APPLICATIONS FOR WRITS OF HABEAS CORPUS

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RECOGNIZING VALID ISSUES

Does the Application:

- **Seek Relief From Final Felony Conviction (not probation)**
- **Raise Constitutional or Fundamental Errors**
- **Allege Confinement or Collateral Consequences**
- **Plead Facts, Which, If True, Would Entitle Applicant to Relief**

TIME LINE FOR DISTRICT COURT

- State Has 15 Days To Answer
- Within 20 Days of Expiration of Time For State's Answer District Court Shall:

  1. Decide Whether There Are Controverted, Previously Unresolved Facts Material To Legality of Applicant's Confinement

  2. If Yes, Enter An Order Designating Issues To Be Resolved

ORDER DESIGNATING ISSUES

The Court finds there are controverted, previously unresolved facts material to the legality of applicant's confinement, to wit, whether the applicant received ineffective assistance of counsel. These issues shall be resolved by submission of affidavits and an evidentiary hearing.

WAYS TO RESOLVE ISSUES

- Affidavits
- Depositions
- Interrogatories
- Forensic Testing
- Hearings
- Personal Recollection

IF NO ISSUES TO BE RESOLVED

- Court Makes This Finding
- Clerk Sends Application, Answer and Court's Order To Court of Criminal Appeals

FINDINGS BY DISTRICT COURT

- District Court Issues Findings of Fact and Conclusions of Law
- Transmitted to Court of Criminal Appeals
- Court of Criminal Appeals Grants or Denies Relief
- Court of Criminal Appeals Not Bound By District Court's Findings and Conclusions
- Court Will Ordinarily Follow the Findings and Conclusions if Supported By Record

FACTS THAT BAR RELIEF

- Issue Could Have Been Raised on Direct Appeal
- Issue Was Decided On Direct Appeal (exception on ineffective assistance)
- Subsequent Writs
- 4th Amendment Violation Not Cognizable
- Insufficiency of Evidence Not Cognizable (no evidence is cognizable)

WHETHER TO HOLD A LIVE HEARING

QUESTIONS:

1. **Are there factual questions to be resolved?**
2. **Does resolution of the factual questions require credibility determinations?**
3. **Would hearing the witness testify aid the court in making credibility assessment?**

LAWYER V. CLIENT

- **SHOULD LAWYER ALWAYS WIN?**
- **GALLEGO V. U.S., 174 F.3D 1196 (11TH CIR. 1999): "We cannot adopt a per se credit counsel in case of conflict rule" where "the defendant is going to lose every time."**
- **Judge should assess credibility of the lawyer and client based on their testimony.**

COMMON ISSUES

- Ineffective Assistance of Counsel
- Suppression of Exculpatory Evidence
- New Evidence Establishing Actual Innocence
- New Science
- Perjured Testimony

TEXAS ACTUAL INNOCENCE STANDARD

- **Ex Parte Elizondo, 947 S.W.2d 202 (Tex. Crim. App. 1996)**

  Bare claims of actual innocence are cognizable on a writ application. Applicant must show that newly discovered evidence of actual innocence unquestionably established innocence.

- **Habeas Court must examine the new evidence in light of the evidence presented at trial.**

- **In order to grant relief, the reviewing court must believe that no rational juror would have convicted in light of the newly discovered evidence.**

Establishing a bare claim of actual innocence is a herculean task.
***Ex Parte Brown*, 205 S.W.3d 538 (Tex. Crim. App. 2006)**

RECANTATIONS

Ex Parte Thompson,
153 S.W.3d 416 (Tex. Crim. App. 2005)

Complainant, daughter of Applicant, provided affidavit and testimony stating that sexual abuse never occurred.

GUILTY PLEAS

Ex Parte Tuley,
109 S.W.3d 388
(Tex. Crim. App. 2002)

Actual innocence claims are not barred by guilty plea.

NEWLY DISCOVERED OR NEWLY AVAILABLE EVIDENCE:

- **Ex Parte Calderon, 309 S.W.3d 64 (Tex. Crim. App. 2010)**

  Evidence of innocence must be newly discovered or newly available.

