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Supreme Court of Texas.
In re Coy Reece.
No. 09-0520.

October 12, 2010.

Appearances:

Robert B. Gilbreath from Hawkins Parnell Thackston & Young LLP, Dallas, TX, for relator.
Edward Jason Dennis from Lynn Tillotson Pinker & Cox, LLP, Dallas, TX, for real parties in interest.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 09- 0520 In re Coy Reece.

MARSHALL: May it please the Court, Mr. Gilbreath will present argument for the Relator. Relator has reserved five minutes for rebuttal.

ORAL ARGUMENT OF ROBERT B. GILBREATH ON BEHALF OF THE RELATOR

ATTORNEY ROBERT B. GILBREATH: May it please the Court, opposing counsel and I agree on one thing in this case and that is that the Court in this case does not have habeas jurisdiction. We have asked the Court to exercise its mandamus jurisdiction and we have relied almost exclusively on the Court's 1960 decision in *Deramus v. Thornton*. In that case, I think the Court presciently anticipated this very case and held that under some circumstances when habeas relief is not available, mandamus relief will be appropriate. The Court also noted, I say it held, actually it stated that in dicta. Let me be more precise. The Court also noted again in dicta that there was no jurisdictional problem with exercising mandamus jurisdiction under these circumstances. In 1995 and then again in 1997, the Court then reiterated what it said in *Deramus* and those cases are cited on my list of supplemental authorities; the *Dunn v. Street* case and the *Rosser v. Squire* case. In both of those cases, the Court again said look, if we don't have habeas jurisdiction, we can exercise our mandamus jurisdiction. So I think as a

purely prudential matter, the notion that mandamus is appropriate when habeas is not available seems to be a sound one.

JUSTICE EVA M. GUZMAN: Is your motion for reconsideration still pending at the CCA?

ATTORNEY ROBERT B. GILBREATH: Yes.

JUSTICE EVA M. GUZMAN: And how does that impact your argument that you have no adequate remedy by appeal if we still have--

ATTORNEY ROBERT B. GILBREATH: That we have no adequate remedy over there?

JUSTICE EVA M. GUZMAN: If it's still pending. In other words, they may change their mind.

ATTORNEY ROBERT B. GILBREATH: I think they've made it pretty clear in their decision or their order rather sending the case over here that they don't want the case because they consider it to be a civil matter. So the question I think that the Court needs to be considering and which I didn't fully address in my briefing is whether anything has changed since 1960 to create a jurisdictional problem. And the answer to that question is no. As recently as 1979 this Court held, and that's the third case on my list, the Grimm case, the Court said look we have mandamus jurisdiction in criminal cases and the Court used to exercise that mandamus jurisdiction quite frequently. The only reason it doesn't do so anymore is that as of January 1978 the Court of Criminal Appeals by constitutional amendment was given concurrent jurisdiction to exercise mandamus jurisdiction in criminal cases and that's explained in that Grimm case cited on the list. And so this Court no longer needs to exercise mandamus jurisdiction in criminal law cases, although it does have the power to do so. But I think it's ultimately irrelevant that the Court has mandamus jurisdiction in criminal law cases, criminal law matters, because this contempt judgment is not a criminal law matter. The Court of Criminal Appeals certainly didn't think so. It said look, this is from a civil case; we don't have any business handling it. And the reason is that even though we call this criminal contempt it's really a more accurate term for it is punitive contempt.

JUSTICE EVA M. GUZMAN: But he's asking that he be discharged from restrictions on his liberty. Doesn't that look more like a habeas and not a--

ATTORNEY ROBERT B. GILBREATH: It is typically addressed by habeas and this Court has the power of course to do so. In many respects the Court has jurisdiction to issue habeas relief, but in some instances habeas just isn't available and the Court has taken up a number of cases like that for example in the Dunn case and the Rosser case on my list there the Court said look, we don't have--- Yes, Your Honor.

JUSTICE DEBRA H. LEHRMANN: If we were to grant mandamus relief here wouldn't we just be opening ourselves up to a flood of mandamuses?

ATTORNEY ROBERT B. GILBREATH: No, you wouldn't, Your Honor, for this reason. First off, this is the only case that we've been able to find where the Court doesn't have habeas jurisdiction. This is a rarity. I mean there are no cases in Texas where a person has been held in contempt for allegedly committing perjury in their deposition.

JUSTICE DAVID M. MEDINA: Does the procedure matter at the lower court? For example, here he was found to be lying under oath, right?

ATTORNEY ROBERT B. GILBREATH: Yes.

JUSTICE DAVID M. MEDINA: Rather than in violation of an order that's already in existence.

ATTORNEY ROBERT B. GILBREATH: Right.

JUSTICE DAVID M. MEDINA: Does that matter?

