AN INTRODUCTION TO TEXAS POST-CONVICTION HABEAS CORPUS

(PURSUANT TO ARTICLE 11.07, *et seq.*, C.Cr.P.)

FOR LAY PEOPLE & OTHERS WHO NEVER THOUGHT THEY'D CARE

Welcome to Article 11.07, Texas Code of Criminal Procedure, the Texas statutory complex known as habeas corpus, in which the rules are probably no longer what you may have become accustomed to and in which many of your perceptions about the law will prove incorrect. By now you have probably completed a journey though the criminal justice system including the appellate courts and find yourself "briefed out" such that you think there is no one who will listen within the system. You may well be right, because habeas corpus in Texas is reserved as a remedy for extreme violations of the rights of the defendant and the mistakes you perceive may not rise to that level.

This paper is intended as nothing more than an introduction to the subject of post-conviction habeas in the courts of Texas for

laypeople or for lawyers who have not practiced in this area. It is not a primer. It is not a how-to document. It is not a legal paper. All of those are available - including a paper on habeas I offer through the Texas Independent Bar Association. Other of my papers are available through the State Bar of Texas as well as the Texas County and District Attorney's Assocation. Additionally other authors have written papers and books on the topic including national texts which touch on Texas procedures. You will need to include multiple sources in your research to ensure the highest possible percentages for success as the odds are already heavily against you.

Anyone Can Play

One of the more interesting aspects of habeas practice in Texas is that it is an area of law which ANYONE can practice. You do not need to be a lawyer to file a petition seeking relief, nor must you be incarcerated. Any person may file a petition for seeking relief for anyone else. Plus, there are no fees to pay. And all you have to do is follow the rules.

The extent of this ability to seek relief on behalf of another person, an ability usually reserved to attorneys, has not been

fleshed out by any litigation. While the statute allows the filing of a petition for habeas corpus relief, it goes no further. Could a layperson appear in court on another's behalf in an 11.07 matter? Can a non-lawyer file a brief on a petitioner's behalf, or sign pleadings on his behalf? The history of the Court of Criminal Appeals shows that others who are not licensed to practice law have been allowed to sign and file pleadings including briefs in cases other than their own. Some have claimed to be "attorneys in fact" when signing such pleadings. I don't think that the statutes would allow court appearances but who knows?

Because of the statutory allowance of filings by non-lawyers, initial requirements are lax. You do not have to attach the judgment which will be done by the District Clerk. Similarly, you do not have to serve opposing counsel which will also be done by the District Clerk. But this liberality as to access to the courts is not extended to matters of proof.

A Short Description of Habeas Corpus

Habeas corpus as discussed in this article is a vehicle to attack the illegal restraint of a person who, pursuant to the requirements of Article 11.07, has been convicted finally of a felony without any

remaining appellate possibilities. This is truly the "court of last resort" envisioned by many writers.

A "writ of habeas corpus" is not a mystical item. The word "writ" means nothing more or less than "order," in this context. Thus, one is applying for an order, or writ, of habeas corpus. A writ of habeas corpus which is issued by a court pursuant to such an application simply imposes a requirement on the custodian of a prisoner that the detention be explained and justified. This is usually accomplished by showing a legal document allowing for such detention. It is then up to the petitioner to show that the justification is incomplete or flawed such as to require a new trial with the mistakes not repeated.

Not an Easy Proposition

Obtaining relief pursuant to habeas corpus is NOT easy! It is not the procedures which are difficult - a form is required making it fairly easy for just about anyone to file an application. But identifying a mistake or error which will or might result in relief via habeas corpus is exceedingly difficult and that is the first step. There are many papers, articles and books which can help you in this process, several of which I authored and which are available

through the website for the Texas Independent Bar Association. Others are also available ranging from self help books by former inmates to national studies of habeas case law and procedures which cover Texas law. All will offer, to some degree or another, valuable insights both as to procedure and the law at this phase of the criminal justice odessey.

Once you have identified those allegations of error which you intend to bring to the courts' attention you must face the next, and perhaps harder, obstacle - proving your allegation. Merely having the affected party swear to the factual allegations is not enough proof to carry the day. In fact, that level of proof won't get you an answer most of the time. Simply put, you must be prepared to prove, by affidavit to be attached to the application and, later, by actual live testimony, the truth of the factual allegations demonstrating the error which is so egregious as to entitle you to relief by habeas corpus. There is no presumption that will help you out, no lowering of the bar because the person affected is a prisoner generally even though the Court of Criminal Appeals does tend to investigate some areas in which availability of proof to a prisoner is somewhat restricted in lieu of requiring those prisoners to try to

obtain records easily obtainable by trial officials. Don't count on that happening to you or in your case. As mentioned earlier, the Texas Court of Criminal Appeals is very liberal in its attitude toward access to the courts with the allegations. This does not mean that there is any liberality in proof issues, and, in fact, there is not. Any presumption will be against you and in favor of continued detention of the affected person.

