Article 11.07 Writs of Habeas Corpus

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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 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.

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.

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 by this Constitution or other law on some other court, tribunal, or administrative body. District Court judges shall have the power to issue writs necessary to enforce their jurisdiction." Tex. Const. Art. V, § 8.

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 pre-conviction situations where the person is charged with a felony (Article 11.08) or 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 Article 11.07 cases, 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. 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]

Petitioner: The petitioner is the person who seeks habeas relief on behalf of an applicant. In 11.07 habeas corpus, the petitioner does not have to be a licensed attorney. Tex. R. App. P. Appendix E (11.07 form).

Petition or Application?: Is the document filed to obtain or invoke the writ a petition or an application? Articles 11.07, 11.071, and 11.072 (relating to felony writs, death penalty writs, and community supervision writs, respectively) refer to an "application," as do the Rules of Appellate Procedure. Tex. R. App. P. 3.1(d). But other parts of the Code of Criminal Procedure use the word "petition." Tex. Code Crim. Proc. art. 11.14. The best you can do is to refer to the document as an "application" if it is filed under 11.07, 11.071, or 11.072, and a "petition" if it is filed under other authority.

Issuing, Granting, and Returning the Writ: These words are not particularly problematic in *post-conviction* habeas litigation, but the practitioner should be familiar with them in other habeas contexts. In other situations, habeas corpus relief is a two-step process. The judge first decides whether to "**issue**" the writ, which means that the judge will consider the writ on its merits. Language about "granting the writ" does not necessarily refer to a grant of ultimate relief, it could just mean that the judge has decided to hear the merits of the writ. To complicate matters further, the judge who decides to issue the writ may not be the judge deciding the merits—that depends upon where the writ "**returns**" or where it is "returnable." It is possible a judge from another jurisdiction could decide that the writ should be heard (issue), but it will generally be returnable (and decided) in the county where the offense allegedly occurred. Tex. Code Crim. Proc. art. 11.10.

These are not concerns in post-conviction habeas corpus situations because the legislature has decided that in these cases the writ should issue by operation of law. This means that courts do not have discretion to decide whether to hear post-conviction writs on the merits. However, the issue is critically important in other contexts, as a judge's refusal to issue the writ is not typically appealable.

D. The Importance of Pleading

In all extraordinary writ situations, pleading is crucial to the proponent's success. Habeas corpus is generally governed by the preponderance burden of proof[2] and the applicant must prove by a preponderance of the evidence the facts showing entitlement to relief. *Ex parte Lalonde*, 570 S.W.3d 716, 725 (Tex. Crim. App. 2019). The most important Texas habeas corpus case is not one setting forth a constitutional right, but one governing pleading. It stands for the simple proposition that the applicant must allege facts, which, if true, could entitle him or her to relief. *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985). The applicant's factual allegations must embrace everything necessary to prove the claim. *This is a chronic deficiency in Texas habeas applications filed by pro-se applicants and licensed lawyers alike*. As will be discussed in greater detail below, successful habeas claims typically demonstrate that an error occurred and that the applicant suffered harm. The applicant must present a complete factual narrative establishing both propositions.

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[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.

[2] As will be discussed, actual innocence claims carry a "clear and convincing" burden.

IV. Article 11.07 Habeas Corpus Basics

Litigation of an Article 11.07 habeas corpus application involves a bifurcated procedure beginning in the court of conviction and ending in the Court of Criminal Appeals. This procedure allows the local parties to the conviction to undertake fact finding and make recommendations, and for the Court of Criminal Appeals to review the record and have the last word. In this procedural posture, the convicting court is often referred to as the "habeas court," and the judge of that court referred to as the "habeas judge."

A. "Final felony conviction"

Writ applications filed under authority of Article 11.07 must attack final felony convictions. The Court of Criminal Appeals will dismiss writs that do not satisfy those three requirements.

i. Final Whether the conviction is "final" is always an issue for recent convictions. If the sentence is probated, it is not a final conviction, and different procedures apply. Tex. Code Crim. Proc. art. 11.072.

Pointing to the statutory "final felony conviction" qualifier, the Court held that it does not have jurisdiction to consider an application for habeas corpus under Article 11.07 until the felony judgment under attack becomes final. *Ex parte Johnson*, 12 S.W.3d 472, 473 (Tex. Crim. App. 2000). If a writ application is filed shortly after a conviction and there is no suggestion in the writ record that notice of appeal was filed, then the Court generally presumes that the conviction is final. If the case is pending on direct appeal or discretionary review, the conviction is not final and will not be final until the appellate mandate issues. *Jones v. State*, 711 S.W.2d 634, 636 (Tex. Crim. App. 1986). When the 11.07 application is filed on the same day mandate issues, if possible, the Court will look to the time on the file stamps to see whether the appellate mandate issued before the writ was filed. Presumably, if the writ was filed one minute before the mandate issued, the Court would dismiss the writ for want of jurisdiction. However, "absent evidence to the contrary, a direct-appeal mandate is presumed to have issued at 9:00 a.m. on the date it issues." *Ex parte Hastings*, 366 S.W.3d 199, 201 (Tex. Crim. App. 2012).

The Court introduced the concept of the "dormant mandate" in a case where it had previously granted the applicant the opportunity to pursue an out-of-time discretionary review. The initial appellate mandate was never recalled, and after the Court refused the out-of-time petition for discretionary review (PDR), no other mandate issued. The Court held that when it issued mandate on the applicant's 11.07 application that led to the out-of-time PDR, it notified the appellate court that the appellate process was reinstated which did not render the original mandate ineffective, but held it "temporarily dormant" until the Court could dispose of the out-of-time appeal. *Ex parte Webb*, 270 S.W.3d 108, 111 (Tex. Crim. App. 2008). Therefore, the applicant's second 11.07 application, filed almost one year after the Court refused PDR, but without issuance of any further mandate, challenged a final conviction. *Id.*

ii. Felony The "felony" qualifier is more straightforward. If the case is a misdemeanor, the party must file a different writ. Tex. Code Crim. Proc. art. 11.09. Article 11.07 is used for state jail felonies, state jail felonies punished as misdemeanors under Section 12.44 of the Penal Code,[3] felonies wrongly punished as misdemeanors,[4] and first, second, and third-degree felonies as well as capital felonies when the defendant received a sentence other than death. *See Ex parte Palmberg*, 491 S.W.3d 804, 805 n.1 (Tex. Crim. App.

[3] *Ex parte Oranday-Garcia*, 410 S.W.3d 865, 866 n.2 (Tex. Crim. App. 2013).

[4] *Ex parte Sparks*, 206 S.W.3d 680 (Tex. Crim. App. 2006) stated the issue as "whether post-conviction habeas corpus is available when a felony conviction was rendered on a guilty plea when in fact the offense was a misdemeanor." To be clear, the applicant was challenging an 8-year sentence, so the issue was less whether the Court had jurisdiction under Article 11.07 and more whether there was a remedy for the claim.

2016) (reading *Sparks* and Penal Code Section 12.44(a) together for the proposition that a state jail conviction punished as if it were a Class A misdemeanor is subject to attack under Article 11.07).

iii. Conviction Finally, "conviction" ties into "finality." If the case is an unadjudicated deferred adjudication or an unrevoked community supervision, there is no conviction to challenge and the party must file a writ under authority of a different article in Chapter 11. The same is true if charges are pending. Similarly, juvenile adjudications, even when the person is transferred to prison in TDCJ, are not convictions for crimes and Article 11.07 provides no remedy. *Ex parte Valle*, 104 S.W.3d 888, 889–90 (Tex. Crim. App. 2003).

Because a Code of Criminal Procedure Chapter 64 proceeding for DNA testing is not one that results in confinement, habeas corpus is not an appropriate remedy for counsel errors or other problems in Chapter 64 proceedings. *Ex parte Baker*, 185 S.W.3d 894, 897 (Tex. Crim. App. 2006).[5]

Writ applications filed under Article 11.07 that do not challenge a felony conviction are summarily dismissed.

B. Restraint

At the outset, the writ application must allege that the applicant is restrained in some way by the conviction under attack. The applicant must challenge either the fact or length of confinement. *Ex parte Lockett*, 956 S.W.2d 41, 42 (Tex. Crim. App. 1997) (deciding that a challenge to a "drug tax" levied by the Comptroller did not "request a change of either the fact or length" of the applicant's confinement, and that the Court did not have Article 11.07 jurisdiction to hear the claim).

Article 11.01 says the writ is the remedy when someone is "restrained" in their liberty. Tex. Code Crim. Proc. art. 11.01. Article 11.07 is more specific and speaks in terms of "confinement," which means "confinement for any offense *or any collateral consequence resulting from the conviction* that is the basis of the instant habeas corpus." Tex. Code Crim. Proc. art. 11.07 § 3(c) (emphasis added). This means that the applicant need not show literal confinement, and "a showing of a collateral consequence, without more, is now sufficient to establish 'confinement' so as to trigger application" of Article 11.07. *Ex parte Harrington*, 310 S.W.3d 452, 457 (Tex. Crim. App. 2010).

Any 11.07 applicant who is not obviously serving a prison sentence at the time of filing must specifically allege how they are confined and be prepared to offer proof, if necessary. A simple allegation covering confinement, if unchallenged by the State, is typically enough to establish jurisdiction, but no allegations of confinement in a case where the sentence has obviously been discharged will generally result in a summary dismissal. If an applicant files a writ while incarcerated but discharges the sentence before the writ is decided, the initial allegation of restraint is sufficient for jurisdiction over the writ for the duration of its pendency. *Ex parte Dennis*, __ S.W.3d __, No. WR-89,188-01 (Tex. Crim. App. Dec. 21, 2022)

In *Harrington*, the trial court found that the applicant was not in custody for the DWI conviction at issue but had suffered the loss of his job due to his incarceration, loss of job opportunities due to his status as a felon, loss of his right to vote during his incarceration and parole period, loss of the right to run for an elected office, and loss of the right to possess firearms. The court also found that he may be affected by specific future collateral consequences. *Ex parte Harrington*, 310 S.W.3d 452, 455–56 (Tex. Crim. App. 2010). These findings were supported by the applicant's testimony at a writ hearing and were sufficient to

[5] It is possible that a remedy in these situations is a second motion for DNA testing. *Ex parte Suhre*, 185 S.W.3d 898 (Tex. Crim. App. 2006).

prove confinement under Article 11.07. In an unpublished case, the Court recently dismissed, finding that the allegation that his discharged conviction "could lead to an enhancement of a felony committed after his release" was insufficient under *Harrington* to show restraint. *Ex parte Collier*, No. WR-91,784-01 (Tex. Crim. App. Apr. 12, 2023) (not designated for publication).

An applicant who is released from prison to parole or mandatory supervision remains confined for purposes of Article 11.07 jurisdiction. *Ex parte Elliott*, 746 S.W.2d 762, 763 n.1 (Tex. Crim. App. 1988) (note that this decision pre-dates the definition of "confinement" in Article 11.07 that explicitly included collateral consequences as an aspect of confinement).

V. Article 11.07 Procedure

Article 11.07 habeas corpus applications follow a path that is unique in our criminal law.[6] They are filed in the court of conviction, but upon filing, they become automatically returnable to the Court of Criminal Appeals. The State may respond, and the trial court may conduct fact finding and then issue findings of fact and a recommendation to the Court of Criminal Appeals. The writ record is then sent to the Court of Criminal Appeals for a decision on the case. The Court may remand the case to the trial court for fact finding, but the final decision rests with the Court of Criminal Appeals. What follows are details about the various deadlines, practices, and procedural hurdles involved in navigating this process.

A. County Procedure and Deadlines

i. Filing A writ application filed under Article 11.07 must be filed in the county of conviction with the district clerk and in the court "in which the conviction being challenged was obtained." Tex. Code Crim. Proc. art. 11.07 § 3(b). The clerk shall then assign the case a file number ancillary to that of the challenged conviction. *Id.* The clerk shall also forward the writ application to the attorney representing the State. *Id.* Filing fees are prohibited. Tex. Code Crim. Proc. art. 11.051.

As will be discussed in greater detail to come, a series of deadlines keep the writ application moving. The deadlines for responses and forwarding the record both run from when the State is served, which is not necessarily the filing date.

ii. The Form Applications filed under Article 11.07 must be filed on the form prescribed by the Court of Criminal Appeals. Tex. R. App. P. 73.1(a). The form is available on the Court of Criminal Appeals' website, and the Rules of Appellate Procedure require the district clerks to make the form available to applicants by request, without charge. Tex. R. App. P. 73.1(b). Texas prison law libraries should also make the form available to inmates. The form is also available as an appendix to the Rules of Appellate Procedure. Tex. R. App. P. Appendix E. Be certain to use the most recent version of the form. As of this writing (late May 2023) the current form says "Revised 2018" on each page.

Compliance The form must be filled out completely by the applicant or petitioner. It provides two pages for each legal ground, which should be used to state the legal basis for the ground (ineffective assistance of trial counsel, for instance) and "set forth in summary fashion the facts supporting each ground." Tex. R. App. P. 73.1(c). Grounds not raised on the form will not be considered and legal citations and extensive legal arguments should be raised in a separate memorandum. *Id.*[7] The grounds for relief shall not exceed

[6] Actually, Article 11.071 procedure is roughly analogous, but does have key differences, particularly with respect to subsequent applications.

[7] This should not be read as a categorical ban on legal citations on the form. The Court does not dismiss writ applications just because they contain legal citations on the form. However, the form should generally be used for

the two pages for each ground, and the memorandum shall not exceed 15,000 words if computer-generated, and 50 pages if handwritten or composed on a typewriter. Tex. R. App. P. 73.1(c) & (d). The Rules of Appellate Procedure also provide typeface requirements and require a certificate of compliance for the memorandum. Tex. R. App. P. 73.1(e) & (f).

Dismissal for Non-Compliance The Court of Criminal Appeals routinely dismisses writ applications that do not conform to these rules as non-compliant. Tex. R. App. P. 73.2. However, non-compliance is not a reason for a district clerk to refuse initial filing. *See* Tex. R. App. P. 73.4(a) (requiring the district clerk to "accept and file all" 11.07 applications). Failure to certify to the word count in the memorandum and exceeding the two page per ground limit will cause a writ application to be peremptorily dismissed, as will not using the form altogether. However, the Rules are not jurisdictional, and the Court will overlook compliance problems in certain situations. In *Golden*, the Court considered a writ application that was not verified properly in accordance with Article 11.14. The Court chose to address the merits of the non-compliant writ application and grant relief. In that case, the trial court recommended granting relief and the State agreed. *Ex parte Golden*, 991 S.W.2d 859, 862 (Tex. Crim. App. 1999). In general, the Court follows this example and does not dismiss non-compliant writ applications with an agreed grant recommendation that the Court agrees with. *See Ex parte Morton*, No. AP-76,663 (Tex. Crim. App. Oct. 12, 2011) (not designated for publication).

Multiple Counts v. Multiple Cause Numbers The applicant challenging multiple cause numbers, even if they are all from the same proceedings, must fill out a separate form for each cause number. However, the applicant challenging multiple counts under one cause number may fill out a single form for each cause number and indicate on the form which counts are being challenged.

Memorandum The theory behind the memorandum is that it is where the applicant makes extensive legal arguments. My personal view is that applicants should use the memorandum to flesh out the facts of the case or trial and focus on the prejudice argument. Unless the applicant wishes to break new legal ground or there is a dispute over the state of the law, extensive legal argumentation beyond setting out the applicable standard or test is not typically productive. From my experience, the most common failing in habeas corpus applications across the spectrum is the failure to grapple with prejudice, whether it is *Brady* materiality, *Strickland* harm, actual innocence, or harm relating to the other cognizable claims. The applicant must adequately place the error into context of the relevant facts, most of which the Court of Criminal Appeals will be unaware of without assistance from the parties.

Exhibits and Attachments The habeas applicant must, where possible, prove the claims with evidence. Most commonly, this is sworn statements, laboratory results, expert reports, or record excerpts. The applicant should attach whatever proof is available and necessary to support the writ allegations. Because the Court of Criminal Appeals often does not receive a complete record from the county, the conscientious applicant should reference any exhibits on the writ form so the Court of Criminal Appeals will know if something is missing from the writ record. The Rules of Appellate Procedure now clarify that the Rules of Evidence apply in 11.07 hearings, but the comment to Rule 73.8 specifies that the rule "does not limit the ability of an applicant to attach supporting documents to an application for a writ of habeas corpus."

Verification The Code of Criminal Procedure includes an oath requirement generally applicable to habeas corpus "petitions." Tex. Code Crim. Proc. art. 11.14 § 5. The applicant need not necessarily personally verify an 11.07 application. For example, a petitioner may verify the application according to belief. *Ex parte Rendon*, 326 S.W.3d 221, 223 (Tex. Crim. App. 2010). The verification may be made by an oath before a notary public or officer authorized to administer oaths or as "an unsworn declaration in

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factual allegations and legal citations and argument should be reserved for any memorandum.

substantially the form required by Civil Practice and Remedies Code chapter 132 as set out in the verification section of the application form." Tex. R. App. P. 73.1(g). The current 11.07 form contains spaces for all permissible varieties of verification, including the inmate's unsworn declaration. Tex. R. App. P. Appendix E. 11.07 applications that are not verified are dismissed as non-compliant, though the *Golden* exception can apply. *Ex parte Golden*, 991 S.W.2d 859, 862 (Tex. Crim. App. 1999). Keep Rule of Appellate Procedure 9.1(c)(1) in mind if you, as the petitioner, are verifying the writ application. In that situation, signing the document with the /s/ followed by the petitioner's name is insufficient and the writ must contain an electronic or scanned image of the signature. Tex. R. App. P. 9.1(c).

iii. Timelines in Convicting Court Deadlines for addressing the 11.07 application and forwarding it to the Court of Criminal Appeals begin from the date the clerk serves the writ application on the State. Tex. Code Crim. Proc. art. 11.07 § 3(b).