ATTORNEY ROBERT B. GILBREATH: It does matter in terms of whether the Court has habeas jurisdiction. The Court does not because he wasn't held in contempt for violating an order. Now this Court would have habeas jurisdiction for a criminal contempt. Let's say the judge, the trial judge says I don't want you to mention insurance during your closing argument and the lawyer goes ahead and does so. The Judge then holds him in contempt and says I'm putting you in jail for two days for doing that. That would be a criminal contempt violation of a Court order; this Court has said an oral order is sufficient. So the Court could then use its habeas jurisdiction to get that lawyer out if it felt that that was necessary. So the Court has habeas jurisdiction to answer your question, Justice Lehrmann, over most, almost every instance except this one, which I think should tell the Court something about whether this using contempt power to hold the person or to find somebody in contempt for perjury whether that's appropriate. But I think we'll get to that in a moment if. To finish up on the jurisdictional question, so I think it's comforting that this Court does have mandamus jurisdiction in criminal matters, criminal contempt matters, but it's really kind of irrelevant here because this is not a criminal law matter. It's criminal contempt but it arises out of a civil case.

JUSTICE NATHAN L. HECHT: Do you understand the Court of Criminal Appeals' opinion to be that while on its face the constitution might give them broader power, they're interpreted their power consistent with ours for the last hundred years or so. Is that their position or can you tell?

ATTORNEY ROBERT B. GILBREATH: In terms of jurisdictional power?

JUSTICE NATHAN L HECHT: Uh-huh.

ATTORNEY ROBERT B. GILBREATH: I think that might not, I think it'd be hard to generalize like that, Your Honor, because the constitution has been amended a number of times. For example.

JUSTICE NATHAN L HECHT: But I guess my question is, is the Court of Criminal Appeals' position or can you tell, that they too do not have jurisdiction unless there's a violation of a written order?

ATTORNEY ROBERT B. GILBREATH: Oh. No, I don't think they, I think in their order it seems to me that they say yes, we would have habeas jurisdiction over this.

JUSTICE DON R. WILLETT: Can you clarify the timeline for me? When did the CCA deny the application for rid of habeas corpus?

ATTORNEY ROBERT B. GILBREATH: Well, it was shortly before we came over here. I don't remember the date.

JUSTICE DON R. WILLETT: I'm just trying to find out the exact sort of sequence.

ATTORNEY ROBERT B. GILBREATH: Oh, okay. Well, we went to the Court of Appeals and they let Mr. Reece out of jail. The other side then said, hey wait, you don't have jurisdiction, so then the Court vacated its order, Mr. Reece went back to jail. We went to the Court of Criminal Appeals before he could be reconfined and we said hey we need habeas relief, and they said no he's got to be in confinement. So then once he was reconfined we went back to the Court of Criminal Appeals and then they said we think this is a civil case and they sent it over here across the hall or we brought it.

JUSTICE DON R. WILLETT: Well right. You say they sent, but you filed here.

ATTORNEY ROBERT B. GILBREATH: Yes.

JUSTICE DON R. WILLET: And then you filed your motion to reconsider over there before you filed here or after you filed here?

ATTORNEY ROBERT B. GILBREATH: I think we filed it, the motion to reconsider before we filed here. I'm not certain, but I think that's the right.

JUSTICE DON R. WILLET: And if we say the CCA was mistaken and this case belongs across the hall and they deny your motion for rehearing potentially, then what?

ATTORNEY ROBERT B. GILBREATH: Then I think we're done and I think the problem with that seems to me that, I thought about this. It seems kind of third world for this Court to, for this thing to bounce back and forth between the two Courts. I mean for this Court to say well we could exercise our mandamus jurisdiction and we could exercise our habeas jurisdiction, but no you guys take it, no you guys take it. And I just, I think that that's a good reason for this Court and as Braden has noted about the complexity of the Texas judicial system I think it's a good reason for this Court to say it is a civil case and we'll exercise our mandamus jurisdiction on this and it's a rarity. Now we have--

JUSTICE DAVID M. MEDINA: Let me ask you this. So civil matters, you're saying that Texas Supreme Court can resolve issues such as this one that touch on criminal issues?

ATTORNEY ROBERT B. GILBREATH: The Court has the power to issue mandamus in criminal cases. The Court used to do so quite frequently in I think it was speedy trial cases where a petitioner would come up and say I need to go to trial, I want to get acquitted. And the Court, until 1979 was issuing mandamuses regularly in those cases. So the Court maintains jurisdiction over criminal law matter to issue mandamus. Its appellate jurisdiction, the Court has not appellate jurisdiction over criminal law matters, but the Court has drawn a distinction between its appellate jurisdiction and its original proceeding or mandamus jurisdiction. Now we have argued that a part may not be held in contempt for perjury committed in a deposition. And there are three ways the Court could reach that result. I think the third way is the best approach. The first approach would be to hold that just as a matter of law, perjury cannot be contempt. We had cited on my list I've given you a couple of cases. And Missouri Courts say perjury can't be contempt. New York cases also seem to reach that result. The second approach would be to hold that perjury that's committed outside the presence of a court cannot be contempt or cannot be addressed through the Court's contempt power. As this Court well knows, the perjury that's committed outside the presence of a court is constructive contempt or misbehavior outside the presence of a Court is constructive contempt. And the Court could hold that constructive contempt is limited to violation of court orders. Now [inaudible]--

JUSTICE DAVID M. MEDINA: Well now those examples, that would just encourage people to not tell the truth. They'll take an oath to tell the truth and it doesn't mean anything because there's nothing that can be done to them.

ATTORNEY ROBERT B. GILBREATH: I think there's sufficient deterrence against perjury, Your Honor, to prevent that. I don't think it would encourage it.

