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OPINION COMMITTEE



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August 26, 2014

FILE # ML-47628-14

I.D. # 47628



RQ-1216-GA

The Honorable Greg Abbott
Attorney General of Texas
Attn: Opinion Committee
PO Box 12548
Austin, Texas 78711-2548

Re: REQUEST FOR AN OPINION REGARDING THE ASSESSMENT OF COURT COSTS IN JURY CONTEMPT CASES.

Dear General Abbott:

Enclosed you will find two briefs in support of the assessment of court costs in jury contempt cases for your consideration and opinion. The first is from the El Paso County Council of Judges Jury Contempt Committee which I have been asked to forward to you. Their brief and argument support the assessment of civil costs in jury contempt cases. The second is my brief and argument in support of the assessment of criminal costs in jury contempt cases.

Therefore, I respectfully request your opinion on which type of court costs may be assessed against persons who have been found in contempt of court for failing to appear for jury duty.

Sincerely,

A handwritten signature in cursive script that reads "Jo Anne Bernal".

Jo Anne Bernal
El Paso County Attorney



MIKE IZQUIERDO
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COUNCIL OF JUDGES ADMINISTRATION

EL PASO COUNTY COURTHOUSE
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August 26, 2014

The Honorable Jo Anne Bernal
El Paso County Attorney
El Paso County Courthouse, Suite 503
500 E. San Antonio
El Paso, Texas 79901

RE: Authority of a trial court to assess court costs against jurors who are found to be in contempt of the Court?

Dear Ms. Bernal:

The El Paso Council of Judges, by and through its Juror Contempt Committee, asks if you would forward our request for an opinion to the Texas Attorney General. Our request concerns the nature of juror contempt and what court costs, if any, are appropriate when a prospective juror is held in contempt for knowing failure to appear for jury duty. Our questions and prepared legal brief on the issues follow:

QUESTIONS PRESENTED

Is a contempt proceeding pursuant to Section 62.0141 and Section 21.002 of the Texas Government Code civil or criminal in nature?

When a non-responsive or defaulting juror has been found guilty of contempt pursuant to Section 62.0141 of the Texas Government Code is he subject to civil court costs?

Can civil court costs be assessed to a proceeding of contempt pursuant to Section 21.002 of the Texas Government Code?

BACKGROUND

The jury trial is a crucial area of interaction between law and society. Trial by jury is the cornerstone of our system of justice. Courts throughout the State of Texas are dealing with the issue of unresponsive citizens called to jury duty. Few jurisdictions spend time and resources enforcing already existing remedies to handle nonresponsive citizens.¹ Not many judges hold people in contempt for failing to comply with a jury

¹ <http://www.austinchronicle.com/columns/2008-10-17/688921/>

summons.² Different courts have adopted different methods but many make reference to El Paso's current carrot-and-stick approach³ that has been implemented through the establishment of a jury duty court that imposes sanctions for defaulting jurors.

Lying at the foundation of our court system is the right of courts to seek justice undisturbed so courts have been granted the power to punish conduct that disturbs court proceedings. Nonetheless, the power to charge with contempt may be abused. For this reason, the contempt power of the court is narrowly tailored and should be carefully scrutinized.

In 1999, a visiting Judge was assigned to handle the "Jury Duty Court," as a special docket of the court of the administrative judge of El Paso County. The Jury Duty Plan contained the process through which jurors are summoned for jury duty, and included a process for setting hearings for jurors who failed to return their questionnaires, failed to appear as summoned and then failed to appear to the court hearings set to obtain their compliance. These procedures led to a approximately 90% attendance on jury panels appearing before courts.⁴ Nonetheless, the practice of imposing civil court costs on defaulting jurors who have been held guilty of contempt for not complying with their jury summons has been questioned.

LEGAL ARGUMENTS AND AUTHORITIES

Texas Government Code Section 62.0141 provides as follows:

"In addition to any criminal penalties as prescribed by law, a person summoned for jury service who does not comply with the summons as required by law or who knowingly provides false information in a request for an exemption or to be excused from jury service is subject to a contempt action punishable by a fine of not less than \$100 nor more than \$1,000".

