17151 bond reductions
"must be released on a pr bond" means just that

Ex parte Charlie J. and Tommy John Gill, Nos. PD- 0596-13 & PD-0624-13 . (Publish 11/20/13, Keasler). The TCT (or JMAG) cannot consider factors not listed in 17.151[1] when ordering a PR bond due to delay in indicting the case. (For example the factors listed in TCCP 17.15 Rules for fixing the amount of bail). (1) "We hold that the Legislature intended article 17.151 to operate in conjunction with, not subservient to, article 17.15's rules as long as the judge's decision-making process results in the accused's release." (2) "The first sentence of article 17.151 unequivocally declares that a defendant detained pending trial 'must be released' if the State is not ready for trial within the appropriate amount of time. Conditioning release under article 17.151 on matters such as victim- or community-safety concerns deprives the statute of any meaning apart from article 17.15 and potentially frustrates article 17.151's clear intent." (3) We are unconvinced that the amendment of 17.15 had any effect on our decision in *Rowe*[2] . TCCP 17.40 indicates that to protect the community and the victim –conditions are to be placed on a bond—not that the bond is to be used as an instrument of oppression. Article 17.151 is not unconstitutional. (The State made a separation of powers argument). "We are troubled that the a judge may order the indefinite detention of an uncharged accused on an offense the State is not ready to bring to trial on the basis of his criminal history, the nature of the alleged offense, or that he might present a danger to the victim or the community" Janet's thoughts: I saw the oral arguments in Austin on these two companion cases. It was a full nine judge panel and the Court excoriated the prosecutor on these cases insisting that bond was not to be used as an instrument of oppression and that a bond should NEVER be set so high just so the client could not get out. The TCCA believes in PR Bonds because the TCT can be creative in setting bond conditions.

ETHICS: WHO DOES A CLIENT'S FILE BELONG TO
11071 Writ PROCEDURE
WRIT OF MANDAMUS PROCEDURE

Thanks Bill for sending out this case before the TCCA would even let me into their website

In re Patrick McCann et al., Nos. AP-76,998 & AP-76,999 (Publish, 11/20/13, Hervey). The client lost his death penalty case and lawyer appointed to do 11071 writ. Client had been found competent but arguably was not actually competent. Client refused to allow his trial lawyer to release his file to the Office of Capital Writs who was appointed to do his writ because they were a state agency. A different lawyer was appointed to do his writ the client still refused to release his trial file. The TCT ordered the trial lawyer to release the trial file to the writ lawyer over his client's objections. The trial lawyer filed writs of mandamus and prohibition. The file belongs to the client and he can block his writ lawyer from receiving it. Mandamus will lie. Strong Price dissent (which I actually agree with and I have followed this case since it was remanded to develop the record earlier this year) states basically why do we keep issuing writs of mandamus on unsettled areas of law and why are we letting this marginally competent client call the shots with the file on a death penalty case.

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[1] TEX. CODE CRIM. PROC. (TCCP) 17.151 Release because of delay.

[2] *Rowe v. State*, 853 S. W. 2d 581, 582 (Tex. Crim. App. 1993). Indicates 17.151 is a mandatory statute with no exceptions.

Statutory Construction

Hypothetically correct enhancement paragraph (no I promise I do not make this stuff up)

Roberson v. State, No. PD-0917-12, (Johnson, 11/20/13, publish), client had an indictment with two enhancement paragraphs that were out of order purporting to habitualize her. She objected, the State read the enhancement paragraphs in the correct order as opposed to the order that they were listed in the indictment and Ms. Roberson plead true. She did not allege she received improper notice nor that she was surprised. Appellant had sufficient notice of the details of the enhancement and appellant's objection that the enhancement paragraphs were in the wrong order 'obviates any contention that she was mislead by the error'. The hypothetically correct jury charge applies to this sufficiency of evidence analysis. *Young v. State*[3] therefore since the state proved what they needed to it did not matter that they did not correctly allege in proper sequence what they needed to. Janet's thoughts: probably this would have been better handled if a motion to quash the indictment had been filed alleging not sure what the punishment range of the offense would be but I can see how one would be tempted to lay behind the log on this one.

