

**POST CONVICTION WRITS:
AN OVERVIEW**

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INTRODUCTION	-1-
A. Paper's Focus	-1-
B. Historical Roots	-1-
C. Contemporary Habeas	-1-
1. Importance of Federal Habeas Law	-1-
2. More Than an Appeal	-1-
3. Special Skills	-2-
4. Frivolous Writs	-2-
D. Appendix	-2-
 PART ONE: STATE POST-CONVICTION WRITS	 -2-
I. AUTHORITY	-2-
II. GROUNDS	-3-
A. Relief Available	-3-
B. Relief Not Available	-3-
C. Frequently Encountered Issues	-3-
D. Examples	-4-
1. Denial of Counsel	-4-
a. Theory	-4-
b. Probation	-4-
c. Appeal	-4-
d. Intersection with Presumption of Regularity	-5-
e. Constructive Denial of Counsel	-5-
2. Ineffective Assistance of Counsel	-5-
a. Standard	-5-
b. Application to Both Appointed and Retained Counsel	-5-
c. Relationship to Direct Appeal	-5-
d. Examples	-6-
3. Conflict of Interest	-6-
a. Standard	-6-
b. Joint Representation	-6-
c. Past Representation	-7-
4. Prosecutorial Misconduct	-7-
5. Actual Innocence	-7-
a. Bare Innocence	-8-
b. Procedural Claims [Innocence Gateway]	-8-
c. Examples	-8-
6. Double Jeopardy	-9-
7. Confessions	-9-
8. Attacks on Guilty Pleas	-10-

	a.	Erroneous Admissions Example	-10-
	b.	Broken Bargain Example	-10-
	c.	Witness Recantation	-10-
	9.	Improper/Illegal Sentences (including affirmative findings)	-10-
	a.	Void Sentence	-10-
	b.	Nunc Pro Tunc Correction of Inaccurate Judgment	-11-
	c.	No Waiver	-11-
	d.	Examples	-11-
	e.	Limitation	-11-
	10.	Limited Parole Considerations	-12-
	11.	Denial of Right to Appeal	-12-
III.		Hurdles: Statutory and Procedural Bars	-13-
A.		Finality	-13-
B.		Procedural Default	-14-
	1.	Rule	-14-
	2.	Exceptions	-14-
	a.	Novel Claim	-14-
	b.	Void Sentence	-14-
	c.	Double Jeopardy	-14-
	d.	Late Manifesting	-14-
	3.	Relationship to Direct Appeal	-15-
	a.	No “Re-Litigation” Rule	-15-
	b.	Limited Exception	-15-
	c.	No “Substitute” for Direct Appeal	-15-
C.		Repeat Applications	-16-
	1.	Statutory Limits	-16-
	2.	Predicate for Relief	-16-
	3.	Successful Subsequent Writ Example	-16-
	4.	“Abuse of the Writ”	-17-
D.		Restraint Requirement	-17-
	1.	Rule	-17-
	2.	Parole as “Restraint”	-17-
	3.	Parole Revocation	-17-
E.		Juveniles	-17-
	1.	General Rule	-17-
	2.	District Court’s Plenary Power	-17-
	3.	Juveniles Never Certified	-18-
F.		Exhaustion	-18-
G.		Laches	-18-
H.		Dual Forum Rule	-18-

IV.	DEFENSE INVESTIGATION	-18-
V.	DEFENSE DRAFTING CONSIDERATIONS	-19-
	A. One Writ	-20-
	B. One Form	-20-
	C. One Year	-20-
VI.	PROCEDURES	-21-
	A. Trial Court	-21-
	1. Procedural Overview	-21-
	a. Where Filed	-21-
	b. Clerk's Notice to District Attorney	-22-
	c. Prosecutor's Response	-21-
	d. Trial Judge's Preliminary Decision	-21-
	e. If "No Contested Issues"	-21-
	f. If "Contested Issues"	-22-
	g. Findings of Fact and Conclusions of Law	-22-
	h. Clerk's Transmittal	-22-
	B. "Better Practices" in the Trial Court	-23-
	1. Requesting Proposed Findings of Fact	-23-
	2. Requiring Service	-23-
	3. Setting Date for Objections to Proposed Findings ...	-23-
	4. Setting Date for Ruling	-23-
	C. Court of Criminal Appeals	-23-
	1. Impact of Findings of Fact and Conclusions of Law by Trial Judge	-23-
	2. No New Evidence Considered	-23-
	3. General Orders if Relief Not Granted	-23-
	4. Internal Procedures	-23-
	5. Court of Criminal Appeals Vote	-24-
	a. Denial	-24-
	b. Remand	-24-
	c. Filed and Set	-24-
	PART TWO: FEDERAL POST-CONVICTION WRITS	-24-
	I. AUTHORITY	-24-
	II. IMPACT OF AEDPA	-25-
	A. Timing	-25-
	1. Tolling	-25-
	2. Statutory Exceptions	-26-
	B. Deference	-27-
	1. Findings of Fact	-27-
	2. Adjudication of Merits	-27-
	a. "Contrary To"	-28-

	b.	“Unreasonable Application”	-29-
	3.	Reaching the Merits	-29-
III.	HURDLES		-29-
	A.	Procedural Default	-29-
	1.	Affirmative Defense	-30-
	2.	State Court’s Failure to Apply	-30-
	3.	Cause and Prejudice	-30-
	4.	Actual Innocence	-31-
	B.	Teague Retroactivity	-31-
	C.	Exhaustion	-31-
	D.	Abuse of the Writ	-33-
	1.	History	-33-
	2.	Rules Under AEDPA	-34-
APPENDIX: RESOURCES			-35-
TREATIES			-35-
PRACTICE MANUALS			-35-

INTRODUCTION

The goal of this paper is to bring some clarity to the often Byzantine requirements surrounding post-conviction writ of habeas corpus practice in Texas.

