No. 07-6984

In The Supreme Court of the United States

CARLOS JIMENEZ,

Petitioner,

v.

NATHANIEL QUARTERMAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR *AMICI CURIAE* TEXAS FAIR DEFENSE PROJECT AND TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When a court finds that a defendant lost his right of direct appeal because of a violation of his Sixth Amendment right to the effective assistance of counsel, and accordingly reinstates his appeal, does the time to seek federal habeas review run from the conclusion of the reinstated proceedings?

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BRIEF FOR *AMICI CURIAE* TEXAS FAIR DEFENSE PROJECT AND TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICI*[1]

The Texas Fair Defense Project is a nonprofit organization based in Austin, Texas. TFDP works to improve the fairness and accuracy of the criminal justice system in Texas, with a primary focus on improving access to counsel and the quality of representation provided to poor people accused of crime. TFDP routinely monitors state and local practices for delivering legal services to indigent criminal defendants, and works to protect the right to the effective assistance of counsel in all Texas courts.

With over 2,600 members, the Texas Criminal Defense Lawyers Association is the nation's largest state association of criminal defense attorneys. Founded almost 40 years ago, TCDLA provides assistance, support and continuing education to its members. TCDLA seeks to protect the rights guaranteed

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. Both petitioner and respondent have consented to the filing of *amici* briefs in support of either party, and have filed the letters of consent with the Clerk of the Court.

by the Texas and Federal Constitutions in criminal cases, and to promote the just adjudication of those cases. TCDLA members represent criminal defendants on a daily basis in courthouses across Texas – at trial, on direct appeal, and in state and federal habeas proceedings.

Amici therefore have deep and broad knowledge of their state's criminal justice system. The Texas procedures at issue in this case were developed decades ago, in response to systemic problems in Texas's indigent defense system that deprive some defendants of the effective assistance of counsel after a judgment of conviction is entered but before it becomes final. Texas's highest criminal court, the Texas Court of Criminal Appeals, may grant a remedy colloquially known as an "out-of-time" appeal to defendants who otherwise would lose, due to counsel error, their ability to pursue any claims on direct appeal. The Fifth Circuit's rule undermines the CCA's remedy for this fundamental constitutional error by curtailing or eliminating the ability of affected defendants to obtain federal habeas review of any additional constitutional challenges to their convictions.

STATUTES INVOLVED

The text of 28 U.S.C. § 2244(d) appears at pages 1-2 of the Brief for the Petitioner. The text of Article

11.07 of the Texas Code of Criminal Procedure appears in the Appendix to this *amici* brief, and is cited hereafter as "Article 11.07 § ___."

SUMMARY OF ARGUMENT

The Texas Court of Criminal Appeals granted Carlos Jimenez an out-of-time appeal because his State-appointed counsel's ineffective assistance effectively deprived Mr. Jimenez of his direct appeal. In doing so, the CCA did not consider the underlying merits of the appeal; it simply reinstated the direct appeal for hearing and determination on the merits. At times, such relief is necessary because Texas historically has failed to provide some defendants with effective assistance of counsel on appeal – this may occur when a defendant's trial counsel abandons the client after the trial court enters a judgment of conviction, new appellate counsel is not appointed in a timely fashion, deadlines are missed, the record is not perfected and briefs are not filed, or the client is not informed of her or his rights on appeal.

At the time Mr. Jimenez's appointed lawyer failed to protect his client's rights, there was no indigent defense "system" in Texas – the State provided no funds for indigent defense, and there were no statewide policies for providing indigent defendants with counsel, or minimum qualifications for

counsel seeking court appointments. Instead, there was a "crazy quilt – a mess of different procedures."[2] A study of the State Bar of Texas found a "crisis" in indigent defense,[3] and newspapers across the state urged reform of an "appalling"[4] and "grossly unfair"[5] system. The failure of Mr. Jimenez's counsel to inform him of his rights on appeal is part of this larger pattern of indigent defense shortfalls in Texas. Although the Texas legislature attempted to remedy some of these systemic deficiencies through adoption of the Fair Defense Act in 2001, access to effective counsel from the time of conviction through direct appeal remains a problem. *See, e.g., Ex parte Owens*, 206 S.W.3d 670, 678 (Tex. Crim. App. 2006) (Womack and Cochran, JJ., concurring in the grant of an out-of-time appeal).

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[2] Mark Donald, *Wheel of Justice*, DALLAS OBSERVER, October 18, 2001, *available at* http://www.dallasobserver.com/2001-10-18/news/wheel-of-justice/. All internet sites noted in this brief were visited June 18, 2008.

Internal quotations and citations in materials quoted in this brief have been omitted and, unless otherwise stated, any emphasis has been added.

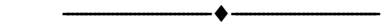
[3] *See, e.g.*, ALLAN K. BUTCHER AND MICHAEL K. MOORE, MUTING GIDEON'S TRUMPET 21, 22 (September 22, 2000), *available at* http://www.uta.edu/pols/moore/indigent/whitepaper.htm.

[4] Editorial, *Appalling Appointment System Must Be Overhauled*, DALLAS MORNING NEWS, December 8, 2000, at 30A, *available at* 2000 WLNR 9484129.