Texas Government Code Section 21.002 provides as follows:

(a) Except as provided by Subsection (g), a court may punish for contempt.

² Nancy J. King, Juror Delinquency in Criminal Trials in America, 1796-1996, 94 Mich. L. Rev. 2673, 2699-700 (1996)

³ <http://www.abrahamwatkins.com/blog/2012/05/two-texas-counties-are-taking-a-tough-approach-to-dealing-with-those-who-ignore-jury-service.shtml>

⁴ The 90% figure is anecdotal, but is consistent among judges who expect 90% of the number of jurors requested for a panel to be present. However, this is not a true appearance rate since the procedures implemented by the jury duty court staff—to set follow up appointments for jurors not completing their questionnaires before the date summoned or for rescheduling jurors who are not found to be in contempt—all result in the 90% appearance rate reported by judges.

- (b) The punishment for contempt of a court other than a justice court or municipal court is a fine of not more than \$500 or confinement in the county jail for not more than six months, or both such a fine and confinement in jail.

Defaulting jurors can be punished for contempt. However, neither statute makes reference to imposing court costs. The ability to impose civil court costs by the County Clerk is dependent on the ability to categorize a juror contempt hearing as a civil contempt hearing. The language of Section 61.041 implies that criminal sanctions are available to the courts in addition to other types of sanctions. This language is similar to civil contempt which is remedial and may use fines, imprisonment, or other sanctions as coercive measures to compel the contemnor to comply in the future with an order of the court. Ex parte Werblud, 536 S.W. 2d 542, 545 (Tex. 1976).

Contempt proceedings are generally referred to as quasi-criminal in nature due to the fact that they may result in a deprivation of liberty. In re Miller, 584 SW 2d 907, 908 (Tex. Civ. App. 1979). They are of a criminal nature because they are not properly civil proceedings and because they concern punishment for unauthorized acts. Ex parte Jackman, 663 S.W.2d 520, 523 (Tex. App. 1983). Contempt hearings for jurors serve two purposes and can be classified as both civil and criminal.

In determining the proper classification of a contempt order as criminal or civil, we look to the nature and purpose of the punishment, rather than the character of the acts to be punished, as the controlling factor. Ex parte Werblud, 536 S.W. 2d 542, 545 (Tex. 1976). A criminal contempt order is punitive in nature and is an exertion of the court's inherent power to punish a contemnor for some completed act that affronted the dignity and authority of the court. In re Reece, 341 S.W. 3d 360, 365 (Tex. 2011). Civil contempt is also known as coercive contempt; it is remedial and may use fines, imprisonment, or other sanctions as coercive measures to compel the contemnor to comply in the future with an order of the court. 536 S.W. 2d 542 at 545. Both civil and criminal contempt may be combined in a single order. Such an order is intended to both coerce and to punish. Ex Parte Sanchez, 703 S.W. 2d 955, 957 (Tex. 1986).

Contempt proceedings pursuant to Section 62.0141 and Section 21.022 are criminal in nature because they punish an act or failure to act in the past. They are also civil in nature because the purpose of the jury duty court was to compel jurors to show up for jury duty. By imposing sanctions and fines, jurors are "coerced" into complying with future jury summons. The system of the jury duty wheel itself ascertains that those same jurors will be re-entered into the cycle. Furthermore, the Jury Duty Court in El Paso was handling contempt proceedings pursuant to Section 62.0141 by allowing jurors to purge themselves of their contemptuous failure to answer to their jury summons by submitting a new jury summons at that time and rescheduling their date to serve. Purging provisions are applicable only in a civil contempt context. Ex parte Mathis, 822 S.W. 2d 727, 731 (Tex. App. Tyler 1991).