NON-RECANTATION ACTUAL INNOCENCE CASE

- **Defendant actually innocent of duty to register as a sex offender. *Ex Parte Harbin*, 297 S.W.3d 283 (Tex. Crim. App. 2009)**

EX PARTE SONIA CACY

Cacy convicted of an arson murder based on false lab report that claimed there was gasoline on her uncle's clothing.

Trial Court finds Cacy is actually innocent.

INEFFECTIVE ASSISTANCE OF COUNSEL

- **Strickland v. Washington, 466 U.S. 668 (1984), test requires Applicant to show:**

  1. Counsel's performance was deficient. Requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment.

  2. The deficient performance prejudiced the defendant.

GUILTY PLEAS

- **Must show that but for counsel's errors defendant would not have entered a guilty plea. *Hill v. Lockhart*, 474 U.S. 52 (1985)**

- **Failure to inform client of plea offer found ineffective. *Ex Parte Lemke*, 13 S.W.3d 791 (Tex. Crim. App. 2000)**

DUTY TO INVESTIGATE

- **Counsel's strategic choices made after less than complete investigation are considered reasonable, on claim of ineffective assistance, precisely to extent that reasonable professional judgments support limitations on investigation. *Wiggins v. Smith, 539 U.S. 510 (2003)***

FAILURE TO INVESTIGATE

- **Failure of trial counsel to investigate information that someone else committed the crime is ineffective. *Ex Parte Amezquita, 223 S.W.3d 363 (Tex. Crim. App. 2006)***

FAILURE TO OBTAIN EXPERT ASSISTANCE

- **Retained counsel performed deficiently in limiting, for economic reasons, his investigation of medical evidence before advising client to plead guilty. *Ex Parte Briggs*, 187 S.W.3d 458 (Tex. Crim. App. 2005)**

INEFFECTIVE ASSISTANCE DURING TRIAL

- **Failure to request limiting instruction. *Ex Parte Varelas,* 45 S.W.3d 627 (Tex. Crim. App. 2001)**
- **Failure to file application for probation. *Ex Parte Welch,* 981 S.W.2d 183 (Tex. Crim. App. 1998)**
- **Failure to request accomplice witness instruction when case based entirely on accomplice testimony. *Ex Parte Zepeda,* 819 S.W.2d 874 (Tex. Crim. App. 1991)**

WHEN TO RAISE ISSUE

- **Ineffective Assistance of Counsel may (should) be raised for first time on a writ. *Ex Parte Torres*, 943 S.W.2d 469 (Tex. Crim. App. 1997).**
- **Trial record is rarely sufficient to show ineffective assistance.**

TRIAL COUNSEL'S REASONS

- **Record must show why counsel took the actions that constitute ineffective assistance. *Thompson v. State, 9 S.W.3d 808 (Tex. Crim. App. 1999)***

- **Trial counsel must provide affidavit or testimony.**

SUPPRESSION OF EXCULPATORY EVIDENCE

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Brady v. Maryland
373 U.S. 83 (1963)

THREE PART TEST TO OBTAIN RELIEF BASED ON SUPPRESSION OF EXCULPATORY EVIDENCE

- **The prosecution withheld or suppressed evidence.**
- **The evidence was favorable to the defense.**
- **The evidence was material to either guilt or punishment.**

MATERIALITY TEST

Evidence qualifies as material when there is "any reasonable likelihood" it could have "affected the judgment of the jury." To prevail on a *Brady* claim, the applicant need not show that he "more likely than not" would have been acquitted had the new evidence been admitted. He must show only that the new evidence is sufficient to "undermine confidence" in the verdict.

***Wearry v. Cain*, 136 S.Ct. 1002 (2016)**

The State has an affirmative duty to disclose evidence favorable and material to a defendant's guilt or punishment under the Due Process Clause of the Fourteenth Amendment. This duty attaches with or without a request for the evidence. When unsure of whether to disclose the evidence, the prosecutor should submit the evidence to the trial judge for his consideration.

