LAUNCHING A COLLATERAL ATTACK ON AN UNDERLYING STATE COURT CONVICTION

Immigration Law For The Federal Criminal Defense Bar
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I. SCOPE OF PAPER

This paper discusses habeas remedies available in Texas courts to those convicted of non-capital offenses. So-called "pre-trial" writs of habeas corpus, which contest matters such as bail, extradition, etc., are not discussed. Writs which challenge the conviction or sentence in death penalty cases are not discussed. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071 (Vernon Supp. 2001). Finally, challenges to state court convictions in federal court pursuant to 28 U.S.C. § 2254 are not covered in this paper.

II. STATE HABEAS PRACTICE IN GENERAL

A. Definitions and Platitudes

1. What is habeas corpus?

a. "A writ of habeas corpus is an order from a judge commanding a party, who is alleged to be restraining the applicant in some way, to appear before the court with the object of alleged restraint and explain the reasons for the restraint." *Ex parte Hargett*, 819 S.W. 2d 866, 868 (Tex. Crim. App. 1991). "The purpose of the writ of habeas corpus is simple--it is a process utilized to determine the lawfulness of confinement." *Ex parte Adams*, 768 S.W. 2d 281, 287 (Tex. Crim. App. 1989).

b. "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 held in custody or under restraint." TEX. CODE CRIM. PROC. ANN. Ann. art. 11.01 (Vernon 1977).

c. "Because of the unique nature of the remedy, habeas corpus relief is underscored by elements of fairness and equity." *Ex parte Drake*, 883 S.W. 2d 213, 215 (Tex. Crim. App. 1994).

2. Sources of the writ in Texas law

a. Article V, § 5 of the Texas Constitution grants the Texas Court of Criminal Appeals "the power to issue the writ of habeas corpus . . . ."

b. "District Court judges shall have the power to issue writs necessary to enforce their jurisdiction." TEX. CONST. Art. V, § 8.

c. "The 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; *see also* TEX. CODE CRIM. PROC. ANN. art. 1.08 (Vernon 1977).

d. The laws the legislature was permitted to enact to insure the speediness and effectuality of habeas are primarily found in chapter 11 of the Texas Code of Criminal Procedure.

B. Representation by Counsel

1. Article 1.051

Pursuant to article 1.051 of the Texas Code of Criminal Procedure, "[a]n eligible indigent defendant" is entitled to the appointment of counsel to represent him in "a habeas corpus proceeding if the court concludes that the interests of justice require representation." TEX. CODE CRIM. PROC. ANN. art. 1.051(d)(3)(Vernon Supp. 2001).

2. Article 26.05(a)

Appointed counsel "shall be paid a reasonable attorney's fee . . . based on the time and labor required, the complexity of the case, and the experience and ability of the appointed counsel" TEX. CODE CRIM. PROC. ANN. art. 26.05(a)(Vernon Supp. 2001).

C. Investigation and Expenses

1. Reasonable expenses

"A counsel, other than an attorney with a public defender's office, appointed to represent a defendant in a criminal proceeding, *including a habeas corpus hearing*, shall be reimbursed for reasonable expenses incurred with prior court approval for purposes of investigation and expert testimony . . . ." TEX. CODE CRIM. PROC. ANN. art. 26.05(a)(Vernon Supp. 2001)(emphasis supplied).

2. *Practice Tips*

a. Expeditious investigation, factual and legal, is necessary:

(i) Seek appointment of a competent investigator.

(ii) Visit your client. Call the warden's office by noon the day before your visit. Bring photo identification and your bar card. Also bring with you anything that require your client's signature, such as releases.

(iii) Visit your client's family.

(iv) Read the entire trial record.

(v) Request permission from the prosecutor to view their file.

(vi) Talk to the trial and appellate attorneys and investigators. The client's files belong to the client. Get them.

(vii) Talk to counsel for co-defendants, if any, and, if permitted, to the co-defendants themselves.

(viii) Get every record of your client's that you can think of, including birth certificates, school records, medical records, military records, employment records, juvenile records, jail records, prison records, probation records, parole records, rap sheets, etc.

(ix) Interview witnesses who were called at the trial, or who should have been called by competent trial counsel, or who can otherwise provide useful information.

(x) Interview jurors who heard the trial.

(xi) Seek the appointment of all necessary experts.

(xii) Do the necessary legal research.

b. For some very helpful suggestions on the investigation necessary for the preparation of a writ in a death penalty case, see: Lynn B. Lamberty, *State Capital Writs: A View From The Applicant's Perspective*, *in* STATE BAR OF TEXAS, TEXAS CRIMINAL APPELLATE MANUAL K-31-39 (1996). Mr. Lamberty's "Investigative Source List," contained in Appendix I of his article, is particularly useful.

D. The Form of the Application

1. Article 11.14

a. Article 11.07 itself is silent on the form of the application.

b. Article 11.14 of the Texas Code of Criminal Procedure, captioned "Requisites of petition," provides the following:

> The petition must state substantially:
>
> 1. That the person for whose benefit the application is made is

> illegally restrained in his liberty, and by whom, naming both parties, if their names are known, or if unknown, designating and describing them;
>
> 2. When the party is confined or restrained by virtue of any writ, order or process, or under color of either, a copy shall be annexed to the petition, or it shall be stated that a copy cannot be obtained;
>
> 3. When the confinement or restraint is not by virtue of any writ, order or process, the petition may state only that the party is illegally confined or restrained in his liberty;
>
> 4. There must be a prayer in the petition for the writ of habeas corpus; and
>
> 5. Oath must be made that the allegations of the petition are true, according to the belief of the petitioner.

TEX. CODE CRIM. PROC. ANN. art. 11.14 (Vernon 1977).

2. *Verification*

a. The application must be verified. At one time, the oath had to be unqualified. That is, it was insufficient to merely swear that the allegations were true to the best of the petitioner's belief. That is no longer true. Now, the so-called "qualified" oath provided by the code of criminal procedure is sufficient. "Oath must be made that the allegations of the petition are true, according to the belief of the petitioner." TEX. CODE CRIM. PROC. ANN. art. 11.14(5)(Vernon 1977). "We . . . hold that a petition for writ of habeas corpus is not required to contain sworn allegations of fact or be made upon an unqualified oath, but rather the qualified oath of Art. 11.14(5) is required and legally sufficient for verification of a petition for writ of habeas corpus." *Johnson v. State*, 811 S.W. 2d 93, 97 (Tex. Crim. App. 1991).

b. Section 132.003 of the Civil Practice and Remedies Code, applicable to persons incarcerated in TDCJ allows for a "declaration," substantially in the following form:

> "I, (insert name and inmate identifying number from Texas Department of Corrections or county jail), being presently incarcerated in (insert Texas Department of Corrections unit name or county jail name) in _____, County, Texas, declare under penalty of perjury that the foregoing is true and correct. Executed on (date). (signature)"

TEX. CIVIL PRAC. & REM. CODE ANN. art. 132.003 (Vernon 1997). This is a proper verification

pursuant to article 11.14(5). *Johnson v. State*, 811 S.W. 2d 93, 97 (Tex. Crim. App. 1991).

c. In *Ex parte Burns*, 635 S.W. 2d 744, 745 (Tex. Crim. App. 1982), the state argued that the application was not properly verified because it was sworn to by counsel rather than applicant himself. The court of criminal appeals disagreed. "These applications were properly verified; there is no impropriety in the verification's being made by counsel--or any other person--rather than the applicant." The petition may be signed and presented by any other person. *Id*. The court noted that it would be unwise to require that the petition be sworn to by the applicant, since oftentimes this is the person who, because of the restraint complained of in the petition, would be least able to execute a sworn application. *Id*.

d. In *Ex parte Golden*, 991 S.W. 2d 851 (Tex. Crim. App. 1999), applicant attached a handwritten "sworn declaration" to his petition, but failed to sign it. "Since applicant has not signed his declaration, he has not satisfied the requisites of § 132.001, et seq. and has not made an oath as required by Article 11.14(5)." The court was then required to determine the proper disposition of this unsworn petition. Finding that article 11.14 merely set out procedural requirements for habeas petition, and was not jurisdictional, the court decided, "[u]nder the peculiar circumstances of this case" to address the merits of the case. *Id*. at 861-62.

3. A copy of the judgment should be attached

a. "When the party is confined or restrained by virtue of any writ, order or process, or under color of either, a copy shall be annexed to the petition, or it shall be stated that a copy cannot be obtained." TEX. CODE CRIM. PROC. ANN. art. 11.14(2)(Vernon 1977).

4. *Rule 73.1*

a. Effective January 1, 2001, the Texas Court of Criminal Appeals amended the Rules of Appellate Procedure, to add Rule 73.1, which provides as follows:

> (a) Prescribed Form. An application for post conviction habeas corpus relief in a felony case without a death penalty, under Code of Criminal Procedure article 11.07, must be made in the form prescribed by the Court of Criminal Appeals in an order entered for that purpose.
>
> (b) Availability of Form. The clerk of the convicting court will make the forms available to applicants on request, without charge.
>
> (c) Contents. The person making the application must provide all information required by the form. The application must specify all grounds for relief, and must set forth in summary fashion the facts

> supporting each ground. The application must not cite cases or other law. Legal citations and arguments may be made in a separate memorandum. The application must be typewritten or handwritten legibly.
>
> (d) Verification. The application must be verified by either:
>
> (1) oath made before a notary public or other officer authorized to administer oaths, or
>
> (2) if the person making the application is an inmate in the Institutional Division of the Department of Criminal Justice or in a county jail, an unsworn declaration in substantially the form required in Civil Practice and Remedies Code chapter 132.

