

# 11.07 Habeas Corpus Toolkit

## FOR THE COLLEGE OF ADVANCED JUDICIAL STUDIES 2013

This paper is designed to provide trial judges with a step-by-step framework to effectively and efficiently manage an Article 11.07 post-conviction habeas corpus docket by examining: applicable procedural rules; burdens; the notion of cognizability; substantive issues like ineffective assistance of counsel, actual innocence, and involuntary pleas; and the perplexing issues related to parole, mandatory supervision, and time credit.

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## I. CONSTITUTIONAL AND STATUTORY FRAMEWORK

### A. Overview

Article I, Section 12 of the Texas Constitution states: “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.”<sup>1</sup> TEX. CONST. art. I, § 12. Similarly, Article 1.08, Texas Code of Criminal Procedure, provides that “[t]he writ of habeas corpus is a writ of right and shall never be suspended.” TEX. CODE CRIM. PROC. art. 1.08. Texas Code of Criminal Procedure, Article 11.01, identifies the writ of habeas corpus as “the remedy to be used when any person is restrained in his liberty” and provides that “[i]t is an order issued by a court or judge of competent jurisdiction, directed to anyone 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. art. 11.01. The writ applies to all unlawful confinement or restraint.<sup>2</sup> TEX. CODE CRIM. PROC. art. 11.23. “The Court of Criminal Appeals, the District Courts, the County Courts, or any Judge of said Courts, have power to issue the writ of habeas corpus; and it is their duty, upon proper motion, to grant the writ under the rules prescribed by law.” TEX. CODE CRIM. PROC. art. 11.05. Unless the application shows that the applicant will not receive any kind of relief, the judge must grant the writ. TEX. CODE CRIM. PROC. art. 11.15.

Article 11 of the Texas Code of Criminal Procedure sets forth the procedures governing specific types of writs of habeas corpus:

**Final Felony Convictions**—Article 11.07 of the Texas Code of Criminal Procedure outlines the requirements for a habeas application in cases involving non-death-penalty-felony convictions. TEX. CODE CRIM. PROC. art. 11.07 § 1; *see also Ex parte Adams*, 768 S.W.2d 281, 287 (Tex. Crim. App. 1989) (“The procedure set forth in Article 11.07, V.A.C.C.P., is the exclusive State felony post-conviction judicial remedy available in Texas.”) (citing *Ex parte Brown*, 662 S.W.2d 3, 4 (Tex. Crim. App. 1983) (per curiam)); *Ex parte Sparks*, 206 S.W.3d 680, 680-83 (Tex. Crim.

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<sup>1</sup> *See also Ex parte Thompson*, 273 S.W.3d 177, 181 (Tex. Crim. App. 2008) (Texas Constitution Article 5, Section 5(c) gives the Court of Criminal Appeals broad grant of original habeas corpus jurisdiction).

<sup>2</sup> “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.” TEX. CODE CRIM. PROC. art. 11.22. And “[t]he words ‘confined’, ‘imprisoned’, ‘in custody’, ‘confinement’, ‘imprisonment’, refer not only to the actual, corporeal and forcible detention of a person, but likewise 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.” TEX. CODE CRIM. PROC. art. 11.21.

App. 2006) (Article 11.07 post-conviction relief is available where the applicant’s felony conviction was actually a misdemeanor). “[J]uvenile adjudications are not ‘convictions’ for the purposes of article 11.07.” *Ex parte Valle*, 104 S.W.3d 888, 889 (Tex. Crim. App. 2003). And a conviction is not “final” until the court of appeals issues its mandate. Therefore, an application filed while an applicant’s direct appeal is pending will be dismissed. *Ex parte Johnson*, 12 S.W.3d 472, 473 (Tex. Crim. App. 2000) (the Court of Criminal Appeals “does not have jurisdiction to consider an application for writ of habeas corpus pursuant to Art. 11.07 until the felony judgment from which relief is sought becomes final.”); *see also Ex parte Torres*, 943 S.W.2d 469, 474 (Tex. Crim. App. 1997) (discussing disposition of prematurely filed applications). “A district court [has] jurisdiction over a writ application filed after 9:00 a.m. on the day the mandate issues in the underlying direct appeal unless evidence to the contrary appears in the habeas record.” *Ex parte Hastings*, 366 S.W.3d 199, 201 (Tex. Crim. App. 2012). When the Court of Criminal Appeals grants an out-of-time PDR, “with respect to the finality requirement of Article 11.07, . . . [it does] not . . . render the court of appeals’s mandate ineffective but rather merely to hold the court of appeals’s mandate temporarily dormant until [the Court] . . . dispose[s] of [the] out-of-time PDR.” *Ex parte Webb*, 270 S.W.3d 108, 111 (Tex. Crim. App. 2008). The court of appeals is not required to recall its mandate or have its clerk issue a new mandate once the Court disposes of the PDR. *Id.*

**Death Sentences**—Article 11.071, Texas Code of Criminal Procedure, provides the procedures to be followed in cases where a sentence of death was imposed. TEX. CODE CRIM. PROC. art. 11.071.

**Community Supervision**—Article 11.072, Texas Code of Criminal Procedure, outlines the requirements for habeas applications involving felony and misdemeanor convictions in which community supervision is or was ordered. TEX. CODE CRIM. PROC. art. 11.072; *see Ex parte Hiracheta*, 307 S.W.3d 323, 325 (Tex. Crim. App. 2010). The appealability of an 11.072 application, which issues automatically by operation of law, is governed by Article 11.072 Section 8 following a disposition by the district court. *Ex parte Villanueva*, 252 S.W.3d 391, 397 (Tex. Crim. App. 2008). Unlike 11.07 proceedings, the standard in *Guzman v. State*, 955 S.W.2d 785 (Tex. Crim. App. 1997), which requires deference to be given to a trial judge’s factfindings, applies in 11.072 proceedings. *Ex parte Garcia*, 353 S.W.3d 785, 788 (Tex. Crim. App. 2011). The trial court cannot grant relief based only an applicant’s sworn pleadings; the pleadings must be supported by live, sworn testimony. *Id.* at 789.

**Post-Indictment**—Under Article 11.08, Texas Code of Criminal Procedure, a person confined on a felony charge after indictment “may apply to the judge of the court in which he is indicted; or if there be no judge within the district, then to the judge of any district whose residence is nearest to the court house of the county in which the applicant is held in custody.” TEX. CODE CRIM. PROC. art. 11.08.

**Misdemeanors**—Article 11.09, Texas Code of Criminal Procedure, provides that a person confined under a misdemeanor charge “may apply to the county judge of the county in which the

misdemeanor is charged to have been committed, or if there be no county judge in said county, then to the county judge whose residence is nearest to the courthouse of the county in which the applicant is held in custody.” TEX. CODE CRIM. PROC. art. 11.09; *Ex parte Schmidt*, 109 S.W.3d 480, 483 (Tex. Crim. App. 2003) (“When they are read together, Article V, section 16 of the Constitution, Section 25.0003(a) of the Government Code, and Article 11.05 of the Code of Criminal Procedure give the statutory county court at law, and the judges of that court, the power to issue the writ of habeas corpus when a person is restrained by an accusation or conviction of misdemeanor.”); *see also Ex parte Jordan*, 659 S.W.2d 827, 828 (Tex. Crim. App. 1983) (“appeals from denial of relief sought in a *misdemeanor* post conviction writ of habeas corpus should be directed to the courts of appeals.”) (emphasis in original).

## **B. Procedures Governing Applications Filed Under Article 11.07, Texas Code of Criminal Procedure**

### **1. Filing**

Under Article 11.07, Texas Code of Criminal Procedure, an applicant must file the application with the clerk of the convicting court.<sup>3</sup> TEX. CODE CRIM. PROC. art. 11.07 § 3(b). The clerk of the court is responsible for assigning the application to that court. *Id.* A writ of habeas corpus issues by operation of law when the clerk of the district court receives the application.<sup>4</sup> *Id.* The clerk shall note this and “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[.]” *Id.* The State is required to answer within fifteen days after it receives the application. *Id.* If the State does not admit a matter alleged in the application, then it is deemed to be denied. *Id.*

### **2. Recusal Motions**

An applicant’s motion to recuse the trial judge on habeas must comply with Rule 18a of the

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<sup>3</sup> If the application is presented to a “district clerk of a county other than the county of conviction[.]” the clerk is not required to transfer the application to the convicting court. *Ex parte Burgess*, 152 S.W.3d 123, 123-24 (Tex. Crim. App. 2004).

<sup>4</sup> In the fiscal year of 2012, the Court of Criminal Appeals received 4,312 11.07 applications, thirty-six original applications for a writ of habeas corpus, and 687 applications for a writ of mandamus. Court of Criminal Appeals Activity: FY 2012, *available at* <http://www.courts.state.tx.us/pubs/AR2012/toc.htm#ccappeals>. Most of these applications were filed by *pro se* applicants. Note that 11.07 applications are “filed” in the district court and “received” by the Court of Criminal Appeals. An 11.07 application will not be “filed” in the Court of Criminal Appeals unless the Court determines that it should be “filed and set for submission.” TEX. CODE CRIM. PROC. art. 11.07 § 5.

Texas Rules of Civil Procedure. *Ex parte Sinegar*, 324 S.W.3d 578, 581 (Tex. Crim. App. 2010). If an applicant complies with Rule 18a's requirements, the judge must either recuse himself or herself or forward the matter to the presiding judge of the administrative judicial district for a recusal hearing. *Id.* at 581-82.

### 3. Resolution of Facts

Within twenty days after the State's answer period expires, the convicting court must determine "whether there are controverted, previously unresolved facts material to the legality of the applicant's confinement." TEX. CODE CRIM. PROC. art. 11.07 § 3(c). "Confinement means confinement for any offense or any collateral consequence resulting from the conviction that is the basis of the instant habeas corpus." *Id.*; see also *Ex parte Harrington*, 310 S.W.3d 452, 457 (Tex. Crim. App. 2010); *Ex parte Langston*, 510 S.W.2d 603, 604 (Tex. Crim. App. 1974). Collateral consequences stemming from a conviction include adverse consequences to an applicant's present and future employment opportunities. *Ex parte Harrington*, 310 S.W.3d at 458.

If the court determines that there are no controverted, previously unresolved facts, then "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." *Id.* The court's failure to act in twenty days constitutes a finding that there are no controverted, previously unresolved facts material to the legality of the applicant's confinement. *Id.*

But if the convicting court determines that unresolved facts exist, within twenty days of the date the State's reply period expires, it must enter an order designating the fact issues to be resolved.<sup>5</sup> TEX. CODE CRIM. PROC. art. 11.07 § 3(d). In resolving those issues, "the court may order affidavits, depositions, interrogatories, and hearings, as well as using personal recollection." *Id.* The court "may appoint an attorney or a magistrate to hold a hearing and make findings of fact."<sup>6</sup> *Id.* If a hearing is held, the reporter must produce a transcript within fifteen days of the hearing's completion. *Id.* "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

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<sup>5</sup> In some cases, the clerk of the trial court will prematurely forward an application to the Court of Criminal Appeals after the trial court has issued an order designating issues to be resolved. The Court of Criminal Appeals will, in most cases, remand the application to the trial court to resolve the issues set out in the trial court's order. See, e.g., *Ex parte Salas*, No. WR-45,783-04 (Tex. Crim. App. Mar. 21, 2007) (per curiam order) (not designated for publication); *Ex parte Duran*, No. WR-61,344-02 (Tex. Crim. App. Dec. 7, 2005) (per curiam order) (not designated for publication).

<sup>6</sup> An appointed attorney "shall be compensated as provided in Article 26.05[.]" Code of Criminal Procedure. TEX. CODE CRIM. PROC. art. 11.07 § 3(d).

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.” *Id.*; see also *Ex parte Williams*, 366 S.W.3d 714, 714-15 (Tex. Crim. App. 2012). This is a continuing duty while the application is pending disposition; the clerk must provide an applicant with copies of documents filed in the case so that the applicant can have an opportunity to contest them and file any response, if necessary. *Ex parte Flores*, 365 S.W.3d 687-88 (Tex. Crim. App. 2012).

#### **4. Failure to Forward Writ Application**

When the clerk fails to forward an 11.07 application to the Court of Criminal Appeals, an applicant can file an original application for a writ of mandamus in the Court of Criminal Appeals seeking leave to compel the clerk to forward the application. *Deleon v. Dist. Clerk*, 187 S.W.3d 473, 474 (Tex. Crim. App. 2006) (per curiam); *Dove v. Collin County Dist. Clerk*, 26 S.W.3d 917, 918 (Tex. Crim. App. 2000) (per curiam) (“The district clerk has no authority to continue to hold Relator’s application for a writ of habeas corpus, assuming one was filed, and is under a ministerial duty to forward that application and related records to [the] Court [of Criminal Appeals] immediately.”) (citing *Martin v. Hamlin*, 25 S.W.3d 718, 719 (Tex. Crim. App. 2000) (per curiam)). If more than thirty-five days have elapsed between the date that the applicant filed his or her 11.07 application in the district court and the date that the applicant filed his or her application for an original application for a writ of mandamus in the Court of Criminal Appeals, the Court of Criminal Appeals will hold the mandamus application in abeyance and order the district clerk to respond. See, e.g., *Silva v. Hidalgo County Dist. Clerk*, No. WR-65,855-03 (Tex. Crim. App. Mar. 28, 2007) (per curiam) (not designated for publication). The clerk will be ordered to file a response by: (1) “submitting the record on such habeas corpus application;” (2) “submitting a copy of a timely filed order which designates issues to be investigated . . . ;” or (4) “stating that Relator has not filed an application for habeas corpus . . . .” *Id.*; *Garcia v. Angelina Dist. Clerk*, No. WR-67,031-01 (Tex. Crim. App. Mar. 28, 2007) (per curiam) (not designated for publication). That an applicant already has an application pending does not excuse the district clerk from accepting the filing of a subsequent application. *Benson v. Dist. Clerk, Montgomery County*, 331 S.W.3d 431, 432-33 (Tex. Crim. App. 2011); *Gibson v. Dallas County Dist. Clerk*, 275 S.W.3d 491, 492-93 (Tex. Crim. App. 2009). Also, the clerk has a duty to accept for filing, and forward, an application that is in substantial compliance with the 11.07 form requirements. *Stanley v. Bell*, \_\_\_ S.W.3d\_\_\_, 2012 Tex. Crim. App. LEXIS 1669, \*3-4 (Tex. Crim. App. Dec. 12, 2012). A clerk’s failure to comply with Article 11.07 deadlines and to file a response with the Court of Criminal Appeals when ordered may result in the Court finding contempt and assessing a fine. *In re Excareno*, 297 S.W.3d 288, 291-92 (Tex. Crim. App. 2009).