Section 31.001 of the Texas Civil Practice and Remedies Code provides as follows:

(b) A judge of any court may include in any order or judgment all costs, including the following:

- (1) Fees of the clerk and service fees due the county;

A successful party is entitled to recover its costs from its adversary. Tex. R. Civ. P. 131. Awarding costs is largely a matter of trial court discretion. Mitchell v. Bank of Am., N.A., 156 S.W.3d 622, 630 (Tex. App. 2004). A court of appeal may reverse a trial court for abuse of discretion only if, after searching the record, it is clear that the court's decision with regards to costs was arbitrary and unreasonable. City of Houston v. Woods, 138 S.W.3d 574, 580 (Tex. App. 2004). Whether a particular expense is recoverable under statute or rule as a court cost is a question of law, which an appellate court will review de novo. Id.

If juror contempt hearings are indeed quasi-criminal and share characteristics to both civil and criminal proceedings then judges are allowed to impose court costs of the clerk to individuals who have been found guilty of contempt because that is a civil remedy.

Section 103.0033 of the Texas Code of Criminal Procedure provides as follows:

(a) In this article:

- (1) "Eligible case" means a criminal case in which the judgment has been entered by a trial court. The term does not include a criminal case in which a defendant has been placed on deferred disposition or has elected to take a driving safety course.
- (2) "Office" means the Office of Court Administration of the Texas Judicial System.
- (3) "Program" means the program to improve the collection of court costs, fees, and fines imposed in criminal cases, as developed and implemented under this article.

(b) This article applies only to:

- (1) a county with a population of 50,000 or greater; and
- (2) a municipality with a population of 100,000 or greater.

If juror contempt hearings are indeed quasi-criminal and share characteristics to both civil and criminal proceedings then judges are allowed to impose court costs of the clerk to individuals who have been found guilty of contempt because El Paso has a Collection Improvement Program which directs the County Clerk's office to collect costs for the District Clerk's office's criminal cases.

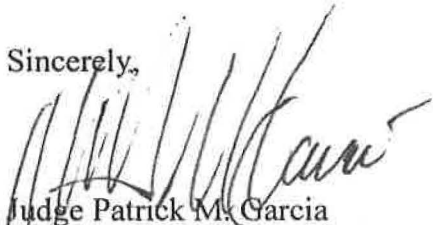
CONCLUSION

The power of contempt is a power given to the courts to protect their dignity of court proceedings. The legislature cannot abridge this power by statute since a power that

the legislature does not give, it cannot take away. Contempt proceedings pursuant to Section 62.0141 and pursuant to Section 21.022 as related to jury duty possess both criminal and civil contempt characteristics. Accordingly, a court that holds a defaulting juror to be guilty of contempt should have both civil and criminal remedies available to it.

Thank you for your prompt consideration of our request that you submit these questions from the El Paso Council of Judges to the Texas Attorney General for his opinion.

Sincerely,



Judge Patrick M. Garcia
Local Administrative Judge
384th District Court



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August 26, 2014

The Honorable Greg Abbott
Attorney General of Texas
Attn: Opinion Committee
PO Box 12548
Austin, Texas 78711-2548

Re: REQUEST FOR AN OPINION REGARDING CRIMINAL COURT COSTS IN JURY
CONTEMPT CASES.

Dear General Abbott:

I am seeking your opinion regarding the authority of the El Paso County District and County Courts to assess criminal court costs in certain jury contempt cases.

I. BACKGROUND

In response to poor juror turnout in El Paso County, the El Paso County Council of Judges created the El Paso County Jury Court ("Jury Court"). A visiting judge staffed the Jury Court under the supervision of the presiding judge of the 384th District Court. The Jury Court generally placed jurors that failed to timely respond to a summons for jury service on an informal afternoon "docket call." The Court liberally accepted excuses from persons that responded to notice of this docket call and simply hand-delivered a new summons for jury service to these persons. These potential jurors were not found in contempt, fined, or assessed costs of any kind.

The Jury Court also maintained a formal morning docket (the "Show-Cause Docket"). The Show-Cause Docket consisted of: potential jurors that repeatedly failed to appear for the afternoon docket call; failed to respond to the hand-delivered jury service summons from an afternoon docket call; or, otherwise failed to respond to a juror summons where there was some evidence that they had received it.¹ The Court provided these potential jurors with a "Notice and Order to Show Cause."²

¹ For example, potential jurors that sent in juror questionnaires, but failed to appear for service, plainly received the jury service summons.

