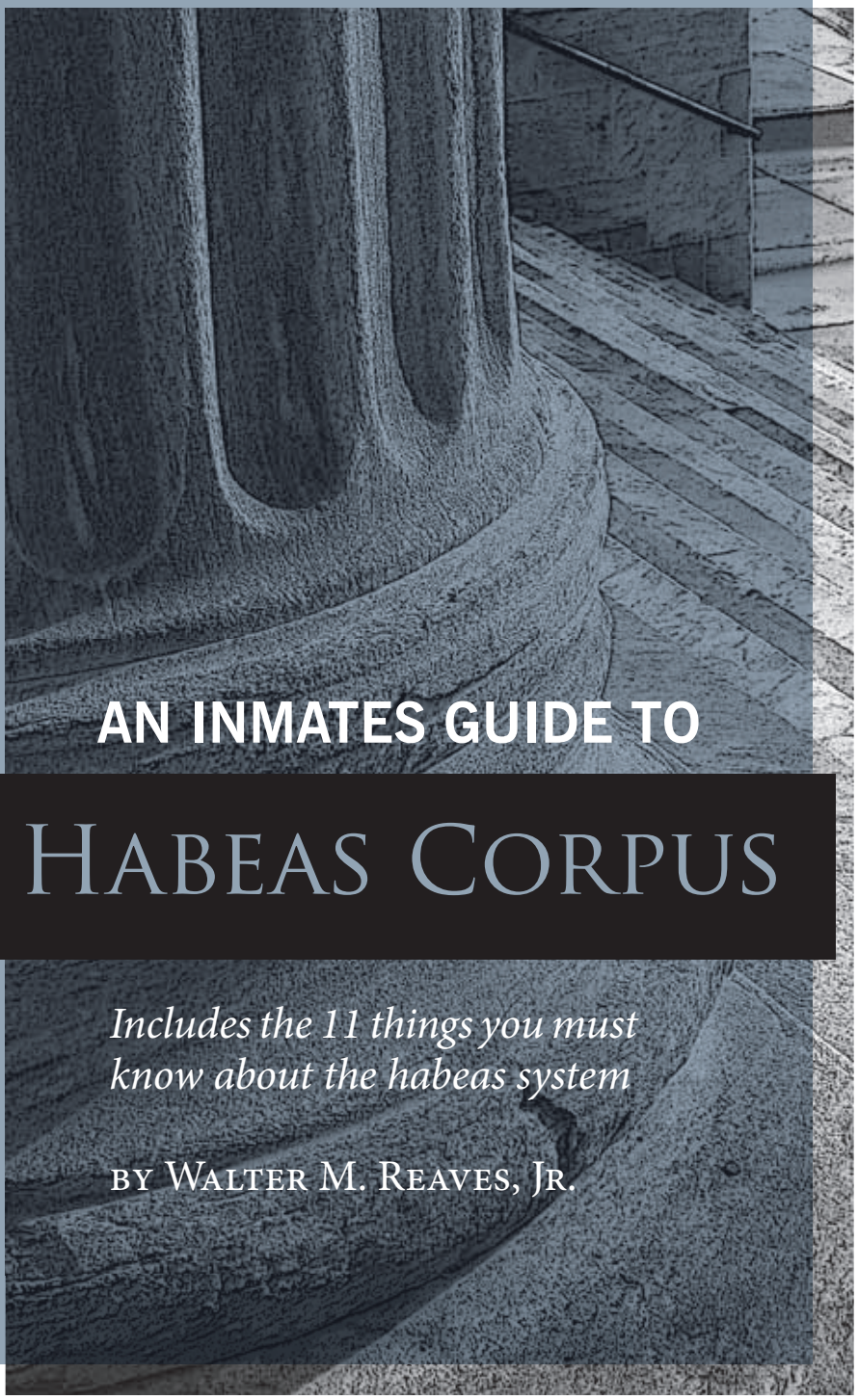


AN INMATES GUIDE TO

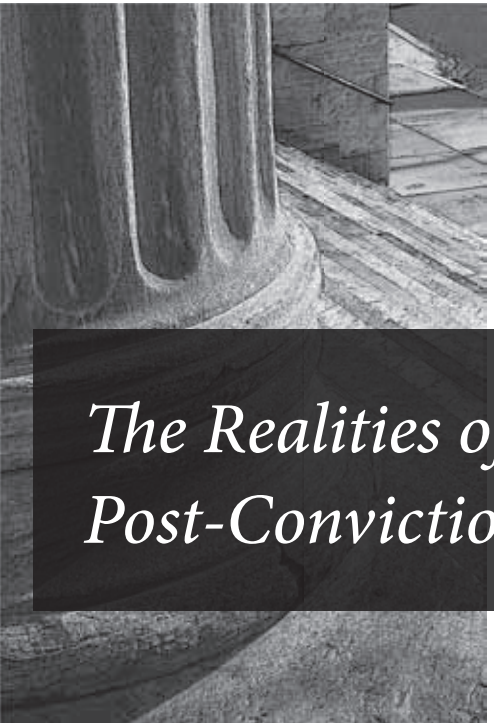
HABEAS CORPUS

Includes the 11 things you must know about the habeas system

BY WALTER M. REAVES, JR.

DISCLAIMER

This guide has been prepared as an aid to those who have an interest in the post-conviction process. Furnishing this guide does not create an attorney-client relationship. The information herein should not be considered as advice for your case. The law is always changing, and should not rely on anything in this guide without determining whether it applies to your case. This guide is not meant to take the place of the advice of a lawyer.



The Realities of the Post-Conviction Process

If you are reading this you've already been convicted. You probably don't think you were treated fairly be the judge, the prosecutor and maybe even your own lawyer. Chances are you may be right. The question you now have is what you can do about—and who can help you.

I'm going to give you an insight that might save you years of anxiety and frustration—not to mention thousands of dollars in legal fees. Just because you were treated badly, or unfairly doesn't mean you are getting out. The sad fact is that the legal system is not perfect, and its not very good and correcting mistakes. Once you are convicted everyone assumes you are guilty, and you had a fair trial. Everyone realizes that is not always the case, but that doesn't prevent judges from affirming convictions. The fact is that there are more than a few people in prison who shouldn't be in there—and there is really no chance of them getting out.

Now that I've given you that cheery piece of advice, I can tell you that it is not completely hopeless. There are still some cases where there is a realistic chance of winning. I'm going to try to explain what they are. Before I go any further I want to throw out a caution. I understand your case is unique—at least it's unique to you. It is human nature to look at things in terms of how they may apply to us. You have probably had the experience where someone was describing some medical condition, and you start thinking that you have the exact same thing. Chances are you probably don't—you are just interpreting things in a certain way. I have no doubt that many—if not most—people will read what I'm about to say, and think that it fits exactly with their case. Chances are it doesn't. You are the worst person in the world to evaluate your own situation because you have a personal interest. So before you get too excited try to keep that in mind.