TEX. R. APP. PROC. 73.1.

b. Indications from staff members at the court of criminal appeals are that the court is requiring strict adherence to Rule 73.1.

c. A copy of a letter from Richard E. Wetzel, Executive Administrator of the Texas Court of Criminal Appeals, to District Clerks around the State, followed by the rule and an application form, is attached to this paper.

E. Pleading Facts

1. Pleading and proving facts is essential

a. "In a postconviction collateral attack, the burden is on the applicant to allege and prove facts which, if true, entitle him to relief." *Ex parte Maldonado*, 688 S.W. 2d 114, 116 (Tex. Crim. App. 1985). In *Maldonado*, the applicant contended that he was confined in violation of due process. The only factual support for this legal conclusion was that: "Although he was indicted for aggravated robbery, the jury was improperly instructed for an offense other than aggravated robbery and the defendant was later adjudged [sic] guilty of aggravated robbery and then sentenced as such." *Id*. at 115-116. The court dismissed the application, finding that it "utterly fails to allege facts which, if true, entitle the applicant to collateral relief." *Id*. at 116.

> "[I]t is not sufficient that the petition allege the denial of a fair and impartial trial or due process of law, which are mere conclusions of law; neither is it adequate to allege the bare fact that the court's charge was somehow erroneous.

> Rather, the applicant must allege the reasons a given 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. Once alleged, the burden on the applicant to prove such a denial is heavy and cannot be carried by merely attaching a certified copy of the court's charge to the application for writ of habeas corpus, as was done here.

Id. *See also Ex parte McPherson*, 32 S.W. 3d 860, 861 (Tex. Crim. App. 2000)(applicant alleged that trial counsel was ineffective for failing to file certain motions but did not allege facts showing why these motions were needed in this case; applicant complained that trial counsel failed to object to inadmissible evidence, but stated only conclusions without any supporting facts).

b. The burden of alleging facts which entitle the applicant to relief cannot be overstated. John Jasuta, Chief Staff Attorney of the Texas Court of Criminal Appeals calls this "the first rule of habeas corpus." John G. Jasuta, *Post Conviction Remedies Pursuant To Article 11.07, V.A.C.C.P., in* STATE BAR OF TEXAS, TEXAS CRIMINAL APPELLATE MANUAL J-11 (1996). To this end, it is recommended that you attach to your application affidavits which support your factual assertions whenever possible:

> While it can be argued that cases . . . do not set a requirement of inclusion of proof within the application, the author believes these cases should be consulted and considered in deciding how much, if any, proof to offer. Those cases and the statute point out that the State need not even file an answer to join the issues. Since the Applicant's sworn allegations of fact are deemed insufficient even to overcome a presumption of regularity it is hard to believe that those allegations are sufficient to overcome the State's answer. I would advise Applicants to offer some proof by affidavit or otherwise demonstrating to the Court what you are capable of proving.

Id. at J-12.

c. Where a contemporaneous objection is required to preserve error in order to obtain collateral relief under article 11.07, the applicant must allege in his petition that this objection was made. And, he must allege facts which show in the context of his trial why the error he complains of was not harmless beyond a reasonable doubt. *Ex parte Dutchover*, 779 S.W. 2d 76, 77-78 (Tex. Crim. App. 1989); *accord Ex parte Barber*, 879 S.W. 2d 889, 891-92 (Tex. Crim. App. 1994)("applicant must plead and prove that the error complained of did in fact contribute to his conviction or punishment").

F. Burden of Proof

1. The burden of proof in a post-conviction habeas corpus proceeding is on

the petitioner. *Ex parte Alexander*, 598 S.W. 2d 308, 309 (Tex. Crim. App. 1980)(that neither petitioner nor his attorney remember whether an examining trial was held is not proof that it was not). Applicant must prove his factual allegations by a preponderance of the evidence. *Ex parte Adams*, 768 S.W. 2d 281, 287-88 (Tex. Crim. App. 1989).

2. In addition, the petitioner must show harm. "That is, he must prove by a preponderance of the evidence that the error contributed to his conviction or punishment." *Ex parte Williams*, 2001 WL 356290 **1 (Tex. Crim. App. 2001)(petitioner failed to show how he was harmed where trial court granted probation even though a person so convicted was ineligible for probation).

3. "In a collateral attack . . . where the burden is upon the applicant to establish the illegality of his restraint, we deem it appropriate to require an applicant to plead and prove facts showing the error did in fact contribute to his conviction or punishment. *Ex parte Dutchover*, 779 S.W.2d 76, 78 (Tex. Crim. App. 1989); *accord Ex parte Fierro*, 934 S.W. 2d 370, 375 (Tex. Crim. App. 1996), *cert. denied*, 521 U.S. 1122 (1997)(state's knowing use of perjured testimony harmless).

G. Discovery

1. The habeas statute makes no provision for discovery prior to filing the petition. *Ex parte Patrick*, 977 S.W. 2d 588 (Tex. Crim. App. 1998), was a death penalty case in which the defendant complained that he had been denied the effective assistance of counsel because the habeas judge would not order discovery of the state's file. Judge Baird, in a concurring opinion, noted that the prudent course would be for the state to allow the defense access to its files. Exculpatory information, of course, must be disclosed. "And this disclosure may be accomplished by court order, even though the statute contains no express provisions controlling post-conviction discovery." *Id*. at 589.

H. Timeliness

1. Too soon

a. An application for writ of habeas corpus is not ripe if filed during the pendency of a direct appeal, before the mandate of the appellate court issues. *Ex parte Johnson*, 12 S.W.3d 472, 473 (Tex. Crim. App. 2000).

2. Too late

a. In federal court, "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1). There is no such strict time limit under Texas law for filing in state court.

b. The more elusive doctrine of "laches" does apply, however. *See Ex parte Carrio*, 992 S.W. 2d 486, 488 (Tex. Crim. App. 1999)("We agree with the State that the doctrine of laches is a theory which we may, and should, employ in our determination of whether to grant relief in any given 11.07 case"); *see also Ex parte Carrio*, 9 S.W. 3d 163, 163 (Tex. Crim. App. 1999)(adopting trial court's finding that denial of relief is justified based on 14 year delay in filing application).

c. *Ex parte Galvan*, 770 S.W. 2d 822 (Tex. Crim. App. 1989), was decided long before article 11.07 was amended. Even so, it has some interesting language. There applicant waited six years after his conviction to complain in his writ that he had been denied the right to appeal.

> This Court has consistently and properly held that we have no desire to impose upon defendants the requirement that claims for relief be asserted within a specified period of time. *Such a rule would be arbitrary and probably unconstitutional*.

Id. at 824(emphasis supplied)(citations omitted).

I. No Substitute for Direct Appeal

1. The general rule is that the court will not consider a claim that has been previously rejected on direct appeal. "However, this doctrine should not be applied where direct appeal cannot be expected to provide an adequate record to evaluate the claim in question, and the claim might be substantiated through additional evidence gathering in a habeas corpus proceeding." *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997). "Because the direct appeal record contained insufficient evidence to evaluate the ineffective assistance issue, we hold that the rejection of his claim on direct appeal does not bar relitigation of his claim on habeas corpus to the extent that applicant seeks to gather and introduce additional evidence not contained in the direct appeal record." *Id*.

2. "Although habeas corpus is traditionally unavailable to review matters which were raised and rejected on appeal, claims involving jurisdictional defects or invoking fundamental constitutional rights may be raised collaterally." *Ex parte Schuessler*, 846 S.W.2d 850, 852 n.6 (Tex. Crim. App. 1993).

3. Because applicant's allegation implicated his federal constitutional rights to be free from cruel and unusual punishment, it "is cognizable via a habeas corpus application despite applicant's failure to raise the complaint on direct appeal." *Ex parte Goodman*, 816 S.W.2d 383, 385 (Tex. Crim. App. 1991).

J. Illustrative Formats

For suggestions on and illustrations of the format of an application, *see* Lynn B. Lamberty, *State Capital Writs: A View From The Applicant's Perspective*, *in* STATE BAR OF TEXAS, TEXAS CRIMINAL APPELLATE MANUAL K-40-43 & Appendix M (1996); 7A MICHAEL J. MCCORMICK, THOMAS D. BLACKWELL & BETTY BLACKWELL, TEXAS CRIMINAL FORMS AND TRIAL MANUAL § 86.29 (Texas Practice 1995).

III. COLLATERAL ATTACKS ON FINAL FELONY CONVICTIONS: ARTICLE 11.07

A. Article 11.07, § 1: Final Felony Convictions

1. Text: Article 11.07, §1

"This article establishes the procedures for an application for writ of habeas corpus in which the applicant seeks relief from a felony judgment imposing a penalty other than death." TEX. CODE CRIM. PROC. ANN. art. 11.07, § 1 (Vernon Supp. 2001).

2. The 1995 amendments do not narrow cognizability

a. The legislature enacted extensive changes to article 11.07 in 1995. The court of criminal appeals has held that the legislature did not intend by these amendments to narrow the class of cognizable claims. Section one is simply meant to make clear that article 11.07 applies in non-death penalty cases; article 11.071 applies in death penalty cases. *Ex parte Whiteside*, 12 S.W. 3d 819, 822 n.1 (Tex. Crim. App. 2000); *accord Ex parte Geiken*, 28 S.W.3d 553, 556 (Tex. Crim. App. 2000)(court may consider claims alleging the illegality of continued confinement even though they do not challenge the validity of the judgment).

b. "Article 11.07 only applies to final felony convictions." The court has no jurisdiction to consider applications for writ of habeas corpus where a direct appeal is pending. *Ex parte Garcia*, 988 S.W. 2d 240, 241 (Tex. Crim. App. 1999);

B. Article 11.07, § 2: Before Conviction

1. Text: Article 11.07, §2

"After indictment found in any felony case, other than a case in which the death penalty is imposed, and before conviction, the writ must be made returnable in the county where the offense has been committed."