Article 11.07 does not provide a time limit for forwarding an 11.07 application to the Court of Criminal Appeals after the trial court has entered a timely order designating issues (ODI). Nevertheless, many applicants file an original application for a writ of mandamus in the Court of Criminal Appeals requesting leave to compel the trial court to make findings and order the clerk

of the court to forward the application. In the past, the Court of Criminal Appeals typically held the mandamus application in abeyance and ordered the trial court to respond. *See, e.g., Jackson v. 183rd Dist. Court*, No. WR-59,058-02 (Tex. Crim. App. Mar. 14, 2007) (per curiam) (not designated for publication). In such cases, the trial court must either submit the habeas record to the Court or provide a reason for its delay in making findings. *Id.*; *Gilliam v. 174th Dist. Court*, No. WR-47,499-02 (Tex. Crim. App. Apr. 4, 2007) (per curiam) (not designated for publication). Now, however, the Court will deny leave to file since there is no ministerial duty for the clerk to forward an application when the trial court has entered a timely ODI. But if the trial court entered an ODI that was untimely—i.e., not within twenty days of the date the State’s reply period expires or a total of 35 days—then the Court will order the clerk to immediately forward the application to the Court of Criminal Appeals. *DeJean v. Dist. Clerk, Dallas County*, 259 S.W.3d 183, 183-84 (Tex. Crim. App. 2008).

## II. THE 11.07 FORM APPLICATION AND NON-COMPLIANCE

An application filed under Article 11.07, Texas Code of Criminal Procedure, must be filed on the prescribed 11.07 form application. *Ex parte Blacklock*, 191 S.W.3d 718, 719 (Tex. Crim. App. 2006) (citing Tex. R. App. P. 73.1(a)). The Court of Criminal Appeals revised the form, and all applications filed on or after September 1, 2011, must be filed on the new form. The form is available on the Court of Criminal Appeals’s website in Microsoft Word, Corel WordPerfect, and Adobe Acrobat formats. *See* Writ of Habeas Corpus Application Art. 11.07 (Revised Sept. 1, 2011), *available at* <http://www.cca.courts.state.tx.us/Forms/Forms.asp>.

A non-compliant application will be dismissed without prejudice.<sup>7</sup>

### A. Verification

Texas Code of Criminal Procedure Article 11.14(5) states, “Oath must be made that the allegations of the petition are true, according to the belief of the petitioner.” Article 11.14(5) “applies to a petitioner who is the applicant himself or some other person filing the application on his behalf, such as his attorney.” *Ex parte Rendon*, 326 S.W.3d 221, 224 (Tex. Crim. App. 2010), *overruling Ex parte Owens*, 206 S.W.3d 670, 679 (Tex. Crim. App. 2006) (citing *Ex parte Golden*, 991 S.W.2d 859, 862 (Tex. Crim. App. 1999) (“Although the instant application is not properly verified, we are not jurisdictionally barred from considering the merits of the issues raised.”)). Under Rule 73.1(d), the application must be verified by: (1) an oath before a notary or other officer authorized to administer oaths, or (2) an unsworn declaration by an inmate (in TDCJ-ID or county jail only) in substantially the form required TEX. CIV. P. & REM. CODE 132—declaring it to be true, according to his or her belief, and under penalty of perjury. *Id.*

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<sup>7</sup> During the 2012 fiscal year, the Court of Criminal Appeals dismissed 245 11.07 applications for non-compliance. Court of Criminal Appeals Activity: FY 2012, *available at* <http://www.courts.state.tx.us/pubs/AR2012/toc.htm#ccappeals>.

Either the applicant or a petitioner may verify an application. *Id.* The petitioner (e.g., attorney) will verify the allegations according to his or her belief. *Id.* A petitioner may verify the truth of the allegations in an application even when the veracity of the allegations belongs only to the applicant. *Id.* at 224. A non-inmate petitioner cannot verify an application, however, by signing the signature line designated “Inmate’s Declaration.” *Id.* at 225.

The Court of Criminal Appeals is currently in the process of amending the form to comply with *Ex parte Rendon*. Until then, the verification requirements per *Ex parte Rendon* are:

An **Inmate Applicant or Petitioner** must: (1) sign the oath before a notary or (2) sign the “Inmate Declaration.”

A **Non-Inmate Applicant or Petitioner** must sign the oath before a notary.

A **Petitioner** (i.e., attorney or other person) must first amend the form by striking “Applicant” and inserting “Petitioner” on the signature line below the notary portion. The Petitioner must then sign the oath before a notary.

An applicant who knowingly files an application that contains false allegations will be cited for abuse of the writ and may be prosecuted. *Ex parte Gaither*, 2012 Tex. Crim. App. LEXIS 1670, \*11-12 (Tex. Crim. App. Dec. 12, 2012) (not designated for publication).

## **B. Grounds for Relief**

Under Rule 73.1, an applicant must set out the grounds for relief and the relevant facts on the required form. *Ex parte Blacklock*, 191 S.W.3d at 719. Even though a supporting memorandum with legal citations and arguments can accompany the form, it cannot be used as a substitute for the sections of the form that require a list of the grounds for relief and supporting facts. *Id.* If the grounds for relief and supporting facts are not listed on the form, the clerk of the convicting court or the clerk of the Court of Criminal Appeals may refuse to file the application and return it to the applicant under Rule 73.2. *Id.*

## **III. WAIVER AND COLLATERAL ESTOPPEL**

A waiver of the right to file an 11.07 habeas application will be effective when it was knowing, intelligent, and voluntary. *Ex parte Insall*, 224 S.W.3d 213, 214 (Tex. Crim. App. 2007).<sup>8</sup> A waiver is not enforceable as to any claims that the applicant could not have known about, with

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<sup>8</sup> The waiver of the right to appeal is not enforceable if it was made before trial and, in certain instances, before the sentence was assessed. *Ex parte Reedy*, 282 S.W.3d 492, 496 (Tex. Crim. App. 2009).



the exercise of due diligence, at the time of the waiver. *Ex parte Reedy*, 282 S.W.3d at 494. When presented with a waiver, each claim will need to be examined independently to determine whether it is “based upon purported defects that are known (or could have been known with the exercise of due diligence and the assistance of counsel) to the applicant[at the time of his waiver.” *Id.* at 498, 504. A waiver will not be enforced against a claim that a plea was involuntary due to ineffective assistance of counsel. *Id.* at 500, 504. And, in one case, when the applicant pled guilty pursuant to a plea agreement providing for the waiver of habeas, the waiver was not enforced because the applicant had been admonished only about the “range of punishment” available, as opposed to a “certain punishment,” upon the revocation of his deferred supervision and an adjudication of guilt. *Ex parte Insall*, 224 S.W.3d at 215 (applicant’s plea found to be voluntary nevertheless because the applicant knew he could be sentenced to life upon revocation and adjudication); *see also text accompanying* footnote 17 (discussing the waiver of the right to appeal).

Under the collateral estoppel doctrine, otherwise known as the invited error doctrine, a party is prevented from prevented from complaining about an error that he or she induced. *Prystash v. State*, 3 S.W.3d 522, 531 (Tex. Crim. App. 1999); *Druery v. State*, 225 S.W.3d 491, 505-06 (Tex.Cr.App. 2007); *see also Ex parte Allen*, 2010 Tex. Crim. App. Unpub. LEXIS 227 (Tex. Crim. App. Apr. 28, 2010) (Keasler, J., concurring).

#### **IV. SUBSTANTIVE ISSUES RELATING TO A COLLATERAL ATTACK OF A CONVICTION AND SENTENCE**

##### **A. Burden of Proof**

In most instances, an applicant must plead facts that entitle him or her to relief and must prove his or her claim by a preponderance of the evidence. *Ex parte Thomas*, 906 S.W.2d 22, 24 (Tex. Crim. App. 1995); *Ex parte Rains*, 555 S.W.2d 478, 481 (Tex. Crim. App. 1976); *Ex parte McPherson*, 32 S.W.3d 860, 861 (Tex. Crim. App. 2000). *But see Ex parte Elizondo*, 205 947 S.W.2d 202, 209 (Tex. Crim. App. 1996) (an applicant must prove a claim of actual innocence based on newly discovered evidence by clear and convincing evidence). In some cases, an applicant’s delay in seeking relief may prejudice the credibility of the applicant’s claim. *Ex parte Young*, 479 S.W.2d 45, 46 (Tex. Crim. App. 1972).

The trial court’s judgment is presumed to be truthful and should not be disregarded. *Breazeale v. State*, 683 S.W.2d 446, 450-51 (Tex. Crim. App. 1985) (op. on reh’g) (citing *Ex parte Morgan*, 412 S.W.2d 657 (Tex. Crim. App. 1967)). Thus, the applicant bears the burden of establishing that any recitations in the record are incorrect. *Id.* at 451.

##### **B. Laches**

For the trial court to find that an applicant’s claim is barred by the doctrine of laches, the State must: “(1) make a *particularized* showing of prejudice, (2) show that the prejudice was *caused*

by the petitioner having filed a late petition, and (3) show that the petitioner has not acted with reasonable diligence as a matter of law.” *Ex parte Carrio*, 992 S.W.2d 486, 488 (Tex. Crim. App. 1999) (quoting *Walters v. Scott*, 21 F.3d 683, 686-87 (5th Cir. 1994) (emphasis in original)). If laches is not pled and proven by the State, the trial court cannot find that the applicant’s claim is barred under the doctrine of laches.

### C. Final Disposition: Dismiss v. Deny

A denial is a disposition related to the merits. *Ex parte Torres*, 943 S.W.2d at 474. “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.” *Id.* A dismissal is a disposition unrelated to the merits. *Id.*; see e.g., *Ex parte Reedy*, 282 S.W.3d at 503.

In some cases, the Court of Criminal Appeals will dismiss some claims while denying other claims presented in an 11.07 application. See, e.g., *Ex parte Deeringer*, 210 S.W.3d 616, 618 (Tex. Crim. App. 2006) (the Court will “rule on the merits of the claims that challenge the conviction, and . . . dismiss the separate claim that seeks jail time credit” under *Ex parte Ybarra*, 149 S.W.3d 147 (Tex. Crim. App. 2004) (per curiam)); *Ex parte Hill*, 2010 Tex. Crim. App. Unpub. LEXIS 704 (Tex. Crim. App. Dec. 8, 2010) (per curiam) (not designated for publication) (dismissing claims challenging the conviction pursuant to Article, 11.07, Section 4 and denying claim related to parole).

### D. Cognizability

The Court of Criminal Appeals will not review the merits of claims that are not cognizable. Frequently raised claims, which are not cognizable, include the following:

**Trial Court Error**—Habeas corpus is available to review jurisdictional defects or the denial of a fundamental or constitutional right; therefore, “[t]he Great Writ should not be used to litigate matters which should have been raised on appeal.” *Ex parte Banks*, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989) (op. on reh’g); see also *Ex parte Douthit*, 232 S.W.3d 69, 75 (Tex. Crim. App. 2007) (a violation of Articles 1.13 and 1.14, which prohibited a capital murder defendant, before Sept. 1, 1991, from waiving a jury trial, is not cognizable; statutory violations are not jurisdictional defects or constitutional or fundamental errors); *Ex parte Cruzata*, 220 S.W.2d 518, 520 (Tex. Crim. App. 2007) (applicant’s claim that his sentence was improper where the trial judge immediately withdrew the applicant’s sentence and re-set sentencing for a later date was not cognizable because the applicant could have raised the issue on appeal but did not do so); *Ex parte Richardson*, 201 S.W.3d 712, 713 (Tex. Crim. App. 2006) (applicant was barred from challenging the trial judge’s lack of authority to preside over the revocation proceeding where the judge was the prosecutor at the original proceeding because the issue could have been raised at trial and on appeal); *Ex parte Nelson*, 137 S.W.3d 666, 667-68 (Tex. Crim. App. 2004) (applicant’s failure to challenge deadly weapon finding on appeal when the applicant did not waive his right to appeal bars review of such a claim on habeas); *Ex parte Townsend*, 137

S.W.3d 79, 81 (Tex. Crim. App. 2004) (applicant's failure to challenge improper stacking order on appeal when the applicant did not waive his right to appeal bars review of such a claim on habeas). Arguably, if the applicant waived the right to appeal and therefore did not have the right to appeal, then certain claims that would otherwise be barred in instances of a valid waiver, may be cognizable.

**Fourth Amendment**—Search and seizure claims are waived by failure to raise them on direct appeal. *Ex parte Kirby*, 492 S.W.2d 579, 581 (Tex. Crim. App. 1973).

**Fifth Amendment**—Self-Incrimination—Where an applicant's claim only implicates the protections afforded under *Miranda*, and the applicant did not raise this allegation on direct appeal, the applicant's claim is not cognizable. *Ex parte Gardner*, 959 S.W.2d 189, 199 (Tex. Crim. App. 1998).

**Sufficiency of the Evidence**—A challenge to the sufficiency of the evidence is not cognizable. *Ex parte Easter*, 615 S.W.2d 719, 721 (Tex. Crim. App. 1981); *Ex parte Williams*, 703 S.W.2d 674, 677 (Tex. Crim. App. 1986); *Ex parte McLain*, 869 S.W.2d 349, 350 (Tex. Crim. App. 1988); *Ex parte Ash*, 514 S.W.2d 762, 763 (Tex. Crim. App. 1974). Because the merits of such claims can never be decided, they are denied. *Ex parte Grigsby*, 137 S.W.3d 673, 674 (Tex. Crim. App. 2004). But a claim of no evidence is cognizable. *Ex parte Perales*, 215 S.W.3d 418, 419-20 (Tex. Crim. App. 2007) (holding that “an allegation of delivery of a controlled substance by actual transfer to an unborn child cannot constitute delivery” and entering judgment of acquittal) (citing *Ex parte Coleman*, 599 S.W.2d 305, 307 (Tex. Crim. App. 1978)).

