MEMORANDUM

TO: Bill Dorsaneo March 3, 2008

FROM: Jody Hughes

RE: Categorization of Certain Cases as Civil or Criminal

Chief Justice Morriss's letter to Justices Hecht and Johnson dated November 13, 2007 notes that "the courts of appeals are split in whether they designate certain proceedings as civil or criminal" and asked the Court to refer the matter to the Advisory Committee to study whether the Appellate Rules could provide more definitive guidelines. In an effort to better understand the problem, I asked the clerks of the courts of appeals to help identify categories of cases in which the civil/criminal designation is unclear or inconsistent, which they did; Sharri Roessler, Clerk of the Waco Court of Appeals, and Kay Waters, a staff attorney with the El Paso Court of Appeals, provided some particularly helpful insights and research materials. The following memo summarizes the law in several categories of proceedings.

The first category listed below—inmate trust fund litigation—reflects perhaps the widest divergence currently among the courts of appeals; however, the split may be resolved soon, as one case is currently pending in the Court of Criminal Appeals on petition for discretionary review. The next three categories—disclosure of grand jury proceedings, bail bond forfeitures, and habeas proceedings—reflect narrower disagreement over categorization but nonetheless could benefit from clarification. The next three categories—expunction of arrest records, juvenile cases, and a catchall "other proceedings ancillary to criminal prosecution"—do not reflect disagreement among the courts of appeals, but I included them because they seemed relevant to the larger issue of how cases are categorized as either civil or criminal.

The appellate courts have struggled to apply a consistent standard to decide what distinguishes a criminal case from a civil one. For example, in a robbery case where the jury found the defendant sane during the robbery but insane at the time of trial, and the trial court ordered further proceedings suspended until the defendant became sane, the Court of Criminal Appeals concluded that the appeal was not a criminal case over which the court had jurisdiction because the defendant had not been found guilty of anything and no punishment had been assessed. *See Hardin v. State*, 248 S.W.2d 487 (Tex. Crim. App. 1952). In a later case, the Court of Criminal Appeals dismissed for lack of jurisdiction an appeal of a denied motion to expunge arrest records, concluding that it was not a criminal case because there were no criminal penalties attached to the proceeding, it was not brought by or in the name of the State, and the defendant was not charged with a crime. *Ex parte Paprskar*, 573 S.W.2d 525 (Tex. Crim. App. 1978).

The court later disavowed *Paprskar*'s reasoning, however, noting that the case likely "would have been decided differently had there been a statute authorizing the appeal." *Kutzner v. State*, 75 S.W.3d 427, 430 (Tex. Crim. App. 2002) (concluding that a motion for DNA testing under Chapter 64 of the Code of Criminal Procedure is a criminal case for jurisdictional purposes because it is

"closely connected to, and could affect," the underlying criminal prosecution); *see also Weiner v. Dial*, 653 S.W.2d 786, 787 & n.1 (Tex. Crim. App. 1983) (rejecting argument that court lacked mandamus jurisdiction over petition filed by court-appointed defense attorney seeking payment for representing indigent defendant in appeal of denial of bail, and overruling *Paprskar* "[t]o the extent of any conflict") ("The provision for appointment and compensation of attorneys to represent indigents in criminal law matters is certainly itself a criminal law matter"). The Court of Criminal Appeals recently discussed these and other holdings and concluded: "'The overriding principle to be gleaned from all of these authorities is that this Court will entertain an appeal when it is expressly authorized by statute and when it is related to the 'standard definition' of a criminal case,' in which there has been a finding of guilt and an assessment of punishment." *Ex parte Burr*, 185 S.W.3d 451, 453 (Tex. Crim. App. 2006) (holding that appeal of denial of a registered sex offender's motion for non-publication of home address pursuant to statutory endangerment exception is a criminal matter).

I. Deduction of Court Costs From Inmate Trust Accounts

Appellate decisions addressing reimbursement of court costs and attorney's fees from non-indigent inmates have cited two statutes that take procedurally distinct approaches. Civil Practice & Remedies Code §63.007(a) provides that a writ of garnishment may be issued against an inmate trust fund to encumber monies in the fund held for the inmate's benefit, such as monies received during confinement. In addition, the Code of Criminal Procedure authorizes a court to order a non-indigent defendant to offset, to the extent he can pay them, the costs of legal services provided, including any expenses and costs; for convicted defendants, these amounts may be ordered paid as court costs. *See* Tex. Code Crim. Proc. art. 26.05(g).[1]

As discussed below, the appellate decisions differ as to whether garnishment procedures or other due process must be followed before court costs and legal fees can be deducted from an inmate's trust account. The courts of appeals are also split as to whether separate litigation over such costs is more properly characterized as civil or criminal in nature, a label that in some cases affects the appellate court's jurisdiction and the availability of appellate relief.