² A copy is attached for your convenience as Exhibit A.

While the El Paso County Council of Judges adopted a “Plan for the Selection of Prospective Jurors, El Paso County, Texas,” the procedures described above were apparently not reduced to writing until July of 2014.³

Prior to July 2014, when the Jury Court found a potential juror in contempt, it ordered that the contemnor pay a fine, plus court costs, and be “remanded to the custody of the Sheriff of El Paso County, Texas, until such fine and court costs have been paid.”⁴ Three items are of note here. First, this judgment did not specify civil or criminal court costs; it simply ordered the payment of “costs.” Second, this judgment ordered fines that were often below the statutory minimum of \$100.⁵ TEX. GOV’T CODE § 62.0141. Finally, despite this, juror contemnors risked deprivation of their liberty if they did not serve their sentences by paying the fine *and* court costs. Thus, court costs were linked, by the court, to the punishment.

The jury court did not file any documents with the District Clerk until a judgment of contempt had been entered. Prior to judgment, all documents were filed and maintained with the Court. Upon judgment, a file was then opened in the Office of the County Clerk for collection purposes. Through an automated arrangement with the District Clerk, *civil* court costs were assessed in these cases for collection by the County Clerk.

Based on our research, we do not believe that *civil* court costs would have been appropriate. However, *criminal* court costs may have been.

II. LEGAL ARGUMENTS AND AUTHORITIES

A. Section 62.0141 of the Texas Government Code

There are multiple statutes that permit a court to punish a prospective juror for failure to attend court. Since the function of the El Paso Jury Court was to punish prospective jurors that failed to respond to a summons for jury service, the Court fined contemnors pursuant to section 62.0141 of the Texas Government Code.⁶ Section 62.0141 of The Texas Government Code provides:

FAILURE TO ANSWER JURY SUMMONS. In addition to any criminal penalty prescribed by law, a person summoned for jury service who does not comply with the summons as required by law or who knowingly provides false information in a request for an exemption or to be excused from jury service is subject to a contempt action punishable by a fine of not less than \$100 nor more than \$1,000.

Thus, this section permits a court to mete out whatever other criminal penalty the law prescribes *and* to hold the prospective juror in contempt. *See, Bloom v. Illinois*, 391 U.S. 194, 201 (U.S. 1968)

³ A copy of the “Plan for the Selection of Prospective Jurors, El Paso County, Texas,” is attached for your convenience as **Exhibit B**. A copy of the “Jury Duty Court Policies and Procedures,” as adopted by the El Paso County Council of Judges in July of 2014 is also attached as **Exhibit C**. This document approximately summarizes the procedures that were in place prior to July of 2014, in unwritten form.

⁴ A copy of this Judgment of Contempt is attached as **Exhibit D** for your convenience.

⁵ *See, Exhibit D*.

⁶ There are a number of other provisions that punish defaulting jurors. Section 62.111 of the Government Code permits a court to penalize a “defaulting juror.” Article 35.01 of the Code of Criminal Procedure provides a fine for jurors that fail to appear when a case has been called for trial. Article 45.027 provides a fine for contempt for jurors that fail to appear when summoned to justice court.

(stating that “*Criminal contempt is a crime* in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both.” [Emphasis added.]) Nevertheless, a conviction for criminal contempt is a conviction for purposes of criminal fees under the Local Government Code because a judgment or sentence has been imposed. TEX. LOC. GOV’T CODE § 133.101.

B. Classification of Contempt

Contempt is a tool courts may use to enforce compliance with their orders, judgments, and processes as well as to ensure the administration of justice. *Ex Parte Powell*, 883 S.W.2d 775, 777 (Tex. App.—Beaumont 1994). Courts classify acts of contempt as either “direct” or “indirect.” *Id.* Acts, which occur in the presence of the court, constitute “direct contempt.” *Id.* In “direct contempt” situations, the court has *direct* knowledge of the facts and thus may administer punishment summarily and without the requirements of complaint, notice, and hearing. *Id.* “Indirect” (also called “constructive”) contempt is an act that occurs outside the presence of the court. *Id.* In these instances, the alleged contemnor has the right to notice of the charge, a right to a trial or hearing, and (in some cases) the right to counsel. *Id.*