JUSTICE DEBRA H. LEHRMANN: What would those thing be? What would the deterrence be?

ATTORNEY ROBERT B. GILBREATH: The threat of criminal prosecution. And I think where the Justice's are heading now is an issue that I'd like to address by referring the Court to a concurring opinion. And this is from a case that's not cited in my brief nor on my list, by Justice Scalia in a case called *Young v. United States*. That's 481 U.S.787. And that case supports why I think the third approach is the best and let me kind of build up

to that if I can. The second approach I think begs the question of why. The Court would say well why can't we say that perjury committed outside the court's presence is not contempt? I mean there's no statute defining constructive contempt, so I guess you could define it that way. So I think that's why the third approach is the best approach. And that is from the United States Supreme Court's jurisprudence. In this case, and it's probably true in every case involving perjury during a deposition, there has been no obstruction of justice. That's a requirement from the United States Supreme Court's decision beginning in 1919, the Hudgings case cited and discussed in our brief. And the question then becomes well what is obstruction in this sense? There's not much case law on it, but I think the best guidance the Court could take is from the *In re Michael* case cited and discussed in our brief a 1945 U.S. Supreme Court decision. There the Court answers this very question. A person was held in contempt for lying during Grand Jury testimony and the Court said well, there was no obstreperous behavior, no failure to answer questions, no evasiveness, no contumacious behavior; all it was was telling a lie. The Court says that's not enough to use the contempt power because what you need is an immediate disruption of the court's business. Courts are used to, that's their job to sort through false and truthful testimony. So handling the problem of lies does not disrupt the immediate business of the Court. So then we get to the, and in this case you don't have any evidence of anything other than telling a lie, which we don't condone obviously, but the question here is whether it disrupted the immediate business of the Court. It didn't; all it did was prevent them from getting at the truth to seek the relief they wanted. It didn't, there was no destruction of documents for example or evidence.

JUSTICE DALE WAINWRIGHT: Now your third point is that you're expounding here is that constructive contempt cannot be found unless there's a signed order?

ATTORNEY ROBERT B. GILBREATH: The third point would be, and this is from the Supreme Court's jurisprudence, it has to obstruct the administration of justice. That's the third approach and here we don't have that. Now, the last thing I think the Court should consider in my running out of time is that Scalia concurring opinion. He makes a very, very important point. He says look, the judicial power is what is granted to court system not the executive power. Reaching out to prosecute crimes such as contempt of a court is exercising the executive power not the judicial power. So it's a separation of powers problem for courts to prosecute contempt. And he says, of course, if you have contempt that causes an immediate disruption of Court business then yes, courts should have the contempt power to deal with that. It's not a perjury case, but essentially his point would be that leave perjury up to the executive branch; let them prosecute it. It's not disrupting court business because courts are already, that's the job of a court to sort truth from falsity.

JUSTICE DALE WAINWRIGHT: You're framing your argument broadly in the sense that constructive contempt should be perhaps enforced by the executive branch. Are you just talking about perjury or any constructive contempt? For example, a TRR order in an urgent situation and it's violated outside the presence of the court. Would you say that contempt there also should be left to another branch?

ATTORNEY ROBERT B. GILBREATH: That is where Justice Scalia would go and that's precisely the type of situation he was dealing with in that case.

JUSTICE DAVID M. MEDINA: What procedure would the court have to enforce its order?

ATTORNEY ROBERT B. GILBREATH: Justice Scalia would say the executive branch can handle these matters and he would say look, just because sometimes the executive branch doesn't always prosecute things that's no reason to violate separation of powers. Now I'm not saying here--

JUSTICE DALE WAINWRIGHT: Then how does a trial court enforce a TRO?

ATTORNEY ROBERT B. GILBREATH: I think here in Texas I think perhaps Scalia went a little too far on that point.

JUSTICE DALE WAINWRIGHT: Where would you go?

ATTORNEY ROBERT B. GILBREATH: In this, in Texas, Courts already have power to enforce TROs through contempt powers and I wouldn't change that. That would be constructive contempt. So I wouldn't change that. I wouldn't go quite as far as Justice Scalia, but I think the broad outlines the theory, the separation of powers problems that he discusses are very helpful to resolving this case.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Mr. Gilbreath. The Court is ready to hear argument now from the Real Parties in Interest.

MARSHALL: May it please the Court, Mr. Dennis will present argument for the Real Parties in Interest.

ORAL ARGUMENT OF EDWARD JASON DENNIS ON BEHALF OF THE RESPONDENT

ATTORNEY EDWARD JASON DENNIS: May it please the Court, Relator's counsel mistakes deference by the Court of Criminal Appeals for dereliction. And in fact, a case cited within their own brief, *ex parte Morris* talks about the language is clearly too simple to be without doubt that this Court doesn't have habeas jurisdiction. We don't dispute that. Mr. Gilbreath said he doesn't dispute that. And not only does this Court not have this jurisdiction, there's no dispute that what they have brought is habeas relief. They are seeking relief from incarceration. But what they're not, the presumption they would have this Court make, which is not warranted and I'll show you why is that the Court of Criminal.

