Court has held that, consistent with Due Process, a court may

¹² *Mathews v. Eldridge*, 424 U.S. 319, 332-333 (1976).

¹³ *Conner v. City of Santa Ana*, 897 F.2d 1487, 1492 (9th Cir. 1990), *cert. denied*, 498 U.S. 816 (1990).

¹⁴ *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84 (1988), *citing Armstrong v. Manzo*, 380 U.S. 545, 550 (1965).

¹⁵ *See Int’l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827 (1994) (criminal penalties may not be imposed on someone who has not been afforded the protections that the constitution requires of such criminal proceedings).

¹⁶ *Ex parte Testard*, 106 S.W. 319, 320 (Tex. 1908).

not start off a contempt proceeding against an attorney with an order of attachment and the arrest of the attorney.¹⁷

Agreeing with this Court’s pronouncement in *Taylor v. Hayes*,¹⁸ the Texas Court of Criminal Appeals has held that the controlling Texas statute (now § 21.002(d), TEX. GOV’T CODE) precludes summary punishment by contempt of an attorney, even though his conduct deemed contumacious is before the Court.¹⁹ In *Pink*, the Texas Court of Criminal Appeals recognized the attorney’s Due Process rights to “reasonable notice of the specific charges and the opportunity to be heard on his own behalf.”²⁰

But the Texas Court of Criminal Appeals has never set forth how the contemnor attorney is to receive that notice or when he is to receive that notice before he may be attached and hauled to jail, or to court.

Conversely, the Texas Supreme Court, in dealing with non-lawyer contemnors in civil cases, has consistently held that “[n]otice in the context of a criminal contempt proceeding requires **two** types of notice: timely notice by **personal service of the show cause hearing**, and full and unambiguous notice of the contempt

¹⁷ See *Cooke v. United States*, 267 U.S. 517, 537 (1925).

¹⁸ *Taylor v. Hayes*, 418 U.S. 488 (1974).

¹⁹ *Ex parte Pink*, 645 S.W.2d 262, 263 (Tex. Crim. App. 1982), citing *Taylor v. Hayes*, 418 U.S. 488 (1974).

²⁰ *Ex parte Pink*, 645 S.W.2d at 264.

accusations.”²¹ Indeed, the Texas Supreme Court has “repeatedly held that full and unambiguous notice of the accusation of contempt **must be** served on the alleged contemnor.”²² The notice must conform to any relevant procedural requirements and be actually delivered to the alleged contemnor in a timely fashion.²³ Notice given to the contemnor’s attorney is inadequate; the notice must be served personally on the contemnor.²⁴ This is consistent with the Texas Supreme Court’s holding that, to acquire jurisdiction over the case and over contemnor, notice of the contempt must issue and be served on the contemnor.²⁵

B. First Due Process Violation:

Unfortunately for Petitioner, neither the Texas Supreme Court nor the Texas Court of Criminal Appeals has ever addressed what constitutes personal service of a writ or notice such as this. Assuming, without

²¹ *Ex parte Blanchard*, 736 S.W.2d 642, 643 (Tex. 1987) (Due Process requires that the alleged contemnor be **personally served** with a show cause order), *citing Ex parte Herring*, 438 S.W.2d 801, 803 (Tex. 1969). *See also Ex parte Johnson*, 654 S.W.2d 415, 416 (Tex. 1983) (contemnor personally served).

²² *Ex parte Adell*, 769 S.W.2d 521, 522 (Tex. 1989), *citing Ex parte Blanchard*, 736 S.W.2d 642, 643 (Tex. 1987); *Ex parte Gordon*, 584 S.W.2d 686, 690 (Tex. 1979); *Ex parte Edgerly*, 441 S.W.2d 514, 516 (Tex. 1969); *see also Ex parte Vetterick*, 744 S.W.2d 598 (Tex. 1988).

²³ *In re Acceptance Ins. Co.*, 33 S.W.3d 443, 449 (Tex. App. – Fort Worth 2000, orig. proceeding).

²⁴ *Ex parte Herring*, 438 S.W.2d 801, 803 (Tex. 1969).

²⁵ *Ex parte Testard*, 106 S.W. 319, 320 (Tex. 1908).

conceding, that personal service of the Notice to Appear and Show Cause could be effected by certified mail, the question then becomes when that notice would have been actually served on Petitioner and therefore effective as to him.

