HOW TO WRIT THE TRIAL COURT

-or-

I THINK I'D RATHER LOSE MY APPEAL UP FRONT

The truth is, it's not too difficult to launch a collateral attack on the trial court by applying for "extraordinary" and "original" jurisdiction in the Court of Criminal Appeals, or for that matter the Oklahoma Supreme Court. It's like the old inside joke, "Can I file a suit over this injustice/wrong/injury?" Of course you can. You just need some paper to write on, and a filing fee for the Clerk.

It's the same with filing writs in Oklahoma City: follow the rules and submit your fee along with your writ. The more difficult question is whether you risk more than you might gain, and whether, all things considered, it's worth the effort and time involved.

Let's first prove how incredibly easy it is to add a writ or two to your litigation arsenal:

THE SIMPLE RECIPE FOR PETITIONER'S PIE

Assuming for the moment that your writ will be directed to the Court of Criminal Appeals, you have only a few rules to master, all set out in Rule 10 of the Rules of the Court of Criminal Appeals. There are only six of these rules, and they're so straightforward that I think the easiest way to follow along is simply to consider their respective text in order:

Rule 10.1 Types of Extraordinary Writs; Jurisdiction

A. This Court may entertain certain extraordinary writs which arise out of criminal matters. Such extraordinary writs include writs of mandamus, prohibition, and habeas corpus. This Court will only entertain such writs if petitioner has been denied relief in the District Court. *See, e.g., McNeil v. Greenway*, 815 P.2d 1202, 1203 (Okl.Cr. 1991), *In re Dykes*, 13 Okl. 339, 74 P. 506, 507 (1903).

Thus we know that all writs are discretionary, and the Court of Criminal Appeals will only have jurisdiction over writs arising from its general jurisdiction over criminal matters. Interestingly, the Court has included two citations in the text of this Rule.

McNeil v. Greenway, 1991 OK CR 90, ¶¶ 5-6, 815 P.2d 1202, 1203

- This mandamus went to the erroneous trial court
- Mandamus requires a "plain legal duty"
- All extraordinary writs require an Adverse Order from the District Court

In re Dykes, 1903 OK 77, 13 Okla. 339, 74 P. 506

- 1903!
- All extraordinary writs require an Adverse Order from the District Court
- No fancy stuff allowed
- If you're on bond, you're not in custody
- Otis was never a prisoner on Andy Griffith

B. The District Court may stay the execution of its judgment upon the filing of a verified motion to stay execution of the judgment pending appeal within ten (10) days from the date of the entry of the judgment. If the motion is granted, the party granted the stay shall file a certified copy of the petition in error in the District Court within five (5) days after the filing of the petition in error in this Court to ensure the District Court is notified of the perfecting of the appeal.

Should you ask the trial court for that stay? If you don't, you won't be able to ask the Court of Criminal Appeals to impose a stay. If you do, take the trouble to verify your motion, since the Court of Criminal Appeals may embarrass you with an Order refusing to consider a stay based on the lack of verification.[1]

C. It shall be the responsibility of the petitioner to ensure the record is filed with the Clerk of this Court. In order to seek relief, the petitioner shall file within thirty (30) days from the date the trial court denied relief:

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[1] Another consideration is that the trial court may interpret a stay from above as staying *all* proceedings, including discovery and other matters you might want to pursue while the writ is pending.

Earth to defense attorney: Does this mean from the day the judge made the decision, or the day you finally obtained that written Adverse Order? Who knows, and even if you know, the smartest approach is to avoid such a problem by anticipating the adverse ruling and being armed with your written proposed Adverse Order on the day of your hearing.[2]

The other demand this subpart makes is that, within the same 30 days, you must see to the assembly and filing of the original record for the writ. Do not treat this like a direct appeal, where it is in the first instance the responsibility of the clerk to assemble and transmit the record for an appeal. Plan on delivering the record and everything else in person to the Clerk of the Appellate Courts, and then taking a tour of the new Dome.

(1) A petition and supporting brief setting forth the relief requested which shall contain a statement of facts, the trial court from which the appeal is lodged and the District Court case number, errors of law urged as having been committed during the proceedings in the trial court and citation of legal authority supporting the petition;

'Nuff said.