[5] Editorial, *Texas Fails To Give Fair Defense To Poor*, SAN ANTONIO EXPRESS-NEWS, December 17, 2000, at 2G, *available at* 2000 WLNR 9673774.

Because these problems sometimes manifest themselves during the direct appeal process, the Texas CCA created the system of reinstating direct appeals through grants of out-of-time appeals. While the ultimate decision to grant or deny rests with the CCA, that court makes its decision only after the convicting court first investigates the pertinent facts, resolves any conflicts in the evidence, considers any defenses raised by the State, makes appropriate findings of fact, and provides both the evidentiary record and a recommended disposition to the CCA. *See* Article 11.07, §§ 3, 5.

The CCA's grant of an out-of-time appeal reinstates the direct appeal, so that the defendant "may then, with the aid of [effective] counsel," secure "a *meaningful* appeal from his conviction." *Ex parte Raley*, 528 S.W.2d 257, 259 (Tex. Crim. App. 1975). Examination of the circumstances, procedures, and function of out-of-time appeals demonstrates both that the Texas High Court regards this remedy as part of the process of direct review, and that the Fifth Circuit's ruling will compound systemic problems in Texas's indigent defense system by limiting the federal habeas rights of defendants who have been denied an entire stage of their state criminal proceedings due to the ineffective assistance of counsel.



ARGUMENT

I. TEXAS'S STRUGGLING INDIGENT DEFENSE SYSTEM LEAVES SOME DEFENDANTS UNREPRESENTED AFTER JUDGMENT

A. When Mr. Jimenez Lost His Right of Appeal, the Texas Indigent Defense System Was a "National Embarrassment"

In 2000, a State Bar of Texas report called Texas's indigent defense system "a national embarrassment" that needed "serious reform" because it ignored "at least the spirit of *Gideon v. Wainwright*." MUTING GIDEON'S TRUMPET, at 8, 22. Texas's "appalling"[6] indigent defense system was "grossly unfair to poor defendants"[7] and "at the bottom of the heap" among her sister states.[8] Practitioners, researchers, and even judges consistently documented a failure to create minimum qualifications for, and require training of, attorneys accepting court appointments; flawed procedures that delayed appointment of counsel or allocated appointments based on attorneys' willingness to "move cases" or contribute to judicial reelection campaigns rather than on attorneys' competency; and inadequate funding at both the state

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[6] Editorial, *Appalling Appointment System Must Be Overhauled*, *supra,* at 30A.

[7] Editorial, *Texas Fails To Give Fair Defense To Poor*, *supra,* at 2G.

[8] Viveca Novak, *The Cost of Poor Advice*, TIME, July 5, 1999, at 38, *available at* 1999 WLNR 6291551.

and county level. As a result, poor people accused of crime were more likely to go to jail than defendants who could afford to hire counsel.[9]

Two studies released in 2000 detailed the shortcomings of indigent defense in Texas. The first, MUTING GIDEON'S TRUMPET, was a statewide survey of indigent defense practices commissioned by the State Bar of Texas's Committee on Legal Services to the Poor in Criminal Matters. The second, THE FAIR DEFENSE REPORT, written in conjunction with national indigent defense experts at The Spangenberg Group, surveyed a representative sample of Texas counties. TEXAS APPLESEED, THE FAIR DEFENSE REPORT: ANALYSIS OF INDIGENT DEFENSE IN TEXAS (2000).[10]

"With few exceptions," researchers found that "training for defense counsel who handle indigent defense cases [was] inadequate," FAIR DEFENSE REPORT at 38, and that appointments were often seen as a way for inexperienced attorneys to "hang out a shingle" and "cut their teeth." *Id*. at 24; *see also* MUTING GIDEON'S TRUMPET at 6. In most counties, there were no minimum eligibility criteria for attorneys accepting court-appointed cases or requirements

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[9] Bob Sablatura, *Study Confirms Money Counts in County's Courts*, HOUSTON CHRONICLE, October 17, 1999, at 1A, *available at* http://www.chron.com/CDA/archives/archive.mpl?id=1999_3171764; *see also* MUTING GIDEON'S TRUMPET, *supra,* at 19-20.

[10] *Available at* http://www.courts.state.tx.us/tfid/Resources.asp.

for continuing legal education programs in criminal law and procedure. FAIR DEFENSE REPORT at 49.

Authors of these studies found that delay in appointing counsel was a "pervasive and serious problem." FAIR DEFENSE REPORT at 45. The State Bar was told "the story of a woman who sat in jail for 27 days before an attorney was assigned to her matter. Within 45 minutes of receiving the case, her court-appointed attorney determined the case lacked merit, he approached the prosecutor who agreed, and the judge ordered her released." MUTING GIDEON'S TRUMPET at 11.