**Allegations Raised and Rejected on Direct Appeal**—An allegation that was rejected on direct appeal is not cognizable on habeas corpus. *Ex parte Acosta*, 672 S.W.2d 470, 472 (Tex. Crim. App. 1984). *But see Ex parte Nailor*, 149 S.W.3d 125, 131 (Tex. Crim. App. 2004) (“if the appellate court rejects a claim of ineffective assistance of counsel because the record on direct appeal does not contain sufficient information to adequately address and resolve a particular allegation of counsel's deficient performance, the defendant may re-urge consideration of that specific act or omission in a later habeas corpus proceeding if he provides additional evidence to prove his claim.”); *Ex parte Brown*, 158 S.W.3d 449, 453-57 (Tex. Crim. App. 2005) (per curiam) (because the trial judge's pattern of prejudging punishment and the trial judge's testimony or statements on the issue were not in the trial court's records, the applicant's due process claim that the trial judge refused to consider the full range of punishment at the hearing on the State's motion to adjudicate was cognizable).

**State Constitutional Claims**—Claims raised under the Texas Constitution are not cognizable in a habeas corpus proceeding if the error is subject to a harm analysis. *Ex parte Dutchover*, 779 S.W.2d 76, 77 (Tex. Crim. App. 1989) (per curiam).

**Violations of Statutes and Rules**—A violation of a statute, rule, or non-constitutional doctrine is not generally cognizable in a post-conviction writ of habeas corpus. *Ex parte Graves*, 70 S.W.3d

103, 109 (Tex. Crim. App. 2002).

**State Speedy Trial Claims**—State statutory speedy trial claims are not cognizable. *Ex parte Owenby*, 749 S.W.2d 880, 881 (Tex. Crim. App. 1988). NOTE: Speedy trial claims based on the United States Constitution are cognizable.

**The Interstate Agreement on Detainers (IAD)**—A violation of the IAD is not a cognizable claim on habeas corpus. *Ex parte Sanchez*, 918 S.W.2d 526, 527 (Tex. Crim. App. 1996).

**Invalid or Defective Indictment**—A challenge to the form or substance of an indictment is deemed waived unless the applicant demonstrates that a pretrial objection was made. *Ex parte Gibson*, 800 S.W.2d 548, 551 (Tex. Crim. App. 1990).

**Unlawful Grant of Probation**—Even if the applicant's probation had been unlawfully granted, the claim is not cognizable on habeas. *Ex parte Williams*, 65 S.W.3d 656, 658 (Tex. Crim. App. 2001).

**Chapter 64 DNA Proceedings**—Habeas corpus is not available for claims of ineffective assistance of counsel in Chapter 64 proceedings. *Ex parte Baker*, 185 S.W.3d 894, 898 (Tex. Crim. App. 2006). Such a claim will be dismissed or denied. *Id.* NOTE: “[F]avorable results of DNA testing under Chapter 64 may be used in post-conviction habeas corpus.” *Id.* at 896.

**Prison Disciplinary Proceedings**—The Court of Criminal Appeals does not review claims regarding prison disciplinary proceedings. *Ex parte Brager*, 704 S.W.2d 46, 46 (Tex. Crim. App. 1986).

## E. Ineffective Assistance of Counsel

Grounds alleging ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution constitute the majority of claims raised in 11.07 applications.<sup>9</sup> Habeas corpus provides the most desirable forum for raising a claim of ineffective assistance, *Andrews v. State*, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005) (observing that “the record on direct appeal is in almost all cases inadequate to show that counsel’s conduct fell below an objectively reasonable standard of performance . . . .”); *Ex parte White*, 160 S.W.3d 46, 49 (Tex. Crim. App. 2004), and such a claim is cognizable unless the exact claim, with supporting facts

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<sup>9</sup> “A finding of professional misconduct based on other matters as well as actions of counsel at trial should have no bearing on a subsequent Article 11.07, V.A.C.C.P., proceedings alleging solely the ineffective assistance of counsel *at trial*.” *Ex parte Raborn*, 658 S.W.2d 602, 604 (Tex. Crim. App. 1983) (emphasis in original). *But see Ex parte Thompson*, 153 S.W.3d 416, 420 (Tex. Crim. App. 2005) (noting that counsel's suspension from the practice of law “lends support to applicant’s claim that his attorney gave him questionable legal advice.”).

and documentation, was raised and rejected on direct appeal. *But see Ex parte Nailor*, 149 S.W.3d at 131.

Ineffective assistance of counsel claims are almost always reviewed under the standard announced in *Strickland v. Washington*.<sup>10</sup> *Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). To prevail on a claim of ineffective assistance, a habeas applicant must establish, by a preponderance of the evidence, “that counsel’s performance ‘was deficient and that a probability exists, sufficient to undermine [the court’s] confidence in the result, that the outcome would have been different but for counsel’s deficient performance.’” *Ex parte Amezquita*, 223 S.W.3d 363, 366 (Tex. Crim. App. 2006) (quoting *Ex parte White*, 160 S.W.3d 46, 49 (Tex. Crim. App. 2004)). To show deficient performance, an applicant must show that “counsel was not acting as a ‘reasonably competent attorney,’” and that his advice was not within the range of competence demanded of attorneys in criminal cases.” *Ex parte Chandler*, 182 S.W.3d 350, 354 (Tex. Crim. App. 2005) (quoting *Strickland*, 466 U.S. at 687). “[S]trategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable[,]” unless outside the wide range of competent assistance. *Strickland*, 466 U.S. 690; *see also Ex parte Ellis*, 233 S.W.3d 324, 331, 336 (Tex. Crim. App. 2007) (even a risky, and perhaps undesirable, all or nothing strategy is within the range of reasonable professional assistance). In establishing resulting prejudice, “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694; *see also Ex parte Rogers*, 369 S.W.3d 858, 864–65 (Tex. Crim. App. 2012) (to establish resulting prejudice at the punishment phase, an applicant must show that the sentencer would have rendered a more favorable sentence).

It is not necessary to review the first prong—deficient performance—if the applicant has failed to satisfy the second, resulting prejudice prong. *Ex parte Martinez*, 330 S.W.3d 891, 901 (Tex. Crim. App. 2011).

When presenting a claim of ineffective assistance, an applicant must allege supporting facts, not just legal conclusions. *Ex parte McPherson*, 32 S.W.3d 860, 861 (Tex. Crim. App. 2000).

Generally, the Court of Criminal Appeals will provide an attorney with an opportunity to respond to a claim of ineffective assistance before finding counsel ineffective. *Andrews v. State*, 159 S.W.3d 98, 104 (Tex. Crim. App. 2005) (Keller, P.J., dissenting).

### **Importance of Findings and Conclusions**

A trial court’s conclusions of law will be reviewed *de novo*. *Ex parte Brown*, 158 S.W.3d at

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<sup>10</sup> 466 U.S. 668 (1984). *But see United States v. Cronin*, 466 U.S. 648, 659 (1984) (prejudice presumed when there is a complete denial of counsel, i.e., actual assistance has not been provided).

453. When judging ineffective assistance of counsel claims, the Court of Criminal Appeals will determine if the trial court's findings of fact are supported by the record. *Ex parte Adams*, 768 S.W.2d 281, 288 (Tex. Crim. App. 1989) (citing *Ex parte Young*, 479 S.W.2d 45, 46 (Tex. Crim. App. 1972)). The Court will usually give "almost total deference to a trial court's factual findings in habeas proceedings, especially when those findings are based upon credibility and demeanor."<sup>11</sup> *Ex parte White*, 160 S.W.3d at 50 (citing *Ex parte Martin*, 6 S.W.3d 524, 526 (Tex. Crim. App. 1999)). The trial court should therefore be sure to include all supporting documentation in the habeas record. *Ex parte Olivares*, 202 S.W.3d 771, 773 (Tex. Crim. App. 2006).<sup>12</sup> The Court of Criminal Appeals is free to reject a trial court's findings if they are not supported by the record. *Id.* at 50-51 (citing *Ex parte Adams*, 768 S.W.2d at 288). And if the Court's review reveals multiple problems with the trial court's findings and conclusions, the Court will become skeptical of all of the findings and conclusions, and the amount of deference given to the correct findings and conclusions will vary depending on the Court's examination of the case as a whole. *Ex parte Reed*, 271 S.W.3d at 727-28. When necessary, the Court will enter alternative or contrary findings and conclusions that the record supports and, in other instances, the Court will clarify and supplement the trial court's findings and conclusions. *Id.* at 727-28. When adopting either of the parties' proposed findings and conclusions, the trial court, as the neutral arbiter, should carefully scrutinize them to ensure that they accurately reflect the evidence in the record before adopting them verbatim. *Id.* at 729.

### 1. Ineffective Assistance of Trial Counsel

Allegations of ineffective assistance of trial counsel claims are grounded on counsel's failure to be familiar with the applicable facts or law or both. Significantly, record-based claims that would not otherwise be cognizable on habeas can be boot-strapped to a claim of ineffective assistance of trial counsel. For instance, an applicant can obtain a review of the merits of an illegal search and seizure claim by challenging counsel's failure to file a motion to suppress if the applicant sets out the necessary facts, which if true, would entitle the applicant to relief. *Ex parte Aviles*, No. AP-75,616 (Tex. Crim. App. Feb. 14, 2007) (per curiam) (not designated for publication) (finding that trial counsel was ineffective for failing to investigate the circumstances of the applicant's arrest and confession and for failing to file a motion to suppress).

Most ineffective assistance claims are unsuccessful because the applicant fails to plead facts, which if true, would entitle him or her to relief. This pleading requirement applies equally to allegations of deficient performance and resulting prejudice. The trial court does not forward

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<sup>11</sup> When making a credibility choice between two attorneys, the trial judge, to avoid the awkward and difficult position of offending one of the attorneys who regularly practice before the court, could say that both attorneys are credible but that one is more credible in this instance.

<sup>12</sup> The trial court should state with particularity what evidence it is relying on when making specific findings and conclusions.

an applicant's trial record to the Court of Criminal Appeals along with the habeas application. Therefore, in some cases, it may be necessary to attach the trial record or relevant portions of the trial record to support a claim of ineffective assistance. *Ex parte Chandler*, 182 S.W.3d 350, 353 n.2 (Tex. Crim. App. 2005) (noting that the applicant bears the burden of proof and that the Court was unable to “independently verify the accuracy of the facts set out in the trial court’s findings” because the applicant failed to include a copy of the trial testimony in the writ record.). *But see Ex parte Olivares*, 202 S.W.3d at 773.

Applicants frequently raise claims challenging the failure of trial attorneys to adequately investigate. *See Wiggins v. Smith*, 539 U.S. 510, 527 (2003); *Ex parte Welborn*, 785 S.W.2d 391, 392-96 (Tex. Crim. App. 1990). *But see Harrington v. Richter*, 131 S. Ct. 770, 789 (2011) (“Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies.”). For instance, trial counsel has a duty to investigate enhancement allegations alleged to increase an offense or punishment level, *Ex parte Harrington*, 310 S.W.3d at 459,<sup>13</sup> and to investigate any available affirmative defense. *Ex parte Imoudu*, 284 S.W.3d 866, 870 (Tex. Crim. App. 2009). To establish that trial counsel was deficient for failing to fully investigate, an applicant must begin by alleging and showing what a more thorough, in-depth investigation would have revealed. *Mooney v. State*, 817 S.W.2d 693, 696-97 (Tex. Crim. App. 1991); *Wilkerson v. State*, 726 S.W.2d 542, 550 (Tex. Crim. App. 1986) (finding “there is nothing in the record to show that potential defenses were precluded or that a visit to the scene would have made any difference in the defense’s case[;] the failure of the attorneys to visit the scene does not militate against a finding of reasonable representation.”). Generally, to support this type of claim, applicants need to submit detailed<sup>14</sup> evidence (e.g., sworn affidavits) from trial counsel, investigators, and/or experts with the habeas application.<sup>15</sup> *See, e.g., Ex parte Imoudu*, 284 S.W.3d at 686 (psychiatric report concluding that the applicant was insane at the time of the offense submitted in support of claim that trial counsel was ineffective in failing to investigate insanity defense); *Ex parte Amezcuita*, 223 S.W.3d 363, 372 (Tex. Crim. App. 2006); *Ex parte Martinez*, 195 S.W.3d at 721-22, 726; *Ex parte Briggs*, 187 S.W.3d 458, 460-70 (Tex. Crim. App. 2005) (trial counsel’s decision not to

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<sup>13</sup> *See also Ex parte Miller*, No. AP-76,167, 2009 Tex. Crim. App. LEXIS 1486, at \*29-41 (Tex. Crim. App. 2009) (not designated for publication) (appellate counsel was ineffective for failing to challenge sufficiency of the evidence to support prior conviction used to support punishment enhancement), *reaffirmed on reh’g*.

<sup>14</sup> *Ex parte Martinez*, 195 S.W.3d 713, 718 (Tex. Crim. App. 2006) (observing that parts of the affidavits filed by the applicant’s trial attorneys and the affidavit filed by an expert hired by the defense were too conclusory to assist the Court in evaluating the applicant’s ineffective assistance of counsel claims).

<sup>15</sup> When affidavits from attorneys and experts are conflicting, the best practice to resolve any conflicts is to hold a live evidentiary hearing instead of a paper hearing.

obtain expert assistance due to lack of available finances cannot be categorized as strategic; therefore, counsel was deficient).

And when challenging trial counsel's failure to call a witness, "the applicant must show that [the witness] had been available to testify and that his testimony would have been of some benefit to the defense." *Ex parte White*, 160 S.W.3d at 52 (citing *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983) ("Counsel's failure to call witnesses at the guilt-innocence and punishment stages is irrelevant absent a showing that such witnesses were available and appellant would benefit from their testimony.")); *see also Ex parte Ramirez*, 280 S.W.3d 848, 853-54 (Tex. Crim. App. 2007) (Applicant failed to show that testimony of uncalled witnesses would have been favorable and that counsel's failure to review video recording of the crime was prejudicial). This can be accomplished by submitting a sworn affidavit from the witness that states that trial counsel failed to contact him or her, that he or she was willing and available to testify, and that sets out the facts that he or she would have testified to had trial counsel called the witness to testify at the applicant's trial. *See, e.g., id.* When evaluating a claim of ineffective assistance for failure to know the applicable law, trial counsel's performance is "judged under the law at the time of trial[.]" *Ex parte Butler*, 884 S.W.2d 782, 783-84 (Tex. Crim. App. 1994) (citing *Strickland*, 466 U.S. at 690). Again, it is important to provide adequate briefing by presenting the applicable facts and law. For example, in challenging counsel's failure to object, an applicant must establish that the trial judge would have erred by overruling that objection. *Ex parte White*, 160 S.W.3d at 53 (citing *Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996) (per curiam)); *see also Ex parte Martinez*, 330 S.W.3d at 901; *Ex parte Lane*, 303 S.W.3d 702, 719-20 (Tex. Crim. App. 2009) (granting new punishment trial based on counsel's deficient performance in failing to object to prejudicial testimony admitted at the guilt and punishment phases). Trial counsel will not be found ineffective for failing to advance an issue of law where the law at the time of trial was unsettled. *Ex parte Smith*, 296 S.W.3d 78, 81 (Tex. Crim. App. 2009); *Ex parte Bahena*, 195 S.W.3d 704, 707 (Tex. Crim. App. 2006); *Ex parte Chandler*, 182 S.W.3d 350, 358-59 (Tex. Crim. App. 2005).