One Swing at the Ball

One of the biggest reasons you should not count on anything resembling luck or official intervention into your situation is that you only get once chance! There are certain exceptions and an inmate might be entitled to multiple applications depending on the availability of one of those exceptions but my best advice is to recognize and accept that you will probably only get this one chance. Build your case completely and as fully as you possibly can. If you cannot prove something right now which, if proven could well result in relief, consider holding off from filing anything until such time as you can prove your allegation and don't hope for luck, despite the disadvantages to waiting. But no matter what you do, or how long you wait, be completely aware that you will only get, in all likelihood,

one chance to attack the substance of the conviction. Do not waste it.

Time Limitations

There are no time limitations set out within the Texas statutes in which an application seeking habeas relief has to be filed. That does not mean, however, that there are not considerations involving the timing of the filing from other sources which must be considered.

There is, first, a time limit imposed by the federal statutes on the length of time in which a federal habeas petition attacking a state conviction must be filed. Since an applicant for federal habeas corpus relief must first show that he presented his allegation(s) to the state courts, this acts indirectly as a time limitation on the filing of the state petition. This time limitation becomes very important if you are having problems proving your allegation. The decision as to whether to take an incomplete application to State court so that the federal habeas route is not lost is one of the hardest decisions facing lawyers, and you should consider the question carefully prior to deciding what to do if the time limitation is a problem in your case.

Secondly, there is the equitable concept of *laches*, which punishes an applicant who waits too long to attack the conviction. This doctrine is in effect in both the State and federal courts. This limitation is less precise than that set up by the federal government in its statutes as it depends on the State claiming and showing an inability to respond to the application due to the passage of time. Thus, if you think that you can wait until your attorney dies and then claim he didn't tell you something you should reconsider since the waiting could well doom your efforts.

Lastly, while not truly a time limitation, there is the requirement that YOU prove the allegation, a task made all the more difficult by the passage of time. If you expect that someone will testify to certain facts to your benefit get that testimony memorialized as soon as possible because time dims memories in just about everyone and such memory loss will usually not act to your benefit.

Form Required

All persons filing an application for habeas corpus relief under Article 11.07 must use a form promulgated by the Court of Criminal

Appeals which is obtainable on their web site. Additionally, the District Clerk of each county is required by rule to disseminate that form when requested. If you attempt to file an application seeking relief under the Article it will be rejected by the District Clerk unless it is on the required form. No exceptions are made and you will probably not be one to get the first such exception. This applies to applications filed by licensed attorneys also, much to some lawyers' chagrin, but application of the requirement is absolute so don't waste your time and efforts fighting it. Unless, of course, you just want to.

Use of the Form

Fill out the form completely as possible. Some questions may not apply to you and you may say so but do not just fail to answer. Do not lie. The Court of Criminal Appeals keeps records on each application filed and cross references them to the extent that they know whether you have filed a previous application attacking this conviction and will quickly determine you have and reject, without consideration, your petition. It is far better to argue an exception to the question you are seeking to avoid rather than simply not answering it. As to lying, if you are caught lying even a little bit your

efficacy will plummet and your allegations will be read with suspicion. It is not worth it.

One particular pitfall which is not explained very clearly in the form or its instructions is found in question # 18, that calling for two parts, the first an allegation, and the second part, a statement of fact supporting the allegation. No legal arguments are allowed, which must be made in a separate memorandum attached to the application. But many applicants set out their allegations within the memorandum and then in the first part of question 18 refer to that separate document instead of setting out the allegation as required on the form. This will get the application rejected. The form instructions are clear that additional pages may only be attached for two reasons: additional factual averments or development or for a memorandum of law. The rule does not allow additional pages to set out your allegations and thus they must be on the form in writing. It might sound like nitpicking or even silly to some, but not following that little piece of advice will keep your application from being seen by the Court of Criminal Appeals and that seems a high price to pay. Put the allegation on the form and at the correct spot.