Giving him the benefit of the doubt, the prosecutor on the contempt apparently believed that merely mailing the Notice to Appear and Show Cause to the 10-story building in which Petitioner offices constitutes service sufficient to comply with the Due Process requirements. (*See* Appendix 17) There is no authority for this mistaken position.

Indeed, in a different context, the Texas Supreme Court has held that notice is given when the item is received, not when it is deposited in the mail.²⁶ That is consistent with the definition of personal service, which is the actual delivery of the notice or process to the person to whom it is directed.²⁷

But the Notice to Appear and Show Cause was not delivered to Petitioner – it was delivered to someone named Cathy Bears, presumably somewhere within the office building in which Petitioner offices. (*See* Appendix 25) In short, Petitioner was never served with notice of the hearing that was set for July 29, 2016, at

²⁶ *McClure v. Georgia Cas. Co.*, 251 S.W. 800, 801 (Tex. 1923) (notice relating to appeal of Industrial Accident Board award).

²⁷ Source: Black's Law Dictionary (10th ed. 2014).

1:30 p.m., or with the order compelling him to be present at that time.

Because, and solely because, he was never served with notice of that hearing, Petitioner was not present in the 251st Judicial District Court on July 29, 2016, at 1:30 p.m.

Even though the complete and utter lack of service of the Notice upon Petitioner was evident on the face of the court's file, the prosecutor falsely swore that Petitioner was served with notice of the hearing by certified mail. Based upon that false sworn application (Appendix 17), a writ of attachment issued (Appendix 12). The writ of attachment was served on Petitioner, resulting in his arrest and confinement in the Potter County Detention Facility for two days. This occurred when, according to *Testard*,²⁸ the court had no jurisdiction over Petitioner or even the cause.

C. Second Due Process Violation:

His attachment and arrest give rise to the second violation of Petitioner's Due Process rights which comes from the authority of the assigned judge to issue a writ of attachment in these circumstances.

Simply put, what was the authority of the assigned judge to issue a writ of attachment for Petitioner's arrest in these circumstances? None. Absolutely none. And the Court of Appeals cited none.

²⁸ *Ex parte Testard*, 106 S.W. 319, 320 (Tex. 1908).

In the context of a criminal contempt proceeding,²⁹ the proceedings should conform as nearly as practicable to proceedings in criminal cases.³⁰ This is consistent with the fact that criminal contempts are petty crimes.³¹

What this means has never been specifically delineated but Petitioner assumes that this means a written charging instrument that is actually served upon the defendant.³² This would be consonant with the Texas Supreme Court's pronouncement that:

“Our immediate problem with the contempt order is that it was not preceded by service of an appropriate show cause order or any other appropriate method of notice. Due process requires that the alleged contemnor be personally served with a show cause order or that it be established that he had knowledge of the content of such order.”³³

²⁹ This was a criminal contempt proceeding. In criminal contempt proceedings, the court punishes the contemnor for improper actions and no subsequent voluntary compliance can avoid punishment for past acts. *Ex parte Busby*, 921 S.W.2d 389, 391 (Tex. App. – Austin 1996, orig. proceeding).

³⁰ *Ex parte Palmateer*, 243 S.W. 160, 161 (Tex. 1951); *Deramus v. Thornton*, 333 S.W.2d 824, 829 (Tex. 1960).

³¹ See *Bloom v. State of Ill.*, 391 U.S. 194, 209-210 (1968).

³² See, e.g., Art. 27.01, Art. 27.11 and Art. 27.12, TEX. CODE CRIM. PRO.

³³ *Ex parte Blanchard*, 736 S.W.2d 642, 643 (Tex. 1987). There is no evidence that Petitioner had knowledge of the order. And mere knowledge of the contents of the order, without personal service, would contradict the holding in *Ex parte Testard*, 106 S.W. 319, 320 (Tex. 1908).

So, what was the authority of the assigned judge to issue a writ of attachment in these circumstances? Since the proceedings should conform as nearly as practicable to proceedings in criminal cases, presumably Art. 24.12, TEX. CODE CRIM. PRO. (1999), controls.