The State "shall answer the application not later than the 30th[8] day after the date the copy of the application is received," but matters in the application not admitted are "deemed denied." *Id.* When the State's attorney "files an answer, motion, or other pleading relating to an application for a writ of habeas corpus or the court issues an order relating to an application for a writ of habeas corpus," the clerk shall serve a copy on the applicant. Tex. Code Crim. Proc. art. 11.07 § 7. *See also* Tex. R. App. P. 73.4(b)(2) (requiring the clerk to send copies of documents to all parties in the case).

Within 20 days of the State's deadline, the convicting court should "decide whether there are controverted, previously unresolved facts material to the legality of the applicant's confinement." Tex. Code Crim. Proc. art. 11.07 § 3(c). If the convicting court decides the application does not raise any controverted issues, the clerk shall immediately transmit a copy of the application, any answers filed, and a certificate reciting the date the finding was made. *Id*. Again, failure to act within 20 days constitutes a finding that there are no controverted issues. All told, the convicting court has 50 days from the date the State is served. If the court designates no issues to be resolved or takes no action by the deadline, the clerk is under a duty to forward the writ application to the Court of Criminal Appeals. *Martin v. Hamlin*, 25 S.W.3d 718, 719 (Tex. Crim. App. 2000) (observing that the statute does not provide authority to extend the time limitations other than by a timely order designating issues, and without a timely order, the clerk has a duty to immediately transmit the writ application to the Court of Criminal Appeals).

If the court decides there are controverted, previously unresolved facts material to the legality of confinement, it shall enter a timely order designating the issues to be resolved. Tex. Code Crim. Proc. art. 11.07 § 3(d). The order designating issues is commonly referred to as the "ODI." Upon entry of an ODI, the district clerk must "immediately transmit" a copy of the order and proof of the date the district attorney received the writ application to the Court of Criminal Appeals. Tex. R. App. P. 73.4(b)(1). With a timely ODI, the trial court then has 180 days from the date of service on the State before the clerk must forward the writ record to the Court of Criminal Appeals. Tex. R. App. P. 73.4(b)(5), 73.5. The trial court may seek an extension of time from the Court of Criminal Appeals to resolve timely designated issues, but the request must come from the court itself,[9] and must be filed in the Court of Criminal Appeals before the expiration of the trial court's deadlines. Tex. R. App. P. 73.4(b)(5), 73.5. There is no statutory authority for extension of the initial deadline to enter an ODI. *McCree v. Hampton*, 824 S.W.2d 578, 579 (Tex. Crim. App. 1992). The Court of Criminal Appeals will deny motions to extend the ODI deadline.

iv. Supplements and Amendments Article 11.07 Applicants are generally free to amend or supplement the

[8] This deadline was expanded from 15 days, applicable to 11.07 applications filed after September 1, 2021.

[9] This requirement is not actually in the text of the rule, so it can't be said to be a requirement. However, this is what the Court requires in its remand orders, and it's safe to say that the Court prefers these requests to come from the trial court.

writ application, so long as the writ is pending. Understanding the difference between these two terms is critical. An amended application "entirely replaces the prior application," and the "applicant who files an amended application while his prior application remains pending should anticipate that only the amended application will be considered" by the convicting court and the Court of Criminal Appeals. *Ex parte Speckman*, 537 S.W.3d 49, 55 n.9 (Tex. Crim. App. 2017). "By contrast, a 'supplemental application' is a pleading raising new claims that are intended to be considered in addition to the claims already presented in the prior application." *Speckman*, 537 S.W.3d at 55 n.9. In either case, if amended or supplemental *applications* are being filed, they must be filed on the 11.07 form and in the convicting court. *Id.*

The applicant is also generally free to file supplemental evidence or argument but must be careful that the supplemental argument does not cause the memorandum to exceed the word count.

In almost all cases, material filed after the initial writ application must be filed in the county of conviction, even if the writ record has been forwarded to the Court of Criminal Appeals. *Ex parte Whisenant*, 443 S.W.3d 930, 932 (Tex. Crim. App. 2014); *Ex parte Pena*, 484 S.W.3d 428, 43–31 (Tex. Crim. App. 2016) (partially superseded by Rule of Appellate Procedure 73.7). If amended or supplemental writ applications or supplemental materials are being filed after the writ record has been forwarded to the Court of Criminal Appeals, the best practice is to notify the Court of Criminal Appeals of the filing.

The Rules of Appellate Procedure specify what a party must show before supplementing the record with evidence *after a writ record has been forwarded* to the Court of Criminal Appeals. Tex. R. App. P. 73.7. The party must file a motion to supplement, and the movant's burden depends on whether the writ has been filed and set at the Court of Criminal Appeals[10] and if so, whether the movant wants to file the evidence in the trial court or directly in the Court of Criminal Appeals. *Id*. Though it is possible for the Court to grant leave to file new evidence directly in the Court of Criminal Appeals after a case has been filed and set, this path is disfavored and carries the highest burden. Tex. R. App. P. 73.7(a)(1). The Rule's commentary makes it clear that before the writ has been forwarded, the party is at liberty to file additional evidentiary materials without any special motion in the Court of Criminal Appeals.

v. Recusal of the Habeas Judge Rule of Civil Procedure 18a, governing recusal of judges, applies to habeas proceedings. *Ex parte Sinegar*, 324 S.W.3d 578 (Tex. Crim. App. 2010). Parties may file a motion to recuse if necessary but must adhere to the requirements of Rule 18a.

vi. Habeas Bond Habeas bond is available when the habeas court makes findings "jointly stipulated by the applicant and the state." Tex. Code Crim. Proc. art. 11.65(b). The applicant may be released on bond subject to conditions imposed by the court "until the applicant is denied relief, remanded to custody, or ordered released" based on the ultimate disposition of the writ application. Tex. Code Crim. Proc. art. 11.65(b). The Court of Criminal Appeals has declined to set bond itself while a writ application is pending, noting that the convicting court is the proper forum. *Ex parte Briggs*, 159 S.W.3d 926 (Tex. Crim. App. 2004).

vii. Appointment of Counsel When the trial court concludes that the interests of justice require representation, an eligible indigent defendant is entitled to have the trial court appoint an attorney to represent the defendant in habeas corpus proceedings. Tex. Code Crim. Proc. arts. 1.051(d)(3), 26.04(c). The Court of Criminal Appeals typically orders appointment of counsel to indigent applicants when it remands a case specifically for a live hearing. Additionally, the Code of Criminal Procedure now provides that the court "shall appoint" counsel to represent an indigent applicant "[i]f at any time the state represents to the convicting court that an eligible indigent defendant . . . is not guilty, is guilty of only a lesser offense,

[10] As will be discussed below, writ applications are rarely filed and set. If a writ application is filed and set and waiting disposition, that usually means that the Court intends to dispose of the case with a substantive written opinion.

or was convicted or sentenced under a law that has been found unconstitutional" by the Court of Criminal Appeals or the United States Supreme Court. Tex. Code Crim. Proc. art. 11.074.

The Court has adhered to the Supreme Court's conclusion that there is no constitutional right to assistance of counsel in collateral review of a conviction. *Pennsylvania v. Finley*, 481 U.S. 551, 554–55 (1987). The Court has also held that the Texas Constitution provides no right to counsel in post-conviction habeas corpus proceedings. *Ex parte Mines*, 26 S.W.3d 910, 913 (Tex. Crim. App. 2000).

viii. Evidence Gathering and Hearings Describing the habeas judge's role in the (for this purpose) analogous 11.071 proceedings, the Court wrote that the habeas judge:

> [I]s the collector of the evidence, the organizer of the materials, the decisionmaker as to what live testimony may be necessary, the factfinder who resolves disputed factual issues, the judge who applies the law to the facts, enters specific findings of fact and conclusions of law, and may make a specific recommendation to grant or deny relief. *Ex parte Simpson*, 136 S.W.3d 660, 668 (Tex. Crim. App. 2004).

To resolve issues, "the court may order affidavits, depositions, interrogatories, additional forensic testing, and hearings, as well as using personal recollection." Tex. Code Crim. Proc. art. 11.07 § 3(d). If the court decides to convene a live hearing, it "may appoint an attorney or a magistrate to hold a hearing and make findings of fact." *Id.* The parties are entitled to "at least seven full days' notice before such hearing is held." Tex. Code Crim. Proc. art. 11.07 § 6. No rule or case necessarily compels it, but courts typically appoint counsel for live hearings with a pro-se indigent applicant. And as noted above, the Court of Criminal Appeals usually orders the habeas court to appoint counsel on remands for live hearings.

The Rules of Evidence apply at a hearing held on an 11.07 habeas corpus hearing. Tex. R. App. P. 73.8. As noted above, the comment to this recent Rule specifies that it does not limit an applicant's ability to attach supporting documents to a writ application. In my experience as a consumer of habeas hearing transcripts, extensive disputes over evidentiary points are often counterproductive at habeas hearings—the courts are aware of the weight of different varieties of evidence.

As with exhibits and memorandums, if there was a live hearing, the parties should take care to make the Court of Criminal Appeals aware of it. Writ records regularly reach the Court without transcripts from the hearing or any indication that a live hearing occurred. This happens despite the Code's explicit instruction that "it shall be the duty of the reporter who is designated to transcribe a hearing . . . to prepare a transcript within 15 days of its conclusion," and to "immediately transmit the transcript to the clerk of the convicting court." Tex. Code Crim. Proc. art. 11.07 § 3(d).

ix. Findings of Fact The habeas court should make findings of fact resolving the issues that were designated for resolution. "As a matter of course [the Court of Criminal Appeals] pays great deference to the convicting court's recommended findings of fact and conclusions of law, as long as they are supported by the record, particularly in those matters with regard to the weight and credibility of the witnesses and, in the case of expert witnesses, the level and scope of their expertise." *Ex parte Van Alstyne*, 239 S.W.3d 815, 817 (Tex. Crim. App. 2007). As Judge Cochran often wrote, the reviewing court is "Johnny-on-the-Spot," particularly when judging credibility and demeanor of witnesses. *Ex parte Thompson*, 153 S.W.3d 416, 425 (Tex. Crim. App. 2005) (Cochran, J., concurring). Parties should always submit proposed findings.

The Court has recently cast doubt on the occasional practice of parties agreeing to relief on some grounds while leaving other grounds raised unresolved with instructions for the Court to remand if it does not agree with the stipulated relief. *Ex parte Roark*, 662 S.W.3d 469 (Tex. Crim. App. 2021). The Court

observed that "without full presentment and examination of all issues in this application, we only invite piecemeal litigation," and that "[g]enerally, all of an applicant's claims should be fully developed and ready to be resolved when the record is transmitted to this Court." *Id*. at 469–70. The Court has since clarified that *Roark* did not set out an inflexible rule. In *Colone*, the Court added a footnote explaining that the record in *Roark* was inadequate to resolve the issues presented, but said that, "[i]n the interests of justice and judicial economy, we retain the discretion to dispose of habeas claims requiring no further fact development, even if the habeas application presents additional claims that would require further fact development were the case to go forward." *Ex parte Colone*, __ S.W.3d __, No. WR-89,538-01 at *3 n.2 (Tex. Crim. App. Mar. 2, 2022).

x. Objections to Findings Parties are free to file objections to the trial court's findings. The Rules of Appellate Procedure provide that objections are due within 10 days from the party's receipt of the findings of fact and conclusions of law. Tex. R. App. P. 73.4(b)(2). The objections should be part of the record that the district clerk forwards to the Court of Criminal Appeals. *Id.* Objections are particularly helpful to the reviewing court in closely fought cases and when a party believes the findings misrepresent or elide crucial facts.

xi. Forwarding the Record At the close of the applicable time (with or without an ODI), the district clerk must transmit the habeas record to the Court of Criminal Appeals. The clerk must transmit "under one cover, the application, any answers filed, any motions filed, transcripts of all depositions of hearings, any hearings, any affidavits, and any other matters such as official records used by the court in resolving issues of fact." Tex. Code Crim. Proc. art. 11.07 § 3(c), (d). The record must include a summary sheet reflecting basic facts about the habeas application and underlying conviction, as specified in the Rules. Tex. R. App. P. 73.4(b)(3). In addition to the documents generated by the habeas litigation, the clerk must also include copies of the charging instrument, any plea papers, the docket sheet, jury charges, the verdict, any proposed findings of fact and conclusions of law, objections to the findings, and the transcripts of any hearings. Tex. R. App. P. 73.4(b)(5).

Mandamus is appropriate to compel the clerk to forward records that have been held past the statutory deadlines set by Article 11.07. *Gibson v. Dallas County Dist. Clerk*, 275 S.W.3d 491 (Tex. Crim. App. 2009); *DeJean v. District Clerk*, 259 S.W.3d 183, 184 (Tex. Crim. App. 2008). On most weeks, the Court of Criminal Appeals issues mandamus orders inquiring into the status of pending 11.07 applications.

xii. General Tips Some jurisdictions have required applicants to file a "shell writ" containing only bare allegations before appointing counsel or providing access to discovery. Sometimes an applicant may file an early, bare bones writ as a placeholder to avoid missing AEDPA deadlines for federal court. The Court of Criminal Appeals has not written an opinion considering this practice, but litigants must understand the potential pitfalls presented by filing skeletal or "shell writs." The primary problem is that the writ record could be forwarded to the Court of Criminal Appeals against the wishes of the parties. Once the writ application is at the Court of Criminal Appeals, it is out of your hands, and the Court no longer grants motions to dismiss writ applications without question. *Ex parte Speckman*, 537 S.W.3d 49 (Tex. Crim. App. 2017).

Whether the applicant has filed a "shell writ" or not, if the writ is filed with further discovery and fact finding anticipated during its pendency, habeas counsel must keep a close eye on the writ to avoid being blindsided if it is sent to the Court of Criminal Appeals without notice. The party may ask the Court of Criminal Appeals to hold the case or remand it, but there are no guarantees once the writ is in Austin. Writ applications can take months to be decided, but they can also move through the Court in weeks, so the litigant must maintain vigilance and know where the writ is.

Though the Code of Criminal Procedure and Rules of Appellate Procedure set forth mandatory deadlines, apart from the deadlines for the ODI and completion of fact finding, the Court of Criminal Appeals is generally not in the business of policing the other deadlines with rigor by, for instance, striking untimely responses or objections. *But see*, *Ex parte Pena*, 484 S.W.3d 428, 430 (Tex. Crim. App. 2016) (conditionally striking an appendix from the State's brief that was filed for the first time in the Court of Criminal Appeals). This could always change, but motions for sanctions, to strike pleadings, for default judgments, and the like are almost always fruitless endeavors. 11.07 litigation, such as it is, has been flexible.

B. Court of Criminal Appeals Review & Procedure

i. General CCA Process When the writ application is received at the Court of Criminal Appeals, it is assigned a cause number[11] and randomly assigned to one of seven staff lawyers who work exclusively on extraordinary writs. The staff lawyer writes a memorandum summarizing the claims, evidence, and arguments, discussing the applicable law and procedural posture, and making a recommendation to the Court. The case is randomly assigned to a judge who then becomes responsible for shepherding the case through the Court for a disposition. In fiscal year 2021,[12] the Court received 3,325 new 11.07 applications and 533 other original proceedings (mandamus, original habeas corpus, prohibition, certiorari), all of which went through this process.[13] Writs returned after remand or abatement follow the same process and go through the same personnel.

ii. Pleading standard As mentioned earlier, the most important thing (in my view) for habeas counsel and pro se applicants to understand is the importance of pleading. The applicant's burden is to allege and prove facts, which, if true, entitle him or her to relief. *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985). In an ineffective assistance claim, you must prove that counsel erred and that the error prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If the applicant with a DWI conviction simply alleges that counsel did not object to a warrantless blood draw, that only tells the Court that counsel may have erred. It tells the Court nothing about the evidence used at trial. Was blood alcohol evidence from the blood draw introduced in trial? Was it the only evidence of intoxication? Was there dash cam video of a visibly intoxicated applicant falling out of a car? Was there a confession? And if there was other incriminating evidence, why was the blood evidence so important that the applicant was prejudiced?