(2) A certified copy of the original record applicable to the writ which shall include a copy of the order entered by the trial court;

Notice that the *certified* record must include a *certified* copy of the Adverse Order. Even though I don't believe that a "Notice of Intent to Seek Extraordinary Relief" is required, my practice is to file a combined "Notice of Intent to Seek Extraordinary Relief with Designation of Original Record" that includes specific references to certified copies of the docket sheet, the

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[2] This is easier said than done, since your proposed order may not meet with 100% approval of your opponent and/or the judge. Some judges will cooperate and specifically delay the pronouncement of their ruling until date that the form of order is settled. Others may leave you to twist in the wind of uncertainty. If that's the case, either file your writ 30 days from the "oral pronouncement," or prepare to waste time and effort establishing that the "date of entry" means the "date of signing" or even the "date of filing" of the written document.

You may be tempted to treat the hearing's transcript as the written order, but I prefer to put my own slant on the findings and conclusions.

Adverse Order and the Notice and Designation, along with other appropriate certified documents and transcripts.[3]

(3) A certified copy of any supporting evidence presented to the District Court upon which the request for relief is predicated; and,

More certification!.

(4) The original transcript of any proceedings conducted on the petition, if applicable.

As a practical matter, obtaining transcripts within your 30 day window of opportunity can present a problem. In my second writ in *State v. Barrett*, it took almost 90 days to obtain transcripts of a couple of hearings relating to our writ discovery and the identity of a claimed confidential informant. It may not work for you, but my strategy in that case was to file a motion for supplementation of the original record at the time I filed the Petition, Brief and the rest of the original record.[4] That writ wasn't successful on its merits, but neither was it dismissed on procedural grounds.

Rule 10.2 Ten-Day Rule

No petition for extraordinary relief shall be filed or considered by this Court unless it is filed at least ten (10) days prior to the date the cause is set for hearing or trial. Three (3) members of this Court may suspend this rule upon proper motion setting forth exigent circumstances supporting the suspension of the rule.

The sure fire way to avoid problems with the ten day rule is to ask for and obtain a stay from the trial court. If you don't get that stay, and if your trial is set in 20 days, then my advice

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3 For the life of me, I can't understand this obsession with *certification* by the clerk. It's as if the lawyer's word isn't enough. Still, it's not up to me, and as you will discover in Rule 10.5, the certified copy of the Adverse Order in the original record is only half the battle: *yet another certified copy of the Adverse Order must be attached to the original of your Petition.* If not, you are out the door without so much as an order for a responsive pleading.

4 I pointed out that the relevant transcripts had been specifically designated in a timely manner, but that the court reporter had not completed transcription and that I could wait no longer to file my Petition, etc..

would be to file your writ within 9 days and moot the ten day rule. If instead you file your writ in 15 days, which is well within the 30 day rule, then you'll be scrambling to get the attention of three Judges, while explaining just why it was that you couldn't get your act together sooner.

In the extreme case, e.g., when the trial court issues its Adverse Order less than 10 days before trial, you'll have solid grounds for relief from this rule, but you're still stuck with the need to file sufficient pleadings, documents, etc., to perfect the writ in time to seek and obtain a stay from the Court of Criminal Appeals.

The lesson therefore is to *plan ahead whenever possible.* This isn't too difficult to do, since you will have already researched the issues, submitted a brief, identified the evidence and prepared your Adverse Order *before* the trial court rules against you. Add in a bunch of boiler plate which you can cut and paste from my or your last writ, and you can do your part in no time.[5] Of course, in the proper case, you might elect to take the full 30 days, even if you don't absolutely need them all. ☺

Rule 10.3 Notice

No petition for extraordinary relief shall be heard without notice to the adverse party. The petition for extraordinary relief and brief in support shall reflect service on the adverse party or parties.

There goes the neighborhood.

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[5] Once upon a time, the esteemed Paul Brunton was preparing for trial in the Tulsa County District Court. Unfortunately, the Judge concerned kept stalling, and did not issue necessary discovery orders 10 days before trial as required by the discovery statutes. Just as that deadline passed, the client's writ was filed and the trial was stayed. This couldn't have happened unless all of the necessary pleadings and other documents were already prepared in anticipation of their time of need.