Thomas v. State
841 S.W.2d 399
(Tex. Crim. App. 1992)

Because *Brady* was aimed at ensuring that an accused receives a fair trial rather than punishing the prosecutor for failing to disclose favorable evidence, the prosecution's obligation to disclose is not measured by the moral culpability, or the willfulness, of the prosecutor. In Brady cases the good or bad faith of the State is irrelevant for due process purposes.

Thomas v. State

Prosecutor denied having any exculpatory evidence

Exculpatory evidence suppressed: Eyewitness (Walker) who said Thomas was not in location where shooting occurred.

Prosecutor later testified,
"I would have brought (Walker's testimony) to the court's attention had I thought it would be exculpatory in any manner."

Thomas v. State

Because we agree that the credibility of the State's only eyewitness, Anita Hanson, was crucial issue in applicant's trial, we conclude that the State had an affirmative constitutional duty under *Brady v. Maryland* to disclose material evidence that impeached her testimony.

Ex Parte Richardson
70 S.W.3d 865 (Tex. Crim. App. 2002)

Previous statement from eyewitness that he could not identify the perpetrator is exculpatory evidence when eyewitness identifies defendant in Court.

Smith v. Cain,
132 S.Ct. 627 (2012)

The scenarios to which *Brady* applies involve the discovery after trial of information which had been known to the prosecution but unknown to the defense.

Pena v. State,
353 S.W.3d 798 (Tex. Crim. App. 2011)

KNOWLEDGE OF POLICE

Knowledge of government agents, such as police officers, of exculpatory evidence is imputed to the prosecution.

Prosecutor has a duty to learn of any favorable evidence known to the others acting in the government's behalf, including the police.

***Kyles*, 115 S.Ct. at 1566**

THE DALLAS COUNTY EXPERIENCE

Opening files of old convictions revealed many cases with exculpatory evidence:

- **State failed to disclose two police reports that identified two other possible suspects.**

Ex Parte Miles,
359 S.W.3d 647 (Tex. Crim. App. 2012)

- **State withheld photograph and police report which supported defendant's defense of misidentification.**

Ex Parte Wyatt,
2012 WL 1647004 (Tex. Crim. App. 2012)

SNITCH TESTIMONY

- When reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of immunity deal violates due process.
- *Napue v. Illinois*
- 360 U.S. 264 (1959)

- "Supreme Court has never limited a *Brady* violation to cases where the facts demonstrate that the state and the witness have reached a bona fide, enforceable deal."
- *Lacaze v. Warden*,
- 645 F.3d 728 (5th Cir. 2010)

SNITCH TESTIMONY

- *Brady* applies to agreement "which are merely implied, suggested, insinuated or inferred."

- Question is whether there exists "some understanding for leniency."
- "It makes no difference whether the understanding is consummated by a wink, a nod and a handshake, or by a signed and notarized formal document ceremoniously impressed with a wax seal. A deal is a deal."
  - *Duggan v. State*,
  - 778 S.W.2d 465 (Tex. Crim. App. 1989)

WEARRY V. CAIN, 136 S.Ct. 1002 (2016)

State failed to disclose that, contrary to the prosecution's assertions at trial, Brown had twice sought a deal to reduce his existing sentence in exchange for testifying against Wearry. The police had told Brown that they would "talk to the D.A. if he told the truth."

Ex Parte Julius Jerome Murphy, No. WR-38,198-04

Capital Murder case remanded for resolution of whether the district attorney's office failed to disclose threats of prosecution and promises of leniency to the state's two main witnesses as required by *Brady* and *Giglio*.