Over and over, applicants (including those represented by experienced counsel) do not allege facts that establish entitlement to relief. The DWI hypothetical above is one hastily drawn example, but failure to allege a complete case can result in a summary denial without resort to an inquiry into, in this instance, whether counsel erred. *See Strickland v. Washington*, 466 U.S. 668, 697 (1984) (noting that a court needn't determine whether counsel was deficient before examining prejudice, predicting that courts will often find it easier to dispose of an ineffectiveness claim on the lack of prejudice). Writ applications are routinely remanded for findings and resolution when they allege facts, which, if true, could entitle the applicant to

[11] When an applicant files for extraordinary writ relief in the Court of Criminal Appeals, he or she is assigned a cause number that will stay with that person for all future writ filings. So, if my first extraordinary writ filed with the Court is a delayed writ mandamus and is given cause number WR-90,000-01, all future filings, including the eventual 11.07 application, will have that WR-90,000 number, and each new case will have a new numerical suffix. If the 11.07 is the next case the Court receives from me, it will be WR-90,000-02, a subsequent writ will be WR-90,000-03, and so on. In the past, the Court assigned habeas corpus cases a new cause number with the "AP" prefix when they were filed and set, but stopped that practice about ten years ago.

[12] As of late May 2023, statistics for Fiscal Year 2022 are in production.

[13] According to the Office of Court Administration, this was the lowest number of 11.07 applications since 2001 and the lowest number of original proceedings since 1999.

relief. Writ applications that do not "allege facts" are routinely denied without written order.

iii. Review of Findings of Fact The habeas court is the "original factfinder" and the Court of Criminal Appeals is the "ultimate factfinder." *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008). When the Court of Criminal Appeals reviews a habeas court's findings and conclusions, it defers to the findings supported by the record, particularly those related to credibility and demeanor. *Ex parte Navarijo*, 433 S.W.3d 558, 567 (Tex. Crim. App. 2014). But the Court has concluded it may invoke its authority as the "ultimate fact finder to make contrary or alternative findings and conclusions" when its independent review of the record shows that the findings and conclusions are not supported by the record. *Ex parte Harleston* 431 S.W.3d 67, 70–71 (Tex. Crim. App. 2014). The Court retains authority to make contrary findings, even when the habeas court's findings are based on credibility. *Id.* When reviewing the habeas court's legal conclusions, the Court applies a *de novo* standard of review, taking into consideration the habeas court's conclusions and recommendations. *Ex parte De La Cruz*, 466 S.W.3d 855, 866 (Tex. Crim. App. 2015).

iv. Remands The Court regularly remands cases to the convicting court for findings or supplemental findings addressing issues it believes must be resolved before deciding the case. The remand order typically specifies which issues the Court is interested in, usually directing the habeas court to resolve those specific issues. Most of the time, the order provides 90 days for the habeas court to investigate and make findings of fact. The Court's remand orders specify that extensions of time must be requested by the trial court and obtained from the Court of Criminal Appeals.

There are different schools of thought as to whether the remand order is jurisdictional, insofar as it ties the hands of the habeas court as to which issues it may investigate. However, the orders typically allow the court to "make any other findings of fact and conclusions of law that it deems relevant and appropriate to the disposition of Applicant's claim for habeas corpus relief." Whether the habeas court is limited by the terms of the remand order has never been a dispositive issue and has not, to my knowledge, been addressed by an opinion.

The Court sometimes issues orders for supplementation of the record directly to the clerk when it discovers that the record is missing a document or transcript. These usually have a shorter deadline and are more like abatement orders—they do not return the case to the trial court (and do not appear on the Court's weekly hand down).

If you are involved in a case that is remanded, review the order to determine what issue the Court wants resolved, and always double-check to make sure the Court has not expedited the deadline or ordered the clerk to send up specific parts of the record. Fact finding that goes beyond the terms of the order may be fruitful, but you also risk wasting time on something the Court does not consider relevant or has already determined is without merit.

v. CCA Dispositions The Court of Criminal Appeals will vote to deny, dismiss, remand, hold, file and set, or grant a writ application.

A dismissal is a decision unrelated to the merits of the claims, while a denial is a final adjudication of the issues raised and will be based either on the trial court's findings and the Court's independent review of the case or on the Court's own review. *See Ex parte Grigsby*, 137 S.W.3d 673, 674 (Tex. Crim. App. 2004) (noting that "a 'dismissal' means that we declined to consider the claim for reasons unrelated to the claim's merits."). The Court may remand the case to the county if the writ raises issues that were not addressed (and the Court believes need to be addressed) or if issues need additional development for resolution. When the Court files and sets (without simultaneously granting relief), that generally means the case is being set for a written opinion to decide unique legal issues or a complex or close factual or legal situation. In that

situation, the parties will usually be given the chance to brief a discrete issue and, more rarely, present oral argument.

vi. Rehearing/Rehearing on the Court's Own Motion The Rules of Appellate Procedure dictate that "[a] motion for rehearing an order that denies habeas corpus relief or dismisses a habeas corpus application under Code of Criminal Procedure, articles 11.07 or 11.071, *may not be filed.* The Court may on its own initiative reconsider the case." Tex. R. App. P. 79.2(d) (emphasis added). For this reason, if you simply file for "rehearing" or "reconsideration" after an order denying or dismissing a writ application, the motion will be dismissed because it is not allowed by the Rules. However, if you style your pleading as a motion or suggestion that the Court reconsider on its own motion, the motion will get a ruling on the merits. Nevertheless, the Court reads everything, so if an impermissible motion for rehearing raises a real problem, the Court typically dismisses the motion only to reconsider the case on its own motion.

Cases that are filed and set for written opinions (distinguished from orders) fall under Rule of Appellate Procedure 77.1 and are subject to the rehearing rules under Rule of Appellate Procedure 79.1.

Successful attempts at rehearing or reconsideration on the Court's own motion typically focus on demonstrable factual or legal errors and should not simply rehash the arguments the Court has already rejected.

VI. Subsequent Writs and "One Bite at the Apple"

A. "One Bite at the Apple"

11.07 litigants must understand the bar on consideration of subsequent writ applications. It informs writ practice not just in the cases of subsequent writs, but must also be on the mind of petitioners and applicants when they file their first writ application, knowing that it is almost certainly the only shot at post-conviction relief.

Basically, writ applicants have one chance to litigate a post-conviction application for habeas corpus, and once that writ has been decided, the merits of any future claims will not be considered unless they are based on newly applicable law, newly discovered facts, or when they are tied to a prima facie showing of innocence. Tex. Code Crim. Proc. art. 11.07 § 4. Section 4 must be taken very seriously. Even future consideration of a winning jurisdictional claim could be barred once a prior writ has been decided. *Ex parte Sledge*, 391 S.W.3d 104 (Tex. Crim. App. 2013). Prosecutors are not at liberty to waive the Section 4 bar. *Ex parte St. Aubin*, 537 S.W.3d 39, 44 n.14 (Tex. Crim. App. 2017). Therefore, those considering filing a writ on a prisoner's behalf must first be certain that the prisoner has not already filed a pro-se writ application before undertaking a complete investigation to discover all viable claims. Prosecutors responding to writ applications must understand whether the merits of the claims are in play or not. But whether a prior writ has been filed and decided is not necessarily the end of the story.

B. Triggering the "Section 4 bar"

Whether Section 4 applies to a subsequent writ is a source of ongoing confusion amongst litigants. It applies when "a subsequent application for writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction." Tex. Code Crim. Proc. art. 11.07 § 4(a). So, the prior writ must have both received a final disposition, and challenged the conviction.[14]

[14] This differs from death penalty writ practice. Under Article 11.071 § 5, any writ filed "after filing an initial

Item 15 on the current 11.07 form asks about prior writ applications and provides space to explain why the current grounds were not and could not be raised in the previous application. Those facing the Section 4 bar should, at a minimum, confront it here and explain either why it does not apply or why they are entitled to an exception. It is also good to address the issue at the beginning of the memorandum of law. This should receive considerable focus since the Court will not consider the rest of the arguments if the applicant does not get past Section 4. If prior writs have been filed, the first thing the Court's staff attorneys will do is to determine whether the Section 4 bar applies and, if it does, they will search the writ record for what the applicant has to say about its application to their case. As in everything else relating to writs, the applicant must allege enough facts to establish an exception—rote recitation of the statute is insufficient. *Ex parte Sowell*, 956 S.W.2d 39, 40 (Tex. Crim. App. 1997).

i. "Final Disposition" This refers to the Court of Criminal Appeals' ruling on the writ application. Until the Court rules on a writ, supplemental, amended, or new writ applications filed in the trial court before a final ruling on an already pending writ are considered on the merits and not barred as subsequent. *Ex parte Saenz*, 491 S.W.3d 819, 825 (Tex. Crim. App. 2016).

ii. Challenge the Conviction Often, what is really at issue in a subsequent application is whether the applicant's prior writ "challenged the conviction." For the procedural bar to apply, the applicant must have filed a writ that raised claims "regarding the validity of the prosecution or the judgment of guilt." *Ex parte Evans*, 964 S.W.2d 643, 647 (Tex. Crim. App. 1998). Therefore, writs that only raised claims relating to parole revocations, for instance, do not trigger the Section 4 bar. *Ex parte Evans*, 964 S.W.2d at 647. Similarly, writ applications seeking only an out-of-time appeal (or PDR) do not "directly seek to overturn the conviction" and do not "pertain to the validity of the prosecution or the judgment of guilt," so writs containing *only* those claims do not cause the Section 4 bar to apply. *Ex parte McPherson*, 32 S.W.3d 860, 861 (Tex. Crim. App. 2000). Before this line of cases got started, the Court implicitly found that granting an out-of-time appeal did not challenge the conviction, as it restores the pendency of the direct appeal, making other claims premature. *Ex parte Torres*, 943 S.W.2d 469, 474 (Tex. Crim. App. 1997).

But when the only claim raised in the first writ argued that appellate counsel was ineffective for not challenging the indictment on direct appeal, the Court concluded that the conviction was challenged for Section 4 purposes. *Ex parte Santana*, 227 S.W.3d 700, 704 (Tex. Crim. App. 2007). This is because, in contrast to a claim that the applicant is entitled to an out-of-time appeal, a claim that counsel should have raised a viable claim on appeal "includes an underlying claim relating to the conviction that must be considered in analyzing deficient performance and prejudice." *Santana*, 227 S.W.3d at 705. In reviewing the underlying claim for prejudice, "the propriety of the prosecution and the judgment of guilt is directly called into question." *Id*.

Once the conviction has been challenged, inquiry into the nature of the claims that have been raised ends. This is because after a writ has challenged the conviction, all future writ applications, *including those raising issues that do not challenge the validity of the prosecution or judgment of guilt*, are subject to Section 4. *Ex parte Whiteside*, 12 S.W.3d 819, 821 (Tex. Crim. App. 2000).

One claim is enough to challenge the conviction. A writ application with ten grounds raising parole issues and eligibility for street time that includes one Fourth Amendment claim challenges the conviction.

iii. Deny or Dismiss Finally, for the Section 4 bar to apply, the claims in a prior writ application must have been decided on the merits. A disposition on the merits of a claim should be a denial, and a disposition unrelated to the merits should be labeled as a dismissal. *Ex parte Torres*, 943 S.W.3d 469, 472–73 (Tex.

application" is a subsequent application that faces the strictures of that article's subsequent writ provisions.

Crim. App. 1997). A writ that has been dismissed on any theory is not a "final disposition." In *Torres*, the Court noted that the first writ application resulted in an out-of-time appeal with the remaining claims unrelated to that issue denied without prejudice. The Court corrected itself, observing that the correct procedure would have been to dismiss those claims. *Ex parte Torres*, 943 S.W.3d at 472–73. To this day, when an applicant is granted an out-of-time appeal, any other claims included in the writ are dismissed under *Torres*.

C. New Facts or Law (a)(1)

On a subsequent writ, one way for the applicant to overcome the Section 4 bar is to show that the issues raised "have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." Tex. Code Crim. Proc. art. 11.07 § 4(a)(1). Note that the timing of the availability is tied to the date the prior writ application was filed.

i. New Factual Basis There aren't many published cases that turn on whether a new factual basis was or was not available at the time of a prior filing, and the issue is typically not close. Article 11.07 says that a factual basis was unavailable at the time of filing a prior writ application "if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date." Tex. Code Crim. Proc. art. 11.07 § (4)(c). Prisoners often obtain merit review on subsequent applications based on mandatory supervision or parole issues that crop up after their initial writ. Recantations are often a new factual basis, but not if the complainant had already recanted at the time of trial. *But see Ex parte Calderon*, 309 S.W.3d 64 (Tex. Crim. App. 2010). If you are facing the issue as an applicant or petitioner, you must address it and make your argument. For instance, have Chapter 64 proceedings led to new DNA results? You might consider addressing why no Chapter 64 proceedings were undertaken before the first writ application was filed.

ii. New Legal Basis The standard for overcoming the Section 4 bar with a new legal basis is exacting. The legal basis of a claim is considered "unavailable" on a prior writ if it "was not recognized by and could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state" on or before the date of the prior writ. Tex. Code Crim. Proc. art. 11.07 § (4)(b).

In 2009, the Court of Criminal Appeals held for the first time that admission of false testimony could violate due process, irrespective of the State's knowledge of its falsity. *Ex parte Chabot*, 300 S.W.3d 768, 772 (Tex. Crim. App. 2009). Three years later, the Court held, without much analysis, that *Chabot* was the "first case in which we explicitly recognized an unknowing-use due-process claim; therefore, that legal basis was unavailable at the time applicant filed his previous application." *Ex parte Chavez*, 371 S.W.3d 200, 205 (Tex. Crim. App. 2012). However, the Court has rejected a "new legal basis" premised on new cases relating to the duties of counsel in perfecting appeal when the claim could have been "reasonably formulated" from prior decisions and statutory language. *Ex parte Fontenot*, 3 S.W.3d 32, 3435 (Tex. Crim. App. 1999). More recently, the Court has held that although the applicant did rely on a new double jeopardy opinion, that opinion was based on double jeopardy principles that were not new but were "familiar principles articulated in earlier cases from the Supreme Court and this Court." *Ex parte St. Aubin*, 537 S.W.3d 39, 45 (Tex. Crim. App. 2017).

Finally, the Court has found that the applicant must show that the new legal basis applies to the claims raised. The Court came to this conclusion when an applicant invoked the *Padilla v. Kentucky*[15] decision

[15] 559 U.S. 356 (2010).

concerning immigration advice in a subsequent writ application. The Court found that the applicant could not possibly prevail under *Padilla* because the challenged conviction pre-dated *Padilla* and intervening cases held the decision was not retroactive. The Court concluded that applicants relying on a new legal basis must show not only that it was unavailable at the time of the first writ application, "but also that the facts he alleges are at least minimally sufficient to bring him within the ambit of that new legal basis for relief." *Ex parte Oranday-Garcia*, 410 S.W.3d 865, 867 (Tex. Crim. App. 2013). Because the new legal basis for his claims did not apply to his case, Oranday-Garcia's writ was dismissed as subsequent. *Oranday-Garcia*, 410 S.W.3d at 869.

D. Constitutional Violations (a)(2) (But for violation of the Constitution, no rational juror . . .)

The second major exception to the bar on subsequent writ applications applies when the applicant can show that, "but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt." Tex. Code Crim. Proc. art. 11.07 § 4(a)(2). This is not as straightforward as it appears and winning claims are rare.

The Court of Criminal Appeals filed and set a case in 2007 "to explain the application of . . . Section 4(a)(2)." *Ex parte Brooks*, 219 S.W.3d 396, 398 (Tex. Crim. App. 2007). The Court then concluded that an applicant "must accompany constitutional-violation claims with a prima facie claim of actual innocence" to satisfy that subsection of Section 4. *Brooks*, 219 S.W.3d at 398. The Court's rationale was that the statutory subsequent writ provisions were enacted in response to *Schlup v. Delo*, in which the Supreme Court held that a federal habeas corpus petitioner could overcome procedural bars by making a prima facie showing of innocence and demonstrating that a constitutional violation more likely than not resulted in the conviction of an innocent person. *Ex parte Brooks*, 219 S.W.3d 396, 399 (Tex. Crim. App. 2007) (citing *Schlup v. Delo*, 513 U.S. 298 (1995)). Therefore, the Court concluded that applications invoking Subsection 4(a)(2) that do not also contain a prima facie showing of actual innocence (which necessarily requires newly discovered evidence of innocence) will be dismissed as subsequent.

Subsection 4(a)(2) carries a preponderance burden, which is lower for the applicant than the clear and convincing burden applicable to actual innocence claims (discussed later). Nevertheless, applicants *very rarely* use evidence of innocence to obtain review of a constitutional claim, and this is probably because an applicant with evidence of innocence will simply push for an innocence claim on its own merits. *Schlup* is a creature of the federal courts, where "bare innocence" claims are still not cognizable.

The rare winning 4(a)(2) case typically comes from a double jeopardy claim. In *Knipp*, post-conviction investigations revealed that the applicant committed one methamphetamine delivery rather than the two for which he was convicted. *Ex parte Knipp*, 236 S.W.3d 214, 215–17 (Tex. Crim. App. 2007). The Court found that, but for the double jeopardy violation, no rational jury would have convicted him of the charge for which he made a prima facie showing of actual innocence. *Ex parte Knipp*, 236 S.W.3d 214, 217 (Tex. Crim. App. 2007). The Court did not question whether the evidence was "newly discovered."