The studies also revealed that judges routinely made appointment decisions improperly. MUTING GIDEON'S TRUMPET at 11-13; FAIR DEFENSE REPORT at 21-22. ALMOST half of all judges surveyed reported that their colleagues on the bench "sometimes appoint counsel because they have a reputation for moving cases, *regardless of the quality of the defense they provide . . .* " MUTING GIDEON'S TRUMPET at 12 (emphasis in original); *see also* FAIR DEFENSE REPORT at 21-22. Judges "sometimes consider[ed] whether an attorney contributed to their campaign or was a political supporter when making appointments," and it was "not uncommon for judges to solicit campaign contributions from criminal defense attorneys and then imply that the attorneys [would] recoup their contributions in the form of appointed work." MUTING GIDEON'S TRUMPET at 13; *see also* FAIR DEFENSE REPORT at 21.

Texas spent less on indigent defense than nearly every other state. FAIR DEFENSE REPORT at 47. The State itself provided no funds for indigent defense, leaving the burden completely upon county governments. *Id.* at 48. "[N]one of the 23 counties [examined in the FAIR DEFENSE REPORT] provide[d] sufficient funds to assure quality representation to all indigent defendants." *Id*. at 47.

Inadequate training, funding, and problematic appointment procedures meant that "[c]riminal defendants with court-appointed attorneys tend[ed] to get sentenced to time behind bars more often than defendants who [could] afford to hire their own lawyers. And the poor typically receive[d] longer punishment."[11] A study in Harris County (Houston) found that in 1996, "58 percent of the defendants with appointed counsel were sentenced to jail or prison, compared with 29 percent of defendants represented by private attorneys."[12]

In sum, researchers found that "the current system of indigent legal representation ignores at

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[11] Editorial, *Indigent Defense*, FORT WORTH STAR-TELEGRAM, October 15, 2000, at 2, *available at* 2000 WLNR 1279061.

[12] Sablatura, *supra*, at 1A (cited in KELLIE DWORACZYK, THE BEST DEFENSE: REPRESENTING INDIGENT CRIMINAL DEFENDANTS, HOUSE RESEARCH ORGANIZATION, FOCUS REP. NO. 76-18, 10 (1999), *available at* http://www.hro.house.state.tx.us/focus/indigent.pdf); *see also* MUTING GIDEON'S TRUMPET at 19-20 (finding that three out of four defense attorneys surveyed responded that retained counsel "usually" or "always" provided better representation than appointed counsel).

least the spirit of *Gideon v. Wainwright*," that "[i]n Texas, indigent criminal representation is, at times, politicized [and] ineffective," that "defense attorneys are frequently provided with neither proper financial incentives nor with sufficient resources to vigorously defend their clients," and "most disturbingly, the current system appears to provide a lower standard of justice for the state's poor." MUTING GIDEON'S TRUMPET at 22.

Spurred by the findings of MUTING GIDEON'S TRUMPET and the FAIR DEFENSE REPORT, in 2001 the Texas legislature passed the Fair Defense Act (FDA), 77th Leg., R.S., ch. 906, 2001 Tex. Gen. Laws 906.[13] The FDA was an "historic" change in the way Texas delivers indigent defense services. *Id.* at 56. The FDA gave counties responsibility for creating standardized indigent defense systems, required adoption and publication of minimum standards for attorneys seeking criminal appointments, and mandated the adoption of transparent systems for allocating appointments. *Id*. Importantly, for the first time, the state provided a small amount of money for indigent defense. FDA, 77th Leg., R.S., ch. 906 § 10.

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[13] *See, e.g.*, Terry Brooks & Shubhangi Deoras, *Texas Enacts Landmark Reforms*, 16 CRIMINAL JUSTICE 56 (Fall 2001), *available at* http://www.equaljusticecenter.org/new_page_3.htm. The "Fair Defense Act" is the popular name for all of the 2001 revisions to state statutes governing indigent defense.

B. Systemic Problems Persist in Texas's Indigent Defense System, Depriving Indigent Defendants of Their Rights on Appeal

Given the widespread problems in trial courts documented in MUTING GIDEON'S TRUMPET and the FAIR DEFENSE REPORT, the FDA focused on trial-level reforms, leaving the appellate system relatively untouched – yet the problems with appointed counsel are just as serious after conviction as prior to conviction.

For example, the trial court in *Ex parte Goodall,* 632 S.W.2d 750, 751 (Tex. Crim. App. 1982), found that appointed counsel had failed to fulfill numerous obligations on direct appeal, and that, accordingly, "the conduct of applicant's counsel was ineffective, denying applicant any meaningful appeal."[14] *Id.* at 751. The CCA agreed, saying:

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[14] The trial court's findings in *Goodall* were: "(1) Notice of appeal was timely given. (2) Notice that the record was complete was given applicant's appointed counsel on appeal. (3) Notice that the record had been approved was given that same counsel. (4) Applicant's counsel did not timely request the preparation of the transcript of the record. (5) The statement of facts was not timely filed. (6) Applicant's counsel has never filed a brief and all time limits for such filing or requests for extension to file have expired. (7) Applicant's counsel has never filed for an extension of time to file the transcription of the record or an appellant's brief. (8) That the conduct of applicant's counsel was ineffective, denying applicant any meaningful appeal." *Id*. at 751.

> Based on these findings, the trial court has recommended applicant's writ be granted permitting an out-of-time appeal only. We agree. Appointed counsel's lack of effective representation on appeal of applicant is *appalling* and can *only* be remedied by placing applicant in the same position after he gave notice of appeal as he would have been had an attorney never been appointed to represent applicant in his direct appeal of his conviction.