A. Paper's Focus

This paper focuses on the non-capital Texas felony conviction as it is attacked in state court via a post-conviction writ. Because of the profound impact of federal writ law on Texas state court practice, federal material is also provided. Writs for persons on community supervision, those facing charges, and attacks on misdemeanor convictions are not discussed. The unique writ system for death penalty cases is not covered in this paper, nor are the procedures in Chapter 64 post-conviction DNA testing..

B. Historical Roots

The writ has a noble heritage, dating back to Twelfth Century England. In the American criminal justice system, the post-conviction writ is the primary vehicle by which state and federal prisoners can attack the constitutional validity of their confinement. Beginning with the passage in 1996 of the Antiterrorism Effective Death Penalty Act (AEDPA), the availability of the writ has been curtailed. However despite these limitations, it remains one of the most vital mechanisms for enforcing Bill of Rights protections.

C. Contemporary Habeas

The practice of Texas post-conviction writ practice has changed dramatically over the past decade. Many of these changes are attributable to corresponding changes in federal writ practice.

1. Importance of Federal Habeas Law

Today's practitioner cannot adequately prepare a state court writ without being aware of federal writ limitations, procedures, filing deadlines and deference to state court. This is true even if Texas counsel never intends to pursue the claim in federal court. However, in many instances, the state habeas practitioner does contemplate that further relief will be sought in the federal system. This means that when investigating possible claims, drafting a state petition, and requesting an evidentiary hearing in state court, counsel must be cognizant of federal rules and limitations. *Refer to "Part Two: Federal Post-Conviction Writs" for a discussion of the applicable time limits, hurdles, and procedures encountered when attacking the validity of a state conviction in federal court.*

2. More Than an Appeal

To the extent that post-conviction writs are written documents filed following conviction, they are often treated as species of appeal or appellate practice. But writs are much more than merely brief-like pleadings accompanied by supporting affidavits or memos. Unlike the direct appeal, the post-conviction writ is a vehicle that allows the convicted defendant to develop "extra record" evidence in support of his claim that his confinement is unlawful; therefore, it has litigation overtones. The post conviction writ is a powerful tool for developing additional evidence that is not available from the transcript of the underlying conviction - - be it the result of guilty plea or trial. A state writ of

habeas corpus is *not* a substitute for direct appeal, nor is it a “rehashing” of issues raised on direct appeal. *Ex parte Clore*, 690 S.W.2d 899 (Tex.Crim.App. 1985).

3. Special Skills

Alleging or defending against a writ, therefore, requires that the practitioner blend the skills of both trial and appellate counsel. It requires special consideration by the trial judge, as well. Although the Texas Code of Criminal Procedure identifies the vehicles for various writ challenges, it provides little guidance concerning best practices or effective methods for dealing with the process of handling post conviction challenges.

The United States Supreme Court recognizes the vital, distinct role that writs play when it held that failure to raise an ineffective assistance of counsel claim on direct appeal does not bar the claim from being brought in a later, “appropriate” post-conviction procedure. *Massaro v. United States*, 123 S. Ct. 1690, 1694 (2003) (“ When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court *must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate*”) (Emphasis added).

4. Frivolous Writs

In 2005, the Texas Legislature passed Section 498.0045 of the Texas Government Code. Under this provision, inmates filing frivolous habeas applications can forfeit up to six (6) months of good time credit. A frivolous writ is defined as one brought for the purpose of abusing judicial resources.

D. Appendix

The Appendix provides a brief list of some available state and federal treatises and practice manuals likely to be relied upon by Texas defense attorneys and prosecutors engaged in a writ practice.

PART ONE: STATE POST-CONVICTION WRITS

The state writ of habeas corpus is a powerful weapon for challenging the constitutionality of a conviction or sentence.

I. AUTHORITY

Cognizable claims on state habeas actions are limited to claims of “jurisdictional or fundamental defects and constitutional claims.” *Ex parte Graves*, 70 S.W.3d 103 (Tex.Crim.App. 2002).

Chapter Eleven of the Texas Code of Criminal Procedure pertains to habeas corpus. It defines the writ of habeas corpus as “the remedy to be used when any person is restrained in his liberty.” Art. 11.01, Tex. Code Crim. Proc. Post-conviction writ procedures for felony cases are set out in Art. 11.07. They apply to applicants seeking relief from all felony judgments other than capital murder prosecutions in which the death penalty has been assessed.

An Article 11.07 writ may not be brought regarding a proceedings which did not result in confinement. *Ex parte Baker*, 185 S.W.3d 894 (Tex. Crim. App. 2006). In *Baker*, the applicant challenged the denial of effective counsel on a post conviction DNA testing motion. The Court of Criminal Appeals concluded that Article 11.07 writ relief was not appropriate because the Chapter

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