Trial counsel has a duty to inform a defendant of all plea offers, *Monreal v. State*, 947 S.W.2d 559, 564 (Tex. Crim. App. 1997), and counsel's failure to do so will, in most instances, result in a finding of ineffective assistance. *See, e.g., Ex parte Blue*, No. AP-75,518 (Tex. Crim. App. Sept. 27, 2006) (per curiam) (not designated for publication).

An allegation that the applicant was prejudiced, without more, is insufficient. In a capital case, the Court of Criminal Appeals noted that it is "authorized" to summarily deny habeas relief where the applicant failed to "set forth any legal or factual arguments, either in his writ or in his brief to this Court," showing how the applicant was prejudiced. *Ex parte Martinez*, 195 S.W.3d at 730. So when arguing resulting prejudice, it is imperative that a statement of the law and/or facts which demonstrate prejudice is included. *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985).

Where the applicant pled guilty, the applicant must allege that but for the counsel's error, he or



she would not have pled guilty and would have insisted on going to trial. *Ex parte Harrington*, 310 S.W.3d 452, 458 (Tex. Crim. App. 2010); *Ex parte Akhtab*, 901 S.W.2d 488, 490 (Tex. Crim. App. 1995) (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). For example, in *Ex parte Moody*, the Court of Criminal Appeals found that the applicant sustained his burden of proof where the applicant's trial counsel incorrectly advised the applicant before he entered his plea that his federal and state sentences would run concurrently. 991 S.W.2d 856, 858-59 (Tex. Crim. App. 1999). In reaching this holding, the Court reasoned: "Unlike a case in which a defendant relies on erroneous parole eligibility information, which is speculative by nature, the concurrency of Applicant's sentences directly affects the length of his confinement." *Id.* at 858. This year the Supreme Court elaborated on the *Hill v. Lockhart* prejudice requirement in cases in which the defendant has proven that he or she would have accepted a plea offer had the offer been properly conveyed by counsel. *Missouri v. Frye*, 132 S. Ct. 1399, 1410-11 (2012). The defendant must show "a reasonable probability that the prosecution would have adhered to the agreement and that it would have been accepted by the trial court. *Id.* at \*27-28. Additionally, a defendant who rejects a plea offer based on the deficient advice of counsel and opts for a trial must prove prejudice by establishing that he or she would have accepted the offer, that the prosecution would have adhered to the offer, that the court would have accepted the offer's terms, and that the conviction or sentence under the offer's terms would have been less severe than that actually imposed. *LaFler v. Cooper*, 132 S. Ct. 1376, 1385 (2012). Where the prejudice is that the defendant would have received a lesser sentence, the trial judge can fashion a new sentence, which may be the term offered by the prosecution, the term imposed at trial, or something in between. *Id.* at 1388. If the offer was for a lesser offense or if there is mandatory sentencing that restricts the judge, the remedy may be to require the prosecution to reoffer the plea. The judge can then decide whether to vacate the conviction and accept the plea or to leave the conviction intact. *Id.* at 1389. In making this determination, the relevant considerations are the defendant's willingness to accept responsibility and the facts available about the crime at the time the offer was made. *Id.*

When an applicant claims that counsel was ineffective for failing to raise the insanity defense and that his or her guilty plea is therefore involuntary, to meet the prejudice prong, courts must consider "whether the insanity defense would have been validly raised and likely to succeed at trial." *Ex parte Imoudu*, 284 S.W.3d at 870. Generally, trial counsel will not be ineffective for failing to advise a defendant of the collateral or indefinite consequences of a guilty plea. *Ex parte Morrow*, 952 S.W.2d 530, 536-37 (Tex. Crim. App. 1997); *see also Mitschke v. State*, 129 S.W.3d 130, 136 (Tex. Crim. App. 2004) (holding that "although the sex-offender registration requirement is a direct consequence of [a] plea, it is a non-punitive measure, and failure to admonish does not necessarily render a plea involuntary."). *But see Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010) (declining to decide whether deportation is a direct or collateral consequence because of its unique nature; "deportation is . . . intimately related to the criminal process" and counsel's erroneous advice about deportation consequences when a defendant pleads guilty will result in a determination that counsel performed deficiently).<sup>16</sup>

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<sup>16</sup> The State's PDR in *De Los Reyes*, PD-1457-11 is pending to determine whether  
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## 2. Ineffective Assistance of Counsel—Denial of Right to Direct Appeal

If a convicted person wants to appeal, trial counsel “must ensure that written notice of appeal is filed with the trial court.”<sup>17</sup> *Jones v. State*, 98 S.W.3d 700, 703 (Tex. Crim. App. 2003) (citing TEX. R. APP. P. 40(b)(1)); *Ex parte Galvan*, 770 S.W.2d 822, 823 (Tex. Crim. App. 1989) (“the standard practice of a particular court which ‘routinely’ appoints different counsel in criminal cases for trial and on appeal does not obviate the affirmative duty of an attorney to preserve a defendant’s right to appeal, regardless of whether he considers his appointment ‘for trial only.’”) (citing *Ward v. State*, 740 S.W.2d 794, 797 (Tex. Crim. App. 1987)).

[T]rial counsel, retained or appointed, has the duty, obligation and responsibility to consult with and fully to advise his client concerning meaning and effect of the judgment rendered by the court, his right to appeal from that judgment, the necessity of giving notice of appeal and taking other steps to pursue an appeal, as well as expressing his professional judgment as to possible grounds for appeal and their merit, and delineating advantages and disadvantages of appeal.<sup>18</sup>

*Ex parte Axel*, 757 S.W.2d 369, 374 (Tex. Crim. App. 1988); *see also Ward*, 740 S.W.2d at 797.

The Court of Criminal Appeals has explained that trial counsel has two options when a client

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Padilla is retroactive for cases on collateral review. The Court will likely wait until the Supreme Court renders a decision on the issue in *Chaidez v. United States*, No.11-820.

<sup>17</sup> “[A] valid waiver of appeal, whether negotiated or non-negotiated, will prevent a defendant from appealing without the consent of the trial court.” *Monreal v. State*, 99 S.W.3d 615, 622 (Tex. Crim. App. 2003); *see also Ex parte Broadway*, 301 S.W.3d 694, 697-99 (Tex. Crim. App. 2009) (a defendant can waive the right to appeal before entering an open guilty plea before the trial court when the punishment to be assessed is uncertain where the State gives consideration for the appeal waiver by consenting to the defendant’s waiver of the right to a jury trial), *abrogating in part Ex parte Delaney*, 207 S.W.3d 794, 798-99 (Tex. Crim. App. 2006) (a waiver of the right to appeal executed before a trial court deferred adjudication and placed the defendant on community supervision does not affect the defendant’s right to appeal following adjudication and sentencing where the defendant was only aware of the range of punishment available upon revocation; because punishment to be assessed was uncertain the waiver was not knowing, intelligent and voluntary); *Blanco v. State*, 18 S.W.3d 218, 220 (Tex. Crim. App. 2000) (stating that the “[a]ppellant was ‘fully aware of the likely consequences’ when he waived his right to appeal, and it is not unfair to expect him to live with those consequences now.”).

<sup>18</sup> “[A]t sentencing the judge of [the] trial court has discretion, but not a duty or responsibility, to inform a defendant of his right to appeal and of other appellate matters to the extent deemed appropriate in the premises.” *Ex parte Axel*, 757 S.W.2d at 374.

wants to appeal. *Jones*, 98 S.W.3d at 703. First, counsel can sign the notice of appeal, which the Court interprets as an implicit offer to serve as appellate counsel. *Id.* Alternatively, the convicted person can file a *pro se* notice of appeal. *Id.* This indicates that counsel does not wish to serve as appellate counsel. *Id.* “A ‘contemporaneous’ presentation of the *pro se* notice with a motion to withdraw by trial counsel serves as actual notice to the trial court of the defendant’s desire to appeal.” *Id.*

For an applicant to show that he or she is entitled to an out-of-time appeal, the applicant must show that he or she manifested the desire to appeal. *Ex parte Galvan*, 770 S.W.2d at 824; *see also Ex parte Crow*, 180 S.W.3d 135, 138 (Tex. Crim. App. 2005) (“When a defendant’s right to an entire judicial proceeding has been denied, the defendant is ‘required to show a reasonable probability that, absent counsel’s errors, a particular proceeding would have occurred, but he [is] not required to show that the proceeding would have resulted in a favorable outcome.’”) (quoting *Johnson v. State*, 169 S.W.3d 223, 231 (Tex. Crim. App. 2005)). When the Court of Criminal Appeals grants an out-of-time appeal, a convicted person is returned to the position he or she was in “immediately after the trial court signed the judgment of conviction.” *Mestas v. State*, 214 S.W.3d 1, 4 (Tex. Crim. App. 2007). Thus, a convicted person can file a motion for new trial before giving notice of appeal. *Id.*

### 3. Ineffective Assistance of Counsel—Denial of Right to File PDR

A convicted person does not have the right to be represented by counsel when filing a petition for discretionary review. *Ex parte Wilson*, 956 S.W.2d 25, 27 (Tex. Crim. App. 1997) (per curiam); *Ross v. Moffitt*, 417 U.S. 600, 610 (1974). However, appellate counsel is required to inform the convicted person of the outcome of his or her appeal<sup>19</sup> and of his or her right to file a petition for discretionary review *pro se*.<sup>20</sup> *Ex parte Wilson*, 956 S.W.2d at 27; *Ex parte Riley*, 193 S.W.3d 900, 901 (Tex. Crim. App. 2006). When an attorney files an *Anders*<sup>21</sup> brief in the court of appeals, the attorney is still obligated to inform the client of the client’s right to file a *pro*

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<sup>19</sup> Attorneys should be careful about relying solely on receipt of notice *via* the United States mail. *Ex parte Riley*, 193 S.W.3d 900, 901-02 (Tex. Crim. App. 2006). The Court of Criminal Appeals has noted that “CaseMail and opinion tracking are online tools offered by the courts to alert an attorney by electronic mail immediately when a case is handed down, alleviating the delay resulting from regular mail. Thanks to technology, attorneys no longer have the excuse that they didn’t know when their client’s case was decided.” *Id.* at 902.

<sup>20</sup> “[N]othing in the United States Constitution, the Texas Constitution, or any statute or rule requires the convicting county to provide a free copy of the trial record to an appellant for purposes of filing a *pro se* petition of discretionary review.” *Ex parte Trainer*, 181 S.W.3d 358, 359 (Tex. Crim. App. 2005).

<sup>21</sup> *Anders v. California*, 386 U.S. 738 (1967).

se petition for discretionary review. *Ex parte Owens*, 206 S.W.3d 670, 674 (Tex. Crim. App. 2006).

An applicant seeking an out-of-time PDR must show that: (1) the applicant “was entitled to be in the appellate process, and (2) absent counsel’s conduct, the [applicant] would have timely filed a PDR.” *Ex parte Crow*, 180 S.W.3d at 138. The Court of Criminal Appeals has found that the applicant failed to sustain his burden of proof where counsel stated that he did not remember if he told the applicant that his convictions had been affirmed and of the applicant’s right to file a petition for discretionary review, but stated that it was his firm’s “usual practice to advise the client of the appellate decision, and of his right to file a PDR and we have no reason to believe that was not done in this case.” *Ex parte Scott*, 190 S.W.3d 672, 673 (Tex. Crim. App. 2006) (per curiam). Even if counsel complied with his or her duties, but there was a breakdown in the system (i.e., problems with the mail) that prevented the applicant from getting timely notice, then the Court of Criminal Appeals will give the applicant the opportunity to file an out-of-time PDR. *Ex parte Riley*, 193 S.W.3d at 902.

#### **4. Ineffective Assistance of Appellate Counsel**

A convicted person is entitled to effective assistance of counsel on direct appeal.<sup>22</sup> *Evitts v. Lucey*, 469 U.S. 387, 396 (1985); *Ex parte Axel*, 757 S.W.2d at 374. To show that appellate counsel rendered ineffective assistance, a habeas applicant must demonstrate that counsel’s failure to raise an issue on appeal was objectively unreasonable and that had counsel raised the issue, the applicant would have prevailed on appeal. *See Smith v. Murray*, 477 U.S. 527, 535-36 (1986); *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000) (finding *Strickland* standard applicable to claim that appellate counsel was ineffective for concluding that the client’s appeal was frivolous).

#### **F. Involuntary Plea**

Involuntary plea claims are also frequently raised in 11.07 applications. The Court of Criminal Appeals has said that “most cases of involuntary pleas result from circumstances that existed outside the record, such as misunderstandings, erroneous information, impaired judgment, ineffective assistance of counsel, and plea-bargains that were not followed or turn out to be impossible of performance.” *Cooper v. State*, 45 S.W.3d 77, 82 (Tex. Crim. App. 2001); *see e.g., Ex parte Zapata*, 235 S.W.3d 794, 795 (Tex. Crim. App. 2007) (applicant’s plea held unknowing and involuntary when Applicant learned of victim’s recantation of sexual assault allegation after he entered plea but before sentencing and thought that he could withdraw his guilty plea before sentencing).

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<sup>22</sup> The Sixth “Amendment itself does not provide any basis for finding a right to self-representation on appeal.” *Martinez v. Court of Appeal of California*, 528 U.S. 152, 160 (2000).