WORK PRODUCT

- **The privilege derived from the work-product doctrine is not absolute, and the duty to reveal material exculpatory evidence as dictated by *Brady* overrides the work-product privilege.**

- ***Ex Parte Miles*,**
- **359 S.W.3d 647**
- **(Tex. Crim. App. 2012)**

STATUTORY CODIFICATION OF *BRADY* REQUIREMENTS

- **Art. 39.14, Tex. Code Crim. Proc. (Michael Morton Act) has codified the *Brady* requirement.**
- **(h) Notwithstanding any other provision of this article, the state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charge.**
- **. . .**
- **(k) If at any time before, during or after trial the state discovers any additional document, items, or information required to be disclosed under Subsection (h), the state shall promptly disclose the existence of the document, items, or information to the defendant or the court.**

SCHULTZ V. COMMISSION FOR LAWYER DISCIPLINE, No. 55649, (Board of Disciplinary Appeals)

- **Rule 3.09(d), Texas Disciplinary Rules of Professional Conduct is broader from *Brady*.**
- **Materiality standard under *Brady* does not apply.**
- **Failure to disclose information required by law to be disclosed, regardless of intent, violates Rule 3.04(a)**

Changing Scientific Evidence

- ***Ex parte Robbins*, 360 S.W.3d 446 (Tex. Crim. App. 2011, cert. denied May 14, 2012)**

- **QUESTION: HOW SHOULD COURTS RESPOND TO CHANGES IN SCIENCE UNDERLYING CONVICTIONS**

Robbins Majority

- **Notwithstanding agreement, among experts that Dr. Moore's findings and testimony were incorrect, the majority refused relief because none of the experts affirmatively proved that "Tristen could not have been intentionally asphyxiated." Thus, the majority concluded Robbins did not "have a due process right to have a jury hear Moore's re-evaluation."**

Judge Cochran Dissenting

- **Discussed her "extremely serious concern" about the increased "disconnect between the worlds of science and of law" that allows a conviction to remain in force when the scientific basis for that conviction has since been rejected by the scientific community.**

Ex Parte Henderson, 384 S.W.3d 833 (Tex. Crim. App. 2012)

- Court accepted trial court's findings of fact that new scientific evidence shows that a short distance fall could have caused the head injury.
- Court found that the new scientific evidence did not establish that Henderson was actually innocent but that it did establish a due process violation.

New Statute Concerning Writs Based on New Scientific Evidence

- **Art. 11.073. Procedure Related to Certain Scientific Evidence.**

  (a) This article applies to relevant scientific evidence that:

  (1) was not available to be offered by a convicted person at the convicted person's trial; or

  (2) contradicts scientific evidence relied on by the state at trial:

  (b) A court may grant relief if . . . :

  (A) relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and

(B) the scientific evidence would be admissible under the Texas Rules of Evidence . . . ; and

(2) the court . . . finds that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.

(c) For purposes of a subsequent writ, a claim or issue could not have been presented in a previously considered application if the claim or issue is based on relevant scientific evidence that was not ascertainable through the exercise of reasonable diligence by the convicted person on or before the date on which the original application or a previously considered application , as applicable, was filed.

(d) In making a finding as to whether relevant scientific evidence was not ascertainable through the exercise of reasonable diligence on or before a specific date, the court shall consider whether the field of scientific knowledge, a testifying expert's scientific knowledge, or a scientific method on which the relevant scientific evidence is based has changed since . . .

Ex Parte Robbins (Robbins II) 478 S.W.3d 678 (Tex. Crim. App. Nov. 26, 2014) rehearing denied 2016

- **Robbins case reconsidered under Art. 11.073 and relief granted**

Medical Examiner's reconsideration of her opinion was new scientific evidence that contradicted scientific evidence relief upon by the state at trial.

Ex Parte Spencer, 337 S.W.3d 869 (Tex. Crim. App. 2011)

- **"We will consider advances in science and technology when determining whether evidence is newly discovered or newly available, but only if the evidence being tested is the same as it was at the time of the offense. Thus, the science or the method of testing can be new, but the evidence must be able to be tested in the same state as it was at the time of the offense."**

PRESENTATION OF PERJURED TESTIMONY

- **Due process violated by state's unknowing presentation of perjured testimony in murder prosecution. *Ex Parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009).**

ADDITIONAL GROUNDS FOR RELIEF

- Double Jeopardy
- Involuntary Guilty Plea
- Denial of Counsel
- Right to Appeal and Discretionary Review

"I'll work on the appeal. You try to escape."