Chapter 26

Interlocutory Review of Pretrial Rulings by Means of Prerogative Writs

§ 26.01 THE AVAILABILITY OF PREROGATIVE WRITS TO OBTAIN INTERLOCUTORY REVIEW OF PRETRIAL RULINGS

In most jurisdictions, pretrial rulings denying defense motions or resolving other issues unfavorably to the defense are unappealable because of the absence of any appellate jurisdiction to entertain interlocutory appeals. *See, e.g., In the Matter of Appeal in Maricopa County Juvenile Action No. JT-295003*, 126 Ariz. 409, 411, 616 P.2d 84, 86 (Ariz. App. 1980); *In the Interest of A.M.,* 94 Ill. App. 3d 86, 88, 418 N.E.2d 484, 485, 49 Ill. Dec. 630 (1981). The ordinary means of securing appellate review of claimed errors in pretrial rulings is an appeal from the trial court's judgment adjudicating the respondent a delinquent and entering a dispositional order. See § 39.02 *infra.* Except in a few States – for example, California, where interlocutory review by prerogative writs is expressly authorized by statute in some situations and has been encouraged by judicial decision in others (*see, e.g.*, *People v. Mena*, 54 Cal. 4th 146, 152-58 & n.10, 277 P.3d 160, 165-69 & n.10, 141 Cal. Rptr. 3d 469, 475-79 & n.10 (2012); *Maine v. Superior Court of Mendocino County*, 68 Cal. 2d 375, 378-81, 438 P.2d 372, 374-76, 66 Cal. Rptr. 724, 726-28 (1969)) – there is no established practice of providing immediate review of interim orders in criminal proceedings even when, as a practical matter, they may be uncorrectable after verdict.

Interlocutory review by an appellate court may nonetheless be available through the prerogative writs of mandamus and prohibition. In the vast majority of jurisdictions, statutes or the common law give appellate courts the power to issue these prerogative writs. In appropriate circumstances the writs may be used to obtain immediate review of pretrial orders in delinquency cases. *See, e.g.*, *Daniel V. v. Superior Court*, 139 Cal. App. 4th 28, 39-40, 49, 42 Cal. Rptr. 3d 471, 477-78, 485 (2006) (granting a petition for a peremptory writ of mandate on the ground that the trial judge had abused her discretion by erroneously denying, as untimely, a petition for judicial disqualification under a statute that "calls for automatic reassignment [of the case] to another judge if a challenge is duly presented"); *P.V. v. District Court in and for the Tenth Judicial District,* 199 Colo. 357, 609 P.2d 110 (1980) (granting a petition for writs of prohibition and mandamus and directing the trial court to dismiss a delinquency Petition for violation of the juvenile's constitutional and statutory rights to a speedy trial); *People ex rel. Thomas v. Judges of the Family Court,* 85 Misc. 2d 569, 379 N.Y.S.2d 656 (N.Y. Supreme Ct., Special Term 1976) (issuing a writ of prohibition forbidding the Family Court to try a juvenile on a Petition that was barred by double jeopardy); *State in the Interest of Joshua,* 327 So. 2d 429 (La. App. 1976) (granting a petition for writs of mandamus and prohibition and directing the juvenile court to give a detained juvenile a probable-cause hearing); *State ex rel. Mateo D.O. v. Circuit Court for Winnebago County*, 280 Wis. 2d 575, 584, 696 N.W.2d 275, 280 (Wis. App. 2005) ("grant[ing] the petition for a supervisory writ of mandamus and direct[ing] the chief judge and circuit court to honor the [juvenile's] request for judicial substitution" pursuant to a statute that provides for automatic disqualification upon the filing of a timely request "in proper form").

Traditionally, the prerogative writs lie to compel (in the case of mandamus) or to prohibit (in the case of prohibition) action by an inferior court that is necessary to prevent the court from proceeding unlawfully because of a "lack of jurisdiction" or "gross abuse of discretion." Many pretrial rulings in delinquency cases would seem susceptible of being brought within the framework of these concepts. "Jurisdiction" is a flexible notion, as the evolution of the term in *habeas corpus* practice attests. *See Johnson v. Zerbst,* 304 U.S. 458 (1938); *Fay v. Noia,* 372 U.S. 391 (1963). "Lack of jurisdiction" needs not connote the absence of any competence in a court to act at all in a proceeding; it may also signify that some fundamental principle of law disempowers the particular action which the court is taking in a matter otherwise within its competence to adjudicate. And "gross abuse of discretion" may mean almost anything an appellate court wants it to mean, as every lawyer knows. Moreover, it is not uncommon for appellate courts, when refusing to issue prerogative writs on the ground that no "abuse of discretion" appears, nevertheless to offer some gratuitous advice to the trial court regarding the appropriate exercise of its discretion or otherwise to express opinions on the merits that the trial court may take to heart thereafter. *See, e.g., Kerr v. United States District Court,* 426 U.S. 394, 405-06 (1976).

