

**2019 County
and District Clerks'
Association of Texas
Winter Education
Conference**

January 28-31, 2019

Embassy Suites by
Hilton Hotel
Conference Center & Spa,
San Marcos

**Piece of the
Puzzle, Part of
the Whole**



11.07 Writs

Wednesday, January 30, 2019
9:15–10:15 a.m

Mr. Benjamin B. Wolff
Director

Office of Capital and Forensic Writs

Benjamin B. Wolff is the Director of the Office of Capital and Forensic Writs. Prior to assuming this position in October 2015, he worked as a post-conviction attorney in Austin, Texas with the Texas Defender Service, representing death-sentenced individuals in state and federal post-conviction proceedings. Before that, Wolff worked for a number of years at The Bronx Defenders, a public defender organization in Bronx, NY, as a trial attorney and in a variety of supervisory positions. In these roles, Wolff supervised attorneys and other legal advocates in their practice, as well as trained and supervised a team of ten investigators. As a trial attorney, Wolff tried numerous felony cases to verdict. Wolff is a graduate of the University of California, Berkeley, Boalt Hall School of Law, and Davidson College. Prior to becoming an attorney, Wolff worked as a mitigation specialist and defense-initiated-victim-outreach (D.I.V.O.) specialist on behalf of defense counsel in capital cases on the West Coast and the South and as an investigator with the Bronx Defenders. A native of Missouri, Ben's experience also includes work with youth in Esteli, Nicaragua and service as an Election Observer in El Salvador.

Habeas Corpus Filing Procedures

Benjamin Wolff
Office of Capital and Forensic Writs

The Nature of Post- Conviction

- What are writs?
- What do writs require?
 - Restraint
 - Illegality

The Nature of Post- Conviction

“The writ of habeas corpus is intended to be applicable to all.. Cases of confinement and restraint where there is no lawful right in the person exercising the power, or where, though the power in facts exists, it is exercised in a manner or degree not sanctioned by law.”

Article 11.23

The Nature of Post- Conviction

Types of claims:
Federal constitutional claims.

Writ Categories

Article 11.07: Final Felony Conviction, Non-Death
filed in district court and forwarded to CCA

Article 11.071: Death Penalty
filed in district court and forwarded to CCA

Article 11.072: Community Supervision; felony and misdemeanor order
or judgment
filed in court supervision was granted and appealed to COA

Article 11.073: Scientific Evidence
apply procedures for 11.07, 11.071, and 11.072

Article 11.08: Charged with Felony and Confined
filed in court charged, or district of residence of nearest judge

Article 11.09: Charged with Misdemeanor and Confined
filed in county charged, or county of residence of nearest judge

Filing 11.07, Non-Death, Final Felony Conviction

Filed with District Clerk by applicant using special form.

Case No. _____
(The district clerk of the county of conviction will fill in this blank.)

**IN THE COURT OF CRIMINAL APPEALS OF TEXAS
APPLICATION FOR A WRIT OF HABEAS CORPUS
SEEKING RELIEF FROM FINAL FELONY CONVICTION
UNDER CODE OF CRIMINAL PROCEDURE ARTICLE 11.07**

NAME: _____

DATE OF BIRTH: _____

PLACE OF CONFINEMENT: _____

WARDEN: _____

TDCJ-CID NUMBER: _____ SID NUMBER: _____

(1) This application concerns (check all that apply):

<input type="checkbox"/> a conviction	<input type="checkbox"/> parole
<input type="checkbox"/> a sentence	<input type="checkbox"/> mandatory supervision
<input type="checkbox"/> time credit	<input type="checkbox"/> out-of-time appeal or petition for discretionary review

(2) What are the court number and county of the district court in which you were convicted?

Filing 11.07, Non-Death, Final Felony Conviction

District Clerk Duties :

Provide Free 11.07 form

No Filing Fee

Assign a cause number ancillary to conviction

Forward application to the State

What happens next?

The State Answers.

Clerk's Duties?

Forward to applicant/applicant's attorney

What happens next?

The Convicting Court Takes Action

Issues ODI

When?

Supposed to be within 20 days of
State's Answer

Clerk's Duties?

Forward to applicant/applicant's
attorney, State

The Order
Designating
Issues (ODI)

If the court finds no controverted issues
of fact (or declines to act)...

DUTY OF CLERK:

"immediately" transmit to CCA, a
copy of the application, any answers,
and a certificate reciting the date upon
which the finding was made"

The Order Designating Issues (ODI)

If a court enters an Order Designating Issues (ODI), then there will be some sort of hearing.

District Clerk's Duties (TRAP 73.4(b)(1)):

- (1) If the convicting court enters an order designating issues, the clerk shall immediately transmit to the Court of Criminal Appeals a copy of that order and proof of the date the district attorney received the habeas application.

What happens next?

After an ODI,
convicting court holds hearing
(may be magistrate)
Type of hearing varies.
Affidavits
Depositions
interrogatories
live hearing (testimony)

Notice Requirement

For any hearing under this act, the applicant and the state are entitled to at least seven full days notice before any such hearing.