JUSTICE DAVID M. MEDINA: Excuse me, I'm sorry. What's the status of Mr. Reece now?

ATTORNEY EDWARD JASON DENNIS: He's sitting in the audience, Your Honor.

JUSTICE DAVID M. MEDINA: He's not incarcerated?

ATTORNEY EDWARD JASON DENNIS: He's not. He was released by bail by this Court. He served about four days of his 14 day incarceration. And, Your Honor, so what Relators Counsel would have this Court presume is that the Court of Criminal Appeals across the hall will not act on its duty and instead have said, we have that jurisdiction, we refuse to exercise it, therefore we need to create, this Court needs to create an exceptional exception to what the constitution permits and the statute permits. And that's not warranted and I'll point this Court to *Ex parte Jones* cited in our briefing. It's a case out of the Court of Criminal Appeals in 1956 and it basically encapsulates an unwritten rule that the Court of Criminal Appeals, which has very broad habeas jurisdiction, defers to this Court to decide the parameters of its own more limited habeas jurisdiction. And in *Ex parte Jones*, the Court says the many questions raised appear to be civil in nature; in view of the above we deem it appropriate to say that in the event of further application for writ of habeas corpus by Relators, it goes on to say we'll only exercise our jurisdiction if the civil courts refuse to. And later in *Ex parte Cvengros*, a case not in our briefing, but found by the Texas Court of Criminal Appeals in 1964 384 S.W. 2d 881, it encapsulates this rule and says as a general practice, this is the Court of Criminal Appeals, where there is reason to believe that the application falls within the area of concurrent jurisdiction, the Court of Criminal Appeals will decline to act until the Supreme Court has decided whether the case comes within its restricted habeas corpus jurisdiction. So--

JUSTICE NATHAN L. HECHT: Well it plainly doesn't.

ATTORNEY EDWARD JASON DENNIS: Absolutely, Your Honor.

JUSTICE NATHAN L. HECHT: And the Relator agrees with that.

ATTORNEY EDWARD JASON DENNIS: Exactly.

JUSTICE NATHAN L. HECHT: Well what are they waiting on?

ATTORNEY EDWARD JASON DENNIS: Well they're actually deferring to this Court.

JUSTICE NATHAN L. HECHT: Why defer? Everybody agrees.

ATTORNEY EDWARD JASON DENNIS: Well, they're not making the presumption that--

JUSTICE NATHAN L. HECHT: It's plain as day.

ATTORNEY EDWARD JASON DENNIS: I'm sorry, Your Honor?

JUSTICE NATHAN L. HECHT: You don't have to presume. It says was there a written order? There was no written order. Everybody can see that. Even the Relator can see it. So I'm not sure why would they defer if they didn't think they really shouldn't do it in this case?

ATTORNEY EDWARD JASON DENNIS: Well, I can't speak for why the Court of Criminal Appeals was thinking when they issued the order other than the unwritten rule which I've described. But what the Relator would have this Court believe is if this Court finds, as it should and must, that the constitution doesn't grant habeas jurisdiction in this case and the government code doesn't permit this Court to have jurisdiction. That if it finds as it should we don't have jurisdiction, the Court of Criminal Appeals won't as it has in other cases assert their habeas jurisdiction.

JUSTICE NATHAN L. HECHT: Why should we think anything else when that's what they've said and it doesn't seem to be even arguable that this Court has habeas jurisdiction?

ATTORNEY EDWARD JASON DENNIS: Well with all do respect, Your Honor, I'd say that they haven't said that in their order. They simply said we dismiss and we ask that you can seek your relief in the Supreme Court. The motion for rehearing being pending for a year with no action is indicative of them waiting for this Court to act. I believe the petitions were filed within days of each other.

JUSTICE DON R. WILLET: Has that Court been formally sort of notified of this proceeding here? I'm sure they're aware of it, but have they been formally, has anything been filed there to make them aware of this?

ATTORNEY EDWARD JASON DENNIS: Your Honor, I don't know if the Relator has filed anything formal letting them know. I thought that there was a reference in that motion for rehearing, but I can't be certain of that. But here, I'll go one step further. Let's presume that as they do that the Court of Criminal Appeals will be derelict and will not assert their duty and would leave Mr. Reece without a remedy in the Court of Criminal Appeals. That still does not give this Court constitutional or statutory jurisdiction to assert habeas in this case.

JUSTICE DAVID M. MEDINA: Would this Court ever have mandamus jurisdiction involving a civil matter where a criminal act has occurred such as here, perjury?

ATTORNEY EDWARD JASON DENNIS: I don't know exactly how to answer that question, but what I will say is this Court has never exercised its jurisdiction to, a mandamus jurisdiction to relive someone from incarceration. That has never happened. In fact--

JUSTICE NATHAN L. HECHT: Well, but we've never had somebody incarcerated on a charge of perjury in a civil case.

ATTORNEY EDWARD JASON DENNIS: I would disagree with that, Your Honor. I would say that out of Court statements, we cited two cases in our brief.

JUSTICE NATHAN L. HECHT: Powell and Sutphin

ATTORNEY EDWARD JASON DENNIS: Exactly.

JUSTICE NATHAN L. HECHT: Sutphin was a fine and Powell was dismissed for a jurisdiction.