2. Why is this section in article 11.07?

Section one of article 11.07 expressly states that that article is concerned with cases where the applicant complains of a "felony judgment." As discussed above, case law

makes it clear that article 11.07 only governs where there has been a "final" felony conviction. There would seem, therefore, to be no logical explanation for § 2, which makes reference to felony cases, "after indictment," but "before conviction."

C. Article 11.07, § 3: Filing the Application

1. Text: Art. 11.07 § 3

(a) After final conviction in any felony case, the writ must be made returnable to the Court of Criminal Appeals of Texas at Austin, Texas.

(b) An application for writ of habeas corpus filed after final conviction in a felony case, other than a case in which the death penalty is imposed, must be filed with the clerk of the court in which the conviction being challenged was obtained, and the clerk shall assign the application to that court. When the application is received by that court, a writ of habeas corpus, returnable to the Court of Criminal Appeals, shall issue by operation of law. The clerk of that court shall make appropriate notation thereof, assign to the case a file number (ancillary to that of the conviction being challenged), and forward a copy of the application by certified mail, return receipt requested, or by personal service to the attorney representing the state in that court, who shall answer the application not later than the 15th day after the date the copy of the application is received. Matters alleged in the application not admitted by the state are deemed denied.

(c) Within 20 days of the expiration of the time in which the state is allowed to answer, it shall be the duty of the convicting court to decide whether there are controverted, previously unresolved facts material to the legality of the applicant's confinement. Confinement means confinement for any offense or any collateral consequence resulting from the conviction that is the basis of the instant habeas corpus. If the convicting court decides that there are no such issues, the clerk shall immediately transmit to the Court of Criminal Appeals a copy of the application , any answers filed, and a certificate reciting the date upon which that finding was made. Failure of the court to act within the allowed 20 days shall constitute such a finding.

(d) If the convicting court decides that there are controverted, previously unresolved facts which are material to the legality of the

> applicant's confinement, it shall enter an order within 20 days of the expiration of the time allowed for the state to reply, designating the issues of fact to be resolved. To resolve those issues the court may order affidavits, depositions, interrogatories, and hearings, as well as using personal recollection. Also, the convicting court may appoint an attorney or a magistrate to hold a hearing and make findings of fact. An attorney so appointed shall be compensated as provided in Article 26.05 of this code. It shall be the duty of the reporter who is designated to transcribe a hearing held pursuant to this article to prepare a transcript within 15 days of its conclusion. After the convicting court makes findings of fact or approves the findings of the person designated to make them, the clerk of the convicting court shall immediately transmit to the Court of Criminal Appeals, under one cover, the application, any answers filed, any motions filed, transcripts of all depositions and hearings, any affidavits, and any other matters such as official records used by the court in resolving issues of fact.

2. Time limits

If the trial court determines that a petition contains allegations of controverted, previously unresolved facts material to illegal confinement, it must enter an order withing 20 days after expiration of the state's time to reply designating the issues of fact to be resolved. "The statute does not supply authority to the trial court to extend the time limitations imposed by the statute, other than by timely entry of an order designating issues to be resolved." If there is no such order, the trial court has the duty to immediately transmit to the court of criminal appeals the record from the application, "deeming the trial court's inaction a finding that no issues of fact require further resolution." *Martin v. Hamlin*, 25 S.W.3d 718, 719 (Tex. Crim. App. 2000).

3. Entitlement to a hearing

In *Ex parte Patterson*, 993 S.W. 2d 114 (Tex. Crim. App. 1999), the applicant alleged that trial counsel was ineffective because he failed to investigate the invalidity of prior convictions alleged for enhancement. The trial court resolved the matter based on an affidavit of trial counsel but the court of criminal appeals held that its findings were not supported by the record. "Because applicant has alleged facts that, if true, might entitle him to relief, we remand this matter to the trial court for resolution of the factual issues presented in accordance with Article 11.07, § 3(d) of the Code of Criminal Procedure. The trial court should hold a hearing to determine what trial counsel told applicant concerning: potential challenges, if any, trial counsel believed applicant could make against the prior convictions after having reviewed them; the likelihood of the trial court setting them aside on those grounds; applicant's ability to appeal the trial court's refusal to set the prior convictions aside; and the consequences of applicant's failure to make these challenges at trial. If the trial court determines trial counsel did advise applicant

of the matters it should also determine why applicant chose not to pursue these potential challenges." *Id*. at 115.

4. "Confinement"

a. After completing his period of probation, and having the indictment dismissed pursuant to the code of criminal procedure, the applicant in *Ex parte Renier,* 734 S.W. 2d 349, 353-54 (Tex. Crim. App. 1987), filed a writ alleging that the conviction was void because of a fundamentally defective indictment. The court of criminal appeals dismissed the application for two reasons: the conviction was not final, and applicant was not confined. Relief under article 11.07 is only available to those who are confined. An applicant who is not actually confined, but is merely suffering from the "restraint" of collateral consequences caused by a void conviction may not seek relief under article 11.07, but may seek it under other statutory and constitutional procedures available in Texas. *See* TEX. CONST. Art. V, § 8. *Id*. at 353-54.

b. Applicant was confined, as required by article 11.07, because he was subject to conditions of mandatory supervision, and by the collateral consequences of a final conviction, rather than a sentence of probation, which had been served out. *Ex parte Fulce*, 993 S.W. 2d 660, 661 (Tex. Crim. App. 1999).

c. In *Ex parte Hargett*, 819 S.W. 2d 866 (Tex. Crim. App. 1991), applicant complained that he was restrained because his conviction impaired his right to military retirement benefits. Although applicant could not obtain relief under article 11.07, because he was not confined, the district court did have "plenary power" to grant him relief under Article V, § 8 of the Texas Constitution. Under *article 11.01*, the writ of habeas corpus is the remedy for anyone complaining of restraint of liberty. Under *article 11.22*, "restraint" is defined as "the kind of control which one person exercises over another, not to confine him within certain limits, but to subject him to the general authority and power of the person claiming such right." Article V, § 8 of the Texas Constitution, then "has much broader availability to applicants than a writ filed pursuant to Art. 11.07. Even though an applicant may not be confined, TEX. CONST., Art. V, § 8 provides an avenue by which collateral legal consequences of a conviction may be challenged." *Id*. at 867.

d. At the time he filed his application, applicant was actually confined in TDC. Before the application could be heard, he was released to mandatory supervision. The court of criminal appeals held that it did have jurisdiction. Under article 11.21, confinement is equated not only to physical detention, but also to "any coercive measures by threats, menaces or the fear of injury, whereby one person exercises a control over the person of another, and detains him within certain limits." And, "the determination of whether one is confined is to be made on the date the application for writ of habeas corpus is filed." *Ex parte Canada*, 754 S.W. 2d 660, 663 (Tex. Crim. App. 1988).

e. An applicant released on parole is confined so as to give the court jurisdiction under article 11.07. *Ex parte Elliott*, 746 S.W. 2d 762, 763 (Tex. Crim. App. 1988).

f. Are *Renier* and its progeny still good law after the 1995 amendments? Pursuant to article 11.07, § 3, "Confinement means confinement for any offense or any collateral consequence resulting from the conviction that is the basis of the instant habeas corpus."

D. Article 11.07, § 4: Subsequent Application

1. *Text: Art. 11.07 §4*

> (a) If a subsequent application for writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> > (1) the current claims and issues 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; or
> >
> > (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.
>
> (b) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis 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 that date.
>
> (c) For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

2. What is a "final disposition?

a. "Given the Legislature's reliance upon federal abuse of the writ doctrine and their intent to give and limit applicants to 'one bite of the apple,' we believe that a 'final disposition' of an initial writ must entail a disposition relating to the merits of all the claims raised. Dispositions relating to the merits should be labeled 'denials' while dispositions unrelated to the merits should be labeled 'dismissals,' but, regardless of the label given to a previous disposition, we will look to the substance of that disposition to determine whether a subsequent writ is barred by § 4. A disposition is related to the merits if it decides the merits or makes a determination that the merits of the applicant's claims can never be decided." *Ex parte Torres*, 943 S.W.2d 469, 474 (Tex. Crim. App. 1997)(where court disposed of some of applicant's claims unrelated to their merits, there was no final disposition, and a subsequent application was not barred).

b. In *Ex parte Thomas*, 953 S.W. 2d 286 (Tex. Crim. App. 1997), the court had denied relief in an earlier application because, at the time, there was a direct appeal pending in the case, making it not yet ripe for habeas review. "Because we disposed of applicant's claim for reasons unrelated to the merits and never addressed the merits of the grounds raised therein, there was no final disposition of applicant's initial writ application, and § 4 does not bar this Court from addressing the merits of the instant application." *Id*. at 289.