The Court also granted double jeopardy relief on a subsequent writ application in *Ex parte Milner*, 394 S.W.3d 502 (Tex. Crim. App. 2013). After federal habeas proceedings vacated a murder conviction, Milner was left with two attempted capital murder convictions based on three victims, which the Court found violated double jeopardy (based on the allowable unit of prosecution for attempted capital murder). *Ex parte Milner*, 394 S.W.3d 502, 50910 (Tex. Crim. App. 2013). The Court said that in cases claiming double jeopardy violations, innocence may be proved "by providing facts sufficient to establish by a preponderance of the evidence that, but for a double-jeopardy violation, no rational juror could have found that the applicant guilty of the challenged offense beyond a reasonable doubt." *Id*. at 506. Apparently, the constitutional violation itself can, in some circumstances, count for evidence of innocence.

The Court has since held that that a double jeopardy violation based on *multiple punishments* will not satisfy the "innocence-gateway exception" to the subsequent writ bar. *Ex parte St. Aubin*, 537 S.W.3d 39 (Tex. Crim. App. 2017).[16] In *St. Aubin*, the applicant shot five people and was convicted of one count of murder and four counts of attempted murder. The Court reasoned that when multiple convictions result from a single trial, the double jeopardy guarantee assures only that the court does not impose multiple punishments for the same offense. *Ex parte St. Aubin*, 537 S.W.3d 39, 43 (Tex. Crim. App. 2017). The Court found that the double jeopardy protection does not prevent the State from prosecuting and obtaining jury verdicts on two offenses, so "it cannot be said that 'but for a violation of the protection against double jeopardy, no rational juror would have found the applicant guilty of both offenses.'" *Id*. The Court distinguished *Knipp*, saying that the offense in that case upon which relief was granted never occurred at all, and finding that the only plausible exception to its multiple punishments rule would be the unusual *Knipp* situation "where a duplicate offense is mistakenly charged." *Id*. at 43–44.

VII. Legal Claims

Post-conviction habeas corpus litigants must understand which legal claims the Court of Criminal Appeals will consider on the merits. Theories of "cognizability" determine which claims are entitled to a review on the merits. *Ex parte Marascio*, 471 S.W.3d 832, 833 (Tex. Crim. App. 2015) (Keasler, J., concurring). This is the body of law telling us that a bare Fourth Amendment claim is generally not "cognizable" on habeas corpus, and will be denied without regard to the merits, while a claim of ineffective assistance of counsel based on failure to challenge a warrantless search will be reviewed on the merits. Given the statutory limitations on multiple habeas corpus applications, knowing which claims will be considered and which claims will be peremptorily denied is crucial to all parties. Unless the applicant believes a claim that is not cognizable in Texas court will be reviewed on the merits in federal court, or may one day be cognizable, raising claims that are not cognizable is probably a futile exercise in state court.

The Court of Criminal Appeals has struggled with these issues for the past 40 years. For some time, the Court treated convictions that were had in violation of due process as "void," under a theory that the trial court lacked jurisdiction. *Ex parte Van Truong*, 770 S.W.2d 810, 813 (Tex. Crim. App. 1989). These cases have mostly been abrogated by more recent decisions, but they make parsing through older cognizability cases challenging for newer practitioners who are accustomed to more limited conceptions of voidness and jurisdictional problems.

As it stands, when it comes to challenging the validity of the conviction or sentence (rather than raising parole issues or pursuing out-of-time appellate proceedings), habeas review is reserved for jurisdictional and constitutional claims that were not available at the time of trial and appeal. Mike Stauffacher's "coulda shoulda woulda" principle is helpful to remember: if a claim could have been raised before the conviction was final, it is probably not available for merit review on post-conviction habeas corpus.

A. Cognizability Generally

"Traditionally, habeas corpus is available to review jurisdictional defects, or denials of fundamental or constitutional rights. The Great Writ should not be used to litigate matters which should have been raised on appeal." *Ex parte Banks*, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989) (opinion on rehearing) (internal

[16] Interestingly, a case is pending as filed and set, awaiting an opinion to "determine whether a double jeopardy claim involving multiple-punishments arising from convictions under separate legal theories can satisfy the 'innocence gateway' exception to the subsequent writ bar, as provided in Texas Code of Criminal Procedure Art. 11.07 § 4(a)(2). *Ex parte Victor*, No. WR-84,934-07 (Filed and set for submission on October 26, 2022).

citations omitted).

Issues that were raised and rejected on direct appeal need not be addressed on habeas corpus. *Ex parte Acosta*, 672 S.W.2d 470, 472 (Tex. Crim. App. 1984).[17] Claims that should have been raised on appeal cannot be raised on habeas corpus. *Ex parte Banks*, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989). *Banks* was arguably limited to statutory claims. *Id*. But "[e]ven a constitutional claim is forfeited if the applicant had the opportunity to raise the issue on appeal." *Ex parte Townsend*, 137 S.W.3d 79, 81 (Tex. Crim. App. 2004). *Townsend* is based on the "adequate remedy at law" requirement underpinning all Texas extraordinary writs. In that case, the issue could have been raised on appeal. Issues that were raised and correctly denied in previous habeas corpus proceedings will be summarily denied. *Ex parte Twyman*, 716 S.W.2d 951, 952–53 (Tex. Crim. App. 1986).[18]

These cases foreclose most "record" claims from habeas review. If the issue or claim could have been litigated earlier and was not, it cannot be raised. If it was litigated, it may not be re-litigated on habeas. And if the applicant waived trial and pleaded guilty, the Court typically believes those waivers also waived the availability of most record claims that could have been raised. This means Fourth Amendment and *Miranda* claims are not available on habeas corpus. *Ex parte Kirby*, 492 S.W.2d 579 (Tex. Crim. App. 1973) (failure to raise sufficiency of a search warrant affidavit on appeal was tantamount to abandonment of the claim. The case is routinely cited for the proposition that search and seizure claims cannot be raised on their own in post-conviction habeas); *Ranson v. State*, 707 S.W.2d 96 (Tex. Crim. App. 1986) (failure to raise problems with confession due to proof of *Miranda* warnings at trial waived those objections).

Errors based on the Texas Constitution *that are subject to harm analysis* are not cognizable in a post-conviction writ of habeas corpus brought under Article 11.07. *Ex parte Dutchover*, 779 S.W.2d 76, 79 (Tex. Crim. App. 1989) (citing *Ex parte Truong*, 770 S.W.2d 810 (Tex. Crim. App. 1989)).

Violations of procedural statutes, even mandatory ones, are not cognizable on habeas corpus. *McCain v. State*, 67 S.W.3d 204, 205 (Tex. Crim. App. 2002); *Ex parte Douthit*, 232 S.W.3d 69 (Tex. Crim. App. 2007).

The longstanding rule is that sufficiency of the evidence is not cognizable on habeas corpus. *Ex parte Easter*, 615 S.W.2d 719 (Tex. Crim. App. 1981). However, a claim of "no evidence" is cognizable. *Ex parte Perales*, 215 S.W.3d 418 (Tex. Crim. App. 2007) (citing *Ex parte Coleman*, 599 S.W.2d 305 (Tex. Crim. App. 1978)).

Indictment claims must be raised before trial and failure to object waives the complaint. *Ex parte Gibson*, 800 S.W.2d 548 (Tex. Crim. App. 1990). Jurisdiction is no longer contingent on whether the indictment contains defects of form or substance, and an indictment charging a person with an offense typically invokes a trial court's jurisdiction. *Teal v. State*, 230 S.W.3d 172, 177 (Tex. Crim. App. 2007). Nevertheless, the Court has said an indictment claim is cognizable if the applicant shows the indictment was so deficient that it did not vest the trial court with jurisdiction. *Ex parte Reedy*, 282 S.W.3d 492, 502 (Tex. Crim. App. 2009); *But see Ex parte Rodgers*, 598 S.W.3d 262, 268 (Tex. Crim. Proc. 2020) (observing that because there was no objection to the indictment, the applicant could "not now challenge its efficacy

[17] This rule does not have such straightforward application to ineffective assistance of counsel claims, which can typically be re-litigated on habeas corpus. *Ex parte Nailor*, 149 S.W.3d 125 (Tex. Crim. App. 2004); *Ex parte Torres*, 943 S.W.2d 469 (Tex. Crim. App. 1997).

[18] In *Tyman*, the Court specifically noted that the claims were correctly denied in the prior writ application. The remedy for claims that were incorrectly denied is probably a suggestion to reconsider on the Court's own motion rather than another writ application.

to invoke the jurisdiction of the district court.").

Prisoners are particularly fond of the claim that the judge did not take the required oath or place the oath on file at the time of trial. The longstanding law holds that the judge's right to the office is not subject to collateral attack. *Snow v. State*, 134 Tex. Crim. 263, 266, 114 S.W.2d 898, 900 (1937).

Finally, litigants should remember that habeas corpus claims should implicate the fact or duration of confinement. For this reason, claims challenging attorney fees are not the proper subject of post-conviction habeas corpus. *Ex parte Knight*, 401 S.W.3d 60 (Tex. Crim. App. 2013).

B. Cognizable claims

i. Ineffective Assistance of Counsel and *Strickland v. Washington* Ineffective assistance claims are probably the most frequently litigated claim on post-conviction habeas corpus. Perhaps this is because these claims allow the merits of claims that might otherwise be barred from review to be litigated, albeit in secondhand fashion. What follows is a brief review of the contours of Texas ineffective assistance of counsel law.

The Sixth Amendment "right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). Ineffective assistance claims based on Article I, Section 10 of the Texas Constitution do not enjoy greater protection for the defendant than the protection provided by *Strickland* and the Sixth Amendment. *Hernandez v. State*, 726 S.W.2d 53, 56 (Tex. Crim. App. 1986).

1. The Strickland Standard Consideration of most ineffective assistance claims is governed by the *Strickland v. Washington* case. The exceptions are set forth later in this section and include situations where the applicant was denied counsel altogether, when counsel had a conflict of interest, and when counsel's errors deprived the applicant of a proceeding.

Strickland is a landmark opinion and it is full of guidance beyond the standard it sets forth. Even practitioners familiar with the case should re-read it from time to time.

For a successful ineffective assistance claim, the applicant must show that counsel erred and that the error prejudiced the applicant. The Supreme Court said it this way:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the *Sixth Amendment*. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless the defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. *Strickland v. Washington*, 466 U.S. 668, 693 (1984).

2. Deficient Performance Courts must measure counsel's performance by an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. at 688. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id*. at 692–93. Judicial scrutiny of counsel's performance should be "highly deferential," and eliminate hindsight with a focus on evaluating the conduct from counsel's perspective. *Id.* at 694. Review of ineffective assistance claims must strongly presume that counsel's conduct was undertaken within the "wide range of professional assistance," so the

defendant must overcome the presumption that the conduct under the circumstances might be considered sound trial strategy. *Id.* at 694–95.

Obviously, the crucial aspect of showing attorney error is demonstrating that counsel actually erred. Two common claims are that counsel did not object and that counsel did not discover and present helpful evidence or testimony. "To show ineffective assistance of counsel for the failure to object during trial, the applicant must show that the trial judge would have erred in overruling the objection." *Ex parte White*, 160 S.W.3d 46, 53 (Tex. Crim. App. 2004) (citing *Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996)). To show that counsel erred in not calling witnesses, the applicant must show that the witnesses were available, and that the applicant would have benefitted from their testimony. *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983) (citing *Hunnicutt v. State*, 531 S.W.2d 618 (Tex. Crim. App. 1976)).

Counsel's alleged legal errors must be judged on the state of the law at the time of the action. The Court will not "find counsel ineffective for failing to take a specific action on an unsettled issue." *State v. Bennett*, 415 S.W.3d 867, 869 (Tex. Crim. App. 2013).

Ineffective assistance claims are judged by the "prevailing law" at the time of the habeas application, so if the law that made counsel ineffective at the time of the trial has changed, the applicant will no longer be entitled to relief based on counsel's errors. *Ex parte Butler*, 884 S.W.2d 782 (Tex. Crim. App. 1994) (citing *Lockhart v. Fretwell*, 506 U.S. 364 (1993)).

Applicants sometimes point to incidents of professional misconduct to bolster their claims. This is usually unavailing. "A finding of professional misconduct based on other matters as well as actions of counsel at trial should have no bearing on a subsequent Article 11.07 . . . proceedings alleging solely the ineffective assistance of counsel *at trial*. We decline to discuss such matter as an abstract subject." *Ex parte Raborn*, 658 S.W.2d 602, 604 (Tex. Crim. App. 1983).

3. Strickland Prejudice My experience is that advocates often expend a disproportionate effort into disputes over whether counsel erred and then rely on the gravity of the purported error to influence a decision about prejudice. But ineffective assistance claims most often rise or fall on the prejudice prong, and that is how they are often resolved. In *Strickland*, the Supreme Court specifically said that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland v. Washington*, 466 U.S. 668, 697 (1984).

To meet this burden, the applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. at 694. Though advocates and courts often think of this in "but for" causation shorthand, that overstates the burden. The Supreme Court specifically disclaimed reliance on a "more likely than not" standard that would be "outcome-determinative. *Id*. at 693.[19] The trial facts matter, and the successful applicant must delve into them. Naturally, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696.

When the alleged attorney error happened during the punishment phase of trial, the harm inquiry

[19] Though the Court of Criminal Appeals generally adheres to a preponderance of the evidence standard in post-conviction habeas (except for innocence claims), litigants must remember that the Supreme Court's *Strickland* standard specifically states that "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

focuses on that phase of the case. The applicant "must prove that there is a reasonable probability that, but for counsel's errors, the sentencing jury would have reached a more favorable verdict." *Ex parte Rogers*, 369 S.W.3d 858, 863 (Tex. Crim. App. 2012) (quoting *Ex parte Cash*, 178 S.W.3d 816, 818 (Tex. Crim. App. 2005)).

When assessing the nature of the harm in an ineffective assistance of trial counsel claim, the harm inquiry almost always looks to how things might have played out in the trial proceedings. Parties often argue, for instance, whether counsel's failure to object prevented a meritorious appellate issue from being preserved. But to prove ineffective assistance of counsel based on counsel's missed objection, the applicant must show that the judge would have erred to overrule the objection. *Ex parte White*, 160 S.W.3d 46, 53 (Tex. Crim. App. 2004). This is essential for determining whether counsel erred, but it also assumes meritorious objections are sustained, meaning that the prejudice inquiry then looks to how the trial would have unfolded with a successful objection. *White*, 160 S.W.3d 46, at 53–54. How the issue would have fared on appeal only becomes relevant when counsel objected, was overruled, and did not renew the objection, leaving the trial court's error unpreserved for appeal. In that situation, the harm inquiry asks whether the issue would have been successful on appeal. *Ex parte Moore*, 395 S.W.3d 152, 158 (Tex. Crim. App. 2013).

With the exception of "Cronic Cases," discussed below, the nature of the attorney error does not typically affect the harm inquiry in ineffective assistance of counsel claims. Though counsel may have erred in not objecting to an issue that was "structural error," the claim could still be subject to the usual Strickland error inquiry, depending on the kind of structural error at issue. *See Weaver v. Massachusetts*, 582 U.S. 286 (2017) (holding that failure to object to public trial violation did not lead to automatic harm in an ineffective assistance claim, but distinguishing between different kinds of structural error).

4. Ineffective Assistance at Guilty Pleas The Court of Criminal Appeals has long entertained claims of ineffective assistance of counsel in guilty plea cases. *Ex parte Bratchett*, 513 S.W.2d 851 (Tex. Crim. App. 1974). In the guilty plea situation, the prejudice inquiry focuses on whether counsel's errors caused an involuntary plea. To make this showing, the "defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Ex parte Moody*, 991 S.W.2d 856, 857–58 (Tex. Crim. App. 1999). This means that the applicant should address how counsel's alleged error influenced the decision to plead guilty and, why, in view of the error, trial would have been the choice. For instance, in *Lockhart*, the issue related to parole eligibility, and the Court noted that applicant "alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty." *Hill v. Lockhart*, 474 U.S. 52, 60 (1985). The Court observed that when the counsel error involves failure to investigate or discover exculpatory evidence, the prejudice assessment will sometimes depend in part on the likelihood of success the applicant would have found at trial. *Hill v.* Lockhart, 474 U.S. at 59–60. However, in *Lee*, the applicant proved that immigration consequences were of paramount importance in his decisions, and the Court found that his plea was involuntary despite "grim" prospects for acquittal or a shorter sentence at trial. *Lee v. United States*, 582 U.S. 357 (2017).

Claims relating to counsel's ineffectiveness in the plea bargaining process face a slightly higher burden in Texas after the Supreme Court decided a pair of companion cases.[20] Following the Supreme Court's lead, the Court of Criminal Appeals adjusted its standard, holding that to show prejudice when the applicant was not made aware of a plea offer or rejected one based on bad advice, "the applicant must show a reasonable probability that: (1) he would have accepted the earlier offer if counsel had not given ineffective assistance; (2) the prosecution would not have withdrawn the offer; and (3) the trial court would not have refused to

[20] *Missouri v. Frye*, 566 U.S. 134 (2012); *Lafler v. Cooper*, 566 U.S. 156 (2012).

accept the offer." *Ex parte Argent*, 393 S.W.3d 781, 784 (Tex. Crim. App. 2013).