The Texarkana court has treated a dispute over deduction of court costs from an inmate trust account as civil in nature. *Abdullah v. State*, 211 S.W.3d 938 (Tex. App.—Texarkana 2006, no pet.) *Abdullah* docketed as a civil case an inmate's appeal of a 2006 order directing payment, from the inmate's trust account to the county clerk, of court costs incurred in his 1998 conviction. The trial court had apparently relied on Civil Practice and Remedies Code §14.006, which allows a court to order an inmate "who has filed a claim" to pay court costs; however, Abdullah had not filed a claim, and was instead only contesting the assessment of costs from his 1998 conviction. The court of appeals noted that a summary bill of costs documented the amount sought but the judgment itself

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[1]Tex. Code Crim. Proc. art. 26.05(g) provides: "If the court determines that a defendant has financial resources that enable him to offset in part or in whole the costs of the legal services provided, including any expenses and costs, the court shall order the defendant to pay during the pendency of the charges or, if convicted, as court costs the amount that it finds the defendant is able to pay."

assessed no costs against Abdullah. Citing Civil Practice & Remedies Code §63.007(a), the court reversed the order directing payment because the State had not followed garnishment procedures or otherwise provided Abdullah due process. *Id.* at 941-43.

By contrast, the Amarillo Court of Appeals has designated an inmate trust account appeal as a criminal case. *See Gross v. State*, 2007 WL 2089365 (Tex. App.—Amarillo 2007, no pet.). In *Gross*, the court disagreed with *Abdullah* while simultaneously distinguishing it on the basis that the judgment against Gross incorporated the assessment of court costs and attorney fees against him:

> Unlike the situation in *Abdullah*, appellant was assessed court costs and attorney fees at the conclusion of trial. The reimbursement of the expenses incurred by the taxpayers were incorporated into the judgment which was signed by the trial court on October 16, 2003. By virtue of the inclusion of these fees in the judgment, appellant had notice that he would be required to pay court costs and attorney fees. Hence, we conclude that the issue of recoupment of attorney fees is closely related to the criminal case.

2007 WL 2089365, at *1. Significantly, the court cited Tex. Code Crim. Proc. 26.05(g), which authorizes reimbursement of attorney's fees and costs from non-indigent defendants, whether convicted or not, and does not mention garnishment procedures.

Gross also relied on *Curry v. Wilson*, 853 S.W.2d 40 (Tex. Crim. App. 1993). That case arose when Judge Wilson concluded that Curry, a criminal defendant found not guilty after a jury trial, was not actually indigent, and ordered him to reimburse the county for the costs of his legal defense. Curry sought a writ of prohibition against Judge Wilson's attempt to enforce her order. As an initial matter, the Court of Criminal Appeals rejected Wilson's argument that the court lacked jurisdiction on the theory that the matter was civil in nature. *Id.* at 43 ("Disputes which arise over the enforcement of statutes governed by the Texas Code of Criminal Procedure, and which arise as a result of or incident to a criminal prosecution, are criminal law matters.") However, it denied Curry's petition for a writ of prohibition, concluding that: (1) Article 26.05 was not unconstitutional for authorizing collection of legal fees from a non-indigent defendant who is acquitted; and (2) Curry's acquittal did not divest the trial court of jurisdiction to order fees collected. *Id.* at 44-47.