3. What is a challenge to the "same conviction"?

a. In *Ex parte Evans*, 964 S.W. 2d 643 (Tex. Crim. App. 1997), petitioner had previously filed a petition complaining of various matters that had occurred in his parole hearing, and the court of criminal appeals was required to consider whether a subsequent writ was barred because he had filed "an initial application challenging the same conviction." The court found that this was not a challenge to the same conviction. "[T]he procedural bar of § 4 is limited to instances in which the initial application raises claims regarding the validity of the prosecution or the judgment of guilt. It does not apply to claims regarding other matters, such as parole revocations." *Id*. at 647. *But cf., Ex parte Whiteside*, 12 S.W. 3d 819, 821 (Tex. Crim. App. 2000)(where the initial application does challenge the conviction, a subsequent application is barred even if it does not).

b. In *Ex parte McPherson*, 32 S.W. 3d 860, 861 (Tex. Crim. App. 2000), the court considered petitioner's second application where the initial application sought an out-of time appeal and was not a challenge to the conviction.

4. Sufficient specific facts

a. "Section 4 plainly requires that the application contain facts which establish an exception, not merely a recitation of the statutory language. Since the present application contains no such facts this Court has no power to consider the allegations or to grant any relief on the basis of the application." *Ex parte Sowell*, 956 S.W.2d 39, 40 (Tex. Crim. App. 1997).

5. What is "reasonable diligence"?

a. In *Ex parte Lemke*, 13 S.W. 3d 791 (Tex. Crim. App. 2000), the court permitted a subsequent application which complained that trial counsel had not conveyed a plea bargain to applicant. "Given that applicant had previously asked his attorney about the existence of plea bargain offers, was told that none were made, and applicant otherwise did not doubt his attorney's representations, applicant satisfied section 4's requirement of 'reasonable diligence.'" *Id*. at 794-95.

6. Could the claim have been reasonably formulated?

a. In *Ex parte Fontenot*, 3 S.W. 3d 32, 34-35 (Tex. Crim. App. 1999), the court dismissed applicant's petition contending that he was entitled to an out-of-time petition for discretionary review due to his counsel's failure to inform him of his right to seek review *pro se*, because this complaint "could have been reasonably formulated under the Court's prior decisions . . . and the revised language of Article 26.04(a)."

E. Article 11.07, § 5: The Court of Criminal Appeals

1. Text: Article 11.07, §5

> The Court of Criminal Appeals may deny relief upon the findings and conclusions of the hearing judge without docketing the cause, or may direct that the cause be docketed and heard as though originally presented to said court or as an appeal. Upon reviewing the record the court shall enter its judgment remanding the applicant to custody or ordering his release, as the law and facts may justify. The mandate of the court shall issue to the court issuing the writ, as in other criminal cases. After conviction the procedure outlined in this Act shall be exclusive and any other proceeding shall be void and of no force and effect in discharging the prisoner.

2. Trial court's findings are not binding

a. The trial court has no authority to order relief "in a post-conviction habeas corpus case, as only the Texas Court of Criminal Appeals has such authority over a final felony conviction." *Ex parte Williams*, 561 S.W.2d 1, 2 (Tex. Crim. App. 1978).

b. The court of criminal appeals is "not bound by the trial judge's conclusions . . . if not supported by the record." *Ex parte McKay*, 819 S.W. 2d 478, 480 (Tex. Crim. App. 1990); *Ex parte Adams*, 768 S.W. 2d 281, 288 (Tex. Crim. App. 1989). "[A]lthough this Court has the ultimate power to decide matters of fact in habeas proceedings, generally if the trial court's findings are supported by the record, they should be accepted by this Court." *Ex parte Brandley*, 781 S.W.. 2d 886, 887-888 (Tex. Crim. App. 1989).

F. Article 11.07, § 6: Seven Days Notice

1. Text: Article 11.07, §6

> Upon any hearing by a district judge by virtue of this Act, the attorney for applicant, and the state, shall be given at least seven full days' notice before such hearing is held.

G. Article 11.07, § 7 Service on Applicant

1. Text: Article 11.07, §7

> When the attorney for the state 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 of the court shall mail or deliver to the applicant a copy of the answer, motion, pleading, or order.

IV. COLLATERAL ATTACKS ON NON-FINAL CONVICTIONS

As noted, article 11.07 does not apply to everyone. To come within its terms, an applicant must have been convicted of a felony; must have been sent to prison; and must be confined at the time the application is filed. Other habeas remedies are available to persons convicted of misdemeanors, or persons who received probation or deferred adjudication, or persons who are not confined.

A. Felonies

1. In *Ex parte McCullough*, 966 S.W.2d 529, 531 (Tex. Crim. App. 1998), the trial court dismissed the petition, finding that it had no jurisdiction because applicant was on deferred adjudication. The court of criminal appeals reversed. "Challenges to final felony convictions in which the death penalty is not assessed must be made under Article 11.07, V.A.C.C.P. Other claims of illegal restraint may be brought under Tex. Const. Art. V, § 8. The denial of relief may be appealed." [citations omitted]

2. In *Ex parte Twyman*, 716 S.W. 2d 951, (Tex. Crim. App. 1986), applicant filed his application after receiving 10 years probation. "Because appellant had been granted probation, his conviction was not final. In this position, appellant had a remedy available to him through habeas relief under Articles 11.05, 11.08, and 11.23, V.A.C.C.P. Appellant was entitled to challenge any unlawful restraint in the trial court where he was convicted. Article V, Sec. 8, Vernon's Ann.Tex.Const. If a trial court denied habeas relief to an applicant after hearing, the applicant's appropriate remedy would be to take an appeal from this denial to the Court of Appeals." *Id*. at 952(case citations omitted); *see also* 863 S.W.2d 476, 486 (Tex. Crim. App. 1993).

B. Misdemeanors

1. " Both county and district courts have original jurisdiction in habeas corpus proceedings when attacks are made upon the validity of misdemeanor convictions; *see* Article 5, Section 8 of the Constitution of Texas; Articles 11.05 and 11.09, V.A.C.C.P., and petitioners have a right of appeal from an order denying relief." *Ex parte Crosley*, 548 S.W.2d 409, 409 (Tex. Crim. App. 1977); *accord Ex parte Renier*, 734 S.W.2d 349, 353 (Tex. Crim. App. 1987).

2. "A judgment of conviction for a misdemeanor offense may have detrimental collateral consequences whether or not probation is completed without a hitch or jail time is actually served. If a misdemeanor judgment is void, and its existence may have

detrimental collateral consequences in some future proceeding, it may be collaterally attacked, whether or not a term of probation was successfully served out." *Tatum v. State*, 846 S.W.2d 324, 327 (Tex. Crim. App. 1993).

C. No Confinement

1. Those who are restrained from the collateral consequences of a conviction, but who are not "confined," may preserve their constitutionally guaranteed right to habeas relief by invoking Article V, §8 of the Texas Constitution, and articles 11.05 and 11.09 of the Texas Constitution. *Ex parte Renier*, 734 S.W.2d 349, 353 (Tex. Crim. App. 1987).

D. Procedure

a. "It is well settled that no appeal can be had from a refusal to issue or grant a writ of habeas corpus even after a hearing. However, the portion of that statement of law which we have emphasized can be confusing so, we will clarify it. In the cases which rely on that statement of law, the 'hearing' which is being referred to is one which a court might hold in order to determine whether there is sufficient cause for the writ to be issued or whether the merits of the claim should be addressed. That type of hearing is not the same as one which is held to ultimately resolve the merits of an applicant's claim. When a hearing is held on the merits of an applicant's claim and the court subsequently rules on the merits of that claim, the losing party may appeal." *Ex parte Hargett*, 819 S.W. 2d 866, 868 (Tex. Crim. App. 1991).

b. "In a case where a judge refuses to issue the requested writ of habeas corpus or denies an applicant the requested hearing on the merits of his claim, an applicant's remedies are limited. Some remedies available to an applicant in that situation are to present the application to another district judge having jurisdiction, or under proper circumstances, to pursue a writ of mandamus. Nevertheless, appeal can be had from a district court order denying an applicant relief on the merits of his claim." *Ex parte Hargett*, 819 S.W. 2d 866, 868 (Tex. Crim. App. 1991).

V. COGNIZABLE ISSUES IN STATE COURT IN GENERAL

A. What Is Cognizability?

1. A claim that can be a proper ground for relief on habeas corpus is said to be "cognizable." *Ex parte McCullough*, 966 S.W. 2d 529, 531 (Tex. Crim. App. 1998).

2. "Traditionally, habeas corpus is available only to review jurisdictional defects . . . or denials of fundamental or constitutional rights." *Ex parte Banks*, 769 S.W. 2d 539, 540 (Tex. Crim. App. 1989)(the improper exclusion of jurors on statutory grounds does not involve jurisdictional or fundamental constitutional considerations, and will therefore not be considered for the first time in an application for writ of habeas corpus); *see Ex parte Williams*,

2001 WL 356290 *1 (Tex. Crim. App. 2001)(to present cognizable claim, applicant "must show a jurisdictional defect in the convicting court or the denial of a fundamental or constitutional right").

3. Those seeking relief under article 11.07 "must request a change of either the fact or the length of confinement." *Ex parte Lockett*, 956 S.W.2d 41, 42 (Tex. Crim. App. 1997)(dismissing writ where applicant was seeking to have the Comptroller barred from collecting his drug tax).

4. "[A] writ of habeas corpus should not be used to litigate matters which should have been raised on direct appeal." *Ex parte Goodman*, 816 S.W. 2d 383, 385 (Tex. Crim. App. 1991).

5. "Although habeas corpus should generally not be used to re-litigate matters which were addressed on appeal . . . a previously litigated issue is subject to collateral attack where our prior judgment is subsequently rendered void or where we have decided to apply relief retroactively after a subsequent change in the law." *Ex parte Drake*, 883 S.W. 2d 213, 215 (Tex. Crim. App. 1994).