5. Ineffective Assistance of Appellate Counsel To show that appellate counsel was ineffective, the applicant must demonstrate that counsel erred, and that but for the error, the applicant "would likely have prevailed on appeal." *Ex parte McFarland*, 163 S.W.3d 743, 748 n.2 (Tex. Crim. App. 2005). Pro se litigants often cite many grounds that appellate counsel should have raised. However, appellate counsel is not under an obligation to raise every colorable claim suggested by the client. *Jones v. Barnes*, 463 U.S. 745, 754 (1983). "[T]he 'process of winnowing out weaker claims on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Burger v. Kemp*, 483 U.S. 776, 784 (1987) (quoting *Jones v. Barnes*, 463 U.S. 745, 751–52 (1983)).

6. Cronic The harm analysis is short circuited when there is an "actual breakdown of the adversarial process" in a case. The Supreme Court suggested that in situations where the "process loses its character as a confrontation between adversaries, the [Sixth Amendment] constitutional guarantee is violated," and no inquiry into harm is necessary. *United States v. Cronic*, 466 U.S. 648, 656–59 (1984). The Court observed that this was the case when the accused is denied counsel at a critical stage, when counsel "fails to subject the prosecution's case to meaningful adversarial testing," when counsel was "denied the right of effective cross examination," and when the "surrounding circumstances made it so unlikely that any lawyer could provide effective assistance." *Cronic*, 466 U.S. at 659–61.

Winning *Cronic* cases are rare. A lawyer who practiced while his license was suspended for failure to respond to grievances was not incompetent as a matter of law, however, it remains a possibility under different circumstances of suspension. *Cantu v. State*, 930 S.W.2d 594, 603 (Tex. Crim. App. 1996). "[A] defendant is denied counsel not only when his attorney is physically absent from the proceeding, but when he is mentally absent as well, *i.e.*, counsel is asleep, unconscious, or otherwise actually *non compos mentis*." *Ex parte McFarland*, 163 S.W.3d 743, 752 (Tex. Crim. App. 2005). When the applicant was represented by two lawyers, one of whom slept during trial, the Court found no *Cronic* violation when he "did have the constant, actual and active participation of a second lawyer," though the participating lawyer was less experienced. *McFarland*, 163 S.W.3d at 753.

7. Ineffective Assistance Due to Conflicts of Interest When the applicant "shows that a conflict of interest actually affected the adequacy of his representation," no showing of prejudice is necessary. *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980). The Court of Criminal Appeals recently affirmed that *Cuyler* controls the harm analysis in ineffective assistance claims based on a conflict. The Court said that "the proper standard by which to analyze claims of ineffective assistance of counsel due to a conflict of interest is the rule set out in *Cuyler v. Sullivan*, that is, the appellant must show that his trial counsel had an actual conflict of interest, and that the conflict actually colored counsel's actions during trial." *Acosta v. State*, 233 S.W.3d 349, 356 (Tex. Crim. App. 2007). "An 'actual conflict of interest' exists if counsel is required to make a choice between advancing his client's interest in a fair trial or advancing other interests (perhaps counsel's own) to the detriment of his client's interest." *Monreal v. State*, 947 S.W.2d 559, 564 (Tex. Crim. App. 1994) (citing *James v. State*, 763 S.W.2d 776, 779 (Tex. Crim. App. 1989)).

ii. Out of Time Appeals and PDRs Attorney errors that cause the applicant to be deprived of an entire proceeding are subject to a different analysis. The applicant must show that due to counsel's errors, "he was deprived of that proceeding and that he would have availed himself of the proceeding had his counsel's conduct not caused a forfeiture." *Ex parte Owens*, 206 S.W.3d 670, 674 (Tex. Crim. App. 2006). The applicant does not need to show that the proceeding would have ended with a favorable outcome. *Id.* at 673–74. Anyone who follows the Court of Criminal Appeals knows that this is by far the most common grant of habeas corpus relief in state court.

1. Direct Appeal Trial counsel, retained or appointed, has the duty to consult with the client about any appellate rights and to perfect appeal, if necessary. The Court summed it up this way:

> Trial counsel's responsibilities consist of a two-step process. First, the attorney must ascertain whether the defendant wishes to appeal. The decision to appeal lies solely with the defendant, and the attorney's duty is to advise him as to the matters described above. If the defendant does not wish to appeal, trial counsel's representation ends. If the defendant decides to appeal, the attorney must ensure that written notice of appeal is filed with the trial court. At this point, trial counsel has two options. He may sign the notice himself, in which case, he effectively 'volunteers' to serve as appellate counsel. Alternatively, the defendant may file the notice pro se, which serves as "an indication that trial counsel does not wish to pursue his client's appeal. A 'contemporaneous' presentation of the pro se notice with a motion to withdraw by trial counsel serves as actual notice to the trial court of the defendant's desire to appeal. *Jones v. State*, 98 S.W.3d 700, 703 (Tex. Crim. App. 2003) (internal citations omitted).

"[T]hat retained counsel did not intend to handle the resultant appeal does not justify his failing to assist his allegedly indigent client in giving notice of appeal." *Ex parte Axel*, 757 S.W.2d 369, 374 (Tex. Crim. App. 1988).

A defendant may waive appeal as part of a plea bargain, and the Court has held that a defendant may knowingly and intelligently waive his entire appeal as part of a plea, even when sentencing is not agreed upon, where consideration has been given for the waiver. *Ex parte Broadway*, 301 S.W.3d 694 (Tex. Crim. App. 2009).

A recent Supreme Court case concluded that when a defendant expressed a desire to appeal after an appellate waiver and counsel did not then perfect appeal, prejudice would be presumed without regard to the merits of the eventual appeal. *Garza v. Idaho*, 139 S. Ct. 738 (2019). The Court of Criminal Appeals then attempted to apply this holding to Texas practice. In *Castillo*, Applicant pleaded guilty as part of a plea bargain and the certification of the right to appeal reflected that he had no right to appeal. The record showed that he wanted to appeal and counsel did not perfect appeal. The Court recognized *Garza's* holding that a lawyer has a duty to perfect appeal upon request despite a waiver of appeal and observed that if the certification form only stated that he had waived his right to appeal, *Garza* would control. However, the Court held that Applicant never had a right to appeal to begin with and "all possible appellate claims were barred" in the case, and so counsel's failure to perfect appeal did not prejudice the applicant. *Ex parte Castillo*, 664 S.W.3d 833 (Tex. Crim. App. 2022).

2. Out of Time Petition for Discretionary Review Appellate counsel has a duty to timely inform an appellant of the appellate decision and of the right to pursue discretionary review pro se. *Ex parte Crow*, 180 S.W.3d 135 (Tex. Crim. App. 2005); *Ex parte Wilson*, 956 S.W.2d 25 (Tex. Crim. App. 1997). Informing the appellant the conviction was affirmed on appeal without informing of the right to pursue a pro-se petition for discretionary review (PDR) is insufficient. *Ex parte Florentino*, 206 S.W.3d 124 (Tex. Crim. App. 2006). This duty also extends to lawyers who filed an *Anders* brief. *Ex parte Owens*, 206 S.W.3d 670 (Tex. Crim. App. 2006). Of course, retained PDR counsel is ineffective when PDR deadlines are missed, also resulting in an out-of-time PDR. In cases where counsel was not ineffective, but a "breakdown in the system" caused the loss of a PDR, due process requires that the appellant be permitted to exercise his statutory right to file a PDR. *Ex parte Riley*, 193 S.W3d 900 (Tex. Crim. App. 2006). This holding is routinely applied to out-of-time appeal situations as well.

The Rules of Appellate Procedure specify the steps appellate lawyers must take when a conviction is affirmed on appeal. The lawyer must, within five days of the opinion's release, send the client a copy of the opinion and notification of the right to file a pro-se PDR. The notification must be sent to the defendant by certified mail, return receipt requested, and the lawyer must send the appellate court a letter certifying compliance with the rule with a copy of the return receipt. Tex. R. App. P. 48.4. The Rule has been in place for well over 15 years, but the Court still sees valid out-of-time PDR claims based on counsel errors on a weekly basis. The Court has not yet said that failure to comply with Rule 48.4 is prima facie evidence of attorney error.

iii. Suppression of Exculpatory Evidence *Brady* claims are appropriately raised in post-conviction habeas corpus because they implicate a constitutional right and require suppressed evidence, which was necessarily unavailable at the time of trial. Untimely disclosure of exculpatory evidence that is discovered at the time of trial proceedings can and should be litigated at trial and on appeal. If trial court litigation of belated discovery was impossible for some reason, the habeas applicant should acknowledge the issue and argue it.

1. Brady Basics The Supreme Court provided a good summary of *Brady* law in 1999, laying out the basic points with citations to many of the Court's foundational *Brady* decisions. Justice Stevens wrote:

> In *Brady* this Court held 'that the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' *Brady v. Maryland*, 373 U.S. 83, 87 (1963). We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, *United States v. Agurs*, 427 U.S. 97, 107 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676 (1985). Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' *Id.* at 682; see also *Kyles v. Whitley*, 514 U.S. 419, 433–34 (1995). Moreover, the rule encompasses evidence 'known only to police investigators and not to the prosecutor.' In order to comply with *Brady*, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.' *Kyles*, 514 U.S. at 437. *Strickler v. Greene*, 527 U.S. 263, 280–81 (1999).

Just as the knowledge of police investigators is imputed to all prosecutors, the knowledge of one prosecutor is imputed to others who may work on the case in the future. In *Giglio*, the grand jury prosecutor made a promise to a co-conspirator that if he testified before the grand jury and at trial, he would not be prosecuted. Other prosecutors did not know about this and he testified at trial that nobody told him he wouldn't be prosecuted. *Giglio v. U.S.*, 405 U.S. 150, 151–54 (1971).

"There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999).

The State's constitutional duty to preserve evidence is limited to that which could be expected to play a significant role in the defense of the case. Rejecting an argument that the State should have preserved breath samples, the Supreme Court has held that to meet this materiality standard, "the evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means" *Cal. v. Trombetta*, 467 U.S. 479, 488–89 (1984) (internal citations omitted). "[U]nless a criminal defendant

can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Ariz. v. Youngblood*, 488 U.S. 51, 58 (1988).

2. Impeachment and Guilty Pleas Though material impeachment evidence is *Brady* evidence that must be disclosed before a trial, the Constitution does not require its disclosure before a guilty plea. *United States v. Ruiz*, 536 U.S. 622, 633 (2002). Therefore, an applicant who pleaded guilty and raises a *Brady* claim based on the failure to disclose impeachment evidence will probably not prevail on that claim.

3. Materiality The "materiality" test for *Brady* cases is based on the ineffective assistance of counsel prejudice test from *Strickland*, which was handed down a year before the *Bagley* opinion. All parties must understand it—the applicant must frame the argument in its terms and the State (and judges) must remember that the test is not a "but for" test, and that it may not be administered with a view to the sufficiency of the evidence.

> "*Bagley's* touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

It is not the applicant's burden to prove there would have been an acquittal in view of the exculpatory evidence. A *Brady* violation is proven "by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 434–35. Suppressed evidence should be considered collectively, not item by item, and courts should resist making independent materiality evaluations and should look to a cumulative evaluation. *Kyles*, 514 U.S. at 436, 441. Evidence is material "when there is 'any reasonable likelihood' it could have 'affected the judgment of the jury,'" and to prevail on a *Brady* claim, the applicant does not need to show the new evidence would have resulted in an acquittal, but "only that the new evidence is sufficient to 'undermine confidence' in the verdict." *Wearry v. Cain*, 577 U.S. 385, 392 (2016) (internal citations omitted).

Like ineffective assistance claims, the battle of *Brady* claims is often focused on the culpability of the State and the alleged devilry of the prosecutor or police officer who buried exculpatory evidence. Of course, the applicant must show that the evidence was suppressed, but I believe the real fight should usually be over materiality. Applicants must train their energy on the materiality argument and might consider looking at Supreme Court decisions focusing on materiality to emulate the analysis. *Kyles* and *Strickler* both provide excellent examples of materiality analysis.[21]

iv. False Evidence False evidence claims have long been cognizable but following the Court's expansion of the claim's availability in its *Chabot* decision, Texas false evidence jurisprudence has been particularly active. In *Chabot*, the Court held that false evidence violates due process when it contributes to a conviction or punishment, *irrespective of the State's knowledge* of the perjury or falsehoods at the time of trial. *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Ex parte Chabot*, 300 S.W.3d 768, 771–72 (Tex. Crim. App. 2009). The Court concluded that, though the case involved unknowing rather than knowing use of testimony, there was no reason to use different harm standards. *Ex parte Chabot*, 300 S.W.3d 768, 771–72 (Tex. Crim. App. 2009).

Following *Chabot*, the applicable standard was the subject of some dispute, with arguments that

[21] In *Kyles*, the applicant prevailed, and in *Strickler*, the State prevailed.

different burdens should apply depending on the State's (or witness's) culpability and the prior availability of the claim. *Ex parte Chavez*, 371 S.W.3d 200 (Tex. Crim. App. 2012) (Keller, P.J., dissenting). However, the Court appeared to settle on a straightforward standard in *Ex parte Weinstein*, 421 S.W.3d 656, 665 (Tex. Crim. App. 2014). The Court requires that testimony be false and material. Materiality is necessary to make a due process violation, and testimony is material only when "there is a '*reasonable likelihood*' that the false testimony *affected the judgment* of the jury. The applicant must still prove his habeas corpus claim by a preponderance of the evidence, but in doing so, he must prove that the false testimony was material and thus it was reasonably likely to influence the judgment of the jury." *Weinstein*, 421 S.W.3d at 665. The continued viability of *Weinstein's* settled standard is in some question as the Court has decided to re-open the settled issue by filing and setting a case "to determine whether 'knowing use' and 'unknowing use' of false testimony claims should employ different standards of materiality or, in at least some cases, be susceptible to different standards of harm." *Ex parte Thomas*, No. WR-94,420-01 (Tex. Crim. App. Apr. 26, 2023) (not designated for publication).

In false evidence cases following a guilty plea, the applicant faces the same situation raised by an ineffective assistance claim. The proof must show that, with knowledge the evidence was false, the applicant would have insisted on going to trial. The false evidence is "material" when the applicant would have chosen a trial. *Ex parte Barnaby*, 475 S.W.3d 316 (Tex. Crim. App. 2015).

v. Article 11.073 This addition to the Code of Criminal Procedure makes explicit that changes in scientific evidence will be cognizable on post-conviction habeas corpus. It codifies (and arguably expands) part of the Court's false evidence jurisprudence and applies to "relevant scientific evidence" that was not available at the trial or contradicts scientific evidence the State relied on at trial. Tex. Code Crim. Proc. art. 11.073(a). It says that a court "may grant" relief if a post-conviction writ alleges that admissible, relevant scientific evidence is available that was not available at the time of trial through the exercise of reasonable diligence and that had it been presented at trial, on the preponderance of the evidence, the person would not have been convicted. Tex. Code Crim. Proc. art. 11.073(b). It also specifies that when deciding whether relevant scientific material was not previously ascertainable through reasonable diligence, the court "shall consider whether the field of scientific knowledge, a testifying expert's scientific knowledge, or a scientific method on which the scientific evidence is based has changed since" the trial or the time a prior writ was filed. Tex. Code Crim. Proc. art. 11.073(d).

The Court has held that a medical examiner who no longer stood by a prior opinion and testimony about cause of death constituted "scientific knowledge" under the statute. *Ex parte Robbins*, 478 S.W.3d 678 (Tex. Crim. App. 2014).[22] Similarly, new DNA technology (Y-STR) has resulted in 11.073 relief on an 11.07 application. *Ex parte Kussmaul*, 548 S.W.3d 606 (Tex. Crim. App. 2018). Finally, the Court agreed that evolving scientific knowledge underlying the field of bitemark comparisons contradicted scientific evidence relied on at trial. *Ex parte Chaney*, 563 S.W.3d 239, 257–61 (Tex. Crim. App. 2018).

The statute contains its own language relating to subsequent writs, clarifying that a claim could not have been presented in a prior writ if it is based on scientific evidence that was not ascertainable by reasonable diligence on or before the date of filing the prior writ. Tex. Code Crim. Proc. art. 11.073(c). The article itself provides a new legal basis for false evidence claims that were rejected prior to its enactment "in the small number of cases where the applicant can show by the preponderance of the evidence that he or she would not have been convicted if the newly available scientific evidence had been presented at trial." *Ex parte Robbins*, 478 S.W.3d 678, 690 (Tex. Crim. App. 2014); *Ex parte Kussmaul*, 548 S.W.3d 606, 633 (Tex. Crim. App. 2018).

[22] This pre-dated amendments to Article 11.073 that have since codified the holding.

The Court has granted relief under Article 11.073 to applicants who pleaded guilty. *Ex parte Kussmaul*, 548 S.W.3d 606, 634–36 (Tex. Crim. App. 2018). However, litigants should be aware that Article 11.073 does not apply to evidence adduced at the punishment phase of a trial because the statutory language conditions relief upon whether the person would not have been "convicted." *Ex parte White*, 506 S.W.3d 39 (Tex. Crim. App. 2016). The legislature has yet to correct this (if it is a bug in the statute), but litigants may still attempt to lodge false evidence claims for punishment evidence in lieu of expansion of 11.073's applicability. *See Ex parte Ghahremani*, 332 S.W.3d 470 (Tex. Crim. App. 2011) (new punishment hearing granted based on false evidence).

vi. Actual Innocence Like Texas false evidence jurisprudence, its actual innocence jurisprudence is recent. For lawyers licensed since the mid 90s, it's almost impossible to conceive that innocence was once manifestly not relevant on habeas. The principle that habeas corpus was not concerned with guilt or innocence or "newly discovered evidence" was part of the bedrock of our law. *Ex parte Binder*, 660 S.W.2d 103, 106 (Tex. Crim. App. 1983). The theory was that these were issues to be raised with the Governor (or President) in pursuit of executive clemency.

