

Article 11.07 Writs of Habeas Corpus

Michael S. Falkenberg
Assistant Public Defender
Harris County Public Defender's Office
Michael.Falkenberg@pdo.hctx.net
713-274-6700

TABLE OF CONTENTS

I. Brief Introduction	1
II. Habeas Corpus Basics & Modern Post-Conviction Habeas	1
III. Texas Habeas Corpus Jurisdiction & Writ Basics	2
<i>A. Constitutional Jurisdiction</i>	<i>2</i>
<i>B. Statutory Jurisdiction.....</i>	<i>3</i>
<i>C. Terminology.....</i>	<i>3</i>
<i>D. The Importance of Pleading.....</i>	<i>4</i>
IV. Article 11.07 Habeas Corpus Basics	5
<i>A. “Final felony conviction”.....</i>	<i>5</i>
i. Final.....	5
ii. Felony.....	6
iii. Conviction.....	6
<i>B. Restraint</i>	<i>6</i>
V. Article 11.07 Procedure	7
<i>A. County Procedure and Deadlines.....</i>	<i>8</i>
i. Filing	8
ii. The Form	8
Compliance	8
Dismissal for Non-Compliance	9
Multiple Counts v. Multiple Cause Numbers	9
Memorandum.....	9
Exhibits and Attachments.....	9
Verification.....	10
iii. Timelines in Convicting Court	10
iv. Supplements and Amendments.....	11
v. Recusal of the Habeas Judge.....	12
vi. Habeas Bond.....	12
vii. Appointment of Counsel	12
viii. Evidence Gathering and Hearings.....	13
ix. Findings of Fact.....	14
x. Objections to Findings.....	15
xi. Forwarding the Record	15
xii. General Tips.....	15
<i>B. Court of Criminal Appeals Review & Procedure</i>	<i>16</i>
i. General CCA Process.....	16
ii. Pleading standard	16
iii. Review of Findings of Fact.....	17
iv. Remands	17
v. CCA Dispositions.....	18

vi. Rehearing/Rehearing on the Court’s Own Motion	18
VI. Subsequent Writs and “One Bite at the Apple”	19
A. “One Bite at the Apple”	19
B. Triggering the “Section 4 bar”	19
i. “Final Disposition”	20
ii. Challenge the Conviction	20
iii. Deny or Dismiss	21
C. New Facts or Law (a)(1)	21
i. New Factual Basis	21
ii. New Legal Basis	22
D. Constitutional Violations (a)(2) (But for violation of the Constitution, no rational juror . . .)	22
VII. Legal Claims	24
A. Cognizability Generally	25
B. Cognizable claims.....	26
i. Ineffective Assistance of Counsel and Strickland v. Washington.....	26
1. The Strickland Standard.....	27
2. Deficient Performance.....	27
3. Strickland Prejudice	28
4. Ineffective Assistance at Guilty Pleas.....	29
5. Ineffective Assistance of Appellate Counsel.....	30
6. Cronic.....	30
7. Ineffective Assistance Due to Conflicts of Interest	31
ii. Out of Time Appeals and PDRs	31
1. Direct Appeal	32
2. Out of Time Petition for Discretionary Review	32
iii. Suppression of Exculpatory Evidence.....	33
1. Brady Basics	33
2. Impeachment and Guilty Pleas.....	34
3. Materiality.....	34
iv. False Evidence.....	35
v. Article 11.073	36
vi. Actual Innocence.....	37
1. The Newly Discovered Evidence Innocence Standard	38
2. Pleading the Case.....	39
3. Recantations.....	39
4. “Hybrid” Innocence Claims.....	39
5. Using New Science to Prove Innocence	40
6. Innocence and Sex Offender Registration	40
7. Guilt for Lesser Offenses	40
8. Schlup and “Procedural Innocence”	40
9. Tim Cole Act Compensation in Actual Innocence cases.....	41
vii. Involuntary Plea.....	42
viii. Illegal Sentence.....	44
ix. Double Jeopardy	45

x. Unconstitutional Statute	46
xi. Indictment and Jury Charge Error	46
xii. Time Credits.....	46
1. Administrative Exhaustion	46
2. Pre-Sentence Jail Time Credits.....	47
3. Post-Conviction Time Credits	48
xiii. Parole & Mandatory Supervision.....	50
1. Release to Parole.....	50
2. Release to Mandatory Supervision	50
3. Revocation	51
VIII. Delay, Laches, & Waiver of Habeas.....	52
A. <i>Delay</i>	52
B. <i>Laches</i>	52
C. <i>Waiver of Habeas Corpus</i>	53
IX. New Extraordinary Writ Opinions from Spring 2023–Winter 2024 (not otherwise mentioned in the paper)	54
X. Pending Issues Filed & Set for Opinions.....	54
XI. Conclusion and Contact Information	56

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 behind 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. But it does cover the great majority of the elemental law in play in most cases. However, given that post-conviction habeas corpus practice is dominated by significant pre-filing investigation, the materials and topics in this paper represent the tip of the iceberg of post-conviction habeas corpus practice.

One curiosity of habeas corpus practice is that the parties must know a wide range of law to investigate and litigate writ applications, but the eventual resolution of individual claims doesn't usually depend on 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.*

At the outset, I'd like to recognize the invaluable assistance I've received in maintaining this paper from Lynda Charleson and Dannet Bock-Barnes, former colleagues at the Court of Criminal Appeals. This paper is built from the bones of Mike Stauffacher's long running 11.07 paper, written during his long service at the Court.

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 a cornerstone of our common law legal culture, but few lawyers really understand it. 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 Article 11.01's "old school" statutory definition, serves several different functions in Texas criminal practice. These different

uses for the writ combined with Texas’s complicated 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 direct appeals are exhausted. 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 issues. Since post-conviction habeas follows exhaustion of appeals, it generally involves claims from outside the four corners of the trial record. The Court of Criminal Appeals has decided that post-conviction habeas 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 courts.

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. This unequivocal suspension clause is more protective than its federal counterpart. *Compare* U.S. Const. art I, § 9, Cl. 2 (allowing suspension of the writ in cases of rebellion, invasion, or when the “public safety” requires it).

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 (mandamus, prohibition, etc.), the Court’s habeas corpus jurisdiction is not limited to “criminal law matters.” *Id.*

District Courts have “exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive jurisdiction may be conferred

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

[2024 Robert O. Dawson eConference on Criminal Appeals](#)

First appeared as part of the conference materials for the
2024 Robert O. Dawson Conference on Criminal Appeals session
"Writs"