

PRESENTED AT

Robert O. Dawson Conference on Criminal Appeals

May 25-27, 2022

Austin, Texas

Article 11.07 Writs of Habeas Corpus

Michael S. Falkenberg

Michael S. Falkenberg
Assistant Public Defender
Post-Conviction Writs Section
Harris County Public Defender's Office
1201 Franklin St., 13th Floor
Houston, TX 77002
Michael.Falkenberg@pdo.hctx.net
(713) 274-6751

Contents

I. Brief Introduction	1
II. Habeas Corpus Basics & Modern Post-Conviction Habeas	1
III. Texas Habeas Corpus Jurisdiction & Writ Basics.....	2
A. Constitutional Jurisdiction	2
B. Statutory Jurisdiction	2
C. Terminology.....	2
D. The Importance of Pleading.....	3
IV. Article 11.07 Habeas Corpus Basics.....	3
A. “Final felony conviction”	4
i. Final	4
ii. Felony	4
iii. Conviction	4
B. Restraint.....	5
V. Article 11.07 Procedure.....	6
A. County Procedure and Deadlines.....	6
i. Filing.....	6
ii. The Form	6
iii. Timelines in Convicting Court	7
iv. Supplements and Amendments.....	8
v. Recusal of the Habeas Judge.....	9
vi. Habeas Bond.....	9
vii. Appointment of Counsel.....	9
viii. Evidence Gathering and Hearings	9
ix. Findings of Fact	10
x. Objections to Findings	10
xi. Forwarding the Record	11
xii. General Tips.....	11
B. Court of Criminal Appeals Review & Procedure	11
i. General CCA Process	11
ii. Pleading standard.....	12
iii. Review of Findings of Fact.....	12
iv. Remands.....	12
v. CCA Dispositions	13
vi. Rehearing/Rehearing on the Court’s Own Motion	13
VI. Subsequent Writs and “One Bite at the Apple”	14
A. “One Bite at the Apple”	14
B. Triggering the “Section 4 bar”	14
i. “Final Disposition”	14
ii. Challenge the Conviction	14
iii. Deny or Dismiss	15
C. New Facts or Law (a)(1).....	15
i. New Factual Basis	15
ii. New Legal Basis	16
D. Constitutional Violations (a)(2) (But for violation of the Constitution, no rational juror . . .).....	16
VII. Legal Claims.....	17
A. Cognizability Generally.....	18
B. Cognizable claims.....	19
i. Ineffective Assistance of Counsel and Strickland v. Washington	19
ii. Out of Time Appeals and PDRs	23
iii. Suppression of Exculpatory Evidence	24
iv. False Evidence	26
v. Article 11.073	26
vi. Actual Innocence	27
vii. Involuntary Plea.....	30
viii. Illegal Sentence.....	31

ix. Double Jeopardy	32
x. Unconstitutional Statute	33
xi. Indictment and Jury Charge Error.....	33
xii. Time Credits	33
xiii. Parole & Mandatory Supervision	36
VIII. Delay, Laches, & Waiver of Habeas	37
A. Delay.....	37
B. Laches	38
C. Waiver of Habeas Corpus	38
IX. New Extraordinary Writ Opinions from 2020–2022 (not otherwise mentioned in the paper)	39
X. Pending Issues Filed & Set for Opinions	40
XI. Conclusion and Contact Information	41

ARTICLE 11.07 WRITS OF HABEAS CORPUS

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 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.

Before I go further, I'd like to recognize the invaluable assistance I've received in maintaining this paper from Lynda Charleson and Dannel Bock-Barnes, former colleagues at the Court of Criminal Appeals.

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 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. 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 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.

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.* 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 County Courts, or any Judge of said Courts" to "issue" the writ of habeas corpus, and adds "it is their duty, upon proper motion, to grant the writ under the rules prescribed by law." Tex. Code Crim. Proc. art. 11.05. The Code then provides specific frameworks for uses of the writ in different situations: felony convictions resulting in death sentences (Article 11.071), any case (felony or misdemeanor) with a community supervision order (Article 11.072), and pretrial situations where the person is charged with a felony (Article 11.08) or charged with a misdemeanor (Article 11.09). The Code lays out procedural rules and practices unique to each situation, apart from the pre-trial writs filed under Articles 11.08 and 11.09. You must know the status of the conviction being challenged and the appropriate article to file under.

The substantive law of post-conviction habeas corpus is mostly developed in the Article 11.07 arena, but the principles from those cases generally apply in all post-conviction situations.

C. Terminology

As with most legal matters, habeas practitioners and litigants must understand certain magic words or terms of art. Happily, there aren't many of them and most are defined in the Code of Criminal Procedure or the Rules of Appellate Procedure.

Applicant: The applicant "is the person for whose relief the writ is asked." Tex. Code Crim. Proc. art. 11.13; Tex. R. App. P. 3.2.¹

¹ In the past, courts have referred to the applicant as the "relator," a term now more at home in the world of all other extraordinary writs. *Ex parte Clear*, 573 S.W.2d 224 (Tex. Crim. App. 1978); TEX. R. APP. P. 3.1(f). In the rare original writ proceeding in the appellate courts or the Texas Supreme Court, the person seeking relief is a relator. TEX. R. APP. P. 52.2.

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: Writs

First appeared as part of the conference materials for the
2022 Robert O. Dawson Conference on Criminal Appeals session
"Writs"