Art. 11.07, sec. 6

Findings of Fact and Conclusions of Law

Following a hearing, the parties will submit proposed findings of fact and conclusions of law.

Then the Court enters findings

Then the Parties may file objections

Objections

The Clerk must forward
Objections to the Court of
Criminal Appeals, even if not
filed within 10 days.

Objections

When in doubt, forward
to CCA

Timing of Article
11.07
Proceedings

Texas Rules of Appellate Procedure

73.5. Time Frame for Resolution of Claims Raised in Application

Within 180 days from the date of receipt of the application by the State, the convicting court shall resolve any issues that the court has timely designated for resolution. Any motion for extension of time must be filed in the Court of Criminal Appeals before the expiration of the 180-day period.

What happens when 180 days pass without resolution?
Court needs to request extension. Don't forward case to CCA prematurely.

180
Resolution
or Extension



Clerk
Forward to
CCA

Remanded Applications

Time triggered by Order

Trial Court has 90 days from date of CCA order to resolve designated issues

Supplemental Record is due 120 days after the date of the CCA's order

go to Resolve

120 to Supplement

Death Penalty Writs

- Appointment of Counsel Automatic
 - Must occur within 30 days
- Death is Different
 - Longer trial
 - More litigation
 - More motions.
 - Importance of record in appellate review
 - Super long records (trial might be 2 months, lots of motions)
 - More scrutiny

Death Penalty Writs

- No deadlines under the TRAP. The 180 day deadline does not apply to death penalty writs.
 - (There are other statutory deadlines, however. If a case is not resolved within a reasonable period of time, the CCA will tell district court to “hurry up”

Death Penalty Writs (special issues)

- Often litigation on completeness of the clerk’s record (reporter’s record).
 - Centers around inclusion of orders
 - Ex parte orders
 - Sealed orders
 - Exhibits (copies of discs won’t do)

Death Penalty Writs (special issues)

- Often litigation on completeness of the clerk's record (reporter's record).
 - Centers around inclusion of orders
 - Ex parte orders
 - Sealed orders
 - Exhibits (copies of discs won't do)
- When in doubt, include.
 - Emailed orders, etc.

Death Penalty Writs (special issues)

- Post-conviction record. Must include all filings, emails, orders.
- All transcripts of proceedings.
 - (who pays? The county)

Death Penalty Writs (special issues)

- Ex parte motions.
 - E.g., funding
 - Cannot be shared with other side
- Sealed motions
 - Cannot be shared with public

Death Penalty Writs (special issues)

- Execution Date Setting Notices
- Must be served on OCFW
- Not later than second business day after order setting execution date, serve
 - 1. the most recent defense attorney (often federal habeas attorney)
 - OCFW
- Service may be accomplished by mail, fax, or email
- service@ocfw.texas.gov
- See Tex. Code Crim. Proc. 43.141

Death Penalty Writs (special issues)

- Efiling.
- Often post-conviction attorneys are not automatically included in efilng system

Compiling the Writ Record

Documents to Forward in Every Case

- Application and Memorandum
- Indictment or Information
- Plea Papers
- Court's Docket Sheet (trial and habeas)
- Jury Charge
- Verdict Form
- Judgment
- Findings and Conclusions, if any
- Answer from State
- Objections
- Transcript of any Evidentiary Hearing \$

Affidavits

Proposed Findings and Conclusions

Amended Findings and Conclusions

Emails

Motions

Trial Record (e.g., actual innocence)

Additional Documents to Forward

Summary Sheet in Every Case

1. Convicting court, county, name of convicting Judge
2. Applicant's name, offense, plea, cause number, sentence, date of sentence
3. Appellate cause number and citation to published decision
4. Whether an evidentiary hearing was held, whether there are findings and conclusion and objections, and what the habeas court recommends
5. The name of habeas counsel, if applicable

Summary Sheet in Every Case

**IN THE COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S SUMMARY SHEET FOR
POSTCONVICTION APPLICATIONS FOR WRIT OF HABEAS CORPUS
UNDER CODE OF CRIMINAL PROCEDURE, ARTICLES 11.07 AND 11.071**

Application for Writ of Habeas Corpus

Ex Parte _____ from _____ County
(Name of Applicant)

_____ Court

TRIAL COURT WRIT NO. _____

APPLICANT'S NAME (As reflected in judgment): _____

OFFENSE (As reflected in judgment): _____

CAUSE NO. (As reflected in judgment): _____

PLEA: _____ GUILTY _____ NOT GUILTY

SENTENCE: _____ DATE: _____
(Terms of years reflected in judgment)

TRIAL DATE: _____

TRIAL JUDGE'S NAME (Judge presiding at trial): _____

APPEAL NO. (If applicable): _____

CITATION TO OPINION (If applicable): _____ S.W.3d _____

HEARING HELD: YES NO

Summary Sheet in Every Case

RECOMMENDATION: _____ GRANT _____ DENY _____ DISMISS _____ NONE
(Habeas judge's recommendation regarding application for writ of habeas corpus)

HABEAS JUDGE'S NAME: _____
(Judge presiding over habeas corpus proceeding)

NAME OF HABEAS COUNSEL IF APPLICANT IS REPRESENTED: _____

I certify that all applicable requirements of Texas Rule of Appellate Procedure 73.4 have been complied with in this habeas proceeding, including the requirement to serve on all the parties in the case any objections, motions, affidavits, exhibits, proposed findings of fact and conclusions of law, findings of fact and conclusions of law, and any other orders entered or pleadings filed in the habeas case.