Municipal code

Bldg maintenance ordinance

State v. Cooper, NOS. PD-0001-13 & PD-0202-13, Publish, Womack, unanimous, appellee was entitled to notice of violations of a municipal code before his subsequent violations of the code could result in convictions. TCCA in no way limits a home-rule city from creating and enforcing municipal ordinances or limit its methods of prosecution. However, we will not guess at what a city intended to do with its codes. Instead, as always, we will enforce the plain language of the code as adopted.

WRIT LAW

Dissenting statement to dismissal of subsequent writ

Ex parte Duane Edward Buck, NO. WR-57,004-03, publish, Alcala joined with Price and Johnson. Three judges on the TCCA would over-rule *ex parte Graves*[4] to hold that:

- Applicant for habeas corpus relief is statutorily entitled to minimally competent representation by appointed counsel[5]
- I would further hold that, when an applicant can demonstrate that initial habeas counsel's performance fell below the minimum standards for representation set in 11071, and when an applicant can demonstrate that, as a result of counsel's incompetence, a substantial claim for relief was forfeited, this Court may properly exercise its habeas jurisdiction to consider the merits of the underlying claim.
- In this case the defense expert opined that the client was a future danger based on his race and did not put on oodles of available mitigation evidence.
- The habeas counsel was ineffective for not raising ineffective counsel on the writ and for raising items that were not cognizable on a writ or without merit – and there was stuff that had merit that could have been raised but was not raised.
- Due to state procedural default defendant was screwed out of a meaningful federal writ as well and many writ issues with merit have never been considered by any court.

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[3] 14 S. W. 3d 748, 750 (Tex. Crim. App. 2000).

[4] 70 S. W. 3d 103, 117 (Tex. Crim. App. 2002). Holding that applicant is not entitled to effective assistance of counsel on a writ.

[5] TEX. CODE CRIM. PROC. 11.071 (2)(a).

- Habeas counsel's failure to investigate the factual and legal basis for relief in this case constituted a violation of TCCP 11071 section 3a.
- "As a result of habeas counsel having raised only non-cognizable or facially frivolous claims in the initial application, applicant has been prevented, through an array of state and federal procedural default rules and bars on successive writs, from receiving a merits adjudication of any legitimate claims for relief. Such an outcome is inconsistent with both the capital habeas statute plain terms and this Court's previous statements regarding its underlying purpose. *See ex parte Kerr*, 64 S. W. 3d 414, 419 (Tex. Crim. App. 2002)
- I would hold that applicant has been deprived of his one full and fair opportunity to present his claims and, therefore, that his initial application for relief was improperly filed.
- I would hold that applicant is entitled to a merits review of his ineffective assistance claim. [in his subsequent writ].
- I would overrule *Graves* to the extent that it precludes consideration of a statutory claim that initial habeas counsel's performance was so incompetent as to render the initial application frivolous and therefore void.
- This writ counsel was so ineffective as to eviscerate the legislative purpose underlying 11071.
- I conclude that appointed counsel in an 11071 proceeding must demonstrate a minimum level of competence in his representation of an applicant and in his investigation of any factual or legal basis for relief.
- I would hold that an initial application was improperly filed and permit consideration of a substantial claim in a later proceeding if an applicant makes a showing that (1) initial habeas counsel wholly failed to perform his statutory duties under Article 11071 and (2) counsel's incompetence led to the forfeiture of a substantial claim for relief. Such an applicant has been deprived of one meaningful opportunity to present his constitutional claims and as such this Court is not barred from considering those claims at a later time. *Ex parte Medina*, 361 S. W. 3d 633, 642 (Tex. Crim. App. 2011)
- I would hold that a claim involving a statutory violation of art. 11071, including a claim that counsel wholly failed to investigate any factual or legal basis for relief, is cognizable for the limited purpose of determining whether this Court is required to apply the bar on subsequent writs.
- I would additionally require a showing that the forfeited claim has merits.
- The volume and persuasive value of the mitigation evidence presented in this application substantially changes the sentencing profile of applicant that was before the jury. Janet's note: this is a big deal with an Alcala opinion because she literally wants to know not that applicant was abused but on what date, how old he was, he big was the cigarette burn, did it get infected, how bad did it hurt etc.