



**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

NO. WR-94,432-01

IN RE STATE OF TEXAS EX REL. KEN PAXTON, Relator

**ON MOTION FOR LEAVE TO FILE A WRIT OF PROHIBITION
IN RELATION TO DALLAS COUNTY CASE OF EX PARTE
WESLEY RUIZ, POTTER COUNTY CASE OF EX PARTE JOHN
LEZELL BALENTINE, AND HARRIS COUNTY CASE OF EX
PARTE ROBERT ALAN FRATTA TRAVIS COUNTY**

**NEWELL, J., filed a dissenting opinion in which WALKER, J.,
joined.**

Recently, in *Nance v. Ward*, the United States Supreme Court recognized that a death-row inmate can bring a civil §1983 action for injunctive relief to challenge the method of his or her execution.¹ We

¹ *Nance v. Ward*, 142 S. Ct. 2214, 2219 (June 23, 2022).

have previously held that a challenge to the lethal injection protocol is not cognizable in an application for a writ of habeas corpus.² And we've held, at least in the context of a civil suit seeking a clemency hearing, that a civil injunction in a civil case that has the effect of staying an execution is a criminal law matter subject to our jurisdiction.³

As Judge Price pointed out in his dissenting opinion in *Chi*, this creates a Catch-22 in which death-row inmates have a civil remedy to pursue claims regarding the method of execution but may not stop the execution to raise them.⁴ Further, this case is slightly different than the factual scenario presented in *State ex. rel. Holmes v. Hon. Court of Appeals for the Third Dist.*, in which we held that a civil suit seeking a clemency hearing could not enjoin a criminal execution. In *Holmes*, the suit was seeking to avoid the execution altogether through clemency

² *Ex parte Alba*, 256 S.W.3d 682, 683-84 (Tex. Crim. App. 2008); see also *Ex parte Chi*, 256 S.W.3d 702, 702-03 (Tex. Crim. App. 2008).

³ *State ex rel. Holmes v. Honorable Ct. of Appeals for Third Dist.*, 885 S.W.2d 389, 394 (Tex. Crim. App. 1994).

⁴ *Chi*, 256 S.W.3d at 714 n.43 (Price, J., dissenting) ("Because this Court refuses to exercise habeas corpus jurisdiction, and because the civil courts cannot enjoin executions even if they can entertain challenges to the lethal-injection protocol, dozens, perhaps even scores, of death-row inmates may eventually be executed before the matter could be resolved on the civil side of the docket.").

proceedings. In this case, at least arguably, the underlying suit seeks to effectuate a proper execution according to state law.⁵

Perhaps this argument by the real-parties-in-interest is too clever by half and instituted for purely dilatory purposes. It certainly appears disingenuous that a death row inmate really desires a proper execution rather than delay through perpetual litigation. Nevertheless, it does point to a conundrum that I believe should be addressed in light of *Nance*. Consequently, I would file and set this matter for submission. Because the Court does not, I respectfully dissent.

Filed: January 4, 2023

Publish

⁵ The real parties in interest purport to use the Texas Pharmacy Act; the Texas Controlled Substances Act; the Texas Food, Drug, and Cosmetic Act; and Texas Penal Code § 38.11 to apply for an injunction in these cases.