ATTORNEY EDWARD JASON DENNIS: Sutphin was a fine, but the incarceration had already been served I believe. And what I would say, Your Honor, is that this case is not as unique as they have you make it out to be. What they're asking this Court to find is and of an exception that says putting aside the constitution and the enabling statute that gives us our habeas jurisdiction, we should exercise exception habeas jurisdiction in this case because of these circumstances that the Court of Criminal Appeals is just not doing their duty.

JUSTICE NATHAN L. HECHT: You have the availability of discovery sanctions in this case I take it because Mr. Reece is a party?

ATTORNEY EDWARD JASON DENNIS: Yes, Your Honor.

JUSTICE NATHAN L. HECHT: But those aren't adequate?

ATTORNEY EDWARD JASON DENNIS: Well, Your Honor, the question, I'm not here defending whether this relief makes the real party in interest whole; I'm defending the Court's decision. I mean sanctions would be.

JUSTICE NATHAN L. HECHT: We didn't ask for the, you mean the Trial Court's decision?

ATTORNEY EDWARD JASON DENNIS: As this was a show cause order on the trial court's own motion, the way it preceded was there was a motion for sanctions and after the evidence was being put on the trial court adjourned the proceedings and said I'm going to issue a show cause order for why this shouldn't be contempt.

JUSTICE NATHAN L. HECHT: But then there was a vigorous argument by the plaintiffs in the case saying that it should be punished as contempt.

ATTORNEY EDWARD JASON DENNIS: Well we certainly advocated for the Court when she held the contempt proceeding, absolutely.

JUSTICE NATHAN L. HECHT: But what I'm wondering is why isn't the availability of discovery sanctions enough? I mean you could default the defendant that way. You would get all the relief you were asking for in the lawsuit.

ATTORNEY EDWARD JASON DENNIS: And that's an excellent point, Your Honor, because you're asking about why wouldn't sanctions make the real party in interest whole. And I think an earlier question in the Relator's argument was why does a criminal conviction give the justice for Mr. Reece's perjury? And this case is a good example of why that doesn't work. The Trial Court has to have the ability to make its proceedings run and make people abide both truthfully and fully with those proceedings because.

JUSTICE EVA M. GUZMAN: Isn't there a due process issue though when you convict someone of a crime without a charging instrument? They're entitled to a trial by jury on this. If you're going to convict someone of a crime don't we have a huge due process issue with what the court did that goes beyond the argument you were just making about ensuring that proceedings in the trial court are orderly?

ATTORNEY EDWARD JASON DENNIS: No, Your Honor. I would disagree that there's a due process issue in this respect. And just, and I want to answer that question. I do want to finish that last thought which is there are other parties to this proceeding. So whether Mr. Reece gets criminal punishment by perjury or whether SB International gets sanctions that relieve it of the attorney's fees it's undergone, that proceeding doesn't go along without those other parties. And you can't make, the trial court needs the ability to force Mr. Reece to participate fully and truthfully in those proceedings and this power is the only way to do it. And to answer your question Justice Guzman, due process has been found by the U.S. Supreme Court basically direct or indirect. And that's a conception that the Relator's Counsel confuses with the power of the contempt court. Basically, the reason that direct and indirect contempt concepts came up is to decide what level of due process ought to be afforded the contemnor. With regards to direct contempt--

JUSTICE EVA M. GUZMAN: But we have no order here though. We do have this general blanket order to tell the truth, I suppose. I mean it's not an order, but it seems like that's what you're arguing is that there's some unwritten.

ATTORNEY EDWARD JASON DENNIS: There is no written order.

JUSTICE EVA M. GUZMAN: Right, so.

ATTORNEY EDWARD JASON DENNIS: Absolutely and that's why this is criminal contempt not civil contempt.

CHIEF JUSTICE WALLACE B. JEFFERSON: Is it contempt of court or just contempt? What's the, I mean I always thought of the phrase as contempt of court which would suggest there be a court order that the party abused in some respect.

ATTORNEY EDWARD JASON DENNIS: Your Honor, Texas jurisprudence has never limited contempt of court to court orders. In fact it's--

CHIEF JUSTICE WALLACE B. JEFFERSON: So then contempt is anytime a party in any case lies and that's punishable by jail?

ATTORNEY EDWARD JASON DENNIS: Well, Your Honor, it's been found as disobedience. Certainly part of that has been disobedience with court orders and decrees. The other part of that has been in general, disobedience and impeding, embarrassing, obstructing the course of justice.

CHIEF JUSTICE WALLACE B. JEFFERSON: Perjury has no, does it have to be on a material matter for perjury to be an issue?

ATTORNEY EDWARD JASON DENNIS: Well that's an interesting point. That's never been addressed by a Texas court. Certainly materiality is an element of perjury as the criminal charge. In this case the focus of it is, in this case the focus of it is. Well, excuse me. In this case there is no dispute over the materiality.

CHIEF JUSTICE WALLACE B. JEFFERSON: What I'm wondering about is it sure would give you the upper hand if you could go through depositions in a big case and there's always, you're going to find some pretty blatant inconsistencies or you often do in testimony in the deposition versus in a hearing. And if that gives rise to the kind of contempt powers that we're talking about here then courts are going to be involved in this business quite a bit more often than they have been, at least in the past.