In 1993, the Supreme Court (reviewing a Texas death penalty case) assumed for the sake of argument without deciding that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional . . ." *Herrera v. Collins*, 506 U.S. 390, 417 (1993). The Supreme Court still has not held that a showing of actual innocence is a matter of constitutional concern. However, the Court of Criminal Appeals decided that it is "clear . . . that the incarceration of an innocent person is as much a violation of the Due Process Clause as is the execution of such a person. It follows that claims of actual innocence are cognizable by this Court in a postconviction habeas corpus proceeding whether the punishment assessed is death or confinement." *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996).

1. The Newly Discovered Evidence Innocence Standard Actual innocence claims carry a higher burden of proof than all other post-conviction habeas corpus claims: the applicant must prove the claim by clear and convincing evidence rather than a preponderance.

The standard announced in *Elizondo* in 1996 applies today. "In the case of a *Herrera*-type claim of actual innocence [in which newly discovered evidence proves innocence], the petitioner must show by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence." *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996). A guilty plea does not prevent or bar applicants from asserting and proving innocence. *Ex parte Tuley*, 109 S.W.3d 388 (Tex. Crim. App. 2002).

First, a court evaluates whether the applicant has provided newly discovered evidence of innocence, then it applies the evidentiary test.

The first step requires applicants to attach the evidence to the writ application, which must be newly discovered and must prove innocence. Losing innocence claims most often fail because they rely on evidence that is not newly discovered or does not prove innocence.

The "newly discovered" requirement means that the evidence of innocence must truly be newly discovered. "Newly discovered evidence refers to evidence that was not known to the defendant at the time of the trial and could not have been known to him even with the exercise of due diligence. He cannot rely upon evidence or facts that were available at the time of his trial, plea, or post-trial motions, such as a motion for new trial." *Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006). However, in some circumstances, evidence may have existed, but was, for all intents and purposes, unavailable. *Ex parte Calderon*, 309 S.W.3d 64 (Tex. Crim. App. 2010).

For the newly discovered evidence to prove innocence, it must be "affirmative" evidence that contradicts inculpatory evidence. For instance, impeachment evidence, even when newly discovered and compelling, typically only collaterally affects the strength of the accusations. *Ex parte Franklin*, 72 S.W.3d 671, 677–78 (Tex. Crim. App. 2002).

The Court has refined the actual innocence framework, clarifying that it is "fact and conduct-centric" in rejecting an innocence claim based on conviction under an unconstitutional statute. *Ex parte Fournier*, 473 S.W.3d 789 (Tex. Crim. App. 2015). The Court observed that the *conduct* upon which the prosecution was premised "still exists as a matter of historical fact," and the constitutionality of the statute is irrelevant as to whether the conduct was committed. *Fournier*, 473 S.W.3d at 793.

Once newly discovered affirmative evidence of innocence is provided, then the court applies the standard to determine whether it satisfies *Elizondo*.

2. Pleading the Case Applicants must focus on the new evidence of innocence and put forward a cohesive theory of innocence. *Ex parte Reed*, 271 S.W.3d 698, 746 (Tex. Crim. App. 2008). The applicant must focus on any inculpatory evidence and explain why it does not matter, or how the innocence evidence affects it. You must work with the standard: "The task is to assess the probable impact of the newly available evidence against the persuasiveness of the state's evidence as a whole . . . one must necessarily weigh such exculpatory evidence against the evidence adduced at trial." *Ex parte Elizondo*, 947 S.W.2d 202, 206 (Tex. Crim. App. 1996). "Our job is not to review the jury's verdict but to decide whether the newly discovered evidence would have convinced the jury of applicant's innocence." *Elizondo*, 947 S.W.2d at 207. Applicants cannot just dispute the facts, which risks transforming an innocence claim into a sufficiency claim.

3. Recantations The most common and most fraught innocence cases involve recantations by complaining witnesses. If you have a recantation case that is at all serious, the Court of Criminal Appeals will almost certainly not decide it without a live hearing at which the recanting witness testifies followed by credibility findings made by the fact finder who witnessed the testimony.

Litigants must be aware of recantation cases like *Harleston*, where the Court of Criminal Appeals rejected the trial court's credibility findings based on how the recantations meshed with each other and the established record. *Ex parte Harleston*, 431 S.W.3d 67 (Tex. Crim. App. 2014). Lawyers representing applicants must master the whole record and advance a unified theory of innocence. "Newly discovered evidence that merely 'muddies the waters' and only casts doubt on an applicant's conviction, such as the multiple recantations and repudiations in this case, is insufficient to prevail in a free-standing actual-innocence claim because that evidence does not affirmatively establish an applicant's factual innocence by clear and convincing evidence." *Harleston*, 431 S.W.3d at 89.

4. "Hybrid" Innocence Claims A successful innocence claim does not necessarily require a single "silver bullet" of evidence to prove innocence. The Court has decided a series of cases that fell apart based on shards of evidence that, when put together with the established facts of a case, proved innocence. In *Ex parte Miles*, a freedom of information request began the process of the disintegration of a Dallas County murder case. *Ex parte Miles*, 359 S.W.3d 647 (Tex. Crim. App. 2012). The renowned "San Antonio 4" case involved a complainant's recantation, expert witness recantation, contextual evidence of prior false accusations, and new expert opinions. *Ex parte Mayhugh*, 512 S.W.3d 285 (Tex. Crim. App. 2016) (plurality) (majority vote for innocence).

5. Using New Science to Prove Innocence Advances in science and technology will be considered to determine whether evidence is newly available or newly discovered, but only if the evidence being tested

is the same as it was at the time of the offense. So, the science or method of testing can be new, but the evidence must be susceptible to testing in the same state as it was at the time of the offense. *Ex parte Spencer*, 337 S.W.3d 869, 879 (Tex. Crim. App. 2011). This was fatal to the applicant's case in *Spencer*. A forensic visual science expert testified that it was physically impossible for the witnesses to make a facial identification in the case, but the Court found that there was no way to replicate the crime scene as it existed at the time because it had undergone changes in the 16 years since the crime.

6. Innocence and Sex Offender Registration The Court has arguably extended the availability of innocence claims to sex offender registration. In *Harbin*, the applicant claimed he did not have a duty to register as a sex offender for the predicate offenses in the indictment. *Ex parte Harbin*, 297 S.W.3d 283 (Tex. Crim. App. 2009). The Court held that he had no duty to register because neither offense listed was eligible as reportable offenses.

7. Guilt for Lesser Offenses The Court decided that "innocence" was not the appropriate terminology when the issue in play is not actual innocence, but whether the applicant is guilty of a different offense. It concluded it would interpret a claim of innocence to mean "guilty only of" a lesser-included offense and "ineligible for" the sentence assessed. *State v. Wilson*, 324 S.W.3d 595 (Tex. Crim. App. 2010). The Court referenced *Wilson* when, after his guilty plea, an applicant learned that he did not possess the controlled substances after all. *Ex parte Mable*, 443 S.W.3d 129 (Tex. Crim. App. 2014). Applying *Wilson*, the Court found it was possible he intended or attempted to possess a controlled substance, so actual innocence could not apply. The Court granted relief based on involuntary plea in *Mable*, but if the applicant could disprove any intent to possess any substance, perhaps the door to actual innocence could still be open in a different case.

8. Schlup and "Procedural Innocence" A *Schlup* claim of innocence is distinguished from a *Herrera* (or *Elizondo*) claim because it is a procedural vehicle to have barred constitutional claims heard on a federal writ. The claim for relief requires evidence of innocence, but "depends critically" on the validity of the constitutional claims. The innocence claim is not the constitutional claim, but a "gateway" through which the habeas applicant must pass to have otherwise barred constitutional claims considered on the merits. Proof of innocence establishes a miscarriage of justice significant enough to reach the merits of the barred claim. The Supreme Court wrote, "if a petitioner such as Schlup presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." *Schlup v. Delo*, 513 U.S. 298, 316 (1995).

Schlup is not specifically relevant in Texas habeas practice, except insofar as it is the apparent basis for the codification of an exception for subsequent applications. Tex. Code Crim. Proc. arts. 11.07 § 4(a)(2); 11.071 § 5(a)(2). Section 4(a)(2) is discussed earlier in the paper for the role it plays in subsequent writ applications. As noted much earlier, the applicant must accompany these claims with evidence of innocence sufficient to make a prima facie innocence claim. *Ex parte Brooks*, 219 S.W.3d 396 (Tex. Crim. App. 2007). As addressed in greater detail in the subsequent writ discussion, double jeopardy claims have thus far had the most success under this theory.

"Procedural innocence" claims are generally not appropriately raised in an initial habeas corpus application because they depend upon procedurally barred constitutional claims. *Ex parte Villegas*, 415 S.W.3d 885 (Tex. Crim. App. 2013). The Court has not addressed whether an applicant may reach a procedurally barred constitutional claim on a first writ (for instance, a Fourth Amendment claim) with a prima facie showing of innocence. Perhaps *Schlup's* rationale just does not apply to Texas cases except through the codified subsequent writ exception. *See Ex parte Villegas*, 415 S.W.3d 885, 887–88 (Tex. Crim. App. 2013) (Price, J., concurring) (observing that "[t]he truth of the matter is that there is really no such

thing as a '*Schlup* actual innocence claim' in Texas.").

9. Tim Cole Act Compensation in Actual Innocence cases. Actual innocence relief is different from other varieties of habeas corpus relief. "A declaration of actual innocence, because of its impact on a defendant's reputation, affords greater relief than merely granting a new trial." *Ex parte Reyes*, 474 S.W.3d 677, 681 (Tex. Crim. App. 2015). A successful actual innocence claim can also lead to compensation for the time the applicant spent wrongly imprisoned. Tex. Civ. Prac. & Rem. Code § 103.001(a)(2)(B).

To be compensated, the winning habeas applicant must file an application with the comptroller within three years of the grant of relief. Tex. Civ. Prac. & Rem. Code §§ 103.003(2), 103.051.[23] Should the comptroller deny a claim, the "claimant may bring an action for mandamus relief." Tex. Civ. Prac. & Rem. Code § 103.051(e). These claims must be litigated in the Texas Supreme Court as the Government Code vests that court with exclusive mandamus jurisdiction over officers of the executive departments of government. Tex. Gov't. Code § 22.002(e).

This has led to a separate (and much smaller) body of actual innocence case law from the Texas Supreme Court. Most notably, the Court issued mandamus to compel payment of actual innocence compensation to an applicant who was granted habeas corpus relief by the Court of Criminal Appeals, but *not* based on an actual innocence theory.[24] Colton Lester was convicted of online solicitation of a minor based on actions that occurred after the Court of Criminal Appeals struck down the criminal statute that was the basis for his prosecution. On mandamus, the Supreme Court said, "[j]ust because existing actual-innocence jurisprudence does not contemplate something as outrageous as Lester's case does not mean that Lester, who committed, no crime, is anything but actually innocent." *In re Lester*, 602 S.W.3d 469, 473 (Tex. 2020). Therefore, "actual innocence under the Tim Cole Act encompasses *Herrera* claims, *Schlup* claims, and that 'narrow class of cases' in which the petitioner's actions were not criminal at the time the acts were committed." *In re Lester*, 602 S.W.3d 469, 475 (Tex. 2020). In a footnote, the Court added that the decision "concerns only the meaning of 'actual innocence' under the Tim Cole Act" and "does not encroach on the Court of Criminal Appeals' criminal-law jurisdiction." *Lester*, 602 S.W.3d at 474 n.2.

vii. Involuntary Plea The most common (and successful) involuntary plea claim is typically tied in with an allegation of attorney error (discussed above). However, "true" involuntary plea claims are also cognizable. Applicants mounting an involuntary plea case must be prepared to show, if necessary, why the presumption of regularity attending to court records (typically reflecting comprehensive admonishments) does not defeat their claim. *Breazeale v. State*, 683 S.W.2d 446, 450 (Tex. Crim. App. 1985).

"Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1969). A guilty plea entered by an applicant fully aware of the direct consequences must stand unless induced by threats, misrepresentation, or perhaps by improper promises. *Ex parte Morrow*, 952 S.W.2d 530, 534 (Tex. Crim. App. 1997) (quoting *Brady v. U.S.*, 397 U.S. 742, 755 (1970)).

Ignorance of direct consequences of guilty pleas that are non-punitive (such as the loss of the right to vote, the right to possess firearms, ineligibility for certain professional licenses, etc.) will not necessarily render an otherwise voluntary plea involuntary. *Mitschke v. State*, 129 S.W.3d 130, 135 (Tex. Crim. App. 2004). The Court has held that sex offender registration is non-punitive, so failure to admonish a defendant about registration consequences does not necessarily cause the plea to be involuntary. *Mitschke*, 129 S.W.3d

[23] Post-conviction actual innocence relief on habeas corpus is not the only path for someone pursuing compensation for wrongful incarceration under the Tim Cole Act. Tex. Civ. Prac. Rem. Code § 103.001(a)(2)(A) & (a)(2)(C).
[24] *Ex parte Lester*, No. WR-88,227-01 (Tex. Crim. App. Apr. 11, 2018) (not designated for publication).

at 136.

The most recent developments in the Court's involuntary plea jurisprudence have been fueled by widespread post-conviction drug testing following quick guilty pleas in Harris County. Post-plea drug testing there has turned up dozens of cases where defendants learned after their judicial confessions that, to the contrary, they possessed no controlled substances, different controlled substances, or a lesser quantity of controlled substances. The parties in Harris County have agreed to relief in most cases, but the appropriate legal framework for analyzing the cases is disputed at the Court of Criminal Appeals.

One such applicant claimed he was actually innocent because post-plea testing showed that what he possessed was not illegal. Rejecting the innocence claim, the Court held instead that the plea was involuntary. *Ex parte Mable*, 443 S.W.3d 129, 131 (Tex. Crim. App. 2014). The Court determined that the parties' mistaken belief that applicant possessed the drugs he was charged with possessing was a "crucial fact" in the case, knowledge of which was necessary for a voluntary plea. *Ex parte Mable*, 443 S.W.3d at 131.

Following *Mable*, the Court has found that the defendant's ignorance that the seized substance was destroyed in a field test would not be sufficiently crucial to cause the plea to be involuntary. *Ex parte Palmberg*, 491 S.W.3d 804 (Tex. Crim. App. 2017). The Court came to the same conclusion when the defendant learned after his plea that the substance he possessed was a different substance but was listed in the same Penalty Group and carried the same punishment range. *Ex parte Broussard*, 517 S.W.3d 814 (Tex. Crim. App. 2017).

The Court granted relief when the applicant pleaded guilty to methamphetamine possession, but later testing revealed he possessed methylethcathinone (which is in a different penalty group but carried the same punishment range in this case). However, the legal rationale for relief splintered the Court, with Judge Keasler arguing that relief was justified by due process concerns and that *Mable* should be overruled, while Judge Newell argued for *Mable's* continued viability and applicability. *Ex parte Saucedo*, 576 S.W.3d 712 (Tex. Crim. App. 2019) (the opinion granting relief is unpublished, but litigants must understand the competing concerns on the Court expressed by the four published side opinions—three concurrences and one dissent). The dispute about *Mable's* scope in light of *Palmberg* remains a live issue at the Court. Over Judge Yeary's published dissent, the Court recently granted relief under *Mable* when DNA testing used to show contraband possession was inconclusive. *See Ex parte Turner*, 635 S.W.3d 682 (Tex. Crim. App. 2021) (Yeary, J., dissenting).

Faced with a situation in which a forensic scientist was known to have committed professional misconduct in other cases, the Court fashioned a test that, if satisfied, would grant an applicant a "presumption of falsity" based on the discredited actor's involvement in the case. The Court wrote that an applicant "can establish that a laboratory technician's sole possession of a substance and testing results derived from that possession are unreliable, and we will infer that the evidence in question is false, if the applicant shows that: (1) the technician in question is a state actor, (2) the technician has committed multiple instances of intentional misconduct in another case or cases, (3) the technician is the same technician that worked on the applicant's case, (4) the misconduct is the type of misconduct that would have affected the evidence in the applicant's case, and (5) the technician handled and processed the evidence in the applicant's case within roughly the same period of time as the other misconduct." *Ex parte Coty*, 418 S.W.3d 597, 605 (Tex. Crim. App. 2014). The Court concluded that with those facts established, the "the burden shifts to the State to offer evidence demonstrating that the laboratory technician committed no such intentional misconduct in the applicant's case." *Id*. The Court has since found that this presumption is not limited to the laboratory, and that the *Coty* test can apply to a police officer's repeated misconduct. *Ex parte Mathews*, __ S.W.3d __, No. WR-91,731-01 (Tex. Crim. App. Jan. 11, 2023).

viii. Illegal Sentence "An illegal sentence is one that is not authorized by law; therefore, a sentence that is outside the range of punishment authorized by law is considered illegal. A claim that a sentence is illegal because it exceeds the statutory maximum is cognizable in a writ of habeas corpus and may be raised at any time. Thus, Applicant's claim that his sentence was illegally enhanced is cognizable even though he failed to raise that issue on direct appeal." *Ex parte Pue*, 552 S.W.3d 226, 228 (Tex. Crim. App. 2018) (internal citations omitted); *See also Ex parte Rodgers*, 598 S.W.3d 262, 267 (Tex. Crim. App. 2020); Ex *parte Parrott*, 396 S.W.3d 531, 534 (Tex. Crim. App. 2013).