A divided Waco Court of Appeals has consistently treated inmate trust account cases as criminal, in one case explicitly following *Gross*'s reasoning. *Zink v. State*, No. 10-07-00026-CR, 2007 WL 4260533 (Tex. App.—Waco 2007, no pet. h.) ("We agree with the Amarillo court's determination [in *Gross*] that this is a criminal case. The order being appealed is "closely connected" to the criminal case in which Zink was convicted.") (citation omitted); *Crawford v. State*, 226 S.W.3d 688 (Tex. App.—Waco 2006, no pet.) (dismissing, on appellant's motion, appeal of order allowing payment of court costs from inmate trust account) (per curiam); *id.* at 688-89 (Gray, C.J., dissenting) (discussing issues relevant to civil/criminal dichotomy, such as filing fees for civil cases and appointment of counsel in criminal cases, and noting that Crawford's complaint was that costs ordered withdrawn from account significantly exceeded amount shown in judgment and bill of costs, not that the wrong procedure was followed); *In re Keeling*, 227 S.W.3d 391 (Tex. App.—Waco 2007, orig. proceeding) (following *Abdullah* and granting mandamus relief to inmate

whose trust account was, without following garnishment procedures, debited for court costs from 1992 conviction in 2006 following parole release and subsequent re-incarceration); *but see id.* at 395 (Gray, C.J., dissenting) (objecting to majority's docketing of mandamus proceeding as criminal case, and concluding that court order was not void and that adequate legal remedies available to petitioner precluded mandamus relief).

In *Zink*, having deemed the matter a criminal appeal, the majority concluded that it lacked jurisdiction because no statute authorized the appeal in a criminal case. 2007 WL 4260533 at *1. In so holding, the majority cited—apparently to demonstrate the procedural distinction—its earlier *Keeling* decision granting mandamus relief in a different case where an inmate's trust fund was garnished without following garnishment procedures. *Id.* Chief Justice Gray concurred in the judgment, disagreeing with the majority's characterization of the case as criminal and noting his views previously expressed in *Keeling* and *Crawford*: "This is a civil garnishment proceeding. Pure and simple. It was brought to recover court costs and fees from a criminal defendant's trust account, funds being held by the State." *Id.* at *1 n.* (Gray, C.J., concurring).

In the most recent inmate trust case in the Waco Court of Appeals, an inmate's appeal was dismissed for lack of jurisdiction, but he subsequently sought and obtained mandamus relief. *See Goad v. State*, No. 10-07-00113-CR, 2007 WL 2994078 (Tex. App.—Waco 2008, no pet. h.) (dismissing appeal from 2006 order that "in effect, garnishes funds from Goad's inmate trust account to satisfy court costs from his July 17, 2003 conviction"); *In re Goad*, No. 10-07-00331-CR, 2008 WL 191637 (Tex. App.—Waco 2008, orig. proceeding) (concluding that order violated inmate's due process and granting mandamus relief, citing *Abdullah* and *Keeling*). In the mandamus proceeding, the State—represented by the district attorney—conceded that "*Keeling*'s procedural due process mandates have not been met" and that the trial court's were are therefore void. 2008 WL 191637, at *1. In a somewhat unusual twist, the trial judge has sought mandamus relief in the Court of Criminal Appeals. *See In re Matt Johnson v. Tenth Court of Appeals*, WR-69,327-01 (petition for writ of mandamus filed February 4, 2008). If review is granted, this proceeding may provide an answer to the question of whether inmate trust fund cases are criminal in nature.

Although the decisions discussed above reflect tension in the case law, the differences may stem more from the categorization of the cases as civil or criminal than from differing interpretations of the substantive law. If the attorney's fees and court costs are included in the judgment of conviction, but the inmate contests the costs at a later time (such as when they are ordered deducted from the trust account), then perhaps the garnishment procedures need not be followed, as the Amarillo Court of Appeals held in *Gross*, because the judgment itself provides sufficient notice. It is not yet clear whether deducting fees and costs from an inmate account requires the State to follow garnishment procedures, either because the taking of such funds is inherently a garnishment action or because §63.007(a) mandates it. Nor is it clear what procedures—if any—must be followed under article 26.05(g), to the extent the amount of fees sought to be deducted are fully reflected in the judgment.

A dispute over inmate trust funds seems more appropriately categorized as civil in nature. Reimbursement is not punitive in nature; a non-indigent defendant is required to make reimbursement under article 25.06(g) regardless of whether he was convicted or acquitted. But regardless, a defendant must have some opportunity to contest the deduction of fees from his trust account, particularly when—as in *Crawford*—the amount ordered deducted exceeds the amount reflected in the judgment. To foreclose the defendant's ability to appeal the cost order simply because the costs arose from the underlying criminal prosecution seems to be an unsatisfactory solution and inconsistent with the classification of other types of cases.