Id.

Additional examples of the circumstances in which out-of-time appeals have been granted include the failure to appoint appellate counsel in a timely manner, resulting in missed deadlines on appeal, *e.g., Jones v. State*, 98 S.W.3d 700, 702 (Tex. Crim. App. 2003); *Ex parte Rosales*, No. AP-75,728, 2007 WL 2403343 (Tex. Crim. App. Aug. 22, 2007) (unpublished);[15] failure of trial counsel to withdraw and seek timely appointment of appellate counsel, *e.g., Ex parte Lopez*, 763 S.W.2d 427, 429 (Tex. Crim. App. 1989); *Ex parte Holguin*, No. AP-75,180, 2006 WL 120277 (Tex. Crim. App. Jan. 18, 2006) (unpublished); errors in addressing notice to the defendant of his rights on appeal, *e.g., Ex parte Parker*, Nos. AP-75,517

[15] Although unpublished decisions of the CCA may not be cited as "authority" in Texas courts, *amici* presents them here only as additional illustrations of the factual circumstances in which the CCA has granted relief.

and 75-117, 2006 WL 2751237 (Tex. Crim. App. Sept. 27, 2006) (unpublished); and other errors of appointed counsel in failing to provide timely or accurate information to their clients, *e.g., Ex parte Axel*, 757 S.W.2d 369, 371 (Tex. Crim. App. 1988); *Ex parte Malpica*, No. AP-75,801, 2007 Tex. Crim. App. Unpub. LEXIS 645 (Tex. Crim. App. 2007) (Tex. Crim. App. Dec. 5, 2007) (unpublished).[16]

Indeed, things derailed so badly in one recent case that the CCA had to grant the remedy *twice*, because counsel appointed after the first grant was as ineffective as his predecessor. *See Ex parte Franks*, No. AP-75,814, 2008 WL 151078 (Tex. Crim. App. Jan. 16, 2008) (unpublished). In *Franks v. State*, 219 S.W.3d 494, 498 (Tex. App. – Austin 2007), the CCA had previously granted a first out-of-time appeal, but the intermediate appellate court ended up dismissing that appeal when new counsel failed to file a timely notice of the reinstated appeal. The CCA then granted a second out-of-time appeal in *Ex parte Franks*, No. AP-75,814.

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[16] *See also Ex parte Perry*, No. AP-75,337 (Tex. Crim. App. Feb. 8, 2006) (unpublished) http://www.cca.courts.state.tx.usopinions/HTMLOpinionInfo.asp?OpinionID=13580 (holding that applicant entitled to out-of-time appeal because counsel filed late notice of appeal); *Ex parte Odneal*, No. AP-75,336 (Tex. Crim. App. February 8, 2006) (unpublished) http://www.cca.courts.state.tx.usopinions/HTMLOpinionInfo.asp?OpinionID=13581 (holding that applicant was entitled to file out-of-time petition for discretionary review because counsel did not timely inform applicant that his conviction had been affirmed or that he could file a petition for discretionary review from his conviction).

This systemic problem has drawn the attention of the Texas legislature as well as the CCA, and both have attempted to remedy defendants' loss of appellate rights because of counsel's failure to apprise them of these rights. Until recently the legislature and CCA have met with limited success.

The Texas legislature first attempted to address the problem of counsel's failure to represent defendants after judgment of conviction with a 1987 amendment to the Code of Criminal Procedure that explicitly gave counsel a duty to represent their clients after judgment and through appeal. Act of June 19, 1987, 70th Leg., R.S., ch. 979 § 2, 1987 Tex. Gen. Laws 979 (amending TEX. CODE OF CRIM. PROC. 26.04(a)). The CCA attempted to impose the same solution. In *Ex parte Axel*, 757 S.W.2d 369 (Tex. Crim. App. 1988), the CCA delineated appointed counsel's responsibility to inform defendants about their appellate rights after judgment. *Id.* at 374; *see also Ex parte Wilson*, 956 S.W.2d 25, 26 (Tex. Crim. App. 1997) ("[a] defendant given an appeal of right is entitled to counsel who must inform the defendant . . . of the right to appeal, including expressing professional judgment as to possible grounds for appeal and their merit, and delineating advantages and disadvantages of appeal."); *Ward v. State*, 740 S.W.2d 794, 796 (Tex. Crim. App. 1987) (emphasizing that "an appointed attorney's legal responsibilities do not magically and automatically terminate at the conclusion of trial.").

The 1987 amendments to the Code of Criminal Procedure, *Axel*, and *Wilson* all suffered from the same fundamental flaw: complete reliance on frequently unreliable, underpaid, and untrained attorneys. *See, e.g., Ex parte Owens*, 206 S.W.3d 670, 678 (Tex. Crim. App. 2006) (Womack and Cochran, JJ., concurring) (criticizing *Axel* and *Wilson* for depending solely on attorneys to admonish defendants of their rights on appeal in confidential, off-the-record meetings).[17] Recognizing that this procedure is flawed, the CCA has adopted the practice of allowing defendants to file out-of-time appeals when counsel fails in his or her duties.

