

PRESENTED AT

Robert O. Dawson Conference on Criminal Appeals

May 6-8, 2020  
Austin, Texas

## Article 11.07 Writs of Habeas Corpus

**Michael S. Falkenberg**

Michael S. Falkenberg  
Supervising Attorney  
Post-Conviction Writs Section  
Court of Criminal Appeals of Texas  
PO Box 12308  
Austin, TX 78711

michael.falkenberg@txcourts.gov  
512.936.1637

## Contents

<b>I. BRIEF INTRODUCTION.....</b>	<b>1</b>
<b>II. HABEAS CORPUS BASICS &amp; MODERN POST-CONVICTION HABEAS.....</b>	<b>1</b>
<b>III. TEXAS HABEAS CORPUS JURISDICTION &amp; WRIT BASICS .....</b>	<b>2</b>
A. CONSTITUTIONAL JURISDICTION .....	2
B. STATUTORY JURISDICTION .....	2
C. TERMINOLOGY .....	3
D. THE IMPORTANCE OF PLEADING.....	4
<b>IV. ARTICLE 11.07 HABEAS CORPUS BASICS .....</b>	<b>4</b>
A. "FINAL FELONY CONVICTION" .....	5
<i>i. Final.....</i>	<i>5</i>
<i>ii. Felony .....</i>	<i>5</i>
<i>iii. Conviction .....</i>	<i>6</i>
B. RESTRAINT.....	6
<b>V. ARTICLE 11.07 PROCEDURE. ....</b>	<b>7</b>
A. COUNTY PROCEDURE AND DEADLINES .....	8
<i>i. Filing .....</i>	<i>8</i>
<i>ii. The Form.....</i>	<i>8</i>
<i>iii. Timelines in convicting court.....</i>	<i>10</i>
<i>iv. Supplements and Amendments.....</i>	<i>11</i>
<i>v. Recusal of the habeas judge .....</i>	<i>12</i>
<i>vi. Habeas bond .....</i>	<i>12</i>
<i>vii. Appointment of counsel .....</i>	<i>12</i>
<i>viii. Evidence gathering and hearings .....</i>	<i>13</i>
<i>ix. Findings of fact.....</i>	<i>13</i>
<i>x. Objections to findings .....</i>	<i>14</i>
<i>xi. Forwarding the Record.....</i>	<i>14</i>
<i>xii. General Tips .....</i>	<i>14</i>
B. COURT OF CRIMINAL APPEALS REVIEW & PROCEDURE .....	15
<i>i. General CCA Process .....</i>	<i>15</i>
<i>ii. Pleading standard.....</i>	<i>16</i>
<i>iii. Review of Findings of Fact.....</i>	<i>16</i>
<i>iv. Remands .....</i>	<i>17</i>
<i>v. CCA Dispositions.....</i>	<i>17</i>
<i>vi. Rehearing/Rehearing on the Court's Own Motion .....</i>	<i>18</i>
<b>VI. SUBSEQUENT WRITS AND "ONE BITE AT THE APPLE" .....</b>	<b>18</b>
A. ONE BITE AT THE APPLE .....	18
B. TRIGGERING THE "SECTION 4 BAR" .....	19

i. "Final Disposition" .....	19
ii. Challenge the conviction .....	19
iii. Deny or Dismiss .....	20
C. NEW FACTS OR LAW (A)(1).....	21
i. New Factual basis .....	21
ii. New Legal basis .....	21
D. CONSTITUTIONAL VIOLATIONS (A)(2) (BUT FOR VIOLATION OF THE CONSTITUTION, NO RATIONAL JUROR . . .)	
.....	22
<b>VII. LEGAL CLAIMS .....</b>	<b>24</b>
A. COGNIZABILITY GENERALLY .....	25
B. COGNIZABLE CLAIMS .....	26
i. Ineffective Assistance of Counsel and Strickland v. Washington .....	26
ii. Out of Time Appeals and PDRs.....	31
iii. Suppression of Exculpatory Evidence .....	33
iv. False Evidence .....	35
v. Article 11.073.....	35
vi. Actual Innocence .....	37
vii. Involuntary Plea .....	41
viii. Illegal Sentence .....	42
ix. Double Jeopardy.....	43
x. Unconstitutional Statute .....	43
xi. Indictment and Jury Charge Error.....	43
xii. Time Credits .....	44
xiii. Parole & Mandatory Supervision.....	47
<b>VIII. DELAY, LACHES, &amp; WAIVER OF HABEAS .....</b>	<b>50</b>
A. DELAY .....	50
B. LACHES .....	50
C. WAIVER OF HABEAS CORPUS.....	51
<b>IX. NEW OPINIONS FROM 2019–2020 .....</b>	<b>51</b>
<b>X. PENDING ISSUES FILED &amp; SET FOR OPINIONS.....</b>	<b>52</b>
<b>XI. CONCLUSION AND CONTACT INFORMATION .....</b>	<b>54</b>

## I. Brief Introduction

This paper is intended to give lawyers, judges, and prisoners an overview of the procedures and law unique to Texas felony post-conviction writ of habeas corpus litigation. It first covers procedural matters and common pitfalls, and then moves into the basics of the substantive law required for the major claims seen in this arena. It is not exhaustive or comprehensive, particularly in its treatment of the substantive law governing the resolution of habeas corpus claims. However, it does contain the great majority of the elemental law in play in most cases.