II. Disclosure of Grand Jury Proceedings

Article 20.02 of the Code of Criminal Procedure provides that "[t]he proceedings of the grand jury shall be secret." Tex. Code Crim. Proc. art. 20.02(a). Subsection (d) provides:

> The defendant may petition a court to order the disclosure of information otherwise made secret by this article or the disclosure of a recording or typewritten transcription under Article 20.012 as a matter preliminary to or in connection with a judicial proceeding. The court may order disclosure of the information, recording, or transcription on a showing by the defendant of a particularized need.

Id. art. 20.02(d). "A petition for disclosure under Subsection (d) must be filed in the district court in which the case is pending," and the "defendant must also file a copy of the petition with the attorney representing the state, the parties to the judicial proceeding, and any other persons required by the court to receive a copy of the petition." *Id.* art 20.02(e).

Litigation over the secrecy of grand jury proceedings—other than a criminal defendant's efforts within a prosecution to access information about the grand jury that indicted him—is usually considered civil in nature. *See United States Government v. Marks*, 949 S.W.2d 320 (Tex. 1997); *In re Reed*, 227 S.W.3d 273 (Tex. App.—San Antonio 2007, orig. proceeding); *Kelly v. State*, 151 S.W.3d 683 (Tex. App.—Waco 2004, no pet.); *Harrison v. Vance*, 34 S.W.3d 660 (Tex. App.—Dallas 2000, no pet.). I have found only one such appellate case docketed as a criminal matter. *In re Grand Jury Proceedings 198G.J.20*, 129 S.W.3d 140 (Tex. App.—San Antonio 2003, pet. denied).

Of the decisions cited above, *Kelly* is the only case that explicitly addressed the civil/criminal distinction. Kelly appealed the trial court's denial of her motion for disclosure of grand jury proceedings under Code of Criminal Procedure 20.02, which she filed three years after the State dismissed criminal charges against her. The Waco Court of Appeals held it was without jurisdiction to consider Kelly's appeal because it was a criminal matter and no statute authorized the appeal. 151 S.W.3d at 684-85. Kelly had argued that the case should be treated as civil because: (1) *In re Grand Jury Proceedings 198G.J.20* was treated as a civil appeal; (2) the matter did not arise during a pending prosecution; (3) Kelly's motion did not "concern the administration of penal justice;" (4) only private parties, and not the State, had appeared in the case; and (5) Kelly could not obtain relief through habeas corpus. *Id.* at 684.

While acknowledging that "some of these statements are true," the court declined to consider the matter a civil case. *Id.* at 685. Addressing Kelly's arguments, the court noted that (1) *In re Grand Jury Proceedings 198G.J.20* did not expressly consider the civil/criminal distinction; (2) the absence of a pending prosecution was held irrelevant in *Kutzner v. State*, 75 S.W.3d 427 (Tex. Crim. App. 2002), which concluded that a motion for DNA testing under Chapter 64 of the Code of Criminal Procedure is a criminal case for jurisdictional purposes because it is "closely connected to, and could affect," the underlying criminal prosecution; (3) the secrecy of grand jury proceedings is a fundamental component of the criminal justice system, and attempts to defeat such secrecy should be adjudicated by the Court of Criminal Appeals as the court of last resort; (4) the State was participating through the district attorney's and others' responses to Kelly's motion; and (5) habeas was not Kelly's only potential avenue for relief. *Id.* at 685-86. Chief Justice Gray concurred in the judgment of dismissal, noting that because there was no prosecution against Kelly when she filed her motion, Article 20.02 did not give the trial court jurisdiction. *Id.* at 687 (Gray, C.J., concurring).

In re Grand Jury Proceedings 198G.J.20 involved a motion to disclose grand jury testimony filed by Shields, who had been indicted for sexual assault of a minor. Shields did not match the minor's description of the perpetrator in several key respects, and after she recanted, the indictment was dismissed. Shields then sued for malicious prosecution and sought to depose grand jurors under Code of Criminal Procedure art. 20.02(d); Shields sought to ask the grand jurors if the prosecutor had presented certain exculpatory evidence. The trial court denied the motion, concluding that Shields could not demonstrate a particularized need for the information because Texas law does not require prosecutors to present exculpatory evidence to the grand jury.