6. Do not confuse cognizability with jurisdiction. "Certain claims may not be cognizable on habeas corpus, i.e., they may not be proper grounds for habeas corpus relief. However, if the district court denies relief, regardless of the underlying claims for the relief sought, the applicant may appeal." *Ex parte McCullough*, 966 S.W. 2d 529, 531 (Tex. Crim. App. 1998).

7. "The 1995 amendments to the Code of Criminal Procedure did not narrow the class of claims cognizable on an Article 11.07 post conviction writ of habeas corpus." *Ex parte Geiken*, 28 S.W.3d 553, 556 (Tex. Crim. App. 2000)(court may consider claims alleging the illegality of continued confinement even though they do not challenge the validity of the judgment).

B. State Constitutional Claims

1. Claims premised on the Texas Constitution which are subject to a harm analysis are at best voidable, and are therefore not cognizable in a post-conviction writ of habeas corpus. *Ex parte Dutchover*, 779 S.W. 2d 76, 77 (Tex. Crim. App. 1989)(erroneous admission of videotape in violation of Article I, § 10 of the Texas Constitution); *accord Ex parte McKay*, 819 S.W. 2d 478, 481 (Tex. Crim. App. 1990)("although a habeas corpus application may be predicated on violations of state constitutional rights, the claim may not be cognizable via habeas corpus when the alleged error, if committed, is nevertheless subject to a harm analysis").

2. In *Ex parte McKay*, 819 S.W. 2d 478 (Tex. Crim. App. 1990), the court that applicant's claim was cognizable even though it was based on the state constitution. "The

trial judge committed error in denying the requested voir dire questioning; the error was of a Texas constitutional dimension; this is a capital murder case where the death penalty was imposed; and the error went to the heart of the decision making process used in arriving at the death penalty; thus, in this instance, this type of error is cognizable by writ of habeas corpus." *Id*. at 485.

VI. SOME COGNIZABLE ISSUES: A NON-EXHAUSTIVE LIST

A. Effective Assistance of Counsel

1. *Strickland v. Washington: Performance and prejudice*

a. *Strickland v. Washington*, 466 U.S. 668 (1984), establishes the two-prong test for determining ineffectiveness of counsel.

> 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 a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687.

b. At issue in *Strickland* was the duty to investigate potentially mitigating evidence at the sentencing phase of a capital trial. *Id.* at 690. Specifically, counsel failed to seek out character witnesses or psychiatric evidence. Employing the newly fashioned two-prong standard, the Court rejected Washington's contention as "a double failure." *Id*. at 700. The Court found that counsel made a strategic choice to argue the mitigating circumstance of extreme emotional disturbance and to rely on defendant's acceptance of responsibility. "Counsel's strategy choice was well within the range of professionally reasonable judgments, and the decision not to seek more character or psychological evidence than was already in hand was likewise reasonable." *Id*. at 699. Furthermore, the Court found that there was no reasonable probability that the evidence that Washington claimed his counsel should have presented would have altered the sentencing decision. *Id*. at 700. *See also Burger v. Kemp*, 483 U.S. 776, 794 (1987)("counsel's decision not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional justification"); *Darden v. Wainwright*, 447 U.S. 168, 186-187 (1986)(failure to present any mitigating evidence was sound strategy).

c. *Patrick v. State*, 906 S.W. 2d 481 (Tex. Crim. App. 1995), provides some insight into just how difficult it is to make out such a claim under *Strickland*. "A strategic choice made after thorough investigation is practically unassailable. A strategic choice made after less than thorough investigation is reasonable to the extent reasonable professional judgment supports the limitation." *Id*. at 495.

2. *Some successful challenges*

a. Inadequate investigation. *Ex parte Hill*, 863 S.W. 2d 488, 489 (Tex. Crim. App. 1993); *Ex parte Welborn*, 785 S.W. 2d 391, 393 (Tex. Crim. App. 1990); *Ex parte Walker*, 777 S.W. 2d 427, 431 (Tex. Crim. App. 1989); *Butler v. State*, 716 S.W. 2d 48, 54 (Tex. Crim. App. 1986); *Jackson v. State*, 857 S.W. 2d 678, 683 (Tex. App.--Houston [14th Dist.] 1993, no pet.); *Haynes v. State*, 790 S.W. 2d 824, 827 (Tex. App.--Austin 1990, no pet.); *Doherty v. State*, 781 S.W. 2d 439, 442 (Tex. App.--Houston [1st Dist.] 1989, no pet.).

b. The failure to object to indictment, jury charge and jury argument. *Ex parte Drinkert*, 821 S.W. 2d 953, 956 (Tex. Crim. App. 1991).

c. The failure to timely inform defendant of a plea bargain. *Randle v. State*, 847 S.W. 2d 576, 580-81 (Tex. Crim. App. 1993); *accord Ex parte Lemke*, 13 S.W. 3d 791, 796-97 (Tex. Crim. App. 2000).

d. The failure to file pre-trial motions. *Ex parte Walker*, 777 S.W. 2d 427, 431 (Tex. Crim. App. 1989).

e. Inadequate voir dire. *Miles v. State*, 644 S.W. 2d 23, 24 (Tex. App.--El Paso 1982, no pet.); *see also Ex parte Welborn*, 785 S.W. 2d 391, 392-394 (Tex. Crim. App. 1990)(failure to voir dire on the law of parties); *Winn v. State*, 871 S.W. 2d 756, 763 (Tex. App.--Corpus Christi 1993, no pet.); *San Roman v. State*, 681 S.W. 2d 872, 874 (Tex. App.--El Paso 1984, pet. ref'd).

f. The failure to preserve error concerning the denial of a challenge for cause. *Winn v. State*, 871 S.W. 2d 756, 762-63 (Tex. App.--Corpus Christi 1993, no pet.).

g. The failure to object to inadmissible oral statements. *Mitchell v. State*, 762 S.W. 2d 916, 920 (Tex. App.--San Antonio 1988, pet. ref'd); *Boyington v. State*, 738 S.W. 2d 704, 707-708 (Tex. App.--Houston [1st Dist.] 1985, no pet.); *Sanders v. State*, 715 S.W. 2d 771, 774-776 (Tex. App.--Tyler 1986, no pet.).

h. The failure to secure expert testimony regarding physical evidence. *Winn v. State*, 871 S.W. 2d 756, 761 (Tex. App.--Corpus Christi 1993, no pet.).

i. The failure to object to inadmissible extraneous offenses. *Jackson v. State*, 857 S.W. 2d 678, 683 (Tex. App.--Houston [14th Dist.] 1993, no pet.); *Wenzy v. State*, 855 S.W. 2d 52, 58 (Tex. App.--Houston [14th Dist.] 1993, pet. ref'd); *Riascos v. State*, 792 S.W. 2d 754, 758 (Tex. App.--Houston [14th Dist.] 1990, pet. ref'd); *Doles v. State*, 786 S.W. 2d 741, 746 (Tex App.--Tyler 1989, no pet.).

j. The elicitation, by the defense, of inadmissible and prejudicial extraneous offenses. *Ex parte Walker*, 777 S.W. 2d 427, 432 (Tex. Crim. App. 1989); *Brown v. State,* 974 S.W. 2d 289, 293-94 (Tex. App.--San Antonio 1998, pet. ref'd); *Green v. State*, 899

S.W. 2d 245, 249 (Tex. App.--San Antonio 1995, no pet.); *Montez v. State*, 824 S.W. 2d 308, 310 (Tex. App.--San Antonio 1992, no pet.); *Strickland v. State*, 747 S.W. 2d 59, 61 (Tex. App.--Texarkana 1988, no pet.); *Hutchinson v. State*, 663 S.W. 2d 610, 614 (Tex. App.--Houston [1st Dist.] 1983, pet. ref'd).

k. The failure to exclude an inadmissible prior conviction. *Ex parte Menchaca*, 854 S.W. 2d 128, 133 (Tex. Crim. App. 1993).

l. The failure to investigate the constitutional validity of a 1959 Louisiana conviction in which applicant had been indigent and unrepresented by counsel. *Ex parte Jordan*, 879 S.W. 2d 61, 62 (Tex. Crim. App. 1994); *see Ex parte Langley*, 833 S.W. 2d 141, 143 (Tex. Crim. App. 1992)(failure to investigate availability of non-final conviction); *Ex parte Felton*, 815 S.W. 2d 733, 734-35 (Tex. Crim. App. 1991)(failure to investigate prior conviction with invalid jury waiver); *Ex parte Pool*, 738 S.W. 2d 285, 285 (Tex. Crim. App. 1987)(failure to investigate validity of prior convictions used for enhancement).

m. The failure to object to improper comments on post-arrest silence. *Brown v. State,* 974 S.W. 2d 289, 294 (Tex. App.--San Antonio 1998, pet. ref'd); *Thomas v. State*, 812 S.W. 2d 346, 350 (Tex. App.--Dallas 1991, pet. ref'd); *San Roman v. State*, 681 S.W. 2d 872, 875 (Tex. App.--El Paso 1984, pet. ref'd); *see also Winn v. State*, 871 S.W. 2d 756, 763 (Tex. App.--Corpus Christi 1993, no pet.)(failure to object to refusal to consent to search).

n. The failure to object, on the record, to witnesses who were improperly allowed to give their opinion about the complainant's truthfulness. *Garcia v. State*, 712 S.W. 2d 249, 253 (Tex. App.--El Paso 1986, pet. ref'd).