Courts further characterize contempt as either “civil” or “criminal.” *Id.* at 778. Civil contempt stems from the failure to obey a court order or decree with respect to another party. *Id.* The civil contempt power is necessary to enforce the rights of private parties before a court. *Id.* Civil contempt proceedings are between the original parties and take place in order to coerce compliance with an order of the court. *Id.* Punishment for civil contempt is conditional and may be “purged” by performing the mandated acts. *Id.*

Criminal contempt generally arises from doing some forbidden act that is directed to the court itself. *Id.* Criminal contempt typically consists of an act of disrespect directed at the court that imperils the administration of justice or brings the court into disrepute. *Id.* Criminal contempt proceedings occur between the accused and the court, not the original parties to the suit. *Id.* A judgment for criminal contempt is finite and unconditional. *Id.* The power to issue a writ of habeas corpus related to a criminal contempt case rests solely with the Court of Criminal Appeals. *Id.* at 779.

Thus, the difference between civil and criminal contempt does not turn on whether the underlying litigation is criminal or civil, but instead on the nature of the punishment handed down by the court. *In re Reece*, 341 S.W.3d 360, 365 (Tex. 2011). If the sentence is simply designed to punish, the contempt is criminal. *Id.* at 365-66. If the sentence is designed to coerce a behavior or enforce a judgment (to another party’s benefit), it is civil in nature. *See Id.*

Finally, some courts have attempted to simplify the above analysis by simply labeling contempt proceedings as “*sui generis*” or “quasi-criminal” in nature. *See, e.g. Ex parte Johnson*, 654 S.W.2d 415, 420 (Tex. 1983); *Ex parte Lopez*, 710 S.W.2d 948, 952 (Tex. App.—San Antonio 1986) (discussing other cases that had labeled contempt proceedings as “*sui generis*”). Texas courts, however, have frowned upon this. *See Ex parte Johnson*, 654 S.W. 2d at 420; *Ex parte Lopez*, 710 S.W. 2d at 952, *supra*. Instead, most Texas courts have focused on the nature of the contempt proceeding. *Ex parte Johnson*, 654 S.W. 2d at 420-21. Moreover, where confinement is a possible penal sanction, basic criminal due process rights will attach, especially if the sentence cannot be “purged.” *Id.* at 421. (Punishments that can be “purged” would be civil in nature.)

In the El Paso County Jury Court, contemnors were ordered to pay a fine and court costs. This punishment was binding without regard to whether the contemnor appeared for jury service in the future. The fine and court costs could not be purged. Thus, under section 62.0141 of the Texas Government Code, jury contempt cases are criminal contempt in nature.

C. Purpose of Court Costs

Court costs directly compensate the government for the use of judicial resources. *Bailey v. State*, 160 S.W.3d 11, 15 (Tex. Crim. App. 2004) (Cochran, J., concurring). Courts have interpreted the open courts provision of art. I, § 13 of the Texas Constitution to require some nexus between a court cost or fee and judicial services. *LeCroy v. Hanlon*, 713 S.W.2d 335, 337-42 (Tex. 1986); *Dallas County v. Sweitzer*, 881 S.W.2d 757, 764-65 (Tex. App.—Dallas 1994). Court costs that the state directs to the state general fund are unconstitutional. *Lecroy*, at 342. Reasonable costs and filing fees that support judicial services, rather than state coffers generally, are constitutionally permissible. *Id.*

D. Judicial Resources Used in Contempt Cases.

We have already concluded that jury contempt cases are criminal contempt in nature because the court disciplines contemnors with fines that cannot be purged. In general, the services that contemnors consume are also criminal in nature.