A habeas applicant must prove by a preponderance of the evidence that his or her guilty plea was “induced by threats, misrepresentations or improper promises.” *Ex parte Morrow*, 952 S.W.3d at 535 (citing *Brady v. United States*, 397 U.S. 742, 755 (1970)). Some of the most common involuntary plea claims involve the following:

**Deportation Consequences**—Counsel is required to advise a non-citizen defendant about the risk of deportation when law clearly states that deportation is presumptively mandatory. *Padilla*, 130 S. Ct. 1473. When the law is unclear, counsel need only advise a non-citizen client that there is a risk of adverse immigration consequences. To obtain relief, the defendant must show that a decision to reject the plea would have been rational under the circumstances. See text accompanying note 16 *supra*.

**Parole Eligibility**—In entering a guilty plea, counsel may be held ineffective for failing to properly advise a defendant about his or her parole eligibility, which is determined by the date that the offense was committed. *Ex parte Moussazadeh*, 361 S.W.3d 684, 689-92 (Tex. Crim. App. 2012). Prejudice is shown by the fact that the defendant would not have pled guilty if he or she knew the time required to be served before becoming eligible for parole. *Id.* at 691.

**Service of Sentence**—An applicant's plea will be found unknowing and involuntary where the applicant was induced to plead guilty pursuant to a plea agreement that is based on an unenforceable representation that the applicant's Texas state sentence would run concurrently with either another federal or state sentence imposed by a state other than Texas. *Ex parte Huerta*, 692 S.W.2d 681, 681-82 (Tex. Crim. App. 1985); *Ex parte Parra*, Nos. AP-75,563-65 (Tex. Crim. App. Dec. 6, 2006) (per curiam) (not designated for publication).

**Shock Probation**—Where an applicant's guilty plea was entered pursuant to an approved plea bargain agreement that provided that the applicant would be granted shock probation, and it is later discovered that the applicant was legally ineligible for shock probation, the applicant's plea will be found involuntary. *Ex parte Austin*, 746 S.W.2d 226, 226-30 (Tex. Crim. App. 1988); *Ex parte Reasoner*, AP-75,606 (Tex. Crim. App. Feb. 7, 2007) (per curiam) (not designated for publication). Likewise, when the trial court lost jurisdiction to grant shock probation as previously agreed to under the terms of an approved plea agreement, habeas relief will be warranted. *Ex parte Rogers*, 629 S.W.2d 741, 742 (Tex. Crim. App. 1982).

## G. Jury Charge Error

Jury charge error is cognizable on habeas. *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985); *Ex parte Coleman*, 599 S.W.2d 305, 306-07 (Tex. Crim. App. 1978). Where unobjected-to-jury-charge error is raised for the first time on habeas, it is reviewed under the “egregious harm” standard set forth in *Almanza v. State*.<sup>23</sup> *Ex parte Smith*, 309 S.W.3d 53, 62-62

<sup>23</sup> 686 S.W.2d 157 (Tex. Crim. App. 1984) (op. on reh'g).

(Tex. Crim. App. 2010). When alleging jury charge error, an applicant must do more than attach a copy of the jury charge and allege “the denial of a fair and impartial trial or due process of law, which are mere conclusions of law[.]” *Ex parte Maldonado*, 688 S.W.2d at 116. It is also insufficient to simply allege that the charge was erroneous. *Id.* An “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.” *Id.*

## H. Double Jeopardy

A violation of the Fifth Amendment’s prohibition against double jeopardy is cognizable on an 11.07 application. *Ex parte Cavazos*, 203 S.W.3d 333, 339 (Tex. Crim. App. 2006); *Ex parte Diaz*, 959 S.W.2d 213, 214 (Tex. Crim. App. 1998). In October 2006, the Court of Criminal Appeals granted habeas relief where the applicant was convicted of two counts of burglary of a habitation, one with intent to commit theft and one with intent to commit sexual assault, that arose from a single entry. *Ex parte Cavazos*, 203 S.W.3d at 337-39. The Court held that “the allowable unit of prosecution in a burglary is the unlawful entry.” *Id.* at 337; *see also Ex parte Senterfitt*, No. AP-75,569 (Tex. Crim. App. Apr. 18, 2007) (per curiam) (not designated for publication) (granting relief pursuant to *Ex parte Cavazos*). The Court granted relief as to the applicant’s claim as it related to his most serious offense. *Ex parte Cavazos*, 203 S.W.3d at 339. The Court found that, although both convictions were designated as first-degree felonies and had the same sentence in terms of years of imprisonment, the applicant’s burglary of a habitation with intent to commit theft conviction was the most serious offense because the trial court had ordered the applicant to pay restitution. *Id.* In making this determination, the Court overruled its decision in *Landers v. State*<sup>24</sup> to the extent that *Landers* held that “the degree of the felony, range of punishment, and rules governing parole eligibility and awarding of good-conduct time” are relevant when determining which offense is the most serious. *Ex parte Cavazos*, 203 S.W.3d at 338.

In *Ex parte Amador*, the Court of Criminal Appeals held that the defendant’s conviction for the lesser-included offense of indecent exposure barred the State from prosecuting the defendant for indecency with a child by exposure where the defendant showed his penis to two women and the three children who accompanied them in a public park. 326 S.W.3d 202, 204-08 (Tex. Crim. App. 2010). The Court reasoned that indecency with a child is an aggravated form of indecent exposure because the indecency with a child by exposure implicitly includes the elements of “offended or alarmed” that are express elements of indecent exposure. *Id.* at 207.

The Court’s habeas docket continues to be active in this area. This past year, the Court held that the prohibition against double jeopardy was violated by the defendant’s conviction for attempted capital murder and aggravated robbery. *Ex parte Carle*, 369 S.W.3d 879, 879 (Tex. Crim. App. 2012). The Court also held that a conviction for aggravated assault while a member

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<sup>24</sup> 957 S.W.2d 558, 559-60 (Tex. Crim. App. 1997).

of a street gang was unlawful where the defendant had previously been convicted of the “greater-inclusive” offense of engaging in organized criminal activity. . . .” *Ex parte Chaddock*, 369 S.W.3d 880, 885-86 (Tex. Crim. App. 2012). In doing so, the Court held that “that *Blockburger* comprises the substantive constitutional test for ‘sameness’ in both the multiple-punishments and the successive-prosecutions contexts . . . .” *Id.* at 885.

### **I. Confrontation Clause—*Crawford***

Generally, an applicant will be permitted to raise a federal constitutional claim on habeas when the claim was not available at the time of the applicant's trial or direct appeal. *See e.g., Ex parte Boyd*, 58 S.W.3d 134, 136 (Tex. Crim. App. 2001) (stating that “[b]ecause the Supreme Court's decision in *Apprendi* came almost four years after applicant's trial, we hold that his failure to assert an *Apprendi*-type claim at trial and on appeal does not bar him from asserting such a claim via habeas corpus.”); *Ex parte Drake*, 883 S.W.2d 213, 215 (Tex. Crim. App. 1994). In September 2006, however, the Court of Criminal Appeals held that the Supreme Court's holding in *Crawford v. Washington*<sup>25</sup> does not apply retroactively on habeas review. *Ex parte Keith*, 202 S.W.3d 767, 768 (Tex. Crim. App. 2006) (per curiam), *reaffirmed in Ex parte Lave*, 257 S.W.3d 235, 237 (Tex. Crim. App. 2008) (adhering to *Teague*'s retroactivity analysis).

### **J. Illegal Sentence**

In *Ex parte Rich*, the Court of Criminal Appeals held that an applicant can challenge an illegal sentence on habeas even though the applicant did not present the claim on direct appeal and entered a plea of true to the illegal enhancement allegation. 194 S.W.3d 508, 511-14 (Tex. Crim. App. 2006); *see also Ex parte Roemer*, 215 S.W.3d 887, 888-91 (Tex. Crim. App. 2007). Where the applicant pled guilty pursuant to a negotiated plea agreement authorizing an illegal sentence, the proper remedy is to remand the applicant to the custody of the sheriff and allow the applicant to withdraw his plea when answering the charges in the indictment. *Ex parte Rich*, 194 S.W.3d at 514-15.

### **K. Actual Innocence**

A claim of actual innocence is cognizable on habeas. *Ex parte Elizondo*, 947 S.W.2d at 205. An applicant can present a claim of actual innocence even if the applicant entered a guilty plea. *Ex parte Tuley*, 109 S.W.3d 388, 393 (Tex. Crim. App. 2002) (“we will not preclude actual innocence claims because the conviction was the result of a guilty plea.”). Two types of actual innocence claims have been identified by the Court of Criminal Appeals—“*Herrera*-type claims or *Schlup*-type claims.” *Ex parte Franklin*, 72 S.W.3d 671, 675 (Tex. Crim. App. 2002) (citing *Herrera v. Collins*, 506 U.S. 390 (1993); *Schlup v. Delo*, 513 U.S. 298 (1995)).

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<sup>25</sup> 541 U.S. 36 (2004).

“A *Herrera*-type claim involves a substantive claim in which applicant asserts his bare claim of innocence based solely on newly discovered evidence.” *Id.* (citing *Schlup*, 513 U.S. at 314; *Ex parte Elizondo*, 947 S.W.2d at 208). Examples of newly-discovered evidence include “trustworthy witness recantations,” “exculpatory scientific evidence, trustworthy eyewitness accounts, and critical physical evidence.” *Id.* at 678 n.7; *see also Ex parte Tuley*, 109 S.W.3d at 397 (granting relief based on victim’s recantation of aggravated sexual assault allegation). Like ineffective assistance of counsel claims, it is necessary to submit evidence to support a claim of actual innocence. *See, e.g., Ex parte Brown*, 205 S.W.3d 538, 541 (Tex. Crim. App. 2006) (applicant attached recantation affidavit from the complainant along with other affidavits, including one from himself as well as others from family members, in support of his actual innocence claim); *Ex parte Gossett*, No. AP-75,642 (Tex. Crim. App. Mar. 21, 2007) (per curiam) (not designated for publication) (finding that the applicant established his innocence based on favorable DNA results from a Chapter 64 DNA proceeding)<sup>26</sup>; *Ex parte Henton*, No. AP-75,344 (Tex. Crim. App. Feb. 15, 2006) (per curiam) (not designated for publication) (same). The newly-discovered evidence submitted by an applicant “must constitute affirmative evidence of the applicant’s innocence.” *Ex parte Franklin*, 72 S.W.3d at 678. If the evidence was available at the time of the applicant’s “trial, plea, or post-trial motions, such as a motion for new trial,” it is not newly-discovered. *Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006); *see also Ex parte Calderon*, 309 S.W.3d 64, 70 (Tex. Crim. App. 2010) (deciding that recantation was newly-available when evidence in the record on the subject conflicted). *But see State v. Wilson*, 324 S.W.3d 595, 598-99 (Tex. Crim. App. 2010). While advances in science and technology may provide a basis for newly-discovered evidence, the science or testing method must be applied to the evidence in the state that it was at the time of the offense. *Ex parte Spencer*, 337 S.W.3d 869, 779 (Tex. Crim. App. 2011). When the Court of Criminal Appeals is presented with evidence that is not newly-discovered, the Court may remand the application to the trial court to give the applicant an opportunity to supplement the old evidence with evidence that was not previously available. *Ex parte Brown*, 205 S.W.3d at 547 (citing *Ex parte Nailor*, 149 S.W.3d at 130-31) (stating that the Court will consider an ineffective assistance of counsel claim on habeas that was raised and rejected on appeal if the applicant “provides additional evidence to prove his claim.”).

For an applicant to establish that he or she is entitled to relief on a *Herrera*-type claim, the applicant must “prove by clear and convincing evidence” “that a jury would acquit him [or her] based on [the] newly discovered evidence[.]” *Ex parte Elizondo*, 947 S.W.2d at 209. When making this determination, the trial “court weighs the evidence of the applicant’s guilt against the new evidence of innocence.” *Ex parte Tuley*, 109 S.W.3d at 390 (citing *Ex parte Elizondo*, 947 S.W.2d at 207). As in other contexts, the Court of Criminal Appeals will give deference to the

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<sup>26</sup> *District Attorney’s Office v. Osborne*, 129 S. Ct. 2308, 2321-22 (2009) (there is no federal substantive due process right to have access to DNA evidence for post-conviction testing but leaving open the possibility that a state’s law governing post-conviction access to DNA may deny procedural due process).



trial court's findings of fact when they are based on credibility determinations and are supported by the record. *Ex parte Thompson*, 153 S.W.3d at 417-18. *But see Ex parte Reed*, 271 S.W.3d at 727-28.

The Court of Criminal Appeals has held that “the concept of actual innocence does not translate in a logical way to the factfinder’s determination of what punishment to assess within a legislatively prescribed term of years.” *Ex parte Chavez*, 213 S.W.3d 320, 326 (Tex. Crim. App. 2006). But the Court left open the possibility that it may apply principles of due process and order a new punishment hearing where “newly discovered or newly available evidence arises that casts substantial doubt upon the reliability of the sentencer’s assessment of a particular term of years[.]” *Id.*

In the past five years, the Court of Criminal Appeals has expanded its actual innocence jurisprudence beyond the strictures of *Herrera*. Actual innocence was applied to an aggravating element of the offense in *Ex parte Stroud*. There, the Court of Criminal Appeals held that the applicant was actually innocent of aggravated sexual assault and guilty only of sexual assault because the victim was older than fourteen at the time of the offense. No. AP-75,638 (Tex. Crim. App. Feb. 13, 2008) (not designated for publication). The Court reformed the judgment to reflect a conviction for sexual assault and remanded for a new punishment hearing. *Id.* In *Ex parte Sparks*, actual innocence was applied to a primary offense enhancement. 206 S.W.3d 680, 683 (Tex. Crim. App. 2006); *see also State v. Wilson*, 324 S.W.3d 595, 598 (Tex. Crim. App. 2010) (actual innocence applies when the applicant is guilty only of the lesser-included offense or ineligible for the punishment assessed). Sparks pled guilty to felony DWI, which had been enhanced from a misdemeanor with Sparks’s two prior DWI convictions. *Id.* at 682. One of the prior convictions was improperly used to enhance the primary DWI offense, so the Court held that Sparks was not guilty of the felony element of the DWI offense. *Id.* at 683. The offense of felon in possession of a firearm has been treated differently. In *Ex parte Jimenez*, the Court held that the applicant’s conviction was not void even though the underlying felony used to obtain the felon in possession conviction had been set aside. 361 S.W.3d 679, 684 (Tex. Crim. App. 2012). The Court reasoned that it was the applicant’s status as a felon at the time he was convicted that is determinative. *Id.* at 682-84.