ATTORNEY EDWARD JASON DENNIS: Well, Your Honor, I would disagree that it's going to go that far. I mean the Courts have had this power of contempt fairly general. There's no case that the Relator cites where this is found not to be within the power and they rarely exercise it. At least five members of this court have been tri-

al court judges and contempt power is exercised cautiously. And in this case it's not just that Mr. Reece lied in a deposition by his own admission he lied in an injunction proceeding there were three motions for sanctions, four motions to compel until ultimately the truth was brought forth. And there's no dispute on the other side that he obstructed justice, which gets sort of to their point about well the Court could enact this new rule or this new rule or this new rule. Well there's no dispute that we don't need to figure out whether or not you need obstruction because obstruction was found by the trial court.

JUSTICE NATHAN L. HECHT: There are a lot of discovery disputes.

ATTORNEY EDWARD JASON DENNIS: Absolutely, Your Honor.

JUSTICE NATHAN L. HECHT: Very serious ones. And I can't fathom that Counsel wouldn't argue if they could not only should you sanction the offender but you should also commit him to jail because he lied, didn't produce documents, withheld documents, told us he didn't have anymore. The list would just go on and on and on. If sanctions has been a problem for the last 30 years, why wouldn't contempt be?

ATTORNEY EDWARD JASON DENNIS: Well, Your Honor, I think that they try to draw an artificial distinction and put it outside the court in a deposition. But as we know, under the Texas rules that's the same as trial testimony. If I came to this Court and said--

JUSTICE NATHAN L. HECHT: But what I'm trying to get you to say, to look at though is there are lots of depositions taken in this state.

ATTORNEY EDWARD JASON DENNIS: Yes, Your Honor.

JUSTICE NATHAN L. HECHT: And there are a lot of people who think that the witness wasn't telling the truth. Why shouldn't those result in contempt hearings?

ATTORNEY EDWARD JASON DENNIS: Well, Your Honor, what I would say is those don't result in contempt hearings because you don't have the particularly exceptional circumstances you have here.

JUSTICE NATHAN L. HECHT: So if he lies twice or five times in two depositions I mean where's the end of it? I'm just wondering how much is contempt going to inject itself into discovery.

ATTORNEY EDWARD JASON DENNIS: Well lying under oath, it that is a problem then it's clear that the criminal Courts and perjury are not taking care of it independent of that. And I wouldn't suggest that because people lie under oath we should just accept that. Part of--

JUSTICE NATHAN L. HECHT: No, but why don't you go to the district attorney and press charges?

ATTORNEY EDWARD JASON DENNIS: Well that's an interesting point that they can do that, but that gets back to your earlier question which is that doesn't remedy what the trial court is trying to do. It's not just I'm going to punish someone for lying in a particular instance, but I'm going to punish someone for obstructing a proceeding for preventing an injunction from being entered by lies under oath for going through several motions or sanctions and compel and ultimately obstructing justice in that court. I mean the court found very exceptional circumstances in this case; not a simple well in the deposition he said red, now you have a document that says green. It's not that simple. She found which uncontested that he impeded and obstructed justice.

JUSTICE NATHAN L. HECHT: He said he wasn't involved in some transactions and it turns out he was. That seems pretty routine to me.

ATTORNEY EDWARD JASON DENNIS: Well, Your Honor, to put some gloss on that, in fact there were

three salespeople. One individual before the same Judge had already been enjoined and he was enjoined from talking to Mr. Reece who was still working for the company and thought to be a loyal employee, and that's who he was talking to was the person who was under injunction. And the way we found out was through a private investigator who surveilled them and then he came back and lied again in his deposition and in the injunction proceedings. So it's not just a matter of he said a lie in a deposition, we're going to prove that up and have a whole contempt to be a cottage industry. It's a matter of very exceptional circumstances in this case.

JUSTICE DAVID M. MEDINA: Does it matter that he also admitted during the proceeding that he did lie?

ATTORNEY EDWARD JASON DENNIS: I think that it matters in the sense that he now has no substantive challenge. He's not saying well, there's some confusion, there's some ambiguity, it's not beyond a reasonable doubt. He admitted not only just to lying in a deposition but lying in an injunction proceeding. And if I came to this Court, I mean the order is phrased lying in a deposition, but there's uncontested testimony by him that he lied in the injunction proceeding before the court. There is unchallenged authority out there that that's a direct contempt. The judge could summarily throw him in jail for that. That's the power within the court. They want you to create an artificial distinction that well because it's in a deposition it's okay to lie, that should be part of the contempt power. But think how artificial that would be under the Texas rules where deposition testimony can be played in court. So let me ask this question, well I'm not asking the questions. We played that deposition excerpt before the court at the hearing. Does that mean it comes within the power? They're trying to draw a line for direct and indirect and in court and out of court, and they're suggesting that a power that's been around for since before this country was created ought to be cut forth. Now, excuse me, out to be cut down.

JUSTICE NATHAN L. HECHT: If he were charged with perjury and arraigned and the judge says how do you plead, he says not guilty. And the Judge says well did you lie and he says yeah, I lied, but I'm pleading not guilty. The Judge couldn't sentence him.