Your office has previously examined a number of these services in general terms. *See, e.g.*, Op. Tex. Att’y Gen. No. JM-176 (1984). Regardless of how contempt is classified, whether “civil” or “criminal” contempt, basic due process rights will attach where “deprivation of liberty may result.” *Id.* Because contempt cases were previously viewed as “quasi-criminal” in nature, your office has concluded that contempt proceedings “should conform as nearly as possible to those in criminal cases.” Op. Tex. Att’y Gen. Nos. JM-0977 (1988), JM-403 (1985), JM-176 (1984). Thus, where confinement for contempt is a possibility, due process rights and procedures (e.g. an indigent’s right to court appointed counsel), may attach. Op. Tex. Att’y Gen. No JM-176 (1984).

While the juror contempt statute at issue here does not specifically contemplate incarceration, there are other statutes that do. (And, indeed the El Paso Jury Court’s previous order mandated incarceration until the fine was paid. *See* Background discussion, Section I, *supra* and **Ex. D.**) *See* TEX. GOV’T CODE § 62.0141. For example, the general contempt statute authorizes punishment for contempt for up to six months. *Id.* § 21.002 (b).⁷ Thus, a prospective juror summoned to court for juror contempt could be punished for contempt under chapter 21 of the Government Code for behavior during the juror contempt proceedings. *See Id.* Thus, judicial resources in general and judicial resources related to providing basic due process are expended in jury contempt cases. Moreover, since jury contempt occurs outside the presence of the court, it is indirect and therefore requires notice of the charge, a right to a hearing, and (potentially) the right to counsel. *See* our previous discussion, section II.B, *supra*. This means the court and the clerk will impart a number of services in order to secure a conviction for jury contempt.

E. Mandatory and Authorized Fees.

The Texas Court of Criminal Appeals classifies courts costs as either “mandatory” or “authorized.” *Johnson v. State*, 423 S.W.3d 385, 389 (Tex. Crim. App. 2014). For example,

⁷ In addition, article 35.01 of the Code of Criminal Procedure authorizes the court to have the body of non-attending jurors attached when a specific case is called for trial.

Chapter 102 of the Texas Code of Criminal Procedure mandates a number of court costs that a defendant “shall” pay upon conviction. *See, e.g.*, TEX. CODE CRIM. PRO. arts. 102.001 (fees for services of peace officers), 102.002 (witness fees), and 102.011 (additional fees for services of peace officers). The Local Government Code imposes mandatory costs as well. *See*, TEX LOC. GOV’T CODE §§ 133.102 (consolidated fees on conviction), 133.103 (time payment fee (if applicable)), 133.105 (fee for support of court-related purposes), 133.107 (fee for support of indigent defense representation).

The Legislature has authorized, but not mandated, a number of other fees. For example, a court may require a defendant with financial resources to reimburse the state for appointed representation. TEX. CODE CRIM. PRO. art. 26.05 (g); *Johnson*, 423 S.W. 3d at 388. In addition, a commissioners court may authorize fees for the electronic payment of court costs. TEX LOC. GOV’T CODE § 133.002.

We have appended a chart of mandatory and authorized costs and fees that we believe may be appropriate in juror contempt cases conducted under section 62.0141 of the Government Code for your consideration.

III. QUESTIONS PRESENTED

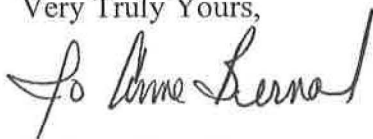
1. Is a jury contempt case under section 62.0141 of the Texas Government Code criminal contempt in nature?
2. What court costs and fees may be collected upon a finding of contempt under this section?
3. If courts costs are collectible in jury contempt cases, does the judge or the clerk have discretion not to assess them?

IV. CONCLUSION

Section 62.0141 of the Texas Government Code permits a court to hold jurors who fail to respond to a juror summons in contempt. The statute explicitly contemplates a fine of \$100 to \$1,000 dollars. However, the statute is silent with respect to court costs and fees. Nevertheless, courts conducting juror contempt hearings must provide basic due process, thus incurring substantial costs and utilizing public resources.

Because juror contempt results in a fine that cannot be purged, it is punishment. Juror contempt is criminal contempt in nature. Criminal court costs are therefore appropriate in juror contempt cases.

Very Truly Yours,



Jo Anne Bernal
El Paso County Attorney