Therefore, particularly when defense counsel can urge that a pretrial order in a delinquency case (a) is plainly wrong or (b) is wrong by force of a constitutional guarantee and (c) has the effect of imposing adverse consequences upon the respondent that may be irremediable at a subsequent stage, the case for interlocutory relief by prerogative writ would seem to be strong. Thus, for example, when the trial judge has denied an indigent respondent's motion for state funds for investigative services, counsel could invoke the constitutional doctrines discussed in §§ 4.31(d) and 11.03(a) *supra* in a petition for a writ of mandamus to compel the judge to authorize the funds. In support of this application for interlocutory review, counsel could stress the crucial need for prompt investigation to find witnesses and preserve physical evidence and could argue that delaying review until appeal would irremediably deprive the respondent of the opportunity to gather evidence indispensable for a fair trial.

§ 26.02 TACTICAL CONSIDERATIONS: POTENTIAL ADVANTAGES AND DISADVANTAGES OF INTERLOCUTORY REVIEW

Counsel would be well advised to keep in mind the possibilities of using mandamus or prohibition to attempt to secure relief against unfavorable pretrial orders. Matters such as discovery, speedy trial, double jeopardy, and the right to state-paid investigative assistance and expert consultation seem particularly appropriate subjects for interlocutory review by use of the writs.

As a practical matter, counsel will frequently come to an appellate court in a more favorable posture before trial than after. After trial the result of sustaining counsel's contention will be the reversal of a judgment and the consequent waste of a good deal of judicial and prosecutorial effort. After trial the case may come before appellate judges on a record that reeks of the respondent's guilt. Under these circumstances the judges are likely to resolve all doubts in

favor of the prosecution. Furthermore, particular claims may be made more persuasive and their equities more visible at the pretrial stage. For example, in postjudgment review of the denial of a respondent's request for pretrial discovery, the appellate court will have the benefit of hindsight and may say that – in light of the developments at trial – the respondent does not seem to have been hurt by not knowing whatever s/he was denied the right to know in preparing his or her defense. On an application for a prerogative writ before trial, the appellate judges know no more about the case than does defense counsel, and they can plainly see counsel's preparatory predicament. They may rule for a respondent at this stage in a case in which they would be hard pressed to rule for the respondent after judgment.

Pursuit of interlocutory review procedures also may indirectly produce relief by inducing the prosecutor to accede to defense counsel's requests. The prospect of an appeal after judgment is so remote as to give most prosecutors little reason to capitulate on close questions that the trial court will probably decide in favor of the prosecution. By contrast, the immediate headache of having to oppose an interlocutory mandamus petition may seem to the prosecutor incommensurate with the harm of giving the respondent what defense counsel wants.

On the other hand, there are potential disadvantages to interlocutory proceedings. The most important of these is the risk of irritating the trial judge by going over his or her head to a higher court. This risk is, of course, particularly grave in those jurisdictions where juvenile cases are tried without a jury, since the judge whose pretrial rulings are being "taken upstairs" will thereafter serve as the trier of fact at trial. If counsel is not sufficiently familiar with the judge to gauge his or her likely temperamental reactions to interlocutory writ proceedings, counsel should consult other attorneys who have appeared before that judge, particularly attorneys who have sought interlocutory review of the judge's pretrial rulings.

In cases in which the respondent is detained before trial, counsel also must take into account the risk of prolonging the period of pretrial detention as a result of interlocutory proceedings. When a detained respondent is likely to receive probation in the event of an adjudication of delinquency, it may well be preferable to delay appellate litigation of all issues until the postjudgment stage, after the respondent has been released from custody and placed on probation. Even when the respondent is likely to be sentenced to a period of incarceration if found delinquent, the consequences of prolonging his or her pretrial detention must be carefully considered in the many jurisdictions where a respondent receives no "credit" at sentencing for time spent in pretrial detention. In these situations, counsel will have to weigh the likelihood of prevailing in the interlocutory proceeding and thereby improving the prospects of winning at trial against the possible harms to the respondent of protracted pretrial detention.