ATTORNEY EDWARD JASON DENNIS: Well that's an interesting point. He's not entitled to a jury for a petty offense like this, so he wouldn't necessarily be entitled to a jury.

JUSTICE NATHAN L. HECHT: In perjury?

ATTORNEY EDWARD JASON DENNIS: In perjury. In less than six months the constitution doesn't give you the constitutional right.

JUSTICE NATHAN L. HECHT: No, I'm saying he's charged with perjury as a crime, the crime of perjury and he's not entitled to a jury?

ATTORNEY EDWARD JASON DENNIS: Well in the criminal context I'd have to say he's not. I don't know the exact criminal rule in that point. What I would say is constitutionally for a charge of less than six months he would not be entitled to jury, but if perjury is a year then he could be entitled to a jury.

JUSTICE PAUL W. GREEN: That's contempt; that's not perjury, is it?

ATTORNEY EDWARD JASON DENNIS: Right, but the perjury in the situation he's given me.

JUSTICE PAUL W. GREEN: He was talking about perjury.

ATTORNEY EDWARD JASON DENNIS: Right.

JUSTICE PAUL W. GREEN: You're talking about contempt.

ATTORNEY EDWARD JASON DENNIS: Right. And the constitutional limit, or excuse me; that's the limit on

contempt. And I believe the constitution is coexistent with that that you don't get a right to a jury.

JUSTICE PAUL W. GREEN: The point is is that if somebody lies and the prosecutor brings charges and information is filed and brought before the court and arraigned and so forth and a trial date is set and he gets a jury if he wants one, wouldn't you say?

ATTORNEY EDWARD JASON DENNIS: I'm sorry, Your Honor, I didn't hear the last part.

JUSTICE PAUL W. GREEN: He gets a jury if he wants one under those conditions.

ATTORNEY EDWARD JASON DENNIS: On those conditions he would.

JUSTICE PAUL W. GREEN: Sure. And if it turns out that the prosecutors are wrong, that the charging is wrong and he wants to appeal it he can appeal it.

ATTORNEY EDWARD JASON DENNIS: That's true.

JUSTICE PAUL W. GREEN: And so in this case you say there's no appeal.

ATTORNEY EDWARD JASON DENNIS: No, I'm not saying there's no appeal. In fact--

JUSTICE PAUL W. GREEN: But what's remedy?

ATTORNEY EDWARD JASON DENNIS: He has the remedy in the Texas Court of Criminal Appeals.

JUSTICE PAUL W. GREEN: They turned it down. They won't hear it.

ATTORNEY EDWARD JASON DENNIS: Okay. And if he doesn't have the remedy he can do like many prisoners who are incarcerated, once you exhaust your habeas remedies in the state courts you can go to a Federal District Court. I don't believe that's warranted in this case because one thing we haven't talked about, I don't think Relator's counsel mentioned at all is there are no due process violations and in fact he affirmatively told the Trial Court I understand these two points we're going forward on and didn't specially except to the others. Now they've advocated the rule that special exceptions shouldn't be required, but that would be in contradiction to the criminal rules. The Rules of Criminal Procedure 1.14 require you to make objections to indictments and technical objections are waived if you don't make them.

CHIEF JUSTICE WALLACE B. JEFFERSON: Let's assume a trial court is hearing an auto accident case and one of the parties is rude; the tone is completely disrespectful, he issues an epithet to the Judge and the judge says you're going to jail until you can cool down. It's a civil case. What is that person's relief? It's not perjury; it's not violation of a criminal law. Is that person's relief habeas relief to a criminal court or is it a civil case and mandamus is the issue about whether the trial court will be used to his or her discretion?

ATTORNEY EDWARD JASON DENNIS: It would be habeas relief to this Court or the Court of Appeals because in the case you've described, cooling down, he's given him a condition. He's not, the distinction between civil contempt and criminal contempt is are you punishing them for something they did or do you have a condition in which they have the keys to their [inaudible]

CHIEF JUSTICE WALLACE B. JEFFERSON: I thought it had to be a violation of a court order.

ATTORNEY EDWARD JASON DENNIS: If it was a violation of a court order then this Court has jurisdiction and cause.

CHIEF JUSTICE WALLACE B. JEFFERSON: Yes, but this is just I'm mad because the person was violating protocol in court, was rude to the judge.

ATTORNEY EDWARD JASON DENNIS: Then it would be a criminal contempt and in fact In re Krupps, the Court of Criminal Appeals, 1986 is a very good example of that.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well does that make sense to say that this Court has no mandamus jurisdiction to determine whether the trial court's conduct in a civil case was an abuse of discretion or not?

ATTORNEY EDWARD JASON DENNIS: Well, Your Honor, whether it makes sense or not is I respectfully submit not a decision this Court should make because the constitution gives limited, it says only habeas where provided by law. And in this case the legislature has only provided it for orders, decrees, and judgments, not for other situations. And so this Court would have to create its own jurisdiction.

JUSTICE PHIL JOHNSON: Counsel did I hear you say that you agree with opposing counsel that in a situation like this the test ought to be whether the administration of justice has been obstructed?