Art. 24.12 requires that a subpoena be duly served before an attachment may be issued. Art. 24.04, TEX. CODE CRIM. PRO. (1999), defines what is service and return of a subpoena. Art. 24.04(a)(4), TEX. CODE CRIM. PRO., permits the mailing of a copy of the subpoena by certified mail, return receipt requested, to the last known address of the witness. But Art. 24.04(b), TEX. CODE CRIM. PRO., requires the officer having the subpoena to make due return thereof. Again, the return (Appendix 22) is blank and there is no way of knowing who actually mailed the Notice to Appear and Show Cause.

“Attachment is a harsh, oppressive remedy; therefore, attachment is not available unless statutory safeguards are **strictly** observed.”³⁴ And an attachment for a witness is **not authorized** unless the witness fails to obey a **properly served** subpoena.³⁵ This was anything but proper service, and attachment should not have been available.

³⁴ *S.R.S. World Wheels, Inc. v. Enlow*, 946 S.W.2d 574, 575 (Tex. App. – Fort Worth 1997) [emphasis supplied].

³⁵ See *Boyle v. State*, 820 S.W.2d 122 (Tex. Crim. App. 1989); *Clark v. State*, 305 S.W.3d 351, 356 (Tex. App. – Houston [14th Dist.] 2010, *aff’d*, 365 S.W.3d 333 (Tex. Crim. App. 2012) [emphasis supplied]. See also Art. 24.04, TEX. CODE CRIM. PRO.

Indeed, the Supreme Court of Texas has held that it requires that notice of the contempt issue and be served on the contemnor in order for the court to acquire jurisdiction over the case and over the contemnor.³⁶ The trial court had no jurisdiction to issue a writ of attachment against Petitioner as it had not acquired jurisdiction over his person by service of the Notice to Appear and Show Cause upon him.

Further, there is no case that holds that a Notice to Appear and Show Cause is a subpoena. While a Notice to Appear and Show Cause is an order, that means that it is a written direction or command delivered by a government official, especially a court or judge.³⁷ Conversely, a subpoena is a process to cause a witness to appear and give testimony, commanding him to lay aside all pretenses and excuses and appear before a court or magistrate therein named at a time therein mentioned to testify for the party named under a penalty therein mentioned.³⁸

And there is no authority for the proposition that a subpoena received by a third person constitutes proper service upon the person named in the subpoena. Again, the statutory safeguards were not strictly observed.

Because Petitioner was never served, the court had no jurisdiction over Petitioner. Consequently, there

³⁶ *Ex parte Testard*, 106 S.W. 319, 320 (Tex. 1908).

³⁷ Source: Black's Law Dictionary (10th ed. 2014).

³⁸ Source: Black's Law Dictionary (4th ed. 1968).

was no authority for the court to issue a writ of attachment and that attachment was, therefore, void. Being arrested on a void order should constitute a prima facie Due Process violation.

D. Third Due Process Violation:

The attachment and arrest also gives rise to the third violation of Petitioner's Due Process rights. The Order on the State's Application for Writ of Attachment (Appendix 12) commanded that the Sheriff of Potter County take immediate custody and control of Petitioner, and commanded Petitioner to "appear and present before the Court instanter and that he appear before this Court to show cause why he has failed to appear as requested."

While perhaps unartfully worded, this was actually both an order to appear and show cause why Petitioner should not be held in contempt for his non-appearance at the July 29, 2016, hearing, and it was a writ of commitment for his contempt in failing to show up when ordered.

A commitment order is issued after a finding of contempt. A commitment order is the warrant, process, or Order by which a court directs a ministerial officer to take custody of a person.³⁹ The order containing this directive need not take a particular form and may be a separate Order issued by the court, an attachment, or

³⁹ *Ex parte Hernandez*, 827 S.W.2d 858 (Tex. 1992).