o. The failure to request a jury instruction concerning the statutory defense of necessity where that defense was raised by the evidence. *Vasquez v. State*, 830 S.W. 2d 948, 951 (Tex. Crim. App. 1992); *see Green v. State*, 899 S.W. 2d 245, 248 (Tex. App.--San Antonio 1995, no pet.)(counsel ineffective for failure to request instruction on the only defense applicable in his case); *Watrous v. State*, 842 S.W. 2d 792, 794 (Tex. App.--El Paso 1992, no pet.)(counsel was ineffective for failure to request medical purpose defense in aggravated sexual assault case); *Banks v. State*, 819 S.W. 2d 676, 682 (Tex. App.--San Antonio 1991, pet. ref'd)(failure to object to jury charge which improperly instructed the jury that injury to a child was not a result oriented crime).

p. The failure to request an instruction on accomplice witness testimony where this was raised by the evidence. *Ex parte Zepeda*, 819 S.W. 2d 874, 877 (Tex. Crim. App. 1990).

q. The failure to request an instruction that the jury disregard evidence it believed to have been seized in violation of article 38.23. *Sanchez v. State*, 931 S.W. 2d 331, 336 (Tex. App.--San Antonio 1996, pet. ref'd).

r. The failure to file an application for probation based on erroneous belief that applicant was ineligible due to prior deferred adjudication. *Ex parte Welch*, 981 S.W. 2d 183, 185 (Tex. Crim. App. 1998)("to be reasonably likely to render effective assistance to his client, a lawyer must be sufficiently abreast of developments in criminal law aspects implicated in the case at hand").

s. The failure to insure that the court of appeals had before it a videotape of the crime which was essential to its sufficiency review. *Ex parte Coy*, 909 S.W. 2d 927, 928 (Tex. Crim. App. 1995).

t. *Ex parte Guzmon*, 730 S.W. 2d 724 (Tex. Crim. App. 1987), was a death penalty case. In its original decision, the court conducted a detailed review of the performance of counsel and the resulting prejudice to defendant, as required by *Strickland*. Counsel was condemned as deficient for referring to his client as a "wetback," for improperly using an interpreter, for failing to communicate with his client, for insufficiently preparing his case at the punishment phase, and for adducing harmful evidence at the punishment phase. *Id.* at 733-34. The court also found that, absent this deficient performance of counsel, there was a reasonable probability that the defendant would have received a life sentence. Significant was that the state's evidence as to future dangerousness was extremely weak. *Id*. at 735. Accordingly, initially, the court granted defendant relief on his application for writ of habeas corpus and remanded for a new trial. The state then filed a motion for rehearing, and during the pendency of this motion, the Governor commuted the sentence to life imprisonment. The court held that this action rendered the matter moot, and granted the state's motion for rehearing. *Id*. at 737.

u. In *Ex parte Varelas*, ___ S.W. 2d ___ No. 73,632 (Tex. Crim. App. 2001), the court found trial counsel deficient for failing to request that the jury be instructed that they must find beyond a reasonable doubt that applicant committed certain extraneous misconduct before considering it in its deliberations, and for failing to request limiting instructions as to the jury's use of this extraneous misconduct. *Id*. at slip op. 8. Whether applicant had previously abused the complainant "was essential to the State's case against applicant." *Id*. at slip op. 4. Had counsel requested the instruction, and the limiting instructions, they would have been given. *Id*. at slip op. 5-6. Trial counsel gave an affidavit in which she assured the court that her failure to request the instructions was "simply an oversight," and not the result of trial strategy. *Id*. at slip op. 7. The court also found that this deficient performance prejudiced applicant. When the charge does not contain an accurate description of the law, "the integrity of the verdict is called into doubt." *Id*. at slip op. 9. Because of the incorrect charge and lack of limiting instruction, it is reasonable to presume that the jury did not necessarily find beyond a reasonable doubt that applicant committed the extraneous conduct, and did not consider this misconduct only for the limited purposes permitted by law. *Id*. at slip op. 9-10. The extraneous misconduct was "central" to the state's case. *Id*. at slip op. 10. "Applicant was prejudiced because the charged offense was similar in nature to the extraneous acts, and the extraneous acts were likely considered as direct evidence of applicant's guilt. Applicant's

defense that L.W.'s mother killed her was undermined because the jury was essentially informed that applicant had harmed L.W. in the past, and therefore, he was the cause of her death. Also, applicant's chances for being convicted only of a lesser-included offenses were severely diminished. We conclude that this harm is 'sufficient to undermine confidence in the outcome' of applicant's trial. There is a reasonable probability that, but for the errors committed by applicant's attorneys, the result of his trial would have been different." *Id*. at slip op. 13-14 (citations omitted).

3. *Denial of counsel is presumptively prejudicial*

a. There is another standard--besides *Strickland* --for reviewing error when counsel has been completely denied. In *United States v. Cronic*, 466 U.S. 660, 659 (1984), the Supreme Court recognized that, where counsel is completely denied, prejudice is presumed, avoiding the need to apply *Strickland's* second prong. Complete denial of counsel may either be actual or constructive. Constructive denial occurs where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing . . . ." *Id*. "*Cronic's* presumption of prejudice applies to only a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied *any meaningful, assistance at all*." *Martin v. McCotter*, 796 F.2d 813, 820 (5th Cir. 1986); *see Lombard v. Lynaugh*, 868 F.2d 1475, 1481 (5th Cir. 1989)(petitioner not required to prove *Strickland* prejudice where appellate lawyer "afforded almost no appellate representation whatever").

b. In *Ex parte Burdine*, 901 S.W. 2d 456 (Tex. Crim. App. 1995)(Maloney, J., dissenting), the trial court found as a matter of fact and law that counsel slept during portions of applicant's capital murder trial. The trial court went on to find that counsel was therefore absent, and that this constituted a *per se* denial of the right to effective assistance of counsel. *Id*. at 457. The court of criminal appeals denied applicant's application for writ of habeas corpus. Judge Maloney, joined by Judges Overstreet and Baird, dissented. "The issue presented in this case has never been addressed by the United States Supreme Court nor by this Court. At least one federal circuit court has recognized that in circumstances similar to those in this case, a Sixth Amendment violation occurred. Accordingly, this Court has a duty to at least file and set this case so that we can consider the issue." *Id*. at 458.

c. The federal district court reached a different conclusion than did the majority of the Texas Court of Criminal Appeals. "This Court therefore concludes that when a defense attorney sleeps through a 'substantial' portion . . . of his client's criminal trial, prejudice is to be presumed as a matter of law. A sleeping counsel is equivalent to no counsel at all." *Burdine v. Johnson*, 65 F. Supp.2d 854, 866 (S. D. Tex. 1999).

d. Two of the three judges on the Fifth Circuit panel which reviewed *Burdine* voted to reverse. Although it was undisputed that the lawyer slept, since Mr. Burdine was unable to prove precisely *when* his lawyer slept, he could not show that anything significant had happened during the sleeping portions of the trial, and therefore, he lost.

> [I]t is possible that unobjectionable evidence (or evidence which Cannon was already anticipating) may have been introduced while Cannon slept, without having any substantial effect on the reliability or fairness of Burdine's trial. But, Burdine essentially asks us to assume that Cannon slept during the portions of the proceedings for which the transcript reflects no activity by him. In the light of the foregoing discussion and the rather vague testimony of the witnesses at the state habeas evidentiary hearing regarding when Cannon slept, it would be inappropriate for us to engage in such speculation. In sum, on this record, we cannot determine whether Cannon slept during a "critical stage" of Burdine's trial.

Burdine v. Johnson, 231 F. 3d 950, 964 (5th Cir. 2000). In deciding against Burdine, the court did not hold that prejudice could never be presumed from a sleeping lawyer, just that, "under the above described circumstances, presumptive prejudice is not warranted." *Id*. The court was careful not to condone sleeping during capital murder trials, "or any other trial, for that matter." *Id*.

> Again, we hold only that, under the specific circumstances of this case, in which it is impossible to determine--instead, only to speculate--that counsel's sleeping was at a critical stage of the trial, prejudice cannot be presumed; the *Strickland* prejudice analysis is adequate to safeguard the Sixth Amendment guarantee of effective assistance of counsel.

Id.

e. Judge Benavides dissented in *Burdine*:

> It is well established that a defendant "requires the guiding hand of counsel at every step in the proceedings against him." [citations omitted] I conclude that being represented by counsel who slept through substantial portions of a client's capital murder trial violates the Sixth Amendment right to counsel, and, thus, Burdine should be entitled to a new trial with the benefit of counsel who does not sleep during substantial portions of his trial. In my opinion, it shocks the conscience that a defendant could be sentenced to death under the circumstances surrounding counsel's representation of Burdine.

Id. at 965 (Benavides, J., dissenting).

f. Recently, petitioner's motion for rehearing *en banc* was granted.

Burdine v. Johnson, 234 F. 3d 1339 (5th Cir. 2000). Observers everywhere await the *en banc* court's decision.

4. *Prejudice is presumed from conflict of interest*

a. Finally, prejudice is presumed when counsel actively represents conflicting interests. *United States v. Cronic,* 466 U.S. at 661 n.28.

b. In *Ex parte McCormick*, 645 S.W. 2d 801 (Tex. Crim. App. 1983), the court reversed the convictions for capital murder because the lawyers jointly representing the two co-defendants had an actual conflict of interest which affected the adequacy of their representation. *Id.* at 806. Although not then adopting a rule that multiple representation is *per se* unconstitutional in a capital case, the court left that possibility open in the future, noting that an attorney "cannot simultaneously argue with any semblance of effectiveness that each defendant is most deserving of the lesser penalty." *Id*. at 806 n.18.

c. In *Burger v. Kemp*, 483 U.S. 766, 785 (1987), the Court found no actual conflict of interest where partners represented co-defendants who were tried separately. Also, the Court found that the defendant was not harmed.

d. *Cf. Ex parte Prejean*, 625 S.W. 2d 731, 733 (Tex. Crim. App. 1981)(trial court erred in disqualifying counsel because of conflict of interest in capital case, because defendant may waive conflict).

