

PRESENTED AT

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Effective and Persuasive Appellate Advocacy

**Aimee Bolletino,
Attorney at Law**

**Melissa Hervey Stryker,
Assistant District Attorney
Harris County, Texas**

Aimee Bolletino
The Law Office of Aimee Bolletino
1207 South Shepherd Drive
Houston, Texas 77019

bolletino@bolletinolaw.com

713.363.3990

Melissa Hervey Stryker
Assistant District Attorney
Harris County District Attorney's Office
500 Jefferson Street, Suite 600
Houston, Texas 77002

Stryker_Melissa@dao.hctx.net

713.274.5826

Robert O. Dawson Conference on Criminal Appeals; May 2021

Effective and Persuasive Appellate Advocacy

Topic description: Practical tips for effective and persuasive appellate advocacy from the prosecution and defense perspectives.

Presenters: Melissa Stryker, Assistant District Attorney, Harris County, Texas, for the prosecution; Aimee Bolletino, Attorney at Law, for the defense

Statutes and Rules Regarding Appeals

1. Texas Rules of Appellate Procedure—know them; follow them: Effective and persuasive appellate advocacy requires that you follow the Texas Rules of Appellate Procedure (TRAP) when you write and file briefs, motions, or other appellate documents. Even the most compelling facts and powerful arguments will be in vain if you fail to heed the TRAP regarding form, content, and timing of your appellate filings.
2. Texas Code of Criminal Procedure—source of other rules and procedures that are pertinent to appellate proceedings, e.g., when the State and the defendant may appeal, when the trial court is required to file written findings of fact and conclusions of law, etc.
3. Local Rules of Intermediate Appellate Courts, Texas Court of Criminal Appeals, and Texas Supreme Court—available on the website for each court

When the State and the defendant may appeal

- **Appeal by State – TCCP Art. 44.01**
 - Appealable Orders
 - Article 44.01(a) lists several specific circumstances in which the State is entitled to appeal a trial court’s order, including if the order:
 - (1) dismisses an indictment, information, or complaint, or any portion of an indictment, information, or complaint;
 - (2) arrests or modifies a judgment;
 - (3) grants a new trial;
 - (4) sustains a claim of former jeopardy;
 - (5) grants a motion to suppress evidence, a confession, or an admission, if jeopardy has not attached in the case and if the prosecuting attorney certifies to the trial court that the appeal is not taken for the purpose of delay and that the evidence, confession, or admission is of substantial importance in the case. Tex. Code Crim. Proc. Ann. art. 44.01(a)(1)-(5).
 - NOTE: the Court of Criminal Appeals and other appellate courts have held that, even if a trial court’s order does not explicitly trigger one of these provisions, the State may appeal if the order nonetheless has an *effect* that falls within the listed appealable orders.¹

¹ See *Alvarez v. Eighth Court of Appeals of Texas*, 977 S.W.2d 590, 593 (Tex. Crim. App. 1998) (“We hold that if the granting of relief by a habeas corpus court results in one of the enumerated situations within Art. 44.01(a), the State may appeal regardless of what label is used to denominate the proceeding which results in the order being entered.”); *State v. Young*, 810 S.W.2d 221, 222-23 (Tex. Crim. App. 1991) (the

- Other Appealable Orders: Other subsections of Article 44.01 authorize the State to appeal in specific circumstances, such as:
 - If the State believes that the defendant has received an illegal sentence;²
 - If the State believes the trial court has wrongly decided a question of law, if defendant is convicted and appeals the judgment;³
 - NOTE: The State typically appeals this issue as cross-points of error in the State’s reply to the defendant’s appellate brief, rather than initiating the State’s own appeal. When the State raises a cross-point of error, the State is not required to file a notice of appeal; rather, the appellate courts have jurisdiction to resolve any cross-appeals or rebuttal issues that the State raises in its reply brief. *See Pfeiffer v. State*, 363 S.W.3d 594 (Tex. Crim. App. 2012).
 - If the trial court grants a defendant’s habeas corpus application under TCCP Article 11.072⁴ (note that there currently is a split among the appellate courts as to whether the State may appeal an order granting habeas corpus relief under TCCP Article 11.09)⁵; or
 - If the trial court exempts a person from complying with the requirements of TCCP Chapter 62 (pertaining to sex offender registration) or terminates a person’s obligation to register as a sex offender under TCCP Chapter 62.⁶

State could appeal an order granting habeas corpus relief which had the effect of dismissing the indictments pending against the appellees because, per Article 44.01(a)(1), the State is entitled to appeal order which dismisses an indictment); *State v. Garcia*, No. 13-11-00689-CR, 2012 WL 7849303, at *3-4 (Tex. App.—Corpus Christi-Edinburg Dec. 13, 2012, no pet.) (mem. op., not designated for publication) (the State could appeal an order granting habeas corpus relief under Article 11.09 because the order was tantamount to an order granting a new trial, which the State may normally appeal under Article 44.01(a)(3)); *Ex parte Crenshaw*, 25 S.W.3d 761, 764 n.4 (Tex. App.—Houston [1st Dist.] 2000, pet. ref’d) (the State may appeal an order granting habeas corpus relief when the order is equivalent to an order that sustains a claim of former jeopardy, given that the State may normally appeal such an order under Article 44.01(a)(4)); *State v. Kanapa*, 778 S.W.2d 592, 593-94 (Tex. App.—Houston [1st Dist.] 1989, no pet.) (the State could appeal an order granting habeas corpus relief and modifying the previous judgment entered against the appellee in a misdemeanor DWI case, given that Article 44.01(a)(2) allows the State to appeal an order modifying a judgment).

² Tex. Code Crim. Proc. Ann. art. 44.01(b).

³ Tex. Code Crim. Proc. Ann. art. 44.01(c).

⁴ Tex. Code Crim. Proc. Ann. art. 44.01(k).

⁵ *Compare State v. Garcia*, No. 13-11-00689-CR, 2012 WL 7849303, at *3-4 (Tex. App.—Corpus Christi-Edinburg Dec. 13, 2012, no pet.) (mem. op., not designated for publication) (the State could appeal an order granting habeas corpus relief under Article 11.09 because the order was tantamount to an order granting a new trial, which the State may normally appeal under Article 44.01(a)(3)) *with State v. Garcia*, No. 14-20-00548-CR, 2021 WL 786746, at *2-4 (Tex. App.—Houston [14th Dist.] Mar. 2, 2021, pet. filed) (concluding that the State had no right to appeal the trial court’s order granting relief on a habeas corpus application under Article 11.09 because Article 44.01 does not explicitly authorize the State to appeal such an order, and the trial court’s order “discharged” the defendant, rather than explicitly granting a new trial, and thus the order does not otherwise qualify as an appealable order under Article 44.01(a)).

⁶ Tex. Code Crim. Proc. Ann. art. 44.01(l).

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