So you want to (or have to) file your writ?

*What you **need** to know.*

From the Office of

Walter Reaves

Preparing an application for writ of habeas corpus is not an easy task. The rules governing habeas review are complex and technical. Few lawyers understand them, which makes it almost impossible for a layman to understand them. Habeas law is not something you can easily learn – no matter how intelligent you are. Part of the problem is that it requires a thorough knowledge of the criminal justice system, as well as criminal law. If you think about it in medical terms, you could learn everything there is to know about how the heart operates, but you couldn't diagnose someone without understanding how it fits together with the rest of the bodily systems.

So if it is so hard to learn, can a laymen ever hope to understand it well enough to present their own writ. The answer is yes, although subject to a lot of limitations.

Overview of the post-conviction system

Before you start, you have to understand how the post-conviction system operates. The most important concept to understand is that the courts presume you are guilty, and that you received a fair trial. Going in you have to understand that the Court is pre-disposed to deny your writ. Statistics bear that out; only a handful of writs are ever successful.

Something else you have to understand is that no one is as interested in your case as you are. You may think you have a unique case, and everyone will see that. The fact is that your case is probably no different from thousands of others. I can't tell you how many times I have received letters from people telling me how unique their case is. I have received hundreds of those letters, and I have yet to find one that met that definition. That doesn't mean I haven't seen cases that involved interesting issues, because I have. However, the issues I see as interesting are seldom those a defendant sees. The fact is that the worst person to evaluate anything is someone with in interest in the matter; no one can be objective about their own case. Just because you believe you have a great case does not mean others will agree.

You also have to understand that handling writs is something no judge wants to do; most view it as a nuisance. That usually means they are not going to spend much time looking a writ; assuming they look at it all. You can be sure that no judge is going to take the time to review a writ that has numerous grounds for relief and a lengthy supporting memorandum. Most of the time that accomplishes nothing more than killing a bunch of trees. What that means to you is that you have to do something to grab the court's attention, and get them to look at your writ.

Identifying claims

The key to drafting a writ is to identify a claim that will interest the court. The obvious problem is knowing what that will be. I can't tell you what those claims are, because they depend on the facts of each case. However, I can point out several claims that are never going to grab a court's attention. Unfortunately, most of these claims are those I see inmates making regularly.

Perjury: I can't estimate the number of times I have had someone tell me that a witness perjured themselves, and it's on the record. Seldom is that ever the case. Perjury is a serious matter, that I have seen only a handful of times. Discrepancies or conflicts in testimony are not perjury. Also, changing stories, or testifying to something different from a prior statement is not perjury. To establish perjury, you have to prove one of those is true, and one is false. You can seldom do that, and I have never seen a case where you can do that based on nothing more than the record. Generally there has to be other evidence that establishes a witness testified falsely

Prosecutor misconduct: To constitute misconduct, a prosecutor has to do something really serious. Making an improper argument, or admitting inadmissible evidence, is not something that will amount to misconduct. I'm not saying prosecutor's don't engage in misconduct, just that it's extremely difficult to prove. This is one of those claims that you can never make based solely on the record. To establish misconduct you generally need something else that establishes what they did. For instance, they hid evidence, or had a witness change their testimony. These claims are almost never successful, and should not be made unless you have the evidence to back it up.

Violations of rules of evidence: Habeas corpus is designed to address constitutional violations. Every trial involves error in the admission or exclusion of evidence. Those claims can be raised on appeal, but they are not claim that can be raised in a habeas application. For example, admitting hearsay evidence is not a good writ claim. Similarly, violations of the rules of criminal procedure are not valid writ claims.

Insufficient evidence or no evidence: You have to remember that you have either plead guilty, or a jury has found you guilty. That's enough for the court. They aren't going to find the evidence is insufficient, unless there is no evidence of guilt. That situation almost never exists. The court is not going to look at the evidence, and decide whether they think you are guilty; they already think you are guilty. Inconsistencies in testimony, or conflicts among the witnesses are not things the court is going to look at. There has to be something really compelling to convince the court there was no evidence to support the verdict.

Length of sentence: No court has the authority to modify a sentence. Even if a judge thinks a sentence is excessive, they don't have any way to change it.

What claims can be raised?