5. *Ineffective assistance on appeal*

a. Due process of law guarantees a criminal defendant effective assistance of counsel on his first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 397 (1985).

b. Appellate counsel in a non-capital case was ineffective for failing to argue that the trial court erred in denying a timely request for a jury shuffle. *Ex parte Daigle*, 848 S.W. 2d 691, 692 (Tex. Crim. App. 1993). *See also Ex parte Dietzman*, 790 S.W. 2d 305, 306 (Tex. Crim. App. 1990)(appellate attorney failure to present many grounds of error for review).

c. Appellant had no right to represent himself on appeal where he first sought to do so after his lawyers had filed their brief. "Allowing applicant untimely to assert his right of self-representation after nearly three years and only after he had read his appellate counsel's briefs would unduly hamper the administration of justice." *Ex parte Thomas*, 906 S.W. 2d 23, 24 (Tex. Crim. App. 1995).

d. Appellate counsel is not prohibited from raising ineffectiveness just because he was the second chair at the trial. *Paulsel v. State*, 784 S.W. 2d 417, 417 (Tex.

Crim. App. 1990).

B. Involuntary Guilty Plea

1. If applicant can establish that his plea was involuntary, he has established a due process violation which is cognizable on habeas in Texas. *See Ex parte McCullough*, 966 S.W. 2d 529, 532 n. 1 (Tex. Crim. App. 1998).

2. In *Ex parte Moody*, 991 S.W. 2d 856 (Tex. Crim. App. 1999), after receiving 151 months on a federal court sentence, applicant pleaded guilty to a state charge and accepted 15 years pursuant to a plea bargain, expecting the two sentences would run concurrently. After learning that the federal sentence would not begin until the state sentenced had been completed, applicant collaterally attacked his plea in state court, asserting that it had been involuntary. Specifically, applicant argued that his trial counsel had advised him that the sentences would be served concurrently, and that he would not have accepted the plea bargain had he known otherwise. The court of criminal appeals granted relief. Counsel's advise was not within the range of competence demanded for a competent criminal lawyer, and the court found that applicant would not have entered the plea absent the erroneous advise. It is irrelevant that neither the trial court nor the prosecutor promised concurrent sentences. "The analysis of an involuntary plea claim differs from the analysis of a broken plea bargain claim, in that prosecutorial or judicial participation is not determinative." *Id*. at 858-59.

C. Defects in Charging Instruments

1. Ordinarily, a defendant waives defects of form or substance in the charging instrument by not raising them by written motion, prior to commencement of trial. TEX. CODE CRIM. PROC. ANN. art. 1.14(b)(Vernon Supp. 1998). *See generally Studer v. State*, 799 S.W. 2d 263 (Tex. Crim. App. 1990).

2. A charging instrument which is so defective that it does not charge a person with an offense as required by Article V, § 12 of the Texas Constitution, is constitutionally invalid, and may be challenged by writ of habeas corpus. *Ex parte Patterson*, 902 S.W. 2d 487, 488 (Tex. Crim. App. 1995).

D. Witt Error

1. A claim of *constitutional* violation, under *Witherspoon/Adams* (and now, presumably, *Witt*), can be raised for the first time by writ of habeas corpus, even though it was not raised on direct appeal. *Ex parte Bravo*, 702 S.W. 2d 189, 193 (Tex. Crim. App. 1982); *but cf*. *Ex parte Banks*, 769 S.W. 2d 539, 541 (Tex. Crim. App. 1989)(defendant may not complain for the first time by writ that a juror was excused in violation of a procedural *statute*).

2. When a *federal* court is reviewing juror bias on *federal habeas corpus*, it

must accord a presumption of correctness to the state court's findings. *Witt*, however, does not require a *state* appellate court to accord this presumption of correctness when reviewing trial court rulings on jury bias. *Greene v. Georgia*, 117 S. Ct. 578, 579 (1996).

3 Although entitled to great deference, the trial judge's ruling is not accorded a presumption of correctness on appeal. *Clark v. State*, 717 S.W. 2d 910, 915 (Tex. Crim. App. 1986); *accord Cordova v. State*, 733 S.W. 2d 175, 186 (Tex. Crim. App. 1987).

E. *Batson v. Kentucky*: Racially Discriminatory Use of Peremptory Challenges

1. *The holding in Batson*

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the black defendant complained that the state used its peremptory challenges in a racially discriminatory way to strike all four black persons on the panel. The Supreme Court recognized that purposeful racial discrimination in jury selection violates a defendant's right to equal protection of the law. *Id*. at 86. "Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his view concerning the outcome' of the case to be tried . . . the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id*. at 89.

2. *Batson error can be raised on habeas*

Batson error can be raised on habeas corpus. *Mathews v. State*, 768 S.W. 2d 731, 732 n.2 (Tex. Crim. App. 1989).

F. Shackling and Guards

1. Shackling a defendant at the guilt-innocence phase is harmful because it infringes his presumption of innocence. It is justified only under exceptional circumstances. The fact that a person is charged with capital murder does not override his presumption of innocence. The trial court abuses its discretion in shackling a defendant merely based on general concerns, where there is no violence or threats of violence during the trial. *Long v. State*, 823 S.W.2d 259, 283 (Tex. Crim. App. 1991)(error harmless, though, where there is no evidence that the jury actually saw the shackles); *see Cooks v. State*, 844 S.W. 2d 697, 722-23 (Tex. Crim. App. 1992)(although shackling is seriously prejudicial and only called for in rare circumstances, it was harmless here, absent evidence the jury actually saw shackles).

2. Shackling at the punishment phase of a non-capital trial was held to be reversible error where there was no evidence of escape, threats of physical violence, resistance, repeated interruptions, or other such egregious conduct. "[J]udicial patience is part of the job and such extreme methods as binding and gagging should only be imposed after clear warnings to the defendant and as a last resort." *Shaw v. State*, 846 S.W. 2d 482, 487 (Tex. App. -- Houston [14th Dist.] 1993, pet. ref'd).

3. It is a violation of federal due process, cognizable on habeas corpus, for the jury to see the defendant in jail clothes and handcuffs. *Ex parte Clark*, 545 S.W. 2d 175, 177 (Tex. Crim. App. 1977).

G. Failure to Disclose Exculpatory Evidence

1. *Brady v. Maryland and United States v. Bagley*

a. In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Court held "that the suppression by the prosecution of evidence favorable to an 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."

b. The issue in *United States v. Bagley*, 473 U.S. 667 (1985), concerned the standard of materiality to be applied to determine whether a conviction should be reversed for failure to disclose impeachment evidence. In rendering its decision, the Court clarified several things about discovery:

(i) the adversary system is still the primary means of discovering the truth. The *Brady* rule, however, which is founded on due process, is meant to insure that a miscarriage of justice does not occur. "Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *Id*. at 675.

(ii) "Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule." *Id*. at 676. The Court makes no distinction between impeachment evidence and exculpatory evidence. *Id*.

(iii) Reversal is not automatic for a *Brady* violation. Instead, "the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *Id*. at 678.

(iv) Finally, the Court determined the standard of materiality applicable to undisclosed evidence. Previously, the Court had recognized at least three different standards, depending on the nature of the evidence, and the type of request made by defendant. In *Bagley*, the Court decided that only one test for materiality is required. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id*. at 682. The judgment in *Bagley* was reversed and remanded to the court of appeals for a determination whether, had the impeachment evidence been disclosed to the defense, there is a reasonable probability that the result of the trial would have been different. *Id*. at 684.

2. *Brady/Bagley reversals in Texas habeas cases*

a. The state had a duty to disclose the statement of an eyewitness which contained assertions which were "diametrically opposite" to her trial testimony. *Ex parte*

Adams, 768 S.W. 2d 281, 290-91 (Tex. Crim. App. 1989);

b. The use of an investigative procedure which, judged by the totality of circumstances, results in a deprivation of due process by suppressing favorable evidence and by creating false testimony and inherently unreliable testimony, is cognizable on habeas corpus. *Ex parte Brandley*, 781 S.W. 2d 886, 894 (Tex. Crim. App. 1989).

H. Knowing Presentation of Perjured Testimony

1. "Due process prohibits prosecutors from presenting testimony that any member of the 'prosecution team,' including both investigative and prosecutorial personnel, knows to be false." *Ex parte Fierro*, 934 S.W. 2d 370, 372 n. 2 (Tex. Crim. App. 1996), *cert. denied*, 521 U.S. 1122 (1997)(error harmless, though); *see also Ex parte Castellano*, 863 S.W.2d 476, 485 (Tex. Crim. App. 1993); *Ex parte Adams*, 768 S.W.2d 281, 292 (Tex. Crim. App. 1989).

I. Jury Instructions at the Guilt/Innocence Phase

1. Jury charge error which, in light of the trial as a whole, so infected the procedure that the applicant was denied a fair and impartial trial, is cognizable on habeas. *Ex parte Maldonado*, 688 S.W. 2d 114, 116 (Tex. Crim. App. 1985).