Rule 10.4 Oral Argument, Response, Disposition, Evidentiary Hearing

A. Oral argument and/or a response may be ordered by this Court. This Court may also remand the petition to the District Court for an evidentiary hearing if determined to be necessary.

B. This Court may dismiss the petition for extraordinary relief or may decline to assume jurisdiction. PROVIDED HOWEVER, if this Court dismisses the petition or declines to assume jurisdiction, an order will be issued citing the authority and rationale for such disposition.

PROVIDED HOWEVER you have NO RIGHT to a rehearing. Seriously, what good does the right to a bogus rationale do you or your client? Any writ, even a perfected and worthy one, can be declined in the discretion of the Court of Criminal Appeals. "Rationale: we chose not to look at this."[6]

Rule 10.5 Perfecting an Application for Extraordinary Writ.

An application for an extraordinary writ shall not be perfected until the following documents are filed:

According to case law, some parts of this list are jurisdictional. Maybe they all are. I kid you not.

(1) A petition, original and seven (7) copies, shall include the case number, the subject matter of the District Court proceedings, and state the nature of the relief sought. The moving party shall be designated as petitioner and the responding party as respondent.

Just do it. Don't ask why.

(2) An original and seven (7) copies of a brief which sets forth arguments and authorities supporting the assertions in the petition.

No problemo.

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[6] For what it's worth, I have specifically requested oral argument in every writ I have filed. Unfortunately, my request has never been granted.

(3) A **certified** copy of the District Court order shall be attached to the petition.

The **emphasis** on **certified** is very definitely in the original. Incredibly, a writ filed by a prisoner was dismissed on jurisdictional grounds because that pro se litigant attached a crummy old file stamped copy of his Adverse Order to his Petition! Even though the Rule 10.1(C)(2) commands that the Original Record always contains a certified copy of the same Adverse Order! Why on earth would "certification" be important? Answer: Because the powers that be have made it important.[7]

(4) When a petitioner seeks to interrupt a District Court proceeding, the petitioner shall state the date the ruling or order was entered, from which the relief is being sought, and the date of the next scheduled hearing.

Naturally, this information can cause problems with both the 10 and 30 day rules.[8]

(5) There shall also be filed a certified copy of the original record and either the original or certified copy of the transcript, where appropriate.

Remember this is your non-transferable responsibility, and each and all of these requirements must meet both the 10 and 30 day rules.

Rule 10.6 Requirements for Particular Writs

A. Writ of Prohibition. Petitioner has the burden of establishing (1) a court, officer or person has or is about to exercise judicial or quasi-judicial power; (2) the exercise of said power is unauthorized by law; and (3) the exercise of said power will result in injury for which there is no other adequate remedy. *See Maynard v. Layden*, 830 P.2d 581, 583 (Okl.Cr. 1992). The adequacy of a remedy is to be determined upon the facts of each particular case. *See State ex rel. Wise v. Clanton*, 560 P.2d 588, 591 (Okla.Cr. 1977).

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7 If you make this mistake, your client will wonder why he's the one making payments to your account.

8 If things are close, e.g., if your timing issues might turn on something like the difference between "announced" and "executed" and "entered," my practice is to leave as much wiggle room as possible: "The Adverse Order was announced from the bench on January 1, 2001, reduced to writing and signed by the Trial Court on January 4, 2001, and filed and entered of record on January 8, 2001.

These are allegations that you must make or you won't get a foot in the door.[9] It's also interesting to look at the cases the Court has chosen to cite within the text of this rule:

Maynard v. Layden, 1992 OK CR 31, ¶10, 830 P.2d 581

- Pittsburg County Judge blocks a Tulsa County death warrant for Benjamin Brewer to allow litigation of constitutional issues presented through a civil rights petition
- Warden seeks prohibition to allow the execution
- Warden succeeds, but the execution date has passed
- A new date is set!