 Signature of District Clerk or Clerk's Representative

 Date Signed

Circumstances under which the writ does not need to be forwarded?

- a. Abuse of Writ Order Previously Entered
- b. Not on 11.07 Form
- c. Applicant files a motion to dismiss
- d. Subsequent Writ
- e. Vexatious Litigant
- f. Conviction not Final
- g. None of the Above

**Sealed
Documents
That are part
of the record**

**Documents
must be
physically
sealed when
forwarded**

Sensitive Data

The writ record must be bound and certified

Include certification with electronic copy

Table of Contents; bookmark electronic copy

**What gets
mailed to the
Applicant ?**

**Anything filed pursuant
to the writ proceedings**

Update the CCA with
any change in mailing
address or email added

- NEW TRAP RULES

Old Rule

TRAP 31.2:
(Appeals in
habeas, bail and
Extradition
cases):

Old Trap Rule 31.2 (submission; hearing)

An appeal in a habeas corpus or bail proceeding will be heard at the earliest practicable time. The

Thus, under old rule, all habeas cases were treated the same.

New Rule

TRAP 31.2 (Appeals in habeas, bail and Extradition cases):

31.2. Submission; Hearing

The applicant need not personally appear. The appellate court will not review any incidental question that might have arisen on the hearing of the application before the trial court. The sole purpose of the appeal is to do substantial justice to the parties.

- (a) In an appeal from a habeas corpus proceeding challenging a conviction or an order placing the defendant on community supervision—but not challenging a particular condition of community supervision—the appellate court should use the same submission and hearing schedules that apply to direct appeals from criminal cases. On motion of any party, or on its own initiative, the appellate court may impose a more expedited timeline or submit the case without briefing, if necessary to do substantial justice to the parties.
- (b) An appeal in any other habeas corpus or bail proceeding, including a challenge to a particular condition of community supervision, shall be submitted and heard at the earliest practicable time.

Revised TRAP Rule 4.6

Complete new rule.
Designed to address
situation where a
defendant never received
notice that the trial court
signed and Order denying
DNA Testing

**Revised TRAP
Rule 4.6**

There were a series of cases before the CCA, where the defendant never got notice of adverse order, so missed chance to appeal.

**Revised TRAP
Rule 4.6**

There were a series of cases before the CCA, where the defendant never got notice of adverse order, so missed chance to appeal.

Revised TRAP Rule 4.6

Now, if late notice, a defendant can, within 120 days, file a motion for additional time.

Revised TRAP Rule 4.6

- (c) *The Court's Order.* After hearing the motion for additional time, the trial judge must sign a written order that determines the earliest date when the defendant or the defendant's attorney received notice or acquired actual knowledge that the trial judge signed the appealable order and whether this date was more than twenty days after the judge signed the appealable order.
- (d) *The Clerk's Duties.* The trial court clerk must immediately (as they are filed or entered in the record) forward to all parties in the case copies of the defendant's motion for additional time, the trial judge's written order under subsection (c), the order the defendant seeks to appeal, any State's response, and any exhibits and related documents.

**New Clerk's
Summary Sheet!
See also TRAP
73.4 (Requiring
Certification)**

Two additions:
1. Name of Habeas
Counsel
2. Certification

NAME OF HABEAS COUNSEL IF APPLICANT IS REPRESENTED: _____

I certify that all applicable requirements of Texas Rule of Appellate Procedure 73.4 have been complied with in this habeas proceeding, including the requirement to serve on all the parties in the case any objections, motions, affidavits, exhibits, proposed findings of fact and conclusions of law, findings of fact and conclusions of law, and any other orders entered or pleadings filed in the habeas case.

Signature of District Clerk or Clerk's Representative

Date Signed

**Revised TRAP
Rule 73.1**

Two Changes:
1. The form for an 11.07
application may be verified
through an unsworn
declaration (instead of
notarized), pursuant to Tex.
Civ. Prac. & Remedies Code
132.001

Revised 11.07 Application Form

1. Allows verification through unsworn declaration
2. Changes to the verification form to reflect this
3. Also requires petitioners (as opposed to applicants) to sign separate statement

Also 2017 Rule Change

Procedures After Writ forwarded to CCA

If a party wants the CCA to consider additional evidence not filed in the trial court:

Option 1: file evidence in CCA and a motion to consider the evidence

Option 2: file motion in the CCA to supplement in the trial court. If granted, then the party can file new evidence in district court.

District Clerk must immediately give the materials to the district judge and send copies to all parties.

Received by the Court of Criminal Appeals and but not yet filed and set.

The party must file a motion to stay pending the filing of evidence. The CCA will then designate a time frame for filing in the district court.

The district clerk shall immediately send a copy to the habeas judge and other parties.

Thank you!!!

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Writs
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