There is something else that I want to point out—that is the extremely small number of inmates who actually have claims that might be successful. Without looking at anything I can tell someone they don't have a case and be right roughly 98% of the time.

Although the odds are stacked against you, there are a few situations where the odds may be better than average. While every case is different, I'll set forth some of those situations. Keep in mind that this is in no way an exhaustive list, and there may be other situations where a winning claim can be made. What I'm about to set out are the most common claims.

Before going further, I need to set out the 11 things you must know about the habeas system.

11 THINGS YOU MUST KNOW ABOUT THE HABEAS SYSTEM

1 Learning the Law involves more than reading cases.
Would you let me operate on you. I have a fairly high IQ, and I've got a college degree as well as a law degree. I promise I'll read everything I can about surgery and medicine, and the operation I'm about to perform. Of course if you wouldn't—if you would I have some serious concerns about your mental status. Why not—because I'm not a doctor and haven't been to medical school is probably the big reason. So why do so many people think they can handle "diagnose their own" case without ever having gone to law school.

Over the years I have reviewed a lot of cases, and dealt with a lot of inmates. From that experience I have learned a number of things. Many defendants want to learn more about their cases, and the law. They take advantage of the law library, and talk with other inmates. Most inmates who do that sincerely believe that they know the law; almost everyone who researches their case also believes they have grounds for writ. Unfortunately, they are almost always wrong.

There are several reasons why it is so difficult for inmates to learn the law. The most basic is that they haven't gone to law school; many don't even have a high school diploma. There's a reason why you have to go to law school for three years—and you can only go to law school after you get a College degree. The primary purpose of law school is not to teach the law – it's to learn how to "think like a lawyer." The law changes, and what you learn in law school is probably not going to be the law 10 years later. You have to know how to find out what the law is, which is not as easy as going to the library and reading a few cases.