State ex rel. Wise v. Clanton, 1977 OK CR 45, ¶¶ 12-17, 560 P.2d 588

- Mayes County DA and others establish an incorporated slush fund for payment of informants
- Accused pusher calls DA to stand at Preliminary Hearing
- DA is asked to name the directors of the slush fund
- Objection! Stay! Writ! Writ Granted!
- Just how high is the "adequate remedy" threshold?

B. Writ of Mandamus. Petitioner has the burden of establishing (1) he has a clear legal right to the relief sought; (2) the respondent's refusal to perform a plain legal duty not involving the exercise of discretion; and (3) the adequacy of mandamus and the inadequacy of other relief. *See Woolen v. Coffman*, 676 P.2d 1375, 1377 (Okl.Cr. 1984). Mandamus is also appropriate to ensure procedural due process requirements are followed in administrative proceedings. *See Waldon v. Evans*, 861 P.2d 311, 313 (Okl.Cr. 1993).

Once again, these are allegations that you must make or you won't get a foot in the door.

Wollen v. Coffman, 1984 OK CR 53, ¶¶ 6,7, 676 P.2d 1375[10]

- DUI defendant order to pay excessive VCF assessment
- Defendant perfects writ of prohibition

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[9] Not surprisingly, my Writ of Prohibition boilerplate tracks the exact language of this rule. Yours should too.

[10] As established in *Woolen*, "prohibited acts" and "failure to perform a legal duty" often overlap. I recommend and regularly file the omnibus "Alternative Petition for a Writ of Mandamus or Prohibition." Mixing the two is mostly a matter of mixing the boilerplate, and I've never had a writ rejected because of surplusage.

- OCCA denies prohibition, but construes the writ as one seeking mandamus
- The trial court is ordered to do things right instead of being ordered not to do things wrong

C. Writ of Habeas Corpus

[Text and discussion omitted, since *habeas corpus* is a different ballgame.]

D. Rehearing. Once this Court has rendered its decision on an extraordinary writ, that decision shall constitute a final order. A petition for rehearing is not allowed. The Clerk of this Court shall return to the movant any petitions for rehearing tendered for filing.

One wonders if the Court would make an exception in the case of a grievous scrivener's error. Probably not, but I wonder why not?

WIN SOME, LOSE SOME, SOME GET RAINED OUT

I've always had the attitude that the prosecutor has a big home field advantage in the trial court. This is probably because I got my wings in Tulsa County, where the District Attorney and his Assistants lead completely charmed lives. Generally speaking, they don't file responses to written defense motions. Instead they show up on the day of a hearing with, *at best*, a couple of photocopies of cases that might or might not be on point.

Writ practice is another matter, especially for these coddled litigants. Briefs, even sloppy and poorly reasoned briefs, have to be prepared and submitted. Logical flaws and holes in reasoning tend to stand out, especially when highlighted by the laser-like precision of the erudite defense counsel's own impeccable filings. ☺ [11]

Let's examine some of the other cons and pros of a writ practice:

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[11] I have to confess that it gives me a tiny bit of pleasure to transport these photocopy lawyers to a forum where briefs have to be prepared and filed, and where the trial judge won't be around to cover for their laziness. Of course I also know that similar cover is sometimes, if not frequently, provided by the appellate jurists.

Cons first:

- The issue presented might be more valuable as an appellate issue.
- The issue presented might not affect the outcome of your trial.
- Your writ might have unintended consequences, since the Court of Criminal Appeals might anticipate other issues which you haven't exhausted in the trial court.
- Your writ might [finally] succeed in educating your opposing counsel.
- The time and effort expended may not be worth it, given your client's limited resources.

Pros:

- The writ may make all the difference in the result of your trial, so your client will avoid the anxiety of conviction and the expense of an appeal.
- The writ may be the ideal mechanism for preserving an appellate issue.
- The writ may be the only chance you have to protect a pre-trial right.
- The writ may prevent you from being forced to disclose something better left unsaid.
- The writ may convince your trial judge that it isn't open season on your client.
- The writ may convince your opposing counsel that the better part of valor is discretion.
- The writ may help you to control the pace of the litigation.

Naturally, there are dozens of additional pros and cons, each dependent on the facts of a particular case. For my own part, I tend to side with the pros.

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