Order issued by the clerk at the court's direction, or included in the contempt judgment.⁴⁰

If Petitioner had been served with the Notice to Appear and Show Cause at the July 29, 2016, hearing, his failure to appear in such a situation would have been, at best, a constructive contempt.⁴¹ There is simply no authority for arresting and incarcerating a person alleged to be in constructive contempt of court without having first given that person full and complete notification and reasonable opportunity to meet charges by way of defense or explanations.⁴²

Conclusion:

This Court should address whether there is a Due Process requirement of personal service of the Notice of Allegations of Contempt and of the Notice of a Hearing to Show Cause upon the contemnor attorney, especially after the conclusion of the underlying case. If this Court should so hold, this Court should address whether merely mailing the Notice of Allegations of Contempt and of the Notice of a Hearing to Show Cause constitutes such personal service, especially when those Notices are not received by the alleged contemnor. And, if this Court should hold that mailing those Notices without their receipt by the alleged contemnor does not constitute personal service of those Notices, then this Court should hold that issuing a writ

⁴⁰ *Id.*

⁴¹ *Ex parte Gordon*, 584 S.W.2d 686, 688 (Tex. 1979).

⁴² *Id.*

of attachment and causing the arrest and incarceration of Petitioner, when he had never been served with notice of the hearing, violated Petitioner's Fourteenth Amendment Due Process rights.

II. Violation Of The Fifth Amendment.

Under § 21.002(b), TEX. GOV'T CODE, the maximum punishment that may be imposed for contempt of a district court is a fine of \$500 and confinement in the county jail for not more than six months, or both. Because of the range of punishment, contempt is a petty crime.⁴³

Petitioner withdrew from representing Mr. Phommivong before the case against him concluded. And the underlying case concluded the week before the Notice to Appear and Show Cause issued. There was then nothing pending in the 251st Judicial District Court. The contempt proceeding was, therefore, a new proceeding with which Petitioner was required to be served in order for the court to acquire jurisdiction over the matter and his person.⁴⁴

But Petitioner was never served with anything. And under *Testard*,⁴⁵ the court had no jurisdiction of the proceeding or over Petitioner. The writ of attachment was, therefore, void.

⁴³ See *Bloom v. State of Ill.*, 391 U.S. 194, 209-210 (1968).

⁴⁴ *Ex parte Testard*, 106 S.W. 319, 320 (Tex. 1908).

⁴⁵ *Ex parte Testard*, 106 S.W. 319, 320 (Tex. 1908).

As Petitioner was never served with the Notice to Appear and Show Cause, he had no obligation to appear in the 251st Judicial District Court on July 29, 2016. This is consistent with the principle that in order to cite a person for contempt for violating a court Order, it must be established that the alleged contemnor had knowledge of the Order which he is said to have violated.⁴⁶ But Petitioner was not served with the Order to Appear and Show Cause and he had no knowledge of that Order.

A. Double Jeopardy Analysis:

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.”⁴⁷ The Double Jeopardy Clause of the United States Constitution embodies three protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense.⁴⁸ “This protection applies both to successive punishments and to successive prosecutions for the same criminal offense.”⁴⁹

⁴⁶ *Wilson v. North Carolina*, 169 U.S. 586, 600 (1898).

⁴⁷ *Benton v. Maryland*, 395 U.S. 784 (1969).

⁴⁸ *Illinois v. Vitale*, 447 U.S. 410 (1980); *Brown v. Ohio*, 432 U.S. 161 (1977).

⁴⁹ *United States v. Dixon*, 509 U.S. 688, 696 (1993).

B. Double Jeopardy Protections In Contempt Proceedings:

The “constitutional protections for criminal defendants other than the double jeopardy provision apply in nonsummary criminal contempt prosecutions just as they do in other criminal prosecutions.”⁵⁰ The Double Jeopardy Clause likewise attaches in nonsummary criminal contempt prosecutions.⁵¹

At the Seventh Court of Appeals, Petitioner argued that he had been punished and that a punishment, already partially suffered, cannot be increased; and that, therefore, the Double Jeopardy Clause prohibits any further punishment.⁵²

C. Punishment:

Petitioner was arrested on July 31, 2016, taken to the Potter County Detention Facility, held overnight and not released until late on August 1, 2016. This when the court had no jurisdiction to order his arrest.

Punishment is defined as a sanction – such as a fine, penalty, confinement, or loss of property, right, or privilege – assessed against a person who has violated

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Petitioner cited *United States v. Benz*, 282 U.S. 304, 307 (1931), for this proposition.

the law.⁵³ And there is no dispute that Petitioner was confined.