Applicants who can successfully challenge the validity of an enhancement conviction cannot show an illegal sentence if they had other "spare" priors that could have been substituted as valid enhancements. *Ex parte Parrott*, 396 S.W.3d 531, 536–37 (Tex. Crim. App. 2013). When that spare (or "replacement conviction") is "for a dissimilar, less reprehensible" conviction (replacing, for instance, an aggravated sexual assault with a felony theft), the Court will measure harm only by whether the sentence is within the allowable range of punishment and without regard to the role the facts of the subsequently disallowed conviction may have played in assessment of the sentence. *Ex parte Hill*, 632 S.W.3d 547, 558–59 (Tex. Crim. App. 2021).

The Court recently extended *Parrott's* logic to apply to "jurisdictional enhancements." So if the prior convictions used to get a DWI prosecution into felony court turn out to be problematic, the applicant will not be able to prove an illegal sentence if the evidence shows there were "spare" prior convictions that could have been used in place of the convictions alleged in the indictment. *Ex parte Rodgers*, 598 S.W.3d 262, 269–70 (Tex. Crim. App. 2020). The Court often remands these cases for harm findings under *Parrott.* Applicants should confront this in their pleadings and prosecutors are well-served by pointing out harm problems in what would otherwise be facially valid illegal sentence claims based on problematic prior convictions used either for jurisdictional or punishment enhancement purposes.

The Court recently resolved a case in which one of the convictions used to enhance a sentence had been vacated on post-conviction habeas corpus. Following the grant in the enhancement case, the applicant raised an illegal sentence claim and the Court granted relief, finding that the determination of the legality of a sentence is based on its legality as it stands now, and not as it stood at some other time. *Ex parte Hill*, 632 S.W.3d 547, 557 (Tex. Crim. App. 2021).

Though cumulation (or, "stacking") orders certainly affect the duration of confinement, improper cumulation orders may not be challenged on habeas because they should have been raised on direct appeal. *Ex parte Townsend*, 137 S.W.3d 79 (Tex. Crim. App. 2004). Even those "bad stacking" issues that could not have been raised on appeal are probably not cognizable on habeas corpus because they arise from statutory violations and do not implicate constitutional rights. *Ex parte Carter*, 521 S.W.3d 344, 349 (Tex. Crim. App. 2017) (plurality). The best route for an applicant's challenge to a "bad stacking" order on habeas corpus is probably through an ineffective assistance of counsel claim.

ix. Double Jeopardy "A claimed violation of the prohibition against double jeopardy is cognizable on post-conviction habeas corpus." *Ex parte Diaz*, 959 S.W.2d 213, 214 n.2 (Tex. Crim. App. 1998). However, to raise the issue for the first time on collateral attack, the undisputed facts must show that the double jeopardy violation is clearly apparent on the face of the record and enforcement of the usual rules of procedural default serve no legitimate state interest. *Gonzalez v. State*, 8 S.W.3d 640, 643 (Tex. Crim. App. 2000). In 2013, the Court filed and set a case to determine, in part, whether the double jeopardy claim was defaulted because there was no objection in the trial court. *Ex parte Denton*, 399 S.W.3d 540 (Tex. Crim. App. 2013). In reaffirming that these claims are cognizable due to "fundamental nature" of double jeopardy protections, the Court arguably dispensed with the "legitimate state interest" issue when it observed that "[w]hile the state may have an interest in maintaining the finality of a conviction, we perceive no legitimate interest in

maintaining a conviction when it is clear on the face of the record that the conviction was obtained in contravention of constitutional double-jeopardy protections." *Ex parte Denton*, 399 S.W.3d 540, 545 (Tex. Crim. App. 2013).

Litigants must understand that though double jeopardy claims are still cognizable, the issue has been contested at the Court of Criminal Appeals, as demonstrated in the side opinions in the *Marascio* case. *Ex parte Marascio*, 471 S.W.3d 832 (Tex. Crim. App. 2015). Nevertheless, double jeopardy relief *is* still granted without controversy. *Ex parte Cook*, 630 S.W.3d 65 (Tex. Crim. App. 2021). And a recent opinion reflects that eight judges agree that "[a]s it stands, precedent supports the continued cognizability of free-standing double-jeopardy claims, and the State has not argued that we should re-evaluate that position." *Ex parte Woods*, 664 S.W.3d 260, *7, n.33[25] (Tex. Crim. App. 2022).

x. Unconstitutional Statute Post-conviction habeas corpus cannot be used to bring a facial constitutional challenge to a statute. *Ex parte Beck*, 541 S.W.3d 846 (Tex. Crim. App. 2017). In general, "a facial constitutional challenge must be preserved during the trial proceedings or later attacks will be forfeited." *Ex parte Beck*, 541 S.W.3d at 852–54. However, once a statute has been declared unconstitutional, post-conviction habeas corpus can provide an avenue for relief for convictions already obtained under the statute. *Id*. at 855–56. "The due-process right not to be convicted under a statute that has been declared facially unconstitutional cannot be forfeited." *Ex parte Lea*, 505 S.W.3d 913, 915 (Tex. Crim. App. 2016). Similarly, probation revocation proceedings predicated on a conviction of an unconstitutional statute may be challenged on post-conviction habeas. *Ex parte Lea*, 505 S.W.3d 913 (Tex. Crim. App. 2016).

xi. Indictment and Jury Charge Error Despite the rule against raising claims that could have been raised on appeal, claims relating to indictments and jury charge error can be cognizable. BUT they come with very high burdens. A claim that the indictment was fundamentally defective "may be cognizable in a writ of habeas corpus, but only if it alleges that the indictment is so deficient that it fails to vest the trial court with jurisdiction." *Ex parte Reedy*, 282 S.W.3d 492, 502 (Tex. Crim. App. 2009). Habeas relief based on a defective jury charge claim requires the applicant to allege the reasons the error in the charge, in light of the trial as a whole, so infected the procedure that the applicant was denied a fair and impartial trial. *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985).

It is likely that any indictment or jury charge problem bad enough to satisfy these burdens would have been noticed and litigated at trial or on appeal. However, the claims are technically still available on habeas, if necessary.

xii. Time Credits Like most other sub-topics in this paper, the subject of time credits deserves its own paper. This paper will only cover a handful of time credit issues that the Court sees most commonly. Remember that entitlement to time credits can extend to time spent in custody in other jurisdictions so long as the prisoner was "held" by a detainer on the case in issue, or can show that he or she was held in constructive custody based on the case at issue. *Ex parte Spates*, 521 S.W.2d 265 (Tex. Crim. App. 1975); *Ex parte Kuban*, 763 S.W.2d 426, 427 (Tex. Crim. App. 1989); *Ex parte Hannington*, 832 S.W.2d 355, 356 (Tex. Crim. App. 1992); *Ex parte Rodriguez*, 195 S.W.3d 700, 703 (Tex. Crim. App. 2006).

1. Administrative Exhaustion As a preliminary matter, with some exceptions, the Government Code forbids prisoners from raising time-served credit errors on 11.07 applications until they have exhausted the issue administratively through the TDCJ Time Dispute Resolution System. Tex. Gov't. Code § 501.0081. The prisoner must have either received a response or waited 180 days from the time they first raised the issue

[25] At the time of writing, though the Southwest Reporter citation was available, its specific pagination was not. The pin cite refers to the slip opinion.

internally without receiving an answer before the claim may be considered exhausted and cognizable on habeas corpus. Tex. Gov't. Code § 501.0081(b). The requirements do not apply to a prisoner who, according to TDCJ's computations, is within 180 days of a presumptive parole date, a mandatory supervision date, or a discharge date. Tex. Gov't. Code § 501.0081(c).

Item 17 on the 11.07 form covers this requirement. If the applicant raises time credit issues and does not respond to Item 17 or provides answers that do not suggest compliance (if, for instance, the dispute resolution claim was submitted 20 days before the writ was filed and no response is indicated), then the entire writ is typically dismissed. *Ex parte Molina*, 483 S.W.3d 24, 28 (Tex. Crim. App. 2016). The Court does not strictly enforce a requirement that the applicant present *evidence* of compliance. *But see Ex parte Stokes*, 15 S.W.3d 532 (Tex. Crim. App. 2000) (faulting the applicant for not providing evidence of a response from TDCJ). A specific allegation of compliance on the form is typically sufficient. However, remands on time issues usually request a response from TDCJ about administrative exhaustion and findings from the convicting court addressing the issue.

Applicants released to mandatory supervision are not "inmates," so they are not subject to the exhaustion requirements of Section 501.0081 (which speaks in terms of "inmates."). *Ex parte Russell*, 60 S.W.3d 875, 877 (Tex. Crim. App. 2001). The other exception applies to pre-sentence jail time claims and will be discussed immediately below.

2. Pre-Sentence Jail Time Credits in Felony Cases[26] In general, pre-sentence jail time credit claims are no longer cognizable on habeas corpus. When they are, they are not subject to the Government Code's exhaustion requirement insofar as the claim relates to the correct award of pre-sentence jail time credit. *Ex parte Molina*, 483 S.W.3d 24 (Tex. Crim. App. 2016). Because the award of pre-sentence jail time credits is the province of the trial court, the remedy is usually to go to the trial court, and there is no sense in requiring inmates to raise the issue with TDCJ. After all, an argument that a judgment is incorrect is not something TDCJ can address. *Ex parte Molina*, 483 S.W.3d 24, 27 (Tex. Crim. App. 2016).

"An incorrect calculation of the amount of back-time awarded to a defendant, or the omission of any statutory back-time in the judgment can be adjusted by a motion for judgment nunc pro tunc." *Collins v.* State, 240 S.W.3d 925, 928 (Tex. Crim. App. 2007) (concluding that a waiver of pre-sentence jail time credits will cause the prisoner to be ineligible for that time credit). Therefore, the appropriate remedy for those who believe they have not been awarded the correct pre-sentence jail time credit under Code of Criminal Procedure Article 42.03 § 2 is to file a motion for judgment nunc pro tunc in the trial court. If the trial court does not respond, the movant must pursue mandamus relief. *Ex parte Ybarra*, 149 S.W.3d 147, 148–49 (Tex. Crim. App. 2004). Resort to mandamus applies whether the trial court does not respond to the nunc pro tunc motion, or if it wrongly denies the motion. *Ex parte Florence*, 319 S.W.3d 695, 696 (Tex. Crim. App. 2010). If the trial court wrongly grants the motion for judgment nunc pro tunc, the State may appeal. *See generally*, *Collins v. State*, 240 S.W.3d 925 (Tex. Crim. App. 2007). Moving pre-sentence jail time credits out of habeas corpus litigation marked a sea change in time credit law, which you must remember when reading older time credit cases.

Importantly, if the applicant claims illegal confinement "because he would have discharged his sentence if given the proper time credit," then habeas corpus is the appropriate remedy. *Ex parte Florence*, 319 S.W.3d 695, 696 (Tex. Crim. App. 2010); *Ex parte Ybarra*, 149 S.W.3d 147, 148 n.2 (Tex. Crim. App. 2004).

[26] To be clear, this discussion applies to felonies. Pre-sentence jail time credits for state jail felonies are not as straightforward. *See*, *Ex parte Harris*, 946 S.W.2d 79 (Tex. Crim. App. 1997); Tex. Code Crim. Proc. art. 42A.559(c).

When applicants file 11.07 applications raising meritless claims challenging the conviction and pre-sentence jail time credit issues, the writ will be decided with a mixed disposition. The "*Ybarra*" claims relating to time credits will be dismissed while the claims challenging the conviction or sentence will be decided on the merits. *Ex parte Deeringer*, 210 S.W.3d 616, 618 (Tex. Crim. App. 2006).

3. Post-Conviction Time Credits This is a vast, tangled area of law, and this version of this paper only addresses the two most common issues the Court sees. Both "street time" and "*Canada* time" concern prisoners who have been returned to prison after supervised release and then dispute the time they are owed upon their return to an actual TDCJ-ID unit.

The statutory provision of "street time" allows some prisoners to be credited with time spent out of custody (on the street) when their parole or mandatory supervision is revoked. The award and denial of street time is governed by Section 508.283(b) & (c) of the Government Code.

The "street time" statute excludes prisoners whose convictions make them ineligible for mandatory supervision from street time eligibility. Tex. Gov't. Code §§ 508.283(b) & (c), 508.149(a). Because a prisoner could be ineligible for mandatory supervision based on a prior conviction, it is not necessarily dispositive that the prisoner is pursuing street time credits for a sentence that is, on its face, eligible for mandatory supervision. *See* Tex. Gov't. Code § 508.149(a) (stating that "[a]n inmate may not be released to mandatory supervision if the inmate is serving a sentence or has been previously convicted of" one of the listed offenses). Section 508.149(a) includes statutory predecessors to the listed offenses. *Ex parte Ervin*, 187 S.W.3d 386, 389 (Tex. Crim. App. 2005).

And though eligibility for mandatory supervision is based on the law in effect at the time of the offense, eligibility for street time is based on the law applicable at the time of the revocation. In rare cases like *Noyola*, shifting statutes can benefit the prisoner. *Ex parte Noyola*, 215 S.W.3d 862, 869–70 (Tex. Crim. App. 2007). Finally, if the prisoner was eligible for street time on the original conviction at the time of release but begins serving a new conviction described by Section 508.149(a) before revocation, the new sentence makes the prisoner ineligible for street time. *Ex parte Hernandez*, 275 S.W.3d 895 (Tex. Crim. App. 2009).

Prisoners who are serving a mandatory-eligible sentence and have no priors for disqualifying offenses are eligible for street time credit upon the revocation of their parole or mandatory supervision if they have spent enough time on supervised release. To be eligible, the prisoner had to have spent more than half of the time remaining on the sentence at the release date before the revocation warrant was issued. Tex. Gov't. Code § 508.283(c); *Ex parte Spann*, 132 S.W.3d 390 (Tex. Crim. App. 2004). In prison parlance, this is referred to as meeting the "mid-point." So if an eligible prisoner had 10 years left on the sentence upon release to mandatory supervision or parole, and the revocation warrant was issued five years and one day after release, the prisoner reached the "mid-point" on supervision and is entitled to credit for time on supervised release. However, if the prisoner fell short of making it to the "mid-point," then all the time is forfeited.

Presiding Judge Keller described the test this way: "1. If, on the summons date, the 'remaining portion' of Applicant's sentence is greater than the time spent on parole, Applicant receives no street-time credit for the time spent on parole. 2. If, however, on the summons date, the 'remaining portion' of Applicant's sentence is less than the time spent on parole, Applicant receives street-time credit for the amount of time spent on parole." *Ex parte Spann*, 132 S.W.3d 390, 393 (Tex. Crim. App. 2004) (emphasis omitted).

The other major topic of post-conviction time credits is what is known as "*Canada* Time," which describes time spent confined under authority of pre-revocation warrants ("blue warrants"). The

Government Code provides that, when it appears a parolee has violated a condition of release, the time from the date of issuance of the pre-revocation warrant to the date of arrest is not counted as part of the time served on the sentence. Tex. Gov't. Code § 508.253. However, upon revocation of parole, prisoners are entitled to credit for the time spent confined under authority of previous pre-revocation warrants. *Ex parte Canada*, 754 S.W.2d 660 (Tex. Crim. App. 1988). Most time credits are tied to restraint of some sort, and eligibility for *Canada* Time runs from the execution of the pre-revocation warrant. *Ex parte Price*, 922 S.W.2d 957, 959 (Tex. Crim. App. 1996).

A parolee is "confined" by an un-executed pre-revocation warrant that prevented release on bond in a new case and is entitled to credits from the time of confinement. *Ex parte White*, 400 S.W.3d 92, 94 (Tex. Crim. App. 2013). The law suggests that the applicant must show that an un-executed blue warrant prevented release on bond, causing confinement that requires the award of time credits. The thread running through the Court's "*Canada* Time" cases is restraint, whether a detainer in another jurisdiction places the parolee in constructive custody, or an un-executed blue warrant makes the parolee ineligible for bail in another case. Applicants must keep proof of restraint in mind when making these claims.

xiii. Parole & Mandatory Supervision The Court rarely intervenes in parole and mandatory supervision matters, but these issues are commonly raised in 11.07 applications filed by pro-se litigants. Naturally, most issues arise in relation to the decision to release to parole, and then in relation to the process for revoking release and the return to prison.

1. Release to Parole This is, perhaps, the least fraught aspect of this process. Parole eligibility, including the time necessary before eligibility for parole release, is determined by the law in effect at the time of the offense. *Ex parte Choice*, 828 S.W.2d 5 (Tex. Crim. App. 1992). Prisoners are entitled to notice, opportunity to be heard, and a reason for a denial of release to parole. *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 16 (1979). The parole panel is not required to have the prisoner before the panel for an interview, but the panel may do so. Tex. Gov't. Code § 508.141(c). Texas courts do not typically intervene in the decision whether to release a prisoner to parole. "The decision to release or not release an inmate of the Texas Department of Corrections, even though eligible for parole, remains within the sound discretion of the Board of Pardons and Paroles." *Ex parte Rutledge*, 741 S.W.2d 460, 463 (Tex. Crim. App. 1987) (*overruled on other grounds by, Ex parte Hallmark*, 883 S.W.2d 672, 674 (Tex. Crim. App. 1994)).

