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Writ Requirements and Best Practices

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WRIT REQUIREMENTS AND BEST PRACTICES: Defense and Prosecution Perspective

An overview of the requirements for litigating an 11.07 and 11.072 writ of habeas corpus from beginning to end; from both a defense and prosecution perspective. Explore best practices from each perspective, including investigation and drafting a writ to filing an answer and presenting at a hearing. Gain helpful tips for the everyday practitioner, the beginner in practice as well as the judge presiding over the case.

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I. Defense Lawyer's Writ Practice Tips and Guidelines: Starting at the Beginning

This portion of the paper covers defense practice in 11.07 and 11.072 writs of habeas corpus. It is not a comprehensive discussion of habeas practice. Instead, it is a practical presentation of best practices and tips for defense lawyers covering the most common areas of writ practice. While other types of writs exist under Chapter 11 of the Texas Code of Criminal Procedure, they are not covered here to give more attention to the areas most utilized by the practitioner in felony cases. In my opinion, writ practice is more of an art than a science, so I offer my ever-evolving knowledge to this audience.

As an initial matter, all writ applicants carry the burden of proof. To prevail in any claim, the practitioner must plead and prove facts, by a preponderance of the evidence, which entitles her or him to relief. Keep in mind that many cases involve errors in the trial court but to prevail on a writ you must show not just that something went wrong, but that it mattered. The prejudice prong of any writ is always where the most attention should be spent to ultimately convince the trial court and the Court of Criminal Appeals that relief is required.

A. Writ Investigation

1. Post-Conviction Records and District Attorney's File

The first task in any writ investigation is to review the clerk's file as well as the district attorney's file. Both can be obtained through a Public Information Request (PIA). Any request must be specific and should include language which makes clear that counsel is only requesting that information not otherwise privileged, and necessarily excluded from such requests. PIA requests must be complied with no later than 10 business days from the written request.

In addition to the clerk's record and district attorneys file, obtaining a copy of any transcripts is an important part of any investigation. If there was an appeal you can now obtain these records directly from the courts of appeals. Where no trial was held, you should always contact the trial court to find out if transcripts exist. Many counties have records of the guilty plea as well as sentencing hearing. If transcripts do exist, you will need to coordinate with the court reporter to prepare those records and pay costs for such preparation.

2. Trial Lawyer's File

A thorough review of court and prosecutor's files are critical to a writ investigation. That said, common claims on a writ can include ineffective assistance of counsel, involuntary plea of guilty or prosecutorial misconduct. Each of these claims requires a thorough understanding of what the prosecutor and defense attorney knew at the time of a trial or a plea. In every case, a writ lawyer must request a copy of the trial lawyer's file. This request is made pursuant to State Bar Rule 1.15(d) and should also advise that 10 business days is a reasonable time to respond. My emailed request reads as follows:

I represent [defendant's name] in post-conviction matters. I am requesting a complete copy of your file pursuant to State Bar Rule 1.15(d). You may send an electronic file directly to me at carmen@carmenroe.com or by regular mail. If it's more convenient for you, my assistant can pick up the file at your location.

Please provide the file within ten (10) days of receipt of this request. If you have any questions or concerns, do not hesitate to contact me directly. Thank you for your assistance!

The trial lawyer's file is essential to any investigation because any claim raised will require that writ counsel be aware of the information known to trial counsel at the time of any plea, trial or sentencing. Writ counsel can learn a lot about strategy and decisions made on behalf of the client by reviewing the notes, correspondence, legal research and even billing of the trial attorney. It's important to note that all court-appointed attorneys are required to itemize a voucher in order to get paid for the work completed on behalf of the client. This can be a road map to the work that was done in any given case and should always be reviewed alongside other information obtained through the course of an investigation. Keep in mind too that if you are looking at a claim of ineffective assistance of counsel (which you almost always are in any writ) you absolutely must contact the trial attorney to discuss the case and any strategy employed.

3. Other Evidence to Consider

Always talk to the client, the family of the client, and collect any other materials they may have in their possession. For example, in cases of ineffective assistance of counsel at punishment asserting the failure to call available witnesses you may want to obtain affidavits from witnesses who were ready and willing to testify at punishment but were never contacted or called by trial counsel. Although it is never advised that you take the client or the family at their word and instead should conduct an independent investigation, this can be a great starting point to ascertain what issues may be presented in any writ.

4. Whether to File a Writ

A very important decision every writ lawyer must make is whether to file a writ of habeas corpus. It is never a foregone conclusion that a writ will be filed. This is particularly true since a client essentially only has the right to file one writ in Texas.¹ If you don't have the evidence or the law to prevail, you should pause to consider a better time to file a writ or that no writ should be filed at all. Simply because you do an investigation or get hired on a writ does not necessarily mean you should file a writ. Often times, this means you should take a separate fee for a writ investigation versus the filing of a writ. Many writ attorneys break the fee up for this very reason. Once you realize there are no issues or that any issues you find are very unlikely to be successful, you have an ethical obligation to advise the client and to make a strategic decision not to file a writ.

¹ Known as the "one writ rule" it provides that a court cannot consider the merits of a subsequent writ after final disposition of an initial application challenging the same conviction unless the very strict requirements of Article 11.07, §4.

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