To avoid finding that Petitioner was punished, the Seventh Court of Appeals held:

“So, the underlying purpose for this detention had nothing to do with extracting retribution from or deterring unlawful conduct by Hesse; it served to afford him opportunity to explain why he did not appear at the hearing.

That Hesse was seized due to his failure to appear at the 21.002(d) hearing also negates one other requirement of the Double Jeopardy Clause. As previously mentioned, the accused must face multiple punishments for the same offense. The supposed ‘offense’ resulting in his attachment was not his previous utterance of an objectionable word but rather his failure to appear when his guilt or innocence for that conduct was being adjudicated. Thus, it cannot even be said that the ‘same offense’ was involved.” (Appendix 1 at p. 5)

But, the portion of the Fourteenth Amendment with which we are concerned in this case – “nor shall any State deprive any person of life, liberty, or property, without due process of law” – indicates that the violation of Due Process standards makes a particular “deprivation” an objectionable, illegal “deprivation.”⁵⁴ That

⁵³ Source: Black’s Law Dictionary (10th ed. 2014).

⁵⁴ Cf. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

is, the Amendment focuses on the means by which the “deprivation” is achieved.

Never being served with a notice to appear and show cause and then being arrested and jailed should be held to be a deprivation of liberty without Due Process of law – an illegal deprivation. Indeed, this event well could be the poster child for a deprivation of liberty without Due Process of law.

When one is arrested and incarcerated without Due Process or probable cause, one is punished within the meaning of the Fifth Amendment. Even more so when the court has no jurisdiction over the cause or over the person of the arrestee (Petitioner), as here.

But for the Notice of Allegations of Contempt and the Order to Show Cause issued by Judge Estevez, there would have been no hearing scheduled on July 29, 2016. And, but for that scheduled hearing, there would have been no basis for the prosecutor to falsely swear that Petitioner was served and failed to appear.

Because of this nexus, this Court should hold that Petitioner has been punished within the meaning of the Double Jeopardy clause and any further punishment on the contempt is barred.

III. False Affidavit To Secure Arrest.

In order to secure issuance of the writ of attachment, the prosecutor falsely swore that Petitioner had been served with the Notice of a Due Process Hearing (sic).

And while captioned as an Order, the document commanded “that the Sheriff of Potter County or his duly appointed deputies take immediate custody and control of David Christopher Hesse and hold and retain custody of the said David Christopher Hesse.” Since a warrant is a writ directing or authorizing someone to do an act, especially one directing a law enforcer to make an arrest, a search, or a seizure,⁵⁵ the order was actually a warrant for Petitioner’s arrest.

A plurality of this Court held that the Fourth Amendment governed “pretrial deprivations of liberty.”⁵⁶ And it is “a violation of the Fourth Amendment for an arrest warrant affiant to ‘knowingly, or with reckless disregard for the truth,’ include false statements in the affidavit.”⁵⁷

Similarly, it is a Fourth Amendment violation to “knowingly or recklessly omit from the affidavit information which, if included, would have vitiated probable cause.”⁵⁸ If an arrest warrant affidavit contains false statements, “the existence of probable cause is determined by setting aside the false information and reviewing the remaining contents of the affidavit.”⁵⁹

To serve is defined as: “1. To make legal delivery of (a notice or process) <a copy of the pleading was served

⁵⁵ Source: Black’s Law Dictionary (10th ed. 2014).

⁵⁶ *Albright v. Oliver*, 510 U.S. 266, 274 (1994).

⁵⁷ *Franks v. Delaware*, 438 U.S. 154, 155-156 (1978).

⁵⁸ *Stewart v. Donges*, 915 F.2d 572, 581-583 (10th Cir. 1990).

⁵⁹ *Id.*

on all interested parties>. 2. To present (a person) with a notice or process as required by law <the defendant was served with process>.”⁶⁰ There is no definition of “to serve” that includes merely mailing a document to a 10-story building, without specifying a suite number or getting the signature of the person to whom the item is mailed, on the return receipt. And, as shown by the Application for Attachment (Appendix 17), the prosecutor knew that Petitioner’s office was in Suite 301 (sic) in the building located at 118 West 8th Avenue in Amarillo.