2. Release to Mandatory Supervision Mandatory supervision issues are more frequently litigated and complex. This is attributable to the ongoing changes to mandatory supervision itself, and eligibility for release to mandatory supervision. From 1977 until 1987, eligible prisoners whose actual calendar time served and their accrued good conduct time equaled the term of their sentence were automatically released on mandatory supervision and treated as if they were on parole. *Ex parte Retzlaff*, 135 S.W.3d 45, 48 (Tex. Crim. App. 2004). Beginning in 1987, eligibility for mandatory supervision release began to be increasingly circumscribed as the legislature added offenses to the ineligible list. Those ineligible for mandatory supervision release were still eligible for parole release. In 1995, the legislature made release to "mandatory supervision" discretionary. Now, eligible prisoners have a presumption of release, but the parole board may vote to block the release of any prisoner for a set of reasons. *Id*.

TDCJ must keep track of who is eligible for what, with regular changes in the law to recall. Prosecutors and courts are accustomed to prisoners describing themselves in terms of which legislative session controls their eligibility. The least complicated mandatory supervision issue is eligibility for those with life sentences. The Court decided that it is mathematically impossible to determine a mandatory supervision release date for a life sentence because the calendar time and good conduct time can never add up to life. Therefore, according to this thinking, prisoners serving life sentences are ineligible for release to mandatory

supervision. *Ex parte Franks*, 71 S.W.3d 327, 328 (Tex. Crim. App. 2001). Eligibility (or not) for mandatory supervision release is determined by the statute in effect at the time of the offense. *Ex parte Hall*, 995 S.W.3d 151, 152 (Tex. Crim. App. 1999). Once a prisoner has been convicted of one of the ineligible offenses, future sentences will be ineligible for mandatory supervision, irrespective of the crime of conviction. *See* Tex. Gov't. Code § 508.149(a) (applying to inmates who are serving a sentence for *or have been convicted* for one of the enumerated offenses). Prior offenses that are not specifically enumerated but are statutory predecessors to current ineligible offenses will make a prisoner ineligible. *Ex parte Ervin*, 187 S.W.3d 386 (Tex. Crim. App. 2005). This goes the other way, sometimes crimes that appear to be covered as ineligible offenses are not. *Ex parte Mabry*, 197 S.W.3d 58 (Tex. Crim. App. 2004) (analyzing shifting classifications of burglary).

Prisoners who are up for a decision by the parole board about whether they will be released to mandatory supervision are "entitled to notice of the specific month and year in which [they] will be reviewed for release to mandatory supervision" as well as "at least thirty days advance notice that [they] will be reviewed in the specified month so that [they have] a sufficient opportunity to submit materials on [their] behalf." *Ex parte Retzlaff*, 135 S.W.3d 45, 50 (Tex. Crim. App. 2004). Applicants claiming deficiencies in notice must show not only the deficiencies but how they adversely affected them. *Ex parte Retzlaff*, 135 S.W.3d at 50.

The prisoner may be denied release to "discretionary mandatory" if the board determines that the prisoner's good conduct time credits do not accurately reflect the potential for rehabilitation or that the prisoner would endanger the public if released. Tex. Gov't. Code § 508.149(b). The Parole Board's decision that a prisoner is unsuitable for release to "discretionary mandatory" release "is not subject to administrative or judicial review." Tex. Gov't. Code § 508.149(d); *Ex parte Geiken*, 28 S.W.3d 553, 556–58 (Tex. Crim. App. 2000).

3. Revocation Parolees are entitled to due process in the revocation process. *Morrissey v. Brewer*, 408 U.S. 471 (1972). Parolees are entitled to: written notice of claimed parole violations; disclosure of the evidence against the parolee; the opportunity to be heard in person and present witnesses and evidence; the right to confrontation and cross examination of adverse witnesses (unless good cause has been found to bar confrontation); a neutral and detached hearing body; and a written statement by the fact finders detailing the evidence relied upon and the reasons for revocation. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972). There is no absolute right to appointed counsel, and the decision regarding the need for counsel is a case-by-case decision left to the parole board's discretion. *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973). "When the parolee may have difficulty in presenting his version of a disputed set of facts or when the facts or mitigating circumstances are so complex that they can fairly be presented only by a trained advocate, counsel should be appointed in a parole revocation proceeding." *Ex parte Taylor*, 957 S.W.2d 43, 47 (Tex. Crim. App. 1997). The parole board may meet with the parolee but is not required to do so. Tex. Gov't. Code § 508.141(c).

Preliminary hearings to determine whether there is probable cause to show a violation of parole conditions must be held within a reasonable time, even if new charges are pending. Tex. Gov't. Code § 508.2811; *Ex parte Cordova*, 235 S.W.3d 735 (Tex. Crim. App. 2007). However, when the parolee is under indictment for a new offense, the 41-day deadline for a final revocation hearing does not apply. *Ex parte Cordova*, 235 S.W.3d 735, 736 (Tex. Crim. App. 2007).

In a recent case in which the parolee was arrested (but not charged) and held on authority of the blue warrant for seven months, the Court ordered the revocation proceedings dismissed and the parolee released from custody based on the blue warrant. *Ex parte Palma*, Nos. WR-90,415-01 & WR-90,415-02 (Tex. Crim. App. Dec. 11, 2019) (not designated for publication). In a published dissent, Presiding Judge Keller

agreed that due process was violated, but argued for a different remedy. *Ex parte Palma*, 588 S.W.3d 279 (Tex. Crim. App. 2019) (Keller, P.J., dissenting). Throughout the COVID-19 pandemic, the Court saw many similar complaints, but they were typically mooted out on remand.

VIII. Delay, Laches, & Waiver of Habeas

This brief section addresses defensive issues that may be availing for the State, and that applicants should understand.

A. Delay

This issue is simple. "[A] petitioner's delay in seeking relief can prejudice the credibility of his claim." *Ex parte Galvan*, 770 S.W.2d 822, 824 (Tex. Crim. App. 1989). In *Galvan*, the applicant raised an ineffective assistance of counsel claim for failure to pursue an appeal almost six years after the conviction. The applicant's claim, that he wanted to appeal from the start and would have, loses credibility when it is not asserted with some alacrity. This can be a powerful line of argument when the applicant waits years to raise an extraordinary irregularity from the proceedings that would make a plea involuntary. This argument is not used often by the State, but applicants should always confront an obvious delay to maintain (or rehabilitate) their credibility.

B. Laches

When laches applies, the Court denies relief without consideration of the merits of the applicant's claims. *Ex parte Hill*, 632 S.W.3d 547, 551 (Tex. Crim. App. 2021). Laches is slightly more complex than the "delay" concept, and has seen significant changes over the past decade. When the Court first held the affirmative defense of laches played a part in habeas litigation, it required the State to make a particularized showing of prejudice in its ability to *respond* to claims caused by the applicant's unreasonable delay in filing the writ. Delay alone was not sufficient to cause particularized prejudice. *Ex parte Carrio*, 992 S.W.2d 486 (Tex. Crim. App. 1999). Since then, the Court has expanded the definition of prejudice to incorporate all forms of prejudice beyond the State's ability to respond to the writ application. A court is free to consider the totality of the circumstances to decide whether to hold consideration of an application barred by laches. *Ex parte Perez*, 398 S.W.3d 206 (Tex. Crim. App. 2013). The Court has rejected a proposed presumption of prejudice arising after a five-year delay. *Id.* But one year after *Perez*, the Court held that the State need not plead laches in its answer (or at all), and that a court could consider laches on its own motion. *Ex parte Smith*, 444 S.W.3d 661 (Tex. Crim. App. 2014).

Though the standard for the State's prejudice showing has been relaxed, the State should still make some specific allegation of prejudice rather than relying on a vague statement that with the passage of time, it could be difficult to respond or retry the case. If the defense lawyer is deceased or no longer has the trial file or cannot remember the case, the State should say so and provide *some* evidence, even if it is only an affidavit. If the State can easily defeat the claims on the merits, then resort to laches is unnecessary. The applicant should be prepared for a laches argument and get in front of the issue with reasons that it took however long it took to file the writ. If a court raises the issue on its own, the applicant must take the opportunity to respond.

C. Waiver of Habeas Corpus

The Court has given a limited approval of habeas corpus waivers. "An applicant may voluntarily, knowingly, and intelligently waive any claim that is based upon facts that, by diligence and with the assistance of trial counsel, he was aware of at the time of the waiver." *Ex parte Reedy*, 282 S.W.3d 492, 504–05 (Tex. Crim. App. 2009). The Court added that it would not enforce a waiver of habeas corpus "as

to a claim that a guilty plea was involuntary because it was the product of ineffective assistance of counsel." *Id.*

The problem for prosecutors trying to enforce waivers is that the language of *Reedy* necessarily excepts most viable legal claims that are brought on habeas. By their nature, ineffective assistance of counsel, *Brady*, innocence, and false evidence are not things that the parties are aware of at the time of the purported waiver. Nevertheless, writ prosecutors who know the record contains a waiver should highlight it and bring it to the Court's attention. Unless the writ claims are heavily dependent on the plea paperwork, a single waiver is easy for a reviewing court to miss. Similarly, applicants must address why the waiver does not apply to their claims.

IX. New Extraordinary Writ Opinions from Spring 2022–Spring 2023 (not otherwise mentioned in the paper)

Mandatory Supervision

Ex parte Rivers, 663 S.W.3d 683 (Tex. Crim. App. 2022). Rivers was serving two sentences, one eligible for "mandatory mandatory" supervision, the other, newer sentence subject to "discretionary mandatory supervision," which ran concurrently with the older case. The Board twice denied discretionary mandatory release on the newer sentence. Shortly after the second denial, he became eligible for mandatory supervision release on the older sentence, but TDCJ told him he would not be released until he became eligible for release on all concurrent sentences. The Court found that TDCJ's actions violated the terms of the old "mandatory mandatory" supervision law. The Court decided that Rivers was eligible to immediate release on the earlier sentence, though because he would still be held by the newer sentence, it would be a "paper parole." As of at least March 2023, Rivers was no longer in TDCJ.

Ineffective Assistance of Counsel

Ex parte Covarrubias, __ S.W.3d __, No. WR-82,509-03 (Tex. Crim. App. Jan. 25, 2023).
The State and the trial court agreed on four instances of ineffective assistance of counsel. The Court found that to prevail on a claim that counsel was ineffective for not using a *peremptory* strike on the basis of bias against the law, the record must show that the juror was, in fact, biased. When a juror expresses some discomfort or disagreement with the law, counsel must ask a follow-up question to determine whether he can follow the law regardless of personal views. When the applicant does not show that a panelist who became a juror was "biased," the applicant cannot show by a reasonable probability that the jury's verdict would have been different with a different panelist on the jury.

Ex parte Salinas, 664 S.W.3d 894 (Tex. Crim. App. 2022)
The Court appears to have filed and set this case to address the habeas court's recommendation to grant relief based on multiple allegations of ineffective assistance. Applicant faulted counsel at his second trial for allowing evidence that he did not respond to a specific question posed by the police during their interview with him. Though counsel objected under the Fifth Amendment (resulting in an opinion from the Supreme Court), they did not object to the use of his pre-arrest silence under the 14th Amendment and Article 38.23. The Court held that counsel could not be faulted as the law governing both issues was unsettled at the time of the trial. The Court also addressed four other ineffective assistance claims as part of a cumulative error claim. After assuming attorney error, the Court concluded there was no harm under *Strickland*.

Sex Offender Registration

Ex parte Kibler, 664 S.W.3d 220 (Tex. Crim. App. 2022) (plurality).

Applicant received convictions in the same proceeding for two separate offenses. The applicable sex offender registration scheme required lifetime registration "if **before or after** the person is convicted or adjudicated for the offense . . . the person receives or has received another reportable conviction or adjudication . . . for an offense or conduct that requires registration . . ." Though the applicant was convicted of both offenses in the same proceeding, the Court held that he was subject to lifetime registration. The opinion is a plurality, but Judge Yeary concurred in the result with a written opinion.

False Evidence

Ex parte Mathews, __ S.W.3d __, No. WR-91,731-01 (Tex. Crim. App. Jan. 11, 2023).
Houston Police Officer Gerald Goines's repeated acts of misconduct triggered the presumption of falsity under *Coty* for the applicant's case, which occurred in 2013, "within roughly the same period of time as the other misconduct."

Illegal Sentence & Estoppel

Ex parte Lozoya, __ S.W.3d __, No. WR-92,475-01 (Tex. Crim. App. Mar. 29, 2023).
As part of his plea bargain, the applicant agreed to ten years of community supervision in a case that was only eligible for five years of community supervision. The State moved to revoke the supervision in the sixth year of supervision and applicant was revoked and sentenced to five years' incarceration. When the legal error in the plea was discovered, Applicant alleged that the judge did not have jurisdiction to revoke. The Court decided that a court does not have jurisdiction to revoke community supervision during an unlawful period of supervision when the motion to revoke and capias issued after the lawful period of supervision expired. Before granting relief, the Court endeavored to clarify its estoppel doctrine, concluding that it did not apply. The Court reasoned that none of the parties knew the correct maximum term of supervision, applicant's acceptance of the term of supervision was not voluntary, and he did not acquiesce to the unlawful period of supervision or ratify it since he pursued his claim when he learned the correct facts and law. The Court observed that in deciding the estoppel issue, it did not decide whether a court may raise this affirmative defense on its own motion (though that is what happened in this case since the Court raised the issue in its remand order). In fashioning a remedy, the Court honored the State's request that the entire agreement was not unwound given their willingness to waive the invalid portion of the judgment and retain the remainder of the agreement. Therefore, the Court set aside the judgment revoking supervision and sentencing applicant to confinement. Applicant apparently did not argue that his entire plea was involuntary due to defense counsel's failure to determine the legality of the agreement. Judge Yeary issued a dissenting opinion arguing that the claim should not be cognizable on post-conviction habeas corpus.

Double Jeopardy

Ex parte Woods, 664 S.W.3d 260 (Tex. Crim. App. 2022).
Woods pleaded guilty as part of a plea agreement and was convicted of two charges of possession of a firearm by a felon for the possession of two weapons. The indictments alleged both offenses were committed on the same date and used the same prior conviction as the predicate felony. After determining that possession of firearm by a felon is a "circumstances" offense for "unit of prosecution" purposes, the Court granted double jeopardy relief. The applicant also alleged ineffective assistance of counsel, but the habeas court found that he had not established deficient performance or prejudice. Presiding Judge Keller's opinion was joined by every judge other than Judge Yeary and included a footnote concluding "[a]s it stands, precedent supports the continued cognizability of free-standing double-jeopardy claims, and the State has not argued that we should re-evaluate that position."

X. Pending Issues Filed & Set for Opinions

The language provided in these summaries is taken from the parties or the Court's orders filing and setting the cases.

Ex parte McMillan, No. WR-88,970-01 (Filed and set for submission on February 12, 2020). The Court filed and set this case to determine whether the rule in *Ex parte Pue* is retroactive. Applicant's sentence was enhanced with a federal sentence for which she served the first part of the sentence in custody and the remainder on supervised release. The retroactivity of *Pue* (or not) would decide whether the finality of the conviction for enhancement purposes is judged by federal law or Texas law.

Ex parte Collier, No. WR-91,748-01 (Filed and set for submission on November 25, 2020). The Court filed and set this case to determine whether the Applicant was denied his right to appeal.

Ex parte Victor, No. WR-84,934-07 (Filed and set for submission on October 26, 2022). The Court filed and set this case to determine whether a double jeopardy claim involving multiple-punishments arising from convictions under separate legal theories can satisfy the "innocence gateway" exception to the subsequent writ bar, as provided in Texas Code of Criminal Procedure Art. 11.07 § 4(a)(2).

Ex parte Thomas, No. WR-94,420-01 (Filed and set for submission on April 26, 2023). The Court filed and set this case to "Determine whether "knowing use" and "unknowing use" of false testimony claims should employ different standards of materiality or, in at least some cases, be susceptible to different standards of harm."

Ex parte Bodden, No. WR-90,536-02 (Filed and set for submission on May 3, 2023) The Court filed and set this fraudulent use or possession of identifying information case to determine "(1) the appropriate method for counting the number of items of identifying information possessed by a defendant under the 2013 version of Section 32.51 of the Texas Penal Code; (2) whether Applicant's conviction for a first degree felony violates due process; and (3) whether Applicant's plea of guilty was voluntarily entered."

XI. Conclusion and Contact Information

I hope this quick overview of the writ issues prisoners and practitioners will face when litigating post-conviction writs is informative and helpful. It covers the crucial legal points necessary to the Court's regular decision-making process. But as I hope its cursory treatment of vast oceans of substantive law shows, it is only the starting point for someone involved in 11.07 litigation. If you ever have any questions about habeas corpus, extraordinary writs, or other extraordinary writ matters, please do not hesitate to contact me.

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