Trial courts do not have the authority to grant a new trial to an applicant based on newly discovered DNA evidence, tested pursuant to Chapter 64 proceedings, that establishes the applicant’s innocence; the only remedy is through either an 11.07 or 11.071 habeas application. *State v. Holloway*, \_\_\_ S.W.3d \_\_\_, PD-0324-11, 2012 Tex. Crim. App. LEXIS 475 (Tex. Crim. App. Mar. 7, 2012).

*See* discussion of *Schlup* claim in Subsequent Application discussion in Part V *supra*.

#### **L. *Brady v. Maryland***

A *Brady*<sup>27</sup> claim is cognizable on habeas. *Ex parte Kimes*, 872 S.W.2d 700, 701 (Tex. Crim. App. 1993) (citing *Ex parte Adams*, 768 S.W.2d 281, 288 (Tex. Crim. App. 1989)). When challenging the State's failure to disclose exculpatory evidence on habeas, an applicant must show the following: (1) "that the State failed to disclose evidence, regardless of the prosecution's good or bad faith"; (2) "that the withheld evidence is favorable to applicant"; and (3) "that the evidence is material, that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different." *Ex parte Richardson*, 70 S.W.3d 865, 870 (Tex. Crim. App. 2002) (internal citations omitted); *Ex parte Miles*, 359 S.W.3d 647, 665-70 (Tex. Crim. App. 2012) (applying *Brady* factors and granting relief). An applicant cannot show constitutional "materiality" by simply alleging that a piece of undisclosed evidence "might have helped the defense[.]" *Hampton v. State*, 86 S.W.3d 603, 612 (Tex. Crim. App. 2002) (quoting *United States v. Agurs*, 427 U.S. 97, 109-10 (1976)). Evidence is not material if the applicant was able to present the evidence that the applicant claims was suppressed at trial. *Marshall v. State*, 210 S.W.3d 618, 636 (Tex. Crim. App. 2006). The State is not required to disclose material exculpatory impeachment information and information supporting any affirmative defense before entering into a plea agreement with a defendant. *United States v. Ruiz*, 536 U.S. 622, 633 (2002). As with ineffective assistance and actual innocence claims, an applicant must submit evidence supporting his or her claim, *see, e.g., Ex parte Richardson*, 70 S.W.3d at 871 (diary of police officer containing material, exculpatory evidence found in district attorney's file after conviction), and present facts to show materiality.

### M. Perjured/False Testimony

The State is obligated to correct testimony from its witnesses that is perjured, false, or misleading. *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Ex parte Ghahremani*, 332 S.W.3d 470, 477 (Tex. Crim. App. 2011). The Fourteenth Amendment's Due Process Clause is violated when the State knowingly or unknowingly presented perjured, false, or misleading testimony at the guilt or punishment phases of a defendant's trial.<sup>28</sup> *Ex parte Ghahremani*, 332 S.W.3d at 477; *Ex parte Chabot*, 300 S.W.3d 768, 771-72 (Tex. Crim. App. 2009).

Assuming that the applicant has shown the above, the applicant must also show harm (*i.e.* materiality). *Ex parte Ghahremani*, 332 S.W.3d at 478, 480. The applicable harm standard on habeas depends upon whether the applicant could have presented the claim on direct appeal. *Id.* If the State's presentation was knowing or unknowing and the applicant could have raised the claim on direct appeal, then the applicant must show, "by a preponderance of the evidence[,] that the violation contributed to his conviction or punishment." *Id.*; *Ex parte Fierro*, 934 S.W.2d

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<sup>27</sup> 373 U.S. 83 (1963); *see also United States v. Bagley*, 473 U.S. 667 (1985) (impeachment evidence).

<sup>28</sup> This materiality standard is less stringent (for the applicant) than *Brady's* "reasonable probability" standard. *Ex parte Ghahremani*, 332 S.W.3d at 478, 480.

370, 374-75 (Tex. Crim. App. 1996). But if the State's presentation was knowing and the applicant could not have brought the claim on direct appeal (usually because it could not have been previously discovered), the applicant must satisfy a less stringent standard of harm; the applicant must show that there is a "reasonable likelihood" that the violation contributed to the outcome. *Ex parte Ghahremani*, 332 S.W.3d at 480-81.

In *Ex parte Carmona*, 185 S.W.3d 492, 494-96 (Tex. Crim. App. 2006), the Court of Criminal Appeals ruled that the applicant's claim that his due process rights were violated when the trial court adjudicated his guilt after the court deferred adjudication and placed him on community supervision was cognizable because the adjudication was based entirely on perjured testimony. *Id.* at 496. The Court rejected the State's argument that Article 42.12, Section 5(b), which states that no appeal may be taken from the trial court's determination of guilt, prohibited the applicant from raising the claim on habeas. Based on a plain reading of the statute, the Court held that Article 42.12, Section 5(b) did not preclude relief by habeas corpus. *Id.*

## V. SUBSEQUENT APPLICATIONS

If an applicant has filed an application challenging a particular conviction, then all later applications regarding that conviction must fall under one of the two exceptions in Section 4(a). *Ex parte Whiteside*, 12 S.W.3d 819, 821 (Tex. Crim. App. 2000). An application challenges the conviction if it challenges the validity of the prosecution or the trial court's judgment (even if all the claims raised on the initial application were not cognizable). *Ex parte McPherson*, 32 S.W.3d 860, 861 (Tex. Crim. App. 2000); *see also Ex parte Evans*, 964 S.W.2d 643, 647 (Tex. Crim. App. 1998). If an applicant's first application only requests an out-of-time appeal and relief is denied, for purposes of Section 4, the first application is not to be regarded as an initial application because it does "not directly seek to overturn the conviction."<sup>29</sup> *Ex parte McPherson*, 32 S.W.3d at 861; *see also Ex parte Evans*, 964 S.W.2d at 647. If an applicant's first application requests an out-of-time appeal and presents grounds challenging the conviction and relief is denied, the application will be regarded as an initial application under Section 4. However, if an applicant's first application seeks an out-of-time appeal and presents grounds challenging the conviction and the Court of Criminal Appeals grants the applicant an out-of-time appeal and dismisses the applicant's remaining claims, *see, e.g., Ex parte Brown*, AP-75,651 (Tex. Crim. App. Apr. 4, 2007) (per curiam) (not designated for publication), the first application

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<sup>29</sup> This rule applies equally where the applicant's first application: (1) seeks an out-of-time petition for discretionary review; (2) requests time credit; or (3) raises a claim concerning parole or mandatory supervision. *Ex parte Evans*, 964 S.W.2d at 647 (holding that a challenge to a parole revocation "does not call into question the validity of the prosecution or the judgment of guilt."). The Court of Criminal Appeals will deny claims previously considered on the merits where the applicant files a subsequent application that does not qualify as an initial application under Section 4 because the claims have already been raised and rejected. *Ex parte Twyman*, 716 S.W.2d 951, 952 (Tex. Crim. App. 1986).

will not be regarded as an initial application under Section 4 and the applicant can file a subsequent application without having to meet the requirements of Section 4. *See Ex parte Torres*, 943 S.W.2d at 472 (“because granting an out-of-time appeal restores the pendency of the direct appeal, any remaining substantive claims would become premature, and hence, subject to dismissal.”). Conversely, if the applicant’s initial application presented an ineffective assistance of appellate counsel on direct appeal, then for purposes of Section 4, the application challenged the conviction. *Ex parte Santana*, 227 S.W.3d 700, 704-05 (Tex. Crim. App. 2007) (reviewing a claim of ineffective assistance of appellate counsel on direct appeal includes a review of the merits of the underlying claim when deciding whether counsel performed deficiently and the propriety of the judgment and conviction are called into question when deciding whether the applicant was prejudiced).

Section 4 of Article 11.07, Texas Code of Criminal Procedure, governs the filing of subsequent applications. Under Section 4(a)

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.

When alleging one of the statutory exceptions, an applicant cannot just recite the statutory language; the applicant must allege facts establishing that he or she has satisfied one of the exceptions. *Ex parte Sowell*, 956 S.W.2d 39, 40 (Tex. Crim. App. 1997) (per curiam). The failure to allege facts that establish a cognizable claim will result in a dismissal under Section 4. *Ex parte Santana*, 227 S.W.3d at 705-06 (because the applicant raised a challenge to the sufficiency of the evidence, which is not cognizable, he failed to meet the requirements of Section 4). A claim involving a lack of jurisdiction to revoke community supervision and adjudicate guilt following deferred adjudication must satisfy Section 4 when raised on a subsequent application. *Ex parte Sledge*, \_\_\_ S.W.3d \_\_\_, 2013 Tex. Crim. App. LEXIS 156, \*9-19 (Tex. Crim. App. Jan. 16, 2013).

#### A. Section 4(a)(1)<sup>30</sup>

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<sup>30</sup> *See generally Rocha v. Thaler*, 626 S.W.3d 815, 835 (5th Cir. 2010) (indicating likelihood that federal courts reviewing state habeas proceedings will review a Court of Criminal Appeals’s dismissal under 4(a)(1) as a ruling on the merits if the Court of Criminal Appeals determined that the application does not make a prima facie showing of merit when dismissing

**Factual Basis**—The factual basis of a claim is unavailable under Subsection (a)(1) if it “was not ascertainable through the exercise of reasonable diligence on or before that date.” TEX. CODE CRIM. PROC. art. 11.07 § 4(c). “Reasonable diligence,” according to the Court of Criminal Appeals, “suggests at least some kind of inquiry has been made into the matter at issue.” *Ex parte Lemke*, 13 S.W.3d 791, 794-95 (Tex. Crim. App. 2000) (finding that the applicant established that his ineffective assistance of counsel claim was previously unavailable). Consistent with the preponderance of the evidence burden of proof that is generally applicable on habeas, the applicant must establish that the factual basis of his claim was unavailable when the initial application was filed. *Ex parte Madding*, 70 S.W.3d 131, 133-34 (Tex. Crim. App. 2002). A fact is “[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation.” *Ex parte Medellin*, 223 S.W.3d 315, 350-51 (Tex. Crim. App. 2006) (describing the meaning of factual basis in Article 11.071, Section 5(a)(1)) (quoting BLACK’S LAW DICTIONARY 610 (7th ed. 1999)).

**Legal Basis**—The legal basis of a claim is unavailable under Section (a)(1) if it “was not recognized by and could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.” TEX. CODE CRIM. PROC. art. 11.07 § 4(b); *Ex parte Fontenot*, 3 S.W.3d 32, 34-35 (Tex. Crim. App. 1999) (denying relief on the applicant’s claim that he was entitled to an out-of-time petition for discretionary review because his claim “could have been reasonably formulated under the Court’s prior decisions in both *Ayala* and *Axel* and the revised language of Article 26.04(a).”). The applicant must present a cognizable claim based on law that was previously unavailable. *Ex parte Staley*, 160 S.W.3d 56, 63 (Tex. Crim. App. 2005). Where an applicant has filed prior applications that were subsequently dismissed under Section 4 and the applicant files another subsequent application claiming that the legal basis for his or her current claim was previously unavailable, the applicant must show that it was unavailable when the applicant’s subsequent applications were dismissed. *Ex parte Hood*, 211 S.W.3d 767, 774 (Tex. Crim. App. 2007).

In *Ex parte Chavez*, the Court held that its decision in *Ex parte Chabot*, 300 S.W.3d at 772, which held, for the first time, that the unknowing use of false testimony in obtaining a conviction violates due process, provides a new legal basis. 371 S.W.3d 200, 205-07 (Tex. Crim. App. 2012).

## **B. Section 4(a)(2)**

To show that an application meets the requirements of Section 4(a)(2) when presenting a *Schlup*-type actual innocence claim, an applicant must make both a constitutional-violation claim and a *prima facie* actual innocence claim. *Ex parte Brooks*, 219 S.W.3d 396, 324, 327 (Tex.

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under Section 4(a)(1)).

Crim. App. 2007) “A *Schlup*-type claim . . . is a procedural claim in which applicant’s claim of innocence does not provide a basis for relief, but is tied to a showing of constitutional error at trial.” *Ex parte Franklin*, 72 S.W.3d at 675 (citing *Schlup*, 513 U.S. at 314); *see also* TEX. CODE CRIM. PROC. 11.071 § 5(a)(2). The *Schlup* actual innocence claim is a gateway that the applicant must satisfy to have any other constitutional claims reviewed. *Ex parte Reed*, 271 S.W.3d at 733. The *Schlup* standard only comes into play when an applicant files a subsequent application; it has no bearing on actual innocence claims raised on initial applications. *Id.* So to obtain review of the merits of an otherwise procedurally barred claim, an applicant must make a threshold showing of innocence by a preponderance of the evidence. *Id.* An applicant must therefore show, with reliable “exculpatory scientific evidence, eye witness accounts, or critical physical evidence,” that “it is more likely than not that no reasonable juror would have” rendered a guilty verdict “beyond a reasonable doubt.” *Id.* (quoting *Ex parte Brooks*, 219 S.W.3d at 324, 327); *see e.g.*, *Ex parte Henderson*, 246 S.W.3d 690, 691-92 (Tex. Crim. App. 2007) (affidavits and reports submitted by biomechanics and physics experts and recanting affidavit from medical examiner indicating that the applicant did not knowingly and intentionally kill the baby-victim).

