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Practical Tips from Writ Litigators

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A PRACTICAL GUIDE TO PROCEEDINGS IN THE TRIAL COURT FOR ARTICLE 11.07 AND 11.072 WRITS OF HABEAS CORPUS

I. INTRODUCTION

This paper is designed as a guide for attorneys with little to no experience in post-conviction habeas practice. It is intended to provide some practical information regarding trial court proceedings related to applications for writ of habeas corpus filed pursuant to Articles 11.07 and 11.072, Texas Code of Criminal Procedure (CCP). This paper compares the similarities and contrasts the differences in each statute and in the practice of these different types of habeas applications.

Although a trial court is authorized to act on habeas applications filed in accordance with other legal provisions (e.g., Articles 11.08, 11.09, or 11.071 of CCP; Article V, Section 8 of Texas Constitution) and there may be some commonality in practices under these provisions, this paper is strictly limited to general practices concerning writs applications filed under Articles 11.07 and 11.072.

II. WHICH STATUTE TO CHOOSE

A. ARTICLE 11.07

An Article 11.07 writ is the sole habeas vehicle to challenge a final felony conviction, except those in which the death penalty is imposed. TEX. CODE CRIM. PROC. ANN. art. 11.07, § 3(b). Article 11.07 should be employed when the writ applicant is currently incarcerated for the final felony conviction¹ which he is challenging. Additionally, Article 11.07 may be used to challenge a final felony conviction in which the sentence has already discharged but the writ applicant can allege some collateral consequence from the conviction. *Ex parte Harrington*, 310 S.W.3d 452 (Tex. Crim. App. 2010) (citing TEX. CODE CRIM. PROC. ANN. art. 11.07, § 3(c)).

PRACTICE TIP: Writ counsel should consider both current and potential future adverse impacts flowing from the conviction. Some of the more obvious include right to possess firearms, run for office, or vote. Perhaps less obvious are consequences that might come in to play in future intersections with the criminal justice system such as enhanced punishment or potential impeachment on credibility. Applicant-specific collateral consequences vary, with housing, public benefits, and employment / licensing each playing a significant role. A comprehensive resource for collateral consequences is the searchable database National Inventory of Collateral Consequences of Conviction (NICCC) which is maintained by the Council of State Governments JusticeCenter:

¹ A conviction is not “final” for Article 11.07 purposes if the writ applicant (a) is currently serving on any form of probation/community supervision, (b) had previously served some form of probation/community supervision that was never revoked, (c) has a pending direct appeal for which the mandate has not issued, or (d) was a juvenile whose confinement is only based upon an adjudication of delinquency. *Ex parte Brown*, 662 S.W.2d 3, 4 (Tex. Crim. App. 1983); *Ex parte Renier*, 734 S.W.2d 349, 351 (Tex. Crim. App. 1987); *Ex parte Valle*, 104 S.W.3d 888, 890 (Tex. Crim. App. 2003).

https://niccc.csgjusticecenter.org/database/results/?jurisdiction=&consequence_category=&narrow_category=&triggering_offense_category=&consequence_type=&duration_category=&page_number=1

In Texas, the Friends of the State Law Library publish “*Statutory Restrictions on Convicted Felons in Texas*”, available at <https://www.sll.texas.gov/libraryresources/collections/restrictions-on-convicted-felons/>. The Texas Department of Licensing and Regulation (TDLR) is the umbrella state agency overseeing 38 specific occupations and industries. Chapter 53 of the Texas Occupations Code addresses the consequences of criminal conviction. TEX. OCC. CODE § 53.002. Some professions address license consequences through their own professional boards, including attorneys, registered nurses, physicians, dentists, veterinarians and pharmacists.

B. ARTICLE 11.072

An Article 11.072 writ is the exclusive habeas vehicle to challenge the legal validity of an order or judgment of conviction requiring community supervision. TEX. CODE CRIM. PROC. ANN. art. 11.072, § 1. Article 11.072 should be employed when the writ applicant is currently serving or has previously successfully served either a felony or misdemeanor community supervision. TEX. CODE CRIM. PROC. ANN. art. 11.072, § 2(b); *State v. Guerrero*, 400 S.W.3d 576, 582 (Tex. Crim. App. 2013).

This provision applies to community supervision orders for deferred adjudication and “straight” probation. Additionally, this provision should be used regardless of whether the writ applicant’s community supervision was successfully completed or terminated either satisfactorily or unsatisfactorily, so long as the community supervision did not result in adjudication/revocation with a term of confinement imposed as punishment upon adjudication/revocation.

An Article 11.072 writ can be used to raise the usual habeas allegations of ineffective assistance of counsel, involuntary plea, due process violations (e.g., *Brady* or false evidence allegations), or actual innocence, which are likewise raised in an Article 11.07 writ. However, a person who can obtain the relief sought through direct appeal (Article 44.02 of CCP or Rule 25.2 of Texas Rules of Appellate Procedure) cannot obtain habeas relief through Article 11.072. TEX. CODE CRIM. PROC. ANN. art. 11.072, § 3(a).

Furthermore, a person serving community supervision may use Article 11.072 to challenge a condition of community supervision. TEX. CODE CRIM. PROC. ANN. art. 11.072, § 2(b)(2). However, a challenge to a condition of community supervision can only be based on constitutional grounds. TEX. CODE CRIM. PROC. ANN. art. 11.072, § 3(c). Additionally, before seeking relief under Article 11.072, the writ applicant must first file a motion to amend the challenged condition of community supervision. TEX. CODE CRIM. PROC. ANN. art. 11.072, § 3(b).²

III. DRAFTING THE APPLICATION

When attacking a final felony conviction under Art. 11.07, the Applicant *must* file the application on the form required by the Texas Court of Criminal Appeals. Tex. R. App. P. 73.1

² Article 11.072, § 3(b) has been construed not only to require the filing of a motion to amend the challenged condition(s) of community supervision but also to require that a ruling be secured on that motion. *Ex parte Duncan*, No. 07-16-00323-CR, 2017 WL 2989613, at *2 (Tex. App.—Amarillo July 12, 2017, no pet.) (mem. op., not designated for publication).

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