What does that leave you with? Truthfully, not a lot. Most successful habeas applications are based on evidence that was not presented at trial. Unfortunately, you seldom have that. You almost never have it without someone re-investigating the case. Some of the more successful claims include the following:

Evidence that was withheld or not disclosed: This is rare, but if you have it your chances of obtaining relief go way up. The problem is finding such evidence. Many times it is discovered by accident; sometimes it comes out in other cases. Unless you get lucky, the only way to find such evidence is to thoroughly re-investigate the case.

Just because you find such evidence doesn't mean you are automatically going to win. You still have a couple of hurdles to overcome. The most significant one is proving the evidence was "material", which means it would have caused a different result. Looking at it another way, it must be something that was really important to the case. You must also prove that the evidence was actually withheld; sometimes prosecutors will claim they disclosed the evidence, or it was available to the lawyer and they didn't look at it.

Evidence that wasn't available at trial: If you have new evidence, you have to show it could not have been discovered, or was not available earlier. The most common type of new evidence is DNA. While it is not the only one, it is a good example of the type of evidence the court will consider.

Ineffective assistance of counsel: This is the most common claim in writs, and also the least successful. You have to understand two important things about ineffective assistance claims. One is that all lawyers make mistakes, and just because a mistake was made doesn't mean they were ineffective. The mistake must be a significant one, which had some impact on the case. The other is that you are not entitled to a great lawyer – only one that is competent. Basically, that means an average lawyer. The term is reasonably effective assistance, which generally means making an effort to defend you. Courts give a lot of deference to lawyers, and assume they have reasons for what they did. That is often referred to as trial tactics. You have to prove that no reasonable lawyer would have made that choice.

There are of course other claims, depending on the type of case. The important thing to remember is that it is something significant enough to get a judge to question the outcome of the trial.

Procedural issues

The Court has designed a form for post-conviction writs that you have to use. The purpose is to make sure all the information is included, and also to make it easier for the court to see what the claims are. Space on the form is limited, so you have to sum up your claim.

There are two parts to each issue. The first is a statement of the issue. Generally, that is one sentence summing up your claim. For instance, "Applicant's counsel did not provide reasonably effective assistance where he failed to use a witness who could provide an alibi for the time of the offense". You then have a chance to describe the facts supporting that claim. For the example, you could name the person and what they would have testified about, and also describe how the lawyer knew about them.

Drafting claims

There is a definite art to drafting claims, and you should spend some time working on that. Many times, that is all the court will look at. If they don't believe it states a claim, they might not look any further. Professional writers may re-write a sentence a number of times, changing wording and order. There is no reason for you to not do the same; before you actually fill in the form, make sure you have it the way you want it.

The statement of facts should be limited to the facts you are relying on. Don't include argument. It is sometimes difficult to distinguish between fact and argument, but if you read it carefully, you can probably tell the difference. Again, spend some time on this, and make it as persuasive as possible. If you have affidavits or other evidence you are relying on, make sure you refer to that.

You can attach exhibits to your writ, and you should do so. Don't just say what a witness would have said; include an affidavit or statement from them. As noted above, successful writs usually involve new evidence; that evidence should be made a part of the writ.

There is no doubt that the court form is limited, and you cannot include everything. You can file a supplement to the writ, and that is the place to set forth your argument. You need to be careful in doing so, and again make it as brief as possible. You can also set out any cases you are relying on, but don't overdo it. You don't need to set forth all the law concerning a claim; most of the time the Court knows it. They have been to law school, and deal with criminal cases every day. You don't need to educate them on ineffective assistance or search and seizure. However, if there is a case you are relying on, include it. If you think your case is similar to one already decided, you certainly want to point that out. If you are relying on a new decision, you also want to point that out. Again, the goal is to be persuasive, and convince the court your case is different from the thousands of other writs they are going to get this year.

Processing writs

The process for handling a writ is somewhat different. The writ application must be filed in the Court where you were convicted. The trial judge cannot grant or

deny the writ. Instead all they can do is make findings of fact and conclusions of law. That means that if there are questions about what happened, the court will make findings. For example, if you are complaining that your lawyer didn't call certain witnesses you told him about, and he says you never told him about the witnesses, the court would make a finding on whether or not you told him. Those findings are important, because they are usually accepted by the Court of Criminal Appeals if there is any evidence to support them.

Many people have questions about how long the Court has to decide a writ application. The Code of Criminal Procedure requires writs to be decided by the trial court within a very short amount of time. Unfortunately, there is no effective way to force a court to act. You can file application for writ of mandamus, and the court may order the trial court to decide the case. You have to decide whether you want to force the issue.