C. New Reforms May Improve Protection of Defendants' Appellate Rights and Reduce the Need for Out-of-Time Appeals

As noted above, one of the failings of the Texas indigent system has been that defendants have been actually or constructively denied the right to counsel on appeal. *See* Section I.B., *supra*. Trial counsel sometimes abandoned defendants after judgment, leaving them unrepresented as appellate timelines

[17] *See also* STATE BAR OF TEXAS, STANDARDS FOR THE PROVISION OF LEGAL SERVICES TO THE POOR IN CRIMINAL MATTERS, 64 Tex. B.J. 682, 686 (2001), *available at* http://www.uta.edu/pols/moore/indigent/standards.htm. Standard 3.4 sets forth the timeframe of representation for appointed counsel and the accompanying commentary notes the widespread problem of late appointment of counsel for appeal. *Id.*

ran. *Id*. Appellate counsel, if appointed, sometimes failed to inform defendants about their rights on appeal. *Id*. Although numerous previous attempts to address this issue have failed, recent amendments to the Texas Code of Criminal Procedure take new steps to ensure that defendants will be informed of their appellate rights, and thus the CCA likely will grant fewer out-of-time appeals in the future.

In 2007, the CCA amended the Texas Rules of Appellate Procedure to help eliminate this form of ineffective assistance of counsel on appeal.[18] Effective September 1, 2007, the trial court is required to inform the defendant of "his rights concerning an appeal, as well as any right to file a *pro se* petition for discretionary review. This notification shall be signed by the defendant, with a copy given to him." TEX. R. APP. P. 25.2(d). *Compare Ex Parte Axel*, 757 S.W.2d at 374 (holding that only counsel, not the court, has the duty to explain rights of appeal to defendant). Moreover, whenever a defendant has a right to appeal, "the court (orally or in writing) shall advise the defendant of his right to appeal and of the requirements for timely filing a sufficient notice of appeal." TEX. R. APP. P. 25.2(h). Finally, the CCA amended the rules to require that defense counsel inform defendants of their right to file a *pro se* petition for discretionary

[18] *Final Approval of Revisions to the Texas Rules of Appellate Procedure,* Misc. Docket No. 06-105 (Tex. Crim. App. August 20, 2007), *available at* http://www.cca.courts.state.tx.us/rules/trap-final_order-06-105.pdf.

review by certified mail after their conviction is affirmed, with a copy to the court of appeals. TEX. R. APP. P. 48.4.

In sum, while Texas has been making some progress in expunging the stigma of a "national embarrassment," out-of-time appeals will remain an important remedy so long as systemic deficiencies in the State's indigent defense system persist.

II. OUT-OF-TIME APPEALS ARE AN IMPORTANT COMPONENT OF DIRECT REVIEW OF CRIMINAL CONVICTIONS IN TEXAS

A. The Texas Scheme of Direct Review

Every Texas defendant enjoys the right of appeal from the judgment of conviction, TEX. CODE CRIM. PROC. Art. 44.02, and the Sixth Amendment secures to indigent defendants the right to "effective assistance of counsel" on appeal through the appointment of a State-provided attorney. *Evitts v. Lucey*, 469 U.S. 387, 397 (1985); *see also Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000). Appeals of non-capital cases are heard by one of the fourteen regional intermediate courts of appeal, TEX. CODE CRIM. PROC. Art. 4.03, and the Texas Rules of Appellate Procedure specify the customary procedures and deadlines for filing the notice of appeal, preparation and perfection of the record, and briefing, argument and disposition on the merits. *See, e.g.*, TEX. R. APP. P. 25.2(b); 26.2(a)(1). If the judgment is affirmed, the defendant may then petition the CCA for discretionary review. *See* TEX. R.

APP. P. 68.1. Although a non-capital defendant has no right to counsel on a petition for discretionary review ("PDR"), appellate counsel must inform a defendant of his right to file a *pro se* PDR. *Id*. 25.2(d), (e), (h).[19]

B. Out-of-Time Appeals Restore the Direct Appeal as a Remedy for the State's Failure to Provide Effective Assistance of Counsel

The State's efforts to provide effective assistance by appointed counsel leave much to be desired, and this problem has persisted for years. *See* Part I *supra*. Not surprisingly, therefore, the CCA developed the out-of-time appeal process in an effort to remedy the situation. Although the process for seeking an out-of-time appeal is nominally called a "habeas" proceeding under Article 11.07, that process does not challenge the underlying judgment of guilt in any conventional, "habeas" sense. Instead, through the process a defendant simply may be awarded reinstatement of the direct appeal, thereby "placing applicant *in the same position* after he gave notice of appeal *as he would have been* had an attorney never been appointed to represent applicant in his direct appeal of his conviction." *Ex parte Goodall*, 632 S.W.2d at 751. The CCA's

[19] As in most jurisdictions that impose capital punishment, capital defendants in Texas enjoy the right of appeal directly to the CCA. *See, e.g., Henderson v. State*, 962 S.W.2d 544 (Tex. Crim. App. 1997), *cert. denied*, 525 U.S. 1978 (1988).