In *Ex parte Knipp*, the Court of Criminal Appeals found that the applicant made a prima facie showing of actual innocence under Section 4(a)(2) regarding one of his drug-offense convictions because the applicant was convicted of two drug offenses in violation of the Double Jeopardy Clause. 236 S.W.3d 214, 217 (Tex. Crim. App. 2007); *see also Ex parte Milner*, \_\_\_ S.W.3d \_\_\_, 2013 Tex. Crim. App. LEXIS 418, at \*7-8 (Tex. Crim. App. Feb. 13, 2013). The Court held that the applicant could not be guilty of one of the offenses and set aside the judgment in that case. *Id.*

In an unprecedented case this year, the Court granted relief on a subsequent application that met the threshold *Schlup* requirement because the medical examiner who testified at the defendant’s trial that it was impossible that the child’s death was accidental retracted his opinion based on new developments in the science of biomechanics. *Ex parte Henderson*, 384 S.W.3d 833 (Tex. Crim. App. 2012). The case is unprecedented because the Court rejected the trial court’s conclusion that relief was warranted on actual innocence grounds and then failed to provide any legal precedent for its decision. *Id.*

## VI. MANDATORY SUPERVISION AND PAROLE

### A. Release

Texas parole statutes do not create a vested liberty interest in release on parole. *Ex parte Retzlaff*, 135 S.W.3d 45, 49 (Tex. Crim. App. 2004) (citing *Ex parte Geiken*, 28 S.W.3d 553, 558 (Tex. Crim. App. 2000)). In contrast, the mandatory supervision statutes do create a vested liberty interest in release to mandatory supervision. *Ex parte Geiken*, 28 S.W.3d 553, 558 (Tex. Crim. App. 2000) (citing *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 11-12 (1979); *Bd. of Pardons v. Allen*, 482 U.S. 369, 377-78 (1987)); *Ex parte Hill*, 208 S.W.3d

462, 464 (Tex. Crim. App. 2006).

An inmate's eligibility for release to mandatory supervision is controlled by the mandatory supervision law in effect when the inmate committed the offense. *Ex parte Hall*, 995 S.W.2d 151, 152 (Tex. Crim. App. 1999).

- Mandatory supervision did not exist prior to 1977.
- Under the mandatory supervision statutes in effect from 1977 until 1987, an inmate not sentenced to death or sentenced to a term of life imprisonment<sup>31</sup> must be released on mandatory supervision if the inmate's "'actual calendar time' plus 'accrued good conduct time' equaled the term of his sentence[.]" *Ex parte Retzlaff*, 135 S.W.3d at 48; *see also Ex parte Ervin*, 187 S.W.3d 386, 388 (Tex. Crim. App. 2005).
- In 1987, the Legislature amended the mandatory supervision statute, which at that time was codified in Article 42.18, Section 8(c), to render certain inmates from being eligible for release on mandatory supervision based on the inmate's holding offense. *Ex parte Ervin*, 187 S.W.3d at 388. Offenses which render an inmate ineligible for release have been considered serious offenses. *Id.* at 388-89. Additionally, the statute was amended to exclude inmates with an affirmative deadly weapon finding from being eligible for release. *Ex parte Retzlaff*, 135 S.W.3d at 48.
- In 1995, the Legislature further restricted the class of inmates eligible for release to mandatory supervision. The 1995 amendments, which became effective on September 1, 1996, excluded inmates who had a previous conviction<sup>32</sup> for one of the offenses designated as ineligible for mandatory supervision release from being eligible for release on mandatory supervision, regardless of the inmate's holding conviction. *Ex parte Ervin*, 187 S.W.3d at 389. Thus, since 1995, the mandatory supervision statute has excluded certain inmates from being eligible for release to mandatory supervision if the inmate is serving a sentence for or has been previously convicted of a specific designated offense. In 1995, the Legislature also amended the mandatory supervision statute to provide for the discretionary release of inmates to mandatory supervision. *Ex parte Shook*, 59 S.W.3d 174, 175 n.1 (Tex. Crim. App. 2001). Under the discretionary

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<sup>31</sup> *Ex parte Franks*, 71 S.W.3d 327, 328 (Tex. Crim. App. 2001) ("it is mathematically impossible to determine a mandatory supervision release date on a life sentence because the calendar time served plus any accrued good conduct time will never add up to life.").

<sup>32</sup> "[T]he phrase 'previously convicted of' [in Section 508.149(a)] means that the person has been convicted of a violent felony *before* committing the holding offense." *Ex parte Keller*, 173 S.W.3d 492, 497 (Tex. Crim. App. 2005) (emphasis in original).

mandatory supervision statute, an inmate otherwise eligible for release may be denied release “if a parole panel determines that the inmate’s accrued good conduct time credits do not accurately reflect his potential for rehabilitation and he would endanger the public if released.” *Id.*

- In 1997, the Legislature moved the laws governing mandatory supervision from the Code of Criminal Procedure to the Government Code. *Ex parte Mabry*, 137 S.W.3d 58, 59 (Tex. Crim. App. 2004) (citing Acts of 1997, 75th Leg., R.S., ch. 165, §§ 12.01, 12.22, 32.01). Since 1997, the provision governing ineligibility for release on mandatory supervision has been codified in Section 508.149(a).

The list of offenses that render an applicant ineligible for release to mandatory supervision in Section 508.149(a), Texas Government Code, include the statutory predecessor offenses. *Ex parte Ervin*, 187 S.W.3d 386, 389 (Tex. Crim. App. 2005). Therefore, when the applicant’s conviction does not appear on the list of offenses enumerated in Section 508.149(c), it may be necessary to review the statutory predecessors to determine the applicant’s eligibility for release. *Id.* at 387-89 (holding that the applicant’s prior conviction for sexual abuse of a child rendered him ineligible for release to mandatory supervision under Section 508.149(a)(6) because it was a predecessor offense to sexual assault defined in Section 22.011 of the Penal Code). Also, that an applicant’s conviction is included in the list of offenses that make an inmate ineligible for release does not necessarily mean that the applicant is actually ineligible for release; a review of the statutory predecessor offense may be warranted. *Ex parte Lindsey*, 226 S.W.3d 433, 434-35 (Tex. Crim. App. 2007); *Ex parte Byrd*, 162 S.W.3d 250, 254 (Tex. Crim. App. 2005) (finding that the applicant’s conviction for the third-degree-felony offense of aggravated assault of a peace officer was not a predecessor offense to the first- or second-degree-felony offense of aggravated assault defined in Section 22.02, Penal Code); *Ex parte Mabry*, 137 S.W.3d 58, 59-60 (Tex. Crim. App. 2004) (holding that the applicant’s holding conviction for burglary of a habitation in the first degree did not bar his release to mandatory supervision because the mandatory supervision statute in effect when he committed the offense only excluded burglary of a habitation offenses where a weapon or explosives were used or where the offender attempted or caused injury); *Ex parte Thompson*, 173 S.W.3d 458, 460-62 (Tex. Crim. App. 2005); *Ex parte Hall*, 995 S.W.2d 151, 152 (Tex. Crim. App. 1999) (holding that Hall’s prior conviction for third degree aggravated assault was not included in the list of offenses ineligible for release on mandatory supervision under the statute in effect when Hall committed his current holding offense of delivery of simulated cocaine.).

When an inmate is denied release to discretionary mandatory supervision, the parole panel’s decision to deny release is not subject to judicial review. *Ex parte Geiken*, 28 S.W.3d at 560 (citing TEX. GOV’T CODE § 508.149(d)). However, the procedures implemented by the Board when reviewing an inmate for release are reviewable. An inmate is entitled to timely notice from the Board and a meaningful opportunity to be heard before the parole panel reviews the inmate for mandatory supervision release. *Id.* This notice is required to allow inmates to “submit any information that they feel relevant to the Board decision.” *Id.*



[W]hen the Board gives the inmate notice of a *specific date* on which the hearing is scheduled to take place, the inmate is entitled to rely on that information and accordingly has until that date to submit relevant information on his behalf. If the Board holds the hearing for such consideration on a date earlier than the specific date the inmate has been notified that the hearing will take place, then the inmate has been misled by the notice and denied the full opportunity he was told he would have in order to submit relevant information to the Board.

*Ex parte Shook*, 59 S.W.3d 174, 176 (Tex. Crim. App. 2001). Written notice that an inmate will be reviewed on some future date and a request that the inmate produce relevant materials “as soon as possible” does not serve as constitutionally sufficient notice. *Ex parte Retzlaff*, 135 S.W.3d at 50. The Court of Criminal Appeals, therefore, has ruled that an inmate must receive at least thirty days’ advance notice of the month and year of his review so that the inmate has an adequate opportunity to prepare and produce materials in support of his release. *Id.*

## **1. Special Sex-Offender Conditions**

When the Board wants to impose special sex-offender conditions on a releasee/inmate and the releasee/inmate has not been convicted of a sex offense, the releasee/inmate is entitled to timely notice that the Board is considering the matter and an opportunity to submit information that will be relevant to the Board’s decision-making. *Ex parte Campbell*, 267 S.W.3d 916, 926 (Tex. Crim. App. 2008) (following Fifth Circuit’s decision in *Coleman v. Dretke*, 395 F.3d 216 (5th Cir. 2004)). But the releasee/inmate is not entitled to an opportunity to respond to all of the “bad” evidence before the Board. *Id.*

The Court of Criminal Appeals decided to follow the Fifth Circuit’s decision in *Meza v. Livingston*. *Ex parte Evans*, 338 S.W.3d 545 (Tex. Crim. App. 2011). *Meza* clarified exactly what type of process is due before sex offender conditions can be imposed on a releasee/inmate who has not been convicted of a sex offense. The court held that an releasee/inmate is entitled to: (1) written notice; (2) disclosure of the evidence that will be presented; (3) a hearing at which the releasee/inmate can be heard and present evidence; (4) the right to confront and cross-examine, unless good cause shows otherwise; (5) a neutral arbiter; (6) a written statement explaining what evidence was relied upon and the reasons sex offender conditions are appropriate. 607 F.3d 392, 412 (5th Cir. 2010).

## **2. Calculating Stacked Sentences**

For all offenses committed before September 1, 1987, stacked sentences are added together and treated as one sentence to determine parole and mandatory supervision eligibility and final discharge date. *Ex parte Forward*, 258 S.W.3d 151, 152 (Tex. Crim. App. 2008) (citing *Hannington v. State*, 832 S.W.2d 355, 355 (Tex. Crim. App. 1992); *Ex parte Cowan*, 171 S.W.3d 890, 893 n.7 (Tex. Crim. App. 2005)).

For stacked sentences for offenses committed on or after September 1, 1987, parole eligibility is calculated separately for each offense, and mandatory supervision eligibility is calculated for only the final sentence in the series. *Id.* at 152-53 (citing *Ex parte Ruthart*, 980 S.W.2d 469, 471-74 (Tex. Crim. App. 1998)). *But see Ex parte Wrigley*, 178 S.W.3d 828, 831 (Tex. Crim. App. 2005) (“a stacked sentence does not begin to run on the date the defendant makes parole on the original offense if his parole is revoked before the trial court sentences the defendant to the stacked sentence.”).

To calculate mandatory supervision eligibility for pre-1987 and post-1987 stacked sentences, all mandatory supervision eligible offenses are calculated as a unit and then the length of the non-eligible sentences is added to get the final mandatory supervision date. *Ex parte Forward*, 258 S.W.3d at 155.

## **B. Revocation**

### **1. Preliminary Hearing**

Due process requires that a preliminary hearing be held “as promptly as convenient” after a parolee has been arrested to “determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions.” *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972); *see also* TEX. GOV’T CODE § 508.2811.

[T]he parolee should be given notice that the hearing will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation. The notice should state what parole violations have been alleged. At the hearing the parolee may appear and speak in his own behalf; he may bring letters, documents, or individuals who can give relevant information to the hearing officer. On request of the parolee, a person who has given adverse information on which parole revocation is to be based is to be made available for questioning in his presence.

*Morrissey*, 408 U.S. at 486-87.

The Court of Criminal Appeals frequently remands applications to the trial court for fact-findings where an applicant challenges the parole board’s failure to provide a preliminary revocation hearing. *See, e.g., Ex parte Brown*, Nos. WR-38,411-04 through -06 (Tex. Crim. App. June 7, 2006) (per curiam) (not designated for publication) (observing that the applicant “made a *prima facie* showing that the two-year delay is unreasonable, and that he is being prejudiced by his inability to make bond on the new Chambers County charges” and ordering the

trial court to direct TDCJ to submit information); *Ex parte Williams*, Nos. WR-66,193-01 & -02 (Tex. Crim. App. Jan. 24, 2007) (per curiam) (not designated for publication).

Recently, the Court of Criminal Appeals filed and set *Ex parte Bohannon* for submission to determine whether the applicant's claim that he was denied a timely preliminary hearing is justiciable under the capable of repetition, yet evading review doctrine, and whether Section 508.2811, Texas Government Code, and *Morrissey* are violated when the Board fails to hold a preliminary hearing when the releasee is confined on pending criminal charges. AP-76,363, submitted Dec. 15, 2010. *But see Collins v. Turner*, 599 F.2d 657, 658 (5th Cir. 1979) ("Recognizing that the petitioner did not challenge the validity of the final revocation hearing, the court held that his "present incarceration stems from a decision . . . made after a hearing that was adequate in all respects; the denial of appellant's preliminary hearing right no longer has any relation to his incarceration.") (citations omitted).

## 2. Final Revocation Hearing

The minimum due process requirements of a final parole revocation hearing include the following:

- (a) written notice of the claimed violations of parole;
- (b) disclosure to the parolee of evidence against him;
- (c) opportunity to be heard in person and to present witnesses and documentary evidence;
- (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
- (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and
- (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

*Morrissey*, 408 U.S. at 489.

The absolute right to counsel is not included in the minimal due process rights afforded to an accused during a revocation hearing. *Ex parte Taylor*, 957 S.W.2d 43, 47 (Tex. Crim. App. 1997) (per curiam) (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)). A due process right to counsel exists if the parolee makes a timely request for counsel based on a "colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present." *Scarpelli*, 411 U.S. at 790. The decision-maker should also consider whether the parolee is capable of "speaking effectively for himself." *Id.* at 790-91. The determination of a parolee's need for counsel is within the discretion of the state authority in charge of administering parole and must be made on an

individual basis. *Ex parte Taylor*, 957 S.W.2d at 47 (quoting *Scarpelli*, 411 U.S. at 790).

Additionally, a parolee's right to confront and cross-examine witnesses at a parole revocation hearing is not unqualified. "Good cause is shown to deny confrontation rights when (1) after looking at the witness and the State's interest, there is a need for the particular witness to testify out of the parolee's presence and (2) the procedures used adequately ensure the reliability of the evidence." *Id.* at 46. Because this determination involves a fact-intensive inquiry, it should also be made on an individual basis. *Id.*

#### **a. Standard for Revocation**

To revoke a parolee's release, the State must prove "by a preponderance of the evidence that the prisoner was not eligible for release, that he obtained that release by a knowing and affirmative misrepresentation of facts, or that he has violated some condition of his release, and that such a violation occurred after his release." *Ex parte Snow*, 899 S.W.2d 201, 202 (Tex. Crim. App. 1995) (citations omitted). The parole board cannot revoke a parolee's release based only on the parolee's conviction for an offense that was committed before the parolee's release. *Id.* at 203.