2. *Lesser included offenses*

a. Where evidence in a capital case supports a verdict of guilty of a lesser included noncapital offense, due process requires that the jury be instructed regarding that offense. *Beck v. Alabama*, 447 U.S. 625, 637 (1980); *see also Hopper v. Evans*, 456 U.S. 605, 609 (1982).

b. The Constitution requires that the jury be instructed on any and all lesser included offenses "if the jury could rationally acquit on the capital crime and convict for the noncapital crime." *Cordova v. Lynaugh*, 838 F. 2d 764, 767 (5th Cir.), *cert. denied*, 108 S.Ct. 2832 (1988).

J. Actual Innocence

1. Because the incarceration of an innocent person violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution, claims of actual innocence are cognizable in postconviction habeas corpus proceedings. *Ex parte Elizondo*, 947 S.W. 2d 202, 205 (Tex. Crim. App. 1996). "Consequently, if applicant can prove by clear and convincing evidence to this Court, in the exercise of its habeas corpus jurisdiction, that a jury would acquit him based on his newly discovered evidence, he is entitled to relief." *Id*. at 209.

2. This is not an easy standard to meet. *See Ex parte Stevens*, 963 S.W.2d 75, 78 (Tex. Crim. App. 1997)(Judge Meyers, in his dissent, is unable to distinguish the facts in this case, where relief was denied, from those in *Elizondo*, where it was granted, leading him to conclude that "today's action appears to stem entirely from a refusal by individual members of the Court to be bound by precedent").

K. Incompetency to Stand Trial

1. Where the trial court fails to conduct a separate hearing to determine competency even though a bona fide doubt as to competency was raised, the matter is cognizable on habeas corpus. *Ex parte Johnston*, 587 S.W. 2d 163, 165 (Tex. Crim. App. 1979). *But cf. Ex parte Tuttle*, 445 S.W. 2d 194, 198 (Tex. Crim. App. 1969)(that applicant was insane at the time of the offense is not cognizable on a writ).

2. Where the same jury that determined applicant's guilt also determined his competence to stand trial the issue is cognizable on habeas corpus. *Ex parte Ridley*, 658 S.W. 2d 177, 177 (Tex. Crim. App. 1983).

3. Where the jury charge is inadequate for a proper determination of applicant's competence to stand trial the issue is cognizable on habeas corpus. *Ex parte McKenzie*, 582 S.W. 2d 153, 154 (Tex. Crim. App. 1979).

L. The Failure to Provide an Interpreter

1. The failure to provide an interpreter to one who does not understand English may be raised by writ of habeas corpus. *Ex parte Nanes*, 558 S.W. 2d 893, 894 (Tex. Crim. App. 1977).

M. Trial Before a Disqualified Judge

1. Trial before a judge disqualified because he had previously prosecuted applicant in a prior conviction used for enhancement can be raised by habeas corpus. *Ex parte Washington*, 442 S.W. 2d 391, 392-93 (Tex. Crim. App. 1969).

2. Trial before a judge who was related to the applicant, even though the judge was unaware of the relationship, and the applicant did not object, can be raised by habeas corpus. *Ex parte Vivier*, 699 S.W. 2d 862, 863 (Tex. Crim. App. 1985).

N. Double Jeopardy

1. "We have long held that a double jeopardy claim is a proper subject for a writ of habeas corpus under Article 11.07, despite the applicant's failure, as in this case, to raise the issue in the trial court." *Ex parte Chappell*, 959 S.W. 2d 627, 627 n1 (Tex. Crim. App.

1998); *see also Ex parte Diaz*, 959 S.W.2d 213, 214 n. 1 (Tex. Crim. App. 1998).

O. Improper Revocation of Mandatory Supervision

1. The improper revocation of mandatory supervision is cognizable. *Ex parte Taylor*, 957 S.W. 2d 43, 44 n.1 (Tex. Crim. App. 1997).

P. Mandatory Supervision Procedures

1. "We hold . . . that applicant can mount a due process challenge to the procedures used by the parole board in considering whether to release applicant to mandatory supervision." *Ex parte Geiken*, 28 S.W.3d 553, 557 (Tex. Crim. App. 2000).

Q. Duration of Confinement and Applicable Time Credits

1. " We have held before that 'the duration of a prisoner's confinement and applicable time credits' are proper subjects for a writ of habeas corpus under Article 11.07 of the Texas Code of Criminal Procedure." *Ex parte Stover*, 946 S.W.2d 343, 344 n. 1 (Tex. Crim. App. 1997); *accord Ex parte Ruthart*, 980 S.W.2d 469, 470 (Tex. Crim. App. 1998); *see also* "Here, Applicant contends that he has been denied credit on his sentence for time that he spent in jail prior to trial, as well as time that he spent in custody pursuant to parole pre-revocation 'blue' warrants. Both claims are cognizable under Article 11.07. *Ex parte Evans*, 964 S.W. 2d 643, 645 (Tex. Crim. App. 1997).

R. Where Sentence Exceeds Statutory Maximum

1. Habeas corpus is the appropriate remedy where the sentence assessed exceeds the statutory maximum. *Ex parte Beck*, 922 S.W. 2d 181, 182 (Tex. Crim. App. 1996).

S. A Non-Indictment Which Does Not Invoke the Jurisdiction of the Court

1. Where the indictment did not allege the name of the defendant, it was so defective as not to constitute an indictment under Article V. § 12 of the Texas Constitution. Since there was no indictment, the trial court had no jurisdiction, and this was cognizable on habeas corpus. *Ex parte Patterson*, 902 S.W. 2d 487, 487 (Tex. Crim. App. 1995)

T. Unlawful Revocation Of Parole

1. "A claim that parole or other form of administrative release has been unlawfully revoked must be brought to the attention of the convicting court under Article 11.07, V.A.C.C.P." *Board of Pardon and Paroles v. The Court of Appeals For The Eighth District*, 910 S.W.2d 481, 483 (Tex. Crim. App. 1995).

VII. SOME NON-COGNIZABLE CLAIMS

A. Sufficiency of the Evidence

1. In any number of cases, the Texas Court of Criminal Appeals has held that sufficiency is not a cognizable issue on habeas corpus. *E.g.*, *Ex parte Brown*, 757 S.W. 2d 367, 368 (Tex. Crim. App. 1988)(legal sufficiency may not be challenged collaterally in Texas) *see generally Ex parte Williams*, 703 S.W. 2d 674 (Tex. Crim. App. 1986).

2. The court has recognized that an applicant may complain on habeas, however, not that the evidence against him was legally insufficient, but instead, that there was *no* evidence to support the verdict. *Ex parte Moffett*, 542 S.W. 2d 184, 186 (Tex. Crim. App. 1976)(due process violation).

3. The United States Supreme Court does permit sufficiency inquiries into state court convictions on federal habeas corpus. The standard of review for determining the legal sufficiency of the evidence in any criminal case "is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

B. Enhancement Based on Void Conviction

1. In *Ex parte Patterson*, 969 S.W. 2d 16, 19-20 (Tex. Crim. App. 1998), applicant complained for the first time in his writ that the state had enhanced his conviction in the instant case with a void conviction. The court agreed that the conviction was void, but held that this was a voidable complaint that should have been raised at trial pursuant to article 1.14(b) of the Texas Code of Criminal Procedure. The court suggested that trial counsel may have been ineffective for not complaining at trial, and the case was remanded for an evidentiary hearing.

C. Unsigned Jury Waiver

1. "[W]here the applicant does not claim he desired and was deprived of his constitutional right to a trial by jury, that he did not intend to waive a jury trial or that he was otherwise harmed, and the record reflects that the applicant agreed to the waiver, we will not set aside a conviction by habeas corpus or collateral attack due to the applicant's failure to sign a written jury form pursuant to article 1.13." *Ex parte Sadberry*, 864 S.W.2d 541, 543 (Tex. Crim. App. 1993).

D. Interstate Agreement on Detainers

1. A violation of the Interstate Agreement on Detainers statute which is neither jurisdictional nor fundamental, is not cognizable in habeas corpus. *Ex parte Sanchez*, 918

S.W. 2d 526, 527 (Tex. Crim. App. 1996).

E. Indictment Not Waived

1. An applicant cannot complain by way of writ of habeas corpus that his conviction was invalid because he did not waive indictment. *Ex parte Long*, 910 S.W. 2d 485, 487 (Tex. Crim. App. 1995).

F. Failure To Admonish Concerning Deportation

1. "An applicant seeking relief from the failure to receive the admonishment required by Art. 26.13(a)(4) [concerning deportation] must establish that there was no admonishment given consistent with Art. 26.13(a)(4) or otherwise suggesting the possibility of deportation, *and* that the lack of admonishment affected his decision to enter a plea of guilty." *Ex parte Tovar*, 901 S.W.2d 484, 486 (Tex. Crim. App. 1995)(emphasis in original).

VIII. RESOURCES

A. John G. Jasuta, *Post Conviction Remedies Pursuant To Article 11.07, V.A.C.C.P., in* STATE BAR OF TEXAS, TEXAS CRIMINAL APPELLATE MANUAL J (1996).

B. John G. Jasuta & David K. Chapman, *Habeas Corpus Under Article 11.07, V.A.C.C.P. And Death Penalty Issues*, STATE BAR OF TEXAS ADVANCED CRIMINAL LAW COURSE, 1998.

C. Lynn B. Lamberty, *State Capital Writs: A View From The Applicant's Perspective*, *in* STATE BAR OF TEXAS, TEXAS CRIMINAL APPELLATE MANUAL K (1996).

D. James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* (Michie, 2ed 1994).

E. Ira P. Robbins, *Habeas Corpus Checklist* (West 2001 Ed.).