Habeas corpus is one of the most complex and complicated areas of the law there is. There are numerous rules, many of which appear to make no sense. For several years I taught post-conviction procedure at Baylor Law School, and discovered how difficult it is to understand habeas law. If sec-

ond and third year law students have trouble understanding, that tells you how difficult it is for someone without a legal education to understand. Not to mention the fact that these law students are generally the brightest kids in their high schools and colleges.

There's also the fact that the inmate reviewing his own case has a personal interest in it. Every case he or she reads is done with the hope or expectation that it applies to their situation. There's an old saying that a lawyer who represents themselves has a fool for a client. I've represented several lawyers over the years who got convicted for various things. They all recognized that even though they were lawyers, they were not competent to handle their own cases.

2 You've been convicted so everyone assumes you are guilty

The habeas system operates on the assumption that the justice system works, and if a jury convicted you are guilty. The system also assumes you are guilty. If you don't learn anything else, learn this. This means that when you claim you are innocent or that you didn't get a fair trial, the court doesn't take it too seriously. It is a common perception—which to some extent is true—that everyone in prison claims they are innocent. So when a court gets a writ they assume you are just one person who didn't like the way things turned out. You have to figure a way to capture the court's attention, and decide your case might be the exception.

3 No one wants to go back and try and case that has already been tried

The overiding principle in habeas litigation is finality. In other words, there has to be some end to litigation. The justice system establishes trials and appeals, and that is enough in most cases. For trial judges, once the case is tried it is done—and they move on to another case. They have more than enough to do without brining back on old cases.

4 Habeas cases are won on the law

I cannot tell you how many writs I have seen that go on for pages with a discussion of the law. Most of the time you are doing nothing more than

killing trees. There are rare exceptions, but for the most part habeas cases are not won on the law. I admit that when you start reading the law it is fascinating—it's like anything else new What most inmates forget is that judges really did go to law school—you don't have to spend 20 pages telling them about ineffective assistance of counsel. Most of the time the law is important only when it is being used to deny a claim. For that reason, legal discussions need to focus on why you are entitled to pursue a claim. Of course that gets back to understanding the law, which is not easy to do.

5 Just because mistakes were made doesn't mean you are going to win.

You can look at almost any trial and find mistakes—both those committed by judges and by lawyers. In fact, it is a rare case where a lawyer doesn't miss some objection, or the judge rules correctly every time. For the most part, that is irrelevant. The justice system has never required a perfect trial—it only requires a fair trial. A vast majority of mistakes are what are called harmless. In other words, they don't have any effect on the trial—the result would have been the same if the mistake had not been made. You have to show far more than mistakes were made—you have to show those mistakes were so serious that the trial was unfair.

6 Contradictions in testimony don't mean anything.

It's not unusual for there to be conflicts in testimony—that is usually nothing more than a function of human memory. A judge is not going to look at testimony and decide you didn't get a fair trial. Chances are, he's not going to look at the testimony at all. Even if he does though, remember Rule number 2—he assumes your guilty.

The system places a lot of confidence in juries. The place to decide conflicts is at trial. Once they jury returns a verdict, the courts assume they found against you.

One other thing deserves mention here. I cannot tell you how any people have told me all I had to was look at their case and I would either see how witnesses lied, or that are not guilty. I've read transcripts where I wondered

how the jury returned a guilty verdict, but I've never seen one where I could tell witnesses were lying. Establishing someone lied is difficult, even with evidence. You can never do it without additional information that was not presented at trial.

7 The judge will cut me some slack because I'm not a lawyer

There is some language in a few cases that say a pro se litigant's pleadings should be liberally construed. Many people read far too much into that; it does not mean the judge is going to bend over backwards to help you out. It also does not mean that the judge is going to supply arguments for you. You should not expect any help from the court; if you don't make the proper argument, they are not going to make it for you.

Another part of this is that you don't get a free bite at the apple. Some people believe that a lawyer can come back and file a writ to address issues they were not aware of it. If you miss an issue, or don't properly argue an issue—which is highly likely—you aren't going to get another shot at it with a lawyer. If you have already filed a writ on your own the chances are that you are done.