### **VII. TIME CREDIT**

#### **A. Pre-Sentence Time Credit**

Where an inmate seeks pre-sentence jail time credit, the inmate must first present the claim to the trial court in a *nunc pro tunc* motion. *Ex parte Ybarra*, 149 S.W.3d at 148-49; *see also Ex parte Deeringer*, 210 S.W.3d at 618 (stating that the Court of Criminal Appeals will dismiss a pre-sentence jail time credit claim and rule on the merits of claims challenging a conviction and sentence). If the trial court does not respond, the inmate should file a petition for a writ of mandamus in the court of appeals. *Ex parte Ybarra*, 149 S.W.3d at 148-49. And if the court of appeals denies leave to file, then the applicant must file a writ of mandamus, not an 11.07 application, in the Court of Criminal Appeals. *Ex parte Florence*, 319 S.W.3d 695, 696 (Tex. Crim App. 2010). But if an inmate alleges that he or "has been incarcerated past his presumptive discharge date, this is no longer a time credit claim but an illegal confinement claim[,]” which the Court of Criminal Appeals will consider. *Ex parte Ybarra*, 149 S.W.3d at 148 n.2; *Ex parte Deeringer*, 210 S.W.3d at 618 n.7. When purely a pre-sentence time credit claim, the claim should be dismissed.

#### **B. Exhaustion**

Section 501.0081, which became effective on January 1, 2000, requires an inmate to submit a time credit claim to the time dispute resolution board and receive a written decision from the board before pursuing habeas relief. TEX. GOV'T CODE § 501.0081(a), (b)(1); *Ex parte Stokes*, 15 S.W.3d 532, 533 (Tex. Crim. App. 2000) (per curiam). There are three exceptions to the exhaustion requirement:

- The inmate is on parole or mandatory supervision. *Ex parte Russell*, 60 S.W.3d 875, 877 (Tex. Crim. App. 2001) (per curiam).
- 180 days have passed since the inmate submitted his or her claim to the resolution board and the inmate has not received a written response. TEX. GOV'T CODE § 501.0081(b)(2).
- The inmate is within 180 days of his or her “presumptive parole date, date of release on mandatory supervision, or date of discharge” according to TDCJ computations. TEX. GOV'T CODE § 501.0081(c).

When seeking time credit on an 11.07 application, an applicant must allege that he or she has administratively exhausted the time credit claim or is excused from doing so. If an applicant does not allege compliance with the exhaustion requirement or fails to demonstrate that he or she meets one of the three exceptions, then the applicant’s habeas application will be dismissed (even when the applicant raises any other claims).

### C. Street-Time Credit

An allegation that an inmate is entitled to street-time credit, without specifics, is generally inadequate. An inmate should allege that his or her release was revoked on or after September 1, 2001, and that he or she is not was not person described by Section 508.149(a) when his or her release was revoked. An inmate should also allege the amount of time credit he or she is entitled to and include all relevant dates that are required for a street-time credit calculation, *i.e.*, the inmate’s sentence begin date, the dates that any pre-revocation warrants initiating revocation proceedings were issued, the time remaining on the inmate’s sentence when the inmate was released, and the amount of time the inmate spent on release before being revoked.

Before September 1, 2001, when an inmate’s release to parole or mandatory supervision was revoked, the inmate did not receive time credit for the period of time spent on parole or mandatory supervision. *Ex parte Spann*, 132 S.W.3d 390, 393 (Tex. Crim. App. 2004).

After September 1, 2001, an inmate’s whose release is revoked may be entitled to have his or her sentence credited with the time spent on parole or mandatory supervision. TEX. GOV'T CODE § 508.283.

[A]n inmate may be entitled to credit for time served while released on parole or mandatory supervision if the inmate meets the following two conditions:

- (1) the inmate is not ‘a person described by Section 508.149(a)’<sup>33</sup> of the Texas

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<sup>33</sup> Section 508.149(a) sets out a list of specific offenses for which an inmate is ineligible for release on mandatory supervision.

Government Code[, the statute listing inmates who are ineligible for mandatory supervision]; and

(2) on the date that the pre-revocation warrant or summons initiating the revocation process is issued, the remaining portion of the inmate's sentence is less than the time the inmate spent on parole. *Ex parte Noyola*, 215 S.W.3d 862 (Tex. Crim. App. 2007).

Because Sections 508.283(c) and 508.149(a) “work in tandem,” the versions of 508.283(c) and 508.149(a) that were in effect when the inmate's release was revoked apply when determining an inmate's eligibility for street-time credit. *Id.* So a releasee is either a person described by §508.149(a) at the time of revocation or not; the status at the time of revocation determines whether he or she gets the time credit. Therefore, when invoking Section 508.149(a) in this context, it is necessary to consider the law applying to that provision.<sup>34</sup> The term “previously convicted of” for purposes of Section 508.149(a) means that the person has been convicted of a violent felony before he or she committed the holding offense, not after. *Ex parte Keller*, 173 S.W.3d 492, 497 (Tex. Crim. App. 2005). But a person released on parole or mandatory supervision is not entitled to credit for street time on his or her original sentence under Section 508.283(c) if, after release but before revocation, he or she begins serving a sentence on a new conviction for an offense that is described by Section 508.149(a). *Ex parte Hernandez*, 275 S.W.3d 895, 896 (Tex. Crim. App. 2009). A person begins serving a sentence on the day it is pronounced, so any pretrial jail credit given does not count when determining whether the applicant is a person described by Section 508.149(a) on the date of revocation. *Ex parte Johnson*, 273 S.W.3d 340, 343 (Tex. Crim. App. 2008).

And when evaluating whether an inmate meets the second condition, the Court of Criminal Appeals has defined the term “remaining portion” in Section 508.283(c) to mean “that part of the sentence remaining at the RELEASE date, less time spent on parole.” *Ex parte Spann*, 132 S.W.3d at 396 (emphasis in original).

#### **D. Good and Work Time Credit**

Under state law, “work” credits are treated as additional good-time credits. TEX. GOV'T CODE ANN. § 498.003(d) (Vernon Supp. 2001).

Good conduct time credit is not mandatory and may be forfeited by violating the guidelines of a conditional release program. *Ex parte Palomo*, 759 S.W.2d 671 (Tex. Crim. App. 1988); *Thompson v. Cockrell*, 263 F.3d 423, 429 (5th Cir. 2001) (“Thompson's own misconduct during mandatory supervision led to the forfeiture of his previously earned good conduct time.

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<sup>34</sup> See e.g., *Ex parte Hale*, 117 S.W.3d 866, 872 (Tex. Crim. App. 2003) (erroneous release on mandatory supervision; applied time credit statute in effect when erroneous release revoked).

Thompson is therefore not entitled to reinstatement of the good conduct time he earned prior to his release.”). “Good conduct time applies only to eligibility for parole or mandatory supervision as provided by Section 508.145 or 508.147 and does not otherwise affect an inmate’s term.” TEX. GOV’T CODE § 598.003(a).

An inmate has no federal constitutional right to earn good time credit. *Wolff v. McDonnell*, 418 U.S. 539, 556-557 (1974); *Malchi v. Thaler*, 211 F.3d 953, 959 (5th Cir. 2000) (“when a state creates a right to good time credit and recognizes that its *revocation* is an authorized sanction for misconduct, a prisoner’s interest therein is embraced within the Fourteenth Amendment’s liberty concerns so as to entitle him to those minimum procedures appropriate under the circumstances and required by the due process clause to insure that this state-created right is not arbitrarily abrogated.”) (emphasis added); *Hamill v. Wright*, 870 F.2d 1032, 1036 (5th Cir. 1989) (holding that there is no federal constitutional right to the award of good conduct time credits); *Bulger v. United States*, 65 F.3d 48, 50 (5th Cir.1995) (holding that the loss of a prison job did not implicate the prisoner’s liberty interest even though the prisoner lost the *ability* to automatically accrue good-time credits); *Turner v. Johnson*, 46 F. Supp.2d 655, 670 (S.D. Tex. 1999) (“When a state creates a right to good time credit sufficient to give rise to a liberty interest, a prisoner is entitled to Fourteenth Amendment procedural due process in relation to the *loss* of such credit.”) (emphasis added) (citing *Madison v. Parker*, 104 F.3d 765, 768 (5th Cir. 1997)); *Thomas v. Scott*, 927 S.W.2d 142, 144 (Tex. App.—Amarillo 1996) (holding that because the petitioner “never received the particular good time desired, he has no basis upon which to demand procedural due process under either the State or Federal Constitution.”); *Luken v. Scott*, 71 F.3d 192, 193 (5th Cir. 1995) (internal citations omitted) (“[t]he loss of the *opportunity* to earn good-time credits, which might lead to earlier parole, is a collateral consequence of . . . [petitioner’s] custodial status . . . [and] such speculative, collateral consequences of prison administrative decisions do not create constitutionally protected liberty interests.”) (emphasis added).

## E. Miscellaneous Time Credit Issues

- **Erroneous Release**—The law governing a releasee applies to an individual/inmate who is erroneously released from custody. *Ex parte Thiles*, 333 S.W.3d 148, 150-51 (Tex. Crim. App. 2011) (erroneously allowed to continue release because no warrant issued after appellate mandate entered; entitled to day-for-day credit); *Ex parte Baker*, 297 S.W.3d 256, 257-59 (Tex. Crim. App. 2009) (erroneously released due to county’s failure to enter a warrant or detainer and entitled to day-for-day credit); *Ex parte Rowe*, 277 S.W.3d 18, 19-20 (Tex. Crim. App. 2009) (erroneously released while serving another state’s probationary term; entitled to day-for-day credit); *Ex parte Hale*, 117 S.W.3d at 872.
- **Pre-revocation Warrant**—An inmate is entitled to time spent in confinement under a pre-revocation or blue warrant. *Ex parte Canada*, 754 S.W.2d 660, 668 (Tex. Crim. App. 1988).

### VIII. PENDING ISSUES

*Ex parte White*, No. AP-76,971: Whether the “the date of the releasee’s arrest” in Government Code Section 508.253 refers to the date the blue warranted was executed or the date an arrest that occurs while the warrant remains pending and acts to deny the inmate bail on another charge.

*Ex parte Maxwell*, No. AP-76,964: whether *Miller v. Alabama*, which prohibits mandatory life without parole for those under 18 at the time of the offense, applies retroactively, and, if so, what remedy is appropriate.

*Ex parte De Leon*, Nos. AP-76,763/764: whether: (1) based on the totality of the record, waiver of appeal was an implicit or explicit element of the plea agreements; and (2) Applicant’s guilty pleas were rendered involuntary because the State re-indicted Applicant’s brother after Applicant appealed his convictions.

*Ex parte Perez*, No. AP-76,800: whether the State’s showing that it would be prejudiced in its ability to re-try Applicant if this Court were to grant relief on a petition for discretionary review is sufficient to invoke the doctrine of laches and deny Applicant the opportunity to file an out-of-time petition for discretionary review. If a showing of prejudice in the State’s ability to re-try a case is sufficient, then under what circumstances is it required, and how may such a showing be rebutted by the applicant?

*Ex parte Denton*, Nos. AP-76,801/02: (1) Whether Applicant’s convictions in each cause for both aggravated robbery and aggravated assault against the same complainant during the same criminal episode constitutes a violation of the prohibition against double jeopardy; (2) Whether the alleged violation may be remedied in this habeas proceeding or is procedurally defaulted because no objection was raised before the trial court; and (3) Whether, if the claim is procedurally defaulted, trial counsel’s failure to object or appellate counsel’s failure to raise the claim constituted deficient representation resulting in harm to Applicant.

*Ex parte Moore*, AP-76,817: Whether Applicant was denied effective assistance of trial counsel when counsel filed and argued, before trial, a motion to suppress evidence obtained from a search conducted pursuant to a warrant, which was denied, but failed to preserve the issue of the validity of the search warrant for appellate review. *See Strickland v. Washington*, 466 U.S. 668 (1984).

*Ex parte Valdez*, No. AP-76,867: whether a prior juvenile adjudication for conduct, that would have been an ineligible felony had it been committed by an adult, renders an inmate ineligible for mandatory supervision review when serving subsequent offenses which are mandatory release eligible on their own.

*Ex parte Parra*, No. AP-76,871: 1. Whether applicant was denied effective assistance of trial



counsel when trial counsel: (a) did not object to the trial court's response to a jury note as violating the mandates of Article 36.27 of the Code of Criminal Procedure; and (b) did not object to the contents of the trial court's response as threatening to the jury and resulting in the deprivation of a fair and impartial jury. 2. Whether the actions of applicant's trial counsel denied him a fair and impartial jury when trial counsel, allegedly, did not adequately question the venire panel during voir dire to reveal that one of the venire members who later served on the jury had been a victim of crimes in the past even though the juror had indicated on a questionnaire that the juror had not been such a victim.

*Ex parte LaHood*, Nos. AP-76,873/74: 1. Whether trial counsel, under *Strickland v. Washington*, 466 U.S. 668 (1984), was deficient for not bringing to the trial court's attention, either before or during trial, evidence of applicant's alleged incompetency to stand trial. 2. Assuming trial counsel was deficient for failing to alert the trial court to the alleged incompetency, whether applicant was harmed by counsel's actions under *Strickland v. Washington*, 466 U.S. 668 (1984), and how the determination of harm should be made considering this Court's holdings in *Sisco v. State*, 599 S.W.2d 607 (Tex. Crim. App. 1980), *Barber v. State*, 737 S.W.2d 824 (Tex. Crim. App. 1987), *Williams v. State*, 663 S.W.2d 832 (Tex. Crim. App. 1984), and their progeny. 3. Assuming deficient performance and resulting harm are shown under *Strickland v. Washington*, 466 U.S. 668 (1984), whether the proper remedy is to order a retrospective competency inquiry or to grant a new trial. *See, e.g., Barber v. State*, 737 S.W.2d 824 (Tex. Crim. App. 1987); *Caballero v. State*, 587 S.W.2d 741 (Tex. Crim. App. 1979).

*Ex parte Argent*, Nos. AP-76,891/91: whether the *Lemke* test survives the *Lafler* and *Frye* decisions.