Asking for and having Petitioner arrested under these circumstances was a violation of his Fourth Amendment rights. That was also a violation of Petitioner’s Fourteenth Amendment Due Process rights. And this Court should so hold.

IV. Denial Of Equal Protection Of The Law.

An officer of the court is someone who is charged with upholding the law and administering the judicial system.⁶¹ An attorney representing his client in the trial of a case is an officer of the Court.⁶² Petitioner was an officer of the court in the underlying proceedings.

The Fourteenth Amendment to the United States Constitution provides in relevant part: “No State

⁶⁰ Source: Black’s Law Dictionary (10th ed. 2014)

⁶¹ Source: Black’s Law Dictionary (10th ed. 2014).

⁶² *Ex parte Pink*, 645 S.W.2d 262, 263 (Tex. Crim. App. 1982).

shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

Because he was an attorney representing a client in a criminal case when he was subsequently sought to be held in contempt, Petitioner’s Due Process rights were substantially different (and less) than those Due Process rights would have been had he been an attorney representing a client in a civil case when he was sought to be held in contempt.

This difference arises from the fact Texas has two courts of last resort: the Supreme Court of Texas and the Texas Court of Criminal Appeals. And more than one hundred years ago, the Alabama Supreme Court explained why having two courts of last resort might be a bad idea:

“There must be in every state a court capable of exercising ultimate judicial power. In this state that is the Supreme Court. If it were otherwise, there would be no organ of government capable of authoritatively settling judicial questions; and there must be such an organ there can be no doubt, for the judicial department is an independent one, and the element of sovereignty delegated to that department must, as in the case of the executive and legislative, reside, in its last and highest form, in one tribunal, one officer, or body of officers.”⁶³

⁶³ *Williams v. Louisville & Nashville R.R.*, 176 Ala. 631, 58 So. 315, 316 (1912).

This case illustrates just how prescient the Supreme Court of Alabama was as to how bad an idea it is and how having two courts of last resort denies persons, such as Petitioner, the equal protection of the laws that the Fourteenth Amendment guarantees them.

Texas’s “dual high courts are largely meant to be co-equals – constitutional twins. This is anomalous among court systems, even in the only other two-court state, Oklahoma. Like Texas, Oklahoma has a Supreme Court that hears civil appeals and a Court of Criminal Appeals that hears criminal appeals. But there are two key differences. First, the Oklahoma Court of Criminal Appeals is “subject to the power of the Legislature to change or abolish.” (*citing* Okla. Const. art. VII, § 1) Second, the Oklahoma Supreme Court is truly supreme; if there is a jurisdictional clash, the Supreme Court “shall determine which court has jurisdiction and such determination shall be final.” (*citing* Okla. Const. art. VII, § 4) In other words, there are two states in the nation with two courts of last resort. But only one state – the Lone Star State – has a non-supreme Supreme Court.”⁶⁴

And, as Justice Willett noted in his dissent, regarding the *Reece* case, “As it illustrates, our dichotomized system invites inter-court confusion, and as Texas history shows, inter-court clashes.”⁶⁵

⁶⁴ *In re Reece*, 341 S.W.3d 360, 380-381 (Tex. 2011), dissent by Justice Willett.

⁶⁵ *In re Reece*, 341 S.W.3d at 384.

Those clashes and confusion are manifest in this case.

Why? Because the jurisdiction of the Supreme Court of Texas extends to all cases except in criminal law matters.⁶⁶ This case is a criminal law matter because it arose during a criminal case and cannot be presented to the Supreme Court of Texas. Conversely, contempts, even criminal contempts, arising from civil cases must ultimately be presented to the Supreme Court of Texas.⁶⁷

The Court of Criminal Appeals has final appellate jurisdiction coextensive with the limits of the state, and its determinations shall be final, in all criminal cases.⁶⁸ Accordingly, the Texas Court of Criminal Appeals has jurisdiction of contempts arising from or during criminal cases. Again, as this contempt proceeding arose during a criminal case, the Texas Court of Criminal Appeals had ultimate jurisdiction of the case.

The Supreme Court of Texas holds that an alleged contemnor must be personally served with the notice of the allegations of contempt and an order to appear and show cause.⁶⁹ This is consistent with its holding

⁶⁶ Art. 5, § 3, Texas Constitution. *See also In re Reece*, 341 S.W.3d 360, 375 (Tex. 2011).