Opinion in Mr. Jimenez's case likewise ordered that he be

> [R]eturned to that point in time at which he may give written notice of appeal so that he may then, with the aid of counsel, obtain a meaningful appeal. For purposes of the Texas Rules of Appellate Procedure, all time limits shall be calculated as if the sentence had been imposed on the date that the mandate of this Court issues. (J. App. at 27).

The out-of-time appeal thereby functions much like warranty repairs or a Lemon Law in the automotive field, for upon a showing of Sixth Amendment defects in workmanship by appointed counsel, appropriate remediation is ordered. This reinstatement of the direct appeal is functionally identical to the state procedures considered in *Orange v. Calbone*, 318 F.3d 1167, 1170-71 (10th Cir. 1167), and *Frasch v. Peguese*, 414 F.3d 518, 524 (4th Cir. 2005), and to the counterpart remedies of many other jurisdictions.[20] As *Frasch* explained, the defendant

> was denied, through no fault of his own, his right to an appeal which he desired and to which he was entitled. Such a defendant is granted a belated appeal to ensure that he obtains as full a review as if his appeal had been properly pursued. (414 F.3d at 524).

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[20] *See* Brief for the Petitioner at 24-27, collecting the authorities.

The CCA views things the same way: "Granting an out-of-time appeal *restores* the pendency of the direct appeal." *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997); *Ex parte Santana*, 227 S.W.2d 700, 704 (Tex. Crim. App. 2007) (quoting *Torres*). Therefore, the CCA does not view an application an application for an out-of-time appeal as a collateral attack upon the judgment, and it is *not* a "first" habeas application under Article 11.07 § 4's strictures regarding "second" habeas applications. *Id.*; *see also* Brief for the Petitioner at 27-32.

It is therefore abundantly clear that the Texas CCA regards out-of-time appeals as a component of the Texas scheme of direct review of criminal convictions. Indeed, words of greater clarity than those quoted in this section of the brief would be difficult to imagine.

C. Procedures for Obtaining an Out-of-Time Appeal in Texas

1. Initial Screening and Fact Finding by the Trial Court

Long before 28 U.S.C. § 2244(d) was enacted in 1996, and continuously since, the CCA has used Article 11.07's procedures – especially those of Section 3 of the Article – to screen applications and determine whether an out-of-time appeal is merited. This makes sense. The particular circumstances of an application may require factfinding, resolution of conflicting evidence, consideration of the State's defenses, and

perhaps other matters pertinent to the applicant's entitlement to relief. Section 3 of Article 11.07 conveniently provides measures well-adapted to these tasks.

Section 3(c) assigns to "the convicting [trial] court" initial responsibility to determine whether disputed fact issues exist. If not, the convicting court returns the application and the State's answer to the CCA for final determination. *Id*. However, if the trial court finds that the factual predicate of the application is "controverted," Section 3(d) requires the trial court to resolve the controversy, if necessary based on evidence presented by "affidavits, depositions, interrogatories" or at an evidentiary "hearing," as well as by "using personal [judicial] recollection" if appropriate. *Id*., § 3(d). The trial court essentially serves the role of "special master" to the CCA, and files with the CCA its findings of fact and recommended disposition, and the evidentiary record upon which they rest.

The importance of the CCA's use of trial court for factfinding is particularly evident in applications that may not involve such record-obvious omissions as appointed counsel's failure to file a notice of appeal or a brief, but instead raise issues of counsel's obligations to keep clients fully informed. While the criminal appeal system in Texas is broadly similar to other jurisdictions, until 2007, Texas depended entirely on defense counsel to advise defendants of their rights to appeal – unlike almost every other jurisdiction.

Owens, 206 S.W.3d at 675-6 (Womack, J. concurring).[21] In contrast, the Federal Rules of Criminal Procedure require that the trial court admonish a defendant of his or her right to appeal after conviction or sentencing. *See* FED. R. CRIM. P. 32(j)(1).

Because of the exclusive reliance on counsel to admonish defendants, when counsel, through action or inaction, fails to fulfill the duty to inform a defendant of his rights, the defendant is entitled to relief through an out-of-time appeal. *See Owens*, 206 S.W.3d at 676 *(*granting out-of-time PDR because of counsel's failure to inform defendant he had a right to file a *pro se* petition for discretionary review). Cases of this kind often require the district court to find the facts on conflicting evidence or evidence outside the original record, such as he-said she-said conflicts between the recollections of defendant and appointed counsel or, as in the present case, whether notice was in fact mailed to and received by Mr. Jimenez. *See* Brief for the Petitioner at 5-6.

2. Ultimate Determination by the Texas CCA

After the trial court submits its findings, the evidentiary record and its recommended disposition,

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[21] In September 2007, the Texas Rules of Appellate Procedure were changed to require the courts to ensure that defendants receive proper admonitions of their rights. TEX. R. APP. P. 25.2, 48.4; *see also* Part I.C. *supra*.

the CCA determines whether the applicant is entitled to relief. *See* Section 5 of Article 11.07. Although findings of fact are customarily reviewed deferentially,[22] the decision to grant or deny an out-of-time appeal is that of the CCA alone and relief is far from automatic. The defendant must show by a preponderance of the evidence that his attorney was constitutionally deficient. For example, in *Ex parte Scott*, 190 S.W.3d 672, 673 (Tex. Crim. App. 2006) the CCA rejected the trial court's recommendation to grant, and denied relief because

> the record does not support the trial court's conclusion that Applicant has proven, by a preponderance of the evidence, that his appellate attorney provided constitutionally ineffective assistance of counsel on appeal which prevented Applicant from filing a petition for discretionary review.