8 If several lawyers tell you the same thing they are probably right

I'm always amazed at people who contact me after already having contacted several lawyers and being told they don't have a case. I'm not saying lawyers are perfect, and never make mistakes, but they seldom make mistakes as to what is an issue and what is not. It's human nature to look for someone who agrees with you. If a doctor gives you a bad diagnosis you don't want it to be true, and you may even get a second opinion. You are probably going to stop there though, because the chances of two doctors being wrong is pretty small. It's the same thing with lawyers. don't keep shopping around for a lawyer to agree with you. If you eventually find one they are probably only agreeing with you so you will hire them.

9 Rules do matter

As I said earlier, the post-conviction system is based on finality, and there are a number of rules that are designed to prevent you from being

able to raise claims. The first thing most prosecutors do when looking at a writ is determining whether there are any procedural bars that can be argued. In other words, can the case be dismissed on procedural grounds. That could be as basic as not filing the writ on the proper form. There are also complex rules about waiver; basically, courts can refuse to review a claim if they determine it has been waived. That could be for any number of reasons, with the most common being the failure to make the claim earlier.

This is another area where you have to know what your are doing. There are exceptions to some of the rules, but it is up to you to raise them.

10 A writ is not a way to re-argue your appeal

One of the most basic rules is that a writ is not a substitute for appeal. That means two separate things. One is that you cannot use a writ to raise claims that could have been raised an appeal. That would include rulings on evidence, and errors made during the trial. The other thing that means is that you cannot re-argue the same issues that were raised in the appeal. You may think the appeal court got it wrong, but that is not something you can raise in a writ.

11 Not all lawyers are qualified to handle a writ of habeas corpus

You may have already discovered that there are not many lawyers who handle writs. Most lawyers recognize that the rules are complex and they are not qualified to handle those cases—and most don't want to. Habeas cases require a lawyer who knows the rules and the law—which is complex—but also knows how to present a case. Essentially, a good habeas lawyer is someone who is both a good appeal lawyer and a good trial lawyer. Before you decide on a lawyer make sure you find out how much experience they have had—you don't want someone learning on your money.

If you are not discouraged after reading this, go back and read it again. If I've done nothing else I want you to have a realistic expectation about your chances.

Now that you know all the negatives, you may wonder whether there is any hope. There are some claims that do have a chance of success. I'll try to set those out, as well how you try to decide between a claim that might have some merit and one that does not.

A NOTE ABOUT GUILTY PLEAS

Before going much further though, I need to say something about guilty pleas.Where you plead guilty you are almost never going to be able to make a successful claim. When you plead guilty the court assumes you are guilty. You have to prove something happened that caused you to plead guilty. The most common claim is that you didn't understand what you were doing; that claim is almost never successful. You have to answer a number of questions when you plead guilty and the court is going to assume you answered those truthfully, and knew what you were doing.

Sometimes a defendant is given the wrong information. The most common is bad information about sentencing. For instance, if you are told the offense is a third degree felony and it's really a first degree felony, you may have a claim. These claims are extremely rare, and generally only successful when the judge is involved; you have to be given the wrong information by your lawyer, and the information is confirmed by the judge. As you can imagine, that rarely happens.

Another claim is that you didn't understand the elements of the offense, or were not aware of a defense that was available. That claim is extremely difficult to establish; generally your word is not going to be enough. Most of the time the judge is going to accept the lawyer's explanation. If they say they explained the law that is probably going to be enough.

Another common claim in guilty pleas is that the lawyer did not properly prepare, or investigate the case. As with most ineffective assistance claims, it is almost never successful. To establish such a claim you have to prove what the lawyer would have found if they had investigated. That usually

means you have to conduct your own investigation. While that is difficult enough to do, you still have to do more – you have to establish that you wouldn't have pled guilty if you had all the information. That generally means the information must be significant, and be something that most people would rely on. Most claims are generally rejected for this reason.

Although rare, occasionally you are able to discover information that the prosecutor should have told you about before entering your plea. You must prove that the information was disclosed, and that you did not know about it. Again, you must establish that you would not have pled guilty if the information had been disclosed.

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 that 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 it 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 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 allege 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 gives a lot of deference to lawyer, and assumes 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 was 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. 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 it 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 5,000 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 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 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 of appeals may order the 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 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 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.

An Inmates Guide to Habeas Corpus

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