Fortunately, most courts – especially in larger counties – handle cases fairly promptly. Many will enter an order setting forth the issues to be resolved, and requesting affidavits. When that is done, the time limits are put on hold.

Conclusions of law are findings on the legal issues. An example would be a finding that your lawyer provided effective assistance. Those findings are not given the same deference by the Court of Criminal appeals; they can make their own determination on legal issues, but that decision will be usually be based on the facts the trial court finds.

Most of the time the District Attorney will prepare findings of fact and conclusions of law, and present them to the judge. Obviously, they are not usually going to ask the judge to make findings that are favorable to you. It is usually a good to idea to submit your own findings with your writ application. You can also object to the proposed findings submitted by the prosecutor. The problem with waiting to object is that many times the proposed findings have already been signed by the time you receive them.

As part of the findings entered by the trial court, they will also make a recommendation on whether the writ should be granted or denied. Again, that is not binding on the Court of Criminal Appeals, and they are free to make their own decision.

Once the findings are made, the case is transferred to the Court of Criminal Appeals. The District Clerk will prepare a record to send to the court. That will include the writ application, and anything filed in connection with that. Once that is received, the Court of Criminal Appeals will notify you that the writ has been received, and you will get a cause number.

The court of criminal appeals has several options for deciding writs. Where written findings have been made, they can deny the writ based on the findings of the court; basically, that means they are adopting the trial court findings. They can also simply deny the writ, with no explanation. Both of those decisions are referred to as "white card denials"; the name comes

from the small white card you receive notifying you of the court's decision.

If the court decides to grant the writ, they will usually issue an opinion. Another option the court has is to set the case for submission. That happens when there are legal issues involved, and the court wants additional argument and briefing. If that occurs, and you are representing yourself, you will generally be provided with an appointed attorney to assist you.

The court can also choose to not decide a writ. That usually happens when there are factual issues that have not been addressed by the court. It also happens when the court has made findings that don't appear to be supported by any evidence. In this situation, the court will remand the case to the District Court to conduct an evidentiary hearing. It is generally up to the court on how to handle the hearing. They can either ask for affidavits, or hold a live hearing. The most common practice is to request affidavits. Once the court has received the evidence it will make findings, and send the case back to the Court of Criminals.

The appellate process

If your case is like most, and your writ is denied, you are limited on appeals. The only appeal is to the United States Supreme Court, by way of a petition for writ of certiorari. The Supreme Court almost never accepts State court writ cases. The court is not interested in whether a particular case has been decided correctly. Instead, they are looking at cases that have some national significance; the issue must also be one involving the federal constitution. There are very few of those, which means the order from the Court of Criminal Appeals is generally the end of review.

You may have an option of going into federal court, and filing an application for habeas corpus there. A federal court will not review a case unless there is a federal constitutional issue. Review in federal court is extremely limited. The most significant hurdle most people face is limitations. The federal writ must be filed within one year of the year the date the state court judgment was final. The state court decision is generally final when the court of appeals denies an appeal; you may get an extra 90 days in some cases if you have filed a petition for discretionary review. The time starts running when you file a state writ, and starts again when it is denied. That means that if you wait 13 months to file your state writ, you are already out of time.

Review in federal court is extremely limited. The court basically acts as an appellate court. That means they review state court decisions, and determine if they are reasonable. That is a different standard from deciding whether the decision is correct. A federal court can believe the state court should have granted the writ, but still deny the federal writ because the decision was unreasonable. Before a decision is

found to be unreasonable, the court must find no reasonable judge would have found against you. As you can imagine, that is extremely difficult to do.

Conclusion

I hope this helps provide some understanding of the writ process, and how to proceed. If you are discouraged, you should be. The chances of having you writ granted are extremely small. If someone were betting, they could make money by betting against you. There are some valid cases, and hopefully, if yours is one, the court will recognize it.

Good luck.

Conclusion

The above information is general in nature, and may or not be applicable to your case. It should be used as a starting point, and should not be relied on without further verifying it accuracy and applicability to your specific case. No such general information can take the place of a consultation with a qualified lawyer. No attorney-client relationship is created by the furnishing of this document.
Prepared and furnished by:

Law Office of Walter M. Reaves, Jr., PC

504 Austin Ave.
Waco, Texas 76701
254-296-0020
FAX 254-296=0023

Email: wmreaves@postconviction.com
Website: www.postconviction.com
Blog: www.wacocriminallawblog.com