Applicants must also "make a limited showing of prejudice," namely, "a reasonable probability that, absent counsel's errors, a particular proceeding would have occurred." *Ex parte Santana*, 227 S.W.3d 700, 704 (Tex. Crim. App. 2007) (denying relief). Where counsel error "result[ed] in the deprivation of an entire judicial proceeding, such as an appeal," the

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[22] *See Ex parte Mowbray*, 943 S.W.2d 461, 465 (Tex. Crim. App. 1996) (holding that in Article 11.07 hearings, "the judge determines the credibility of the witnesses" and if the judge's "findings of fact are supported by the record, they should be accepted . . . ").

applicant has made the necessary showing. *Ex parte Crow*, 180 S.W.3d 135, 138 (Tex. Crim. App. 2005).

As well, the State may raise defenses like laches or unwarranted delay in seeking relief when a defendant seeks an out-of-time appeal. In *Ex parte Galvan*, 770 S.W.2d 822, 824 (Tex. Crim. App. 1989), for example, the CCA refused to reinstate the direct appeal, saying

> This Court has consistently and properly held that we have no desire to impose upon defendants the requirement that claims for relief be asserted within a specified period of time. Such a rule would be arbitrary and probably unconstitutional. Nevertheless, a petitioner's delay in seeking relief can prejudice the credibility of his claim. As noted, it is obvious that the applicant knew of his right to appeal. Further, he never claims that he actually advised anyone he wanted to appeal. Applicant's trial attorney states that he was never asked to appeal the case. Thus, compliance with the first prerequisite to obtain an out of time appeal because of the ineffective assistance of counsel on appeal: a defendant must manifest a desire to appeal, was not proven by the applicant.[23]

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[23] To succeed on a formal defense 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

(Continued on following page)

D. Lack of Access to Resources and Repeated Transfers May Result in Delays Before Prisoners Are Able to File Motions for Out-of-Time Appeals

Although unwarranted delay by the applicant for an out-of-time appeal is a ground on which to deny relief, many delays result in circumstances for which the State alone bears responsibility. Some delay is inevitable when defendants seek an out-of-time appeal: the defendant has lost the benefit of State-provided counsel, and needs time to learn his rights and how to exercise them. In addition, defendants face routine bureaucratic and procedural obstacles that delay their filing of an Article 11.07 application for an out-of-time appeal.

Texas prisoners may move frequently among facilities. After judgment, defendants go from county jails to state prison intake facilities. The average stay at intake facilities is just 45 days, so a defendant may move twice before his appeal is filed, meaning that even diligent counsel may lose track of his or her client, or mail may be greatly delayed. In addition, prisoners have limited access to legal materials at these transfer facilities. *See, e.g.*, *Egerton v. Cockrell*,

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S.W.2d 486, 488 (Tex. Crim. App. 1999) (emphasis in original), citing *Walters v. Scott*, 21 F.3d 683, 686-87 (5th Cir. 1994). Although *Carrio* was not an "out-of time" appeal proceeding, there is no reason to suppose that the CCA would reject its holding in an appropriate case seeking reinstatement of the direct appeal.

334 F.3d 433, 439 (5th Cir. 2003) (noting that legal materials at the first two facilities where the prisoner was held were inadequate).

An indigent defendant who lost his right to direct appeal then would have to navigate habeas *pro se* to reinstate the right. There is no right to counsel in Article 11.07 proceedings, but as Judge Barbara Hervey of the CCA recently noted, even with extensive legal training and experience, judges and lawyers frequently make errors in Article 11.07 proceedings. Judge Hervey noted that "Judges need to better understand how to handle writs," and that, of the 6,000-8,000 non-capital post-conviction writs the CCA processes per year, about *half* are remanded for "further consideration" because of mistakes, frequently mistakes made by inadequately-trained judges and lawyers rather than *pro se* applicants.[24]

Defendants applying for 11.07 relief *pro se* often face the complexity of 11.07 applications with significant intellectual handicaps. On average, Texas prisoners have about an eighth grade education.[25] Many prisoners also suffer mental impairments and require

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[24] Scott Henson, *Hervey on Innocence Proposals: "We're past meet and discuss,"* GRITS FOR BREAKFAST, June 4, 2008, *available at* http://gritsforbreakfast.blogspot.com/2008/06/hervey-on-innocence-proposals-were-past.html.

[25] TEX. DEP'T OF CRIMINAL JUSTICE, FISCAL YEAR 2006 STATISTICAL REPORT 1 (2006), *available at* http://www.tdcj.state.tx.us/publications/executive/FY_2006_Statistical_Report.pdf.

drug or alcohol treatment upon arrival in prison.[26] This Court, in *Halbert v. Michigan*, 545 U.S. 605 (2005), noted the "perilous" nature of "[n]avigating the appellate process without a lawyer's assistance" for those "who have little education, learning disabilities, and mental impairments." *Id.* at 621.