⁶⁷ *Ex parte Green*, 272 S.W. 161 (Tex. Crim. App. 1925).

⁶⁸ Art. 5, § 5(a), Texas Constitution.

⁶⁹ *See, e.g., Ex parte Adell*, 769 S.W.2d 521, 522 (Tex. 1989), *citing Ex parte Blanchard*, 736 S.W.2d 642, 643 (Tex. 1987); *Ex parte Gordon*, 584 S.W.2d 686, 690 (Tex. 1979); *Ex parte Edgerly*, 441 S.W.2d 514, 516 (Tex. 1969).

that service of the notice on the alleged contemnor is required for the court to acquire jurisdiction of the (contempt) case and of the person of the contemnor.⁷⁰

As to a constructive contempt proceeding, the reasoning in the *Testard* case is unassailable and irrefutable, especially as to an attorney who is to be held in contempt in Texas after the conclusion of the underlying case and long after he was no longer associated in any way with the case.

While it noted in one case that no notice or summons was served upon the contemnor before he was held in contempt,⁷¹ the Texas Court of Criminal Appeals has never otherwise addressed the Due Process requirement of personal service of the notice or summons. And definitely not in the context of whether the trial court even had jurisdiction of the Petitioner or of the contempt case, as the Supreme Court of Texas has done.⁷² Not even when presented with the opportunity to do so in the appeal hereunder.

And the Seventh Court of Appeals was not concerned in the least that Petitioner was never served with the Notice to Appear and Show Cause before he was attached, arrested and incarcerated for not showing up. Apparently, the Texas Court of Criminal

⁷⁰ *Ex parte Testard*, 106 S.W. 319, 320 (Tex. 1908).

⁷¹ See *Ex parte O'Fiel*, 246 S.W. 664, 665 (Tex. Crim. App. 1923).

⁷² *Ex parte Testard*, 106 S.W. 319, 320 (Tex. 1908).

Appeals wasn't concerned in the least either, as they refused to hear the case.

Had Petitioner been held in contempt in a civil trial, the Supreme Court of Texas would have had jurisdiction to entertain his writ of habeas corpus. And it is to be presumed that the Supreme Court of Texas would have followed its long line of precedents requiring personal service of the notice upon Petitioner as a matter of Due Process.⁷³

As evidenced by the Opinion of the Seventh Court of Appeals and by the refusal of the Texas Court of Criminal Appeals to hear this matter, such is not the case in a contempt arising in a criminal trial.

In this situation, and as a matter of constitutional law, this Court should hold that Petitioner was denied the equal protection of the laws when the State was not required to personally serve him with the Notice to Appear and Show Cause before he was arrested and incarcerated for not appearing on July 29, 2016.



CONCLUSION AND PRAYER

For these reasons, this Court should issue its writ of certiorari and review the decision of the Seventh

⁷³ *Ex parte Adell*, 769 S.W.2d 521, 522 (Tex. 1989); *Ex parte Vetterick*, 744 S.W.2d 598 (Tex. 1988); *Ex parte Blanchard*, 736 S.W.2d 642, 643 (Tex. 1987); *Ex parte Gordon*, 584 S.W.2d 686, 690 (Tex. 1979); *Ex parte Edgerly*, 441 S.W.2d 514, 516 (Tex. 1969).

Court of Appeals at Amarillo, Texas. This Court should thereafter hold that, as a matter of Due Process, an alleged contemnor must be personally served with the Notice to Appear and Show Cause before the court acquires jurisdiction over his person. This Court should further hold that Petitioner was punished by being arrested without probable cause and that the Fifth and Fourteenth Amendments forbid any further punishment of Petitioner. This Court should also hold that Petitioner's Due Process rights were violated by not being served with notice and by being arrested for not appearing at a hearing of which he had no notice. And this Court should hold that it denies Petitioner the equal protection of the law for the Texas Court of Criminal Appeals to not require that an attorney contemnor be personally served with a Notice to Appear and Show Cause before he may be attached and incarcerated for not appearing at a Show Cause hearing. This Honorable Court should grant Petitioner general relief.

Respectfully submitted,

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Dated: March 16, 2018

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