ATTORNEY EDWARD JASON DENNIS: Your Honor, I frankly said that we don't need to draw that line. I will point out the case I just mentioned, In re Krupps, Court of Criminal Appeals, 1986 specifically said unlike federal law our law has not required that an actual obstruction of justice be present. There they were punishing the failure to rise when the court came in which was upheld. What I'm saying is we don't have to reach that issue in this case because the court found and is unchallenged that justice was obstructed. So in conclusion, Your Honor, I seem I'm out of, well I guess I'm almost out of time.

CHIEF JUSTICE WALLACE B. JEFFERSON: You can conclude with your argument.

ATTORNEY EDWARD JASON DENNIS: What I would say is that last point Justice Johnson, sort of makes the initial point which is jurisdictional. In order to decide whether to adopt one of the several rules that the Relator's counsel put forward, you'd be examining In re Krupps and saying well does it really say that obstruction doesn't have to be an element or not and potentially overruling the Court of Criminal Appeals. And I think that even though this Court and certainly Relator's counsel in their brief think the situation is not right, that habeas should be divided in a different way. That's respectfully not for this Court to decide and so we ask that the Court deny the mandamus petition.

CHIEF JUSTICE WALLACE B. JEFFERSON: Further questions? Thank you, Counsel.

ATTORNEY EDWARD JASON DENNIS: Thank you.

REBUTTAL ARGUMENT OF ROBERT B. GILBREATH ON BEHALF OF PETITIONER

ATTORNEY ROBERT B. GILBREATH: Justice Medina, I think you pinpointed an important point with your question about whether there should be an order. You said under your example if the judge, the trial judge said look plaintiff's counsel has told me that there's reason to believe that your client is lying in depositions and the Judge looked down and said don't lie in anymore depositions, then under those circumstances if he lied in his deposition he'd be violating a court order and this Court would, and if he was held in contempt, punitive contempt, then this Court would have or the Courts of Appeals and this Court would have habeas jurisdiction. Under Justice Jefferson's example where the court is just angry with a party for contumacious behavior that's a criminal contempt, the Court wouldn't have habeas jurisdiction even though it's a civil case. What opposing Counsel is trying to do is sort of enshrine the mechanism in saying that the legislature and the constitution made it very important that the mechanism be important, that it be habeas only. But I don't think that's true. There's no indication of that. This Court saw that in 1960 in the Deramus case where it says it's really not that important; it's a matter of past practice, but we can use our mandamus power. There's not a jurisdictional issue here; it's

just a question of which power do we use, habeas or mandamus.

CHIEF JUSTICE WALLACE B. JEFFERSON: What if it's a criminal case and perjury and contempt and Court of Criminal Appeals denies relief. Can they come to this Court?

ATTORNEY ROBERT B. GILBREATH: No. If the Court does so, I mean if the Court--

CHIEF JUSTICE WALLACE B. JEFFERSON: Mandamus I'm saying.

ATTORNEY ROBERT B. GILBREATH: If the Court of Criminal Appeals were to say we don't have jurisdiction maybe, but that's not going to happen. I think that's the important point to take away from here is what the Court of Criminal Appeals is trying to do is say you guys handle civil cases, we handle criminal cases.

JUSTICE NATHAN L. HECHT: But in answer to the Chief Justice's question, if there were a violation of an order in a criminal case and the Court of Criminal Appeals wouldn't grant relief this Court could. We're not limited.

ATTORNEY ROBERT B. GILBREATH: I think that's true. I think that's true.

JUSTICE NATHAN L. HECHT: To apropos your point, they should do criminal and we should do civil.

ATTORNEY ROBERT B. GILBREATH: Right. And that all kind of, I think it traces back to a number of constitutional amendments. But if you look at the 1980 amendments to the Texas constitution, that's when the legislature gave the, or the people gave the Courts of Appeals jurisdiction over criminal cases. And if you look at the legislative history, the reason they did so is because the Court of Criminal Appeals was overwhelmed in its docket. It needed help. And so from then on, and then also in that year, I guess it was 1980 also, this Court got habeas jurisdiction. So what's happening is the legislature the people through the constitutional amendments and the Courts are just trying to say we handle criminal cases across the hall, you handle civil cases. And contempt arising out of a civil case is a civil matter; it's not a criminal law matter. But even if it were this Court has mandamus jurisdiction.

JUSTICE NATHAN L. HECHT: What is the status of the case in the trial court?

ATTORNEY ROBERT B. GILBREATH: The status of the case, it's still pending. I suspect there's discovery going forward and that sort of thing. Yes. My co-counsel nodded to me yes, that the case is moving forward with discovery. And one last point I want to, the opposing counsel said we do not dispute that there was an obstruction of justice. That was the second half of my argument. Of course we do; we say there was not the type of obstruction of justice that was called for in the United States Supreme Court jurisprudence, the In re Michael case and the Hudgings case. What you have here is a lie, but no separate type of interruption of the business of the court system or the trial court.

JUSTICE DON R. WILLETT: Mr. Dennis, correct that your motion for rehearing across the hall mentioned you were seeking relief in this Court?

ATTORNEY ROBERT B. GILBREATH: I believe that's correct. We have not formally notified that court that we're here today, Your Honor. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The cause is submitted. That concludes the arguments for this morning and the Marshall will now adjourn the Court.

MARSHALL: All rise.



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