Filing the Application

Now that you have done your research and painstakingly filled out the form you are ready to file the application correctly. You must file that application with the District Clerk of the county of the conviction. This is true notwithstanding your belief that the mistake of which complaint is made did not happen in that county, such as an attack on a parole revocation procedure which may have happened in an entirely different county. It matters not. The application must, without exception, be filed in the county of conviction. The form contains a blank in which to put the name and number of the convicting court. The District Clerk will see to it that it gets to that court for processing.

Initial Processing of the Application

The District Clerks of each of Texas' 254 counties will process the application slightly differently although in each instance the result will be more or less the same. The application will be transferred to the District Attorney for reply, which may or may not be forthcoming, and then to the District Court of conviction, acting as the habeas court, for fact-finding and recommendations for final

action to the Court of Criminal Appeals, the court with the final decision-making authority. Upon the making of those fact-findings and/or recommendations the District Clerk will transfer the application to the high court.

There are time limits in which each stage of the process is supposed to be completed compliance with which can, by laborious efforts, be forced. For the most part those officials in the counties do not need to be forced to do anything in the area of moving the application as they are usually more than willing to rid themselves of the applications they find themselves dealing with and moving it to the high court is the easiest way to do that.

The Answer

The District Attorney of the county of conviction is that official who will file an answer to the application for habeas relief - maybe. The law seems to require such an answer but there is no penalty for a failure to file it. In fact, the law sets up an answer in the form of a general denial which, in the absence of further and specific action, will become the finding of fact by statutory default. Thus, you cannot win by default or the failure of the State's representative to answer. In fact, many of the State's District Attorneys ignore habeas

petitions safe in the denials created by the statute and secure in the knowledge that no relief will be forthcoming without their being given another chance to rebut the assertions, either through a hearing following remand, or a brief in the Court of Criminal Appeals if the case is set for a decision by that Court.

The Trial Court's Role

The trial court is the key to post-conviction habeas success in Texas. There are other ways to succeed, of course, but the trial court acting as the habeas court, has a great deal of influence in its power to make specific findings of fact and conclusions of law regarding your factual allegations, along with recommendations for disposition based on those findings and conclusions. Simply put, if the habeas court comes down on your side your odds just got a whole lot better. Thus, you must make every effort to convince that court of the correctness of your position.

This otherwise makes sense as it is generally easier to convince one person than a majority of nine. You should bend every effort to prove your case to the trial court for this reason. Do not make the mistake of thinking that the Court of Criminal Appeals will overrule the habeas court because if the habeas court's findings are

supported in any way by the record they will be upheld. There are instances of the high court intervening and starting the process which leads to relief by remand, but the other possible outcome, that of denial based on the trial court's findings, is much more common.

Processing in the Court of Criminal Appeals

The application will be received by the Clerk of the Court of Criminal Appeals and delivered to the Central Staff of that Court for legal analysis and recommendation. Upon completion, the Clerk ensures delivery of the application along with the Central Staff's memorandum to an individual member of the Court who has the responsibility of reporting the case to the entire Court, known as the Conference. In most cases the individual member of the Court is empowered to act on the Court's behalf but internal rules dictate that some of those cases must be decided by the entire Court acting as a collective. The decisions of the Court are announced on Wednesday mornings and include applications decided that week.

Summary

The law of Texas relating to post-conviction applications for habeas relief is designed to process inmate complaints quickly and efficiently and, in most instances, succeeds. For the most part persons involved in the system are willing to assist in reaching the correct result although in just about every case those people will be defensive and unwilling early on. The law requires them to act, however, and they will do so to process your application, especially if they are treated with the respect they deserve. The law is to be admired as it allows a freedom unheard of in other lands. The prisoner has the right to demand justification for his detention and the law will facilitate that right. The percentages for success are not very high nor should they be given that there will have been several chances for mistakes to have been rectified prior to the prisoner's petition. But the system is in place and does result in relief which cannot be said in many other parts of the world.

Some Final Thoughts

Can one win in habeas in Texas? Of course. Too many people have done so to think otherwise. Many of those wins involve what to most people are trivial matters such as time credits or the right to

petition the Court of Criminal Appeals for discretionary review. But to the persons who are affected by the mistakes which are fixed in those "trivial" matters they are of prime importance. And they should be to us, too. Not because some inmate got out of prison twenty-five days early as he was supposed to do but because that person was able to insist, through the courts, on the mistake being rectified. That says a lot about our system and its priorities, and about us. And I like what it says.