Accordingly, delays in seeking out-of-time appeals usually result from circumstances beyond the control of the applicant, and the State "does not come with very good grace" complaining about matters for which it alone is responsible. *See J. Truitt Payne Co. v. Chrysler Motors Corp*., 451 U.S. 557, 566-67 (1981).

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In sum, systemic deficiencies in the Texas system of indigent representation deprive some defendants of "more than a fair judicial proceeding"; instead, the "deficiency has deprived respondent of the appellate

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[26] *See, e.g.*, LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE, MEDICAL PROBLEMS OF JAIL INMATES 1 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mpji.pdf; DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf. Nationwide in 2006, 22 percent of jail inmates reported a learning impairment such as dyslexia or attention deficit disorder, and 8 percent reported a mental health condition severe enough to prevent them from participating fully in school, work, or other activities, MARUSCHAK, *supra*, at 1; 56 percent of prison and jail inmates without mental problems met the criteria for substance dependence or abuse and 74 percent of prisoners with mental problems met these criteria, JAMES & GLAZE, *supra*, at 1.

proceeding altogether." *Roe v. Flores-Garcia*, 528 U.S. at 483. Out-of-time appeals remedy these deprivations, and such appeals are therefore an important part of the system of direct review of criminal convictions in Texas. For these reasons, 28 U.S.C. § 2244(d) should not be read to exacerbate the situation faced by indigent defendants initially deprived of their Sixth Amendment rights on their direct appeals.

CONCLUSION

The judgment of the court of appeals in this cause should be reversed.

Respectfully submitted,

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APPENDIX
TEXAS CODE OF CRIMINAL PROCEDURE, ARTICLE 11.07

Procedure After Conviction Without Death Penalty

Sec. 1. This article establishes the procedures for an application for writ of habeas corpus in which the applicant seeks relief from a felony judgment imposing a penalty other than death.

Sec. 2. After indictment found in any felony case, other than a case in which the death penalty is imposed, and before conviction, the writ must be made returnable in the county where the offense has been committed.

Sec. 3.

(a) After final conviction in any felony case, the writ must be made returnable to the Court of Criminal Appeals of Texas at Austin, Texas.

(b) An application for writ of habeas corpus filed after final conviction in a felony case, other than a case in which the death penalty is imposed, must be filed with the clerk of the court in which the conviction being challenged was obtained, and the clerk shall assign the application to that court. When the application is received by that court, a writ of habeas corpus, returnable to the Court of Criminal Appeals, shall issue by operation of law. The clerk of that court shall make appropriate notation thereof, 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, who shall answer the application not later than the 15th day after the date the copy of the application is received. Matters alleged in the application not admitted by the state are deemed denied.

(c) Within 20 days of the expiration of the time in which the state is allowed to answer, it shall be the duty of the convicting court to decide whether there are controverted, previously unresolved facts material to the legality of the applicant's confinement. Confinement means confinement for any offense or any collateral consequence resulting from the conviction that is the basis of the instant habeas corpus. If the convicting court decides that there are no such issues, 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. Failure of the court to act within the allowed 20 days shall constitute such a finding.

(d) If the convicting court decides that there are controverted, previously unresolved facts which are material to the legality of the applicant's confinement, it shall enter an order within 20 days of the expiration of the time allowed for the state to reply, designating the issues of fact to be resolved. To resolve those issues the court may order affidavits, depositions, interrogatories, additional forensic testing,

and hearings, as well as using personal recollection. The state shall pay the cost of additional forensic testing ordered under this subsection, except that the applicant shall pay the cost of the testing if the applicant retains counsel for purposes of filing an application under this article. The convicting court may appoint an attorney or a magistrate to hold a hearing and make findings of fact. An attorney so appointed shall be compensated as provided in Article 26.05 of this code. It shall be the duty of the reporter who is designated to transcribe a hearing held pursuant to this article to prepare a transcript within 15 days of its conclusion. 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 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.

(e) For the purposes of Subsection (d), "additional forensic testing" does not include forensic DNA testing as provided for in Chapter 64.

Sec. 4.

(a) If a subsequent application for writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction, 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.

(b) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis 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.

(c) For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

Sec. 5. The Court of Criminal Appeals may deny relief upon the findings and conclusions of the hearing judge without docketing the cause, or may direct that the cause be docketed and heard as though

originally presented to said court or as an appeal. Upon reviewing the record the court shall enter its judgment remanding the applicant to custody or ordering his release, as the law and facts may justify. The mandate of the court shall issue to the court issuing the writ, as in other criminal cases. After conviction the procedure outlined in this Act shall be exclusive and any other proceeding shall be void and of no force and effect in discharging the prisoner.

Sec. 6. Upon any hearing by a district judge by virtue of this Act, the attorney for applicant, and the state, shall be given at least seven full days' notice before such hearing is held.

Sec. 7. When the attorney for the state files an answer, motion, or other pleading relating to an application for a writ of habeas corpus or the court issues an order relating to an application for a writ of habeas corpus, the clerk of the court shall mail or deliver to the applicant a copy of the answer, motion, pleading, or order.