One of the curiosities of habeas corpus practice is that the parties must know a wide range of law to investigate and accurately respond to writ applications, but the eventual resolution of individual claims doesn't often require resort to extensive legal analysis and argument. Decisions on the merits of writ claims are ultimately driven by the facts from the initial investigation and trial and the facts discovered after post-trial investigations. The overarching message of this paper and the accompanying talk is that the parties must know the facts of the case and should focus their arguments on those facts.

## II. Habeas Corpus Basics & Modern Post-Conviction Habeas

“The writ of habeas corpus is the remedy to be used when any person is restrained in his liberty. It is an order issued by a court or judge of competent jurisdiction, directed to any one having a person in his custody, or under his restraint, commanding him to produce such person, at a time and place named in the writ, and show why he is being held in custody or restraint.” Tex. Code Crim. Proc. art. 11.01.

Despite the straightforward statutory definition, there is something mysterious about habeas corpus—it is perceived as a cornerstone of our common law legal culture, but few lawyers really understand it. As reflected by our statutory definition, habeas corpus has historically been the prisoner's tool to challenge the legality of restraint. See *Jones v. Cunningham*, 371 U.S. 236, 238–40 (1963) (providing very brief sketch of historical English practice). Through the years, the Great Writ has been modified in many ways and, despite the “old school” statutory definition, serves several different functions in Texas criminal practice. These different uses for the writ combined with the complexities inherent in the Texas court system create a bewildering maze for practitioners to navigate.

This paper focuses on one aspect of Texas habeas corpus practice, post-conviction

habeas corpus litigation in felony cases (other than those resulting in death sentences). In this setting, habeas corpus becomes available after the exhaustion of direct appeals. Post-conviction habeas corpus is used to challenge the validity of a conviction or sentence, usually on constitutional grounds. It is a collateral attack on the conviction, a new lawsuit, based on claims and evidence from outside of the trial and appellate records that must typically relate to jurisdiction or constitutional claims. Since post-conviction habeas follows exhaustion of appeals, it generally involves claims from outside the four corners of the trial record. It is not available to relitigate claims that have already been rejected, or to litigate claims that could have been litigated in the trial and appellate proceedings. Post-conviction habeas corpus proceedings, as they relate to final felony convictions, are governed by Article 11.07 of the Code of Criminal Procedure, so they are often referred to as “11.07 writs,” or just as “11.07.”

### III. Texas Habeas Corpus Jurisdiction & Writ Basics

Understanding 11.07 writs requires a grasp of the constitutional and statutory scheme governing all habeas corpus writs in Texas criminal cases.

#### A. Constitutional Jurisdiction

Before providing habeas corpus jurisdiction, the Texas Constitution’s Bill of Rights provides that “[t]he writ of habeas corpus is a writ of right, and shall never be suspended. The Legislature shall enact laws to render the remedy speedy and effectual.” Tex. Const. art. I, § 12.

The Texas Constitution grants the Court of Criminal Appeals jurisdiction to make final determinations in all criminal cases in the state. Tex. Const. art. V, § 5(a). The Constitution also grants to the Court, and its judges, the power to issue the writ of habeas corpus, “subject to such regulations as may be prescribed by law.” Tex. Const. art. V, § 5(c). Unlike the Constitution’s grants of other extraordinary writ jurisdiction to the Court of Criminal Appeals, the Court’s habeas corpus jurisdiction is not limited to “criminal law matters.” *Id.* The Texas Supreme Court and its Justices also have the “power to issue writs of habeas corpus, as may be prescribed by law ...” Tex. Const. art. V, § 3(a).

#### B. Statutory Jurisdiction

Most of what the legislature has “prescribed by law” to effectuate the habeas remedy is found in Chapter 11 of the Code of Criminal Procedure. Article 11.05 provides statutory authority for the “Court of Criminal Appeals, the District Courts, the

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Article 11.07 Writs of Habeas Corpus

Also available as part of the eCourse

[2020 Robert O. Dawson eConference on Criminal Appeals](#)

First appeared as part of the conference materials for the  
2020 Robert O. Dawson Conference on Criminal Appeals session  
"11.07 Writs"