A majority of the court of appeals affirmed on the same basis, docketing the appeal as a civil proceeding without discussing the civil versus criminal dichotomy. One justice dissented, opining that prosecutors should have a limited duty to present exculpatory evidence. *See id.* at 144 (Lopez, J., dissenting). The dissent also did not discuss the civil/criminal dichotomy. However, under the reasoning of *Kutzner* the motion for disclosure in this case presumably would be deemed more closely related to the civil suit for malicious prosecution than to the underlying criminal proceedings that were dismissed after indictment.

In the other cases cited above, the appellate court docketed as a civil matter an appellate or original proceeding concerning the secrecy of grand jury proceedings, without discussing the civil versus criminal dichotomy. Notably, unlike *Kelly* and *In re Grand Jury Proceedings 198G.J.20*, none of the other cases involved a person whose criminal indictment was dismissed before trial attempting to access information about the grand jury proceedings.

In *Marks*, the target of a federal grand jury investigation of his tax returns—Marks—sought under the predecessor to Tex. R. Civ. P. 202 a pre-suit deposition of Feldman, his former accountant and a witness in the investigation. Feldman moved to vacate an order permitting the deposition, and the federal government intervened. At a hearing on the motion to vacate, a lawyer for the federal government offered to tell the trial court enough about the investigation to show how Feldman's deposition might hamper it, but she refused to disclose the same information to Feldman, Marks, or anyone else because of federal rules prescribing secrecy for grand jury proceedings. The judge heard

counsel's statements in chambers and *ex parte* but had a court reporter transcribe them, and later sealed the court reporter's record. Marks later sued Feldman for accounting malpractice, but the courts continued to delay Feldman's deposition pending completion of the federal investigation. After Marks was indicted, the federal government withdrew its objection to Feldman's deposition and the deposition took place, but Marks pursued his efforts to disclose the record of the hearing through appeal and mandamus. The Supreme Court held that the sealing of the hearing record did not violate either Tex. R. Civ. P. 76a, due to the rule's exception for court documents "to which access is otherwise restricted by law," or Marks' due process rights. 949 S.W.2d at 325-26.

In *Reed*, the court of appeals denied a district attorney's petition for writ of mandamus or prohibition seeking to vacate the trial court's order quashing portions of grand jury summonses addressed to school officials. It held that the trial court did not clearly abuse its discretion in quashing the portion of the summons stating that the summons itself was confidential, because Texas law, unlike federal law, does not clearly make issuance of summonses confidential. The court docketed the matter as a civil proceeding but applied the stricter criminal mandamus standard.

In *Harrison v. Vance*, the court affirmed the trial court's dismissal as frivolous of a convicted felon's mandamus petition seeking disclosure of grand jury proceedings from the petitioner's criminal case that resulted in his incarceration. 34 S.W.3d at 663. The court noted that grand jury proceedings are not subject to disclosure under the Open Records Act; instead, they are generally secret under the Code of Criminal Procedure, although the trial court has limited discretion to allow disclosure when necessary to the administration of justice. *Id.* (citing *Stern v. State ex rel. Ansel*, 869 S.W.2d 614, 622 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (discussing the various Code of Criminal Procedure provisions requiring secrecy)).

Under *Kutzner*'s "closely connected" standard that the *Kelly* court applied to litigation over the secrecy of grand jury proceedings, *Harrison* perhaps would have been more appropriately docketed as a criminal case; presumably the inmate sought the grand jury proceedings in an effort to collaterally attack his conviction. *Reed*, however, is more difficult to categorize. On the one hand, the applicant below—the school district—was not a party, and was merely being asked to provide records relevant to a criminal investigation. On the other hand, because the criminal investigation was apparently ongoing, the prosecutor's desire to keep the summons secret was directly related to the apparently as-yet-unfiled criminal prosecution.

Marks appears to fall more clearly on the civil side. Although at the time he sought to depose Feldman there was a federal investigation against Marks—and later an indictment—Marks' efforts to depose Feldman were within the rules of civil procedure and took place in the context of what quickly became a separate civil suit against Feldman. While Feldman's testimony was evidently relevant to the criminal proceedings against Marks, it was more immediately relevant to the civil suit against Feldman. Perhaps more importantly, the trial court allowed the *ex parte* summary of the investigation and then sealed it to protect the integrity of the federal criminal proceedings, which the Supreme Court recognized in generally upholding the trial court's actions.

III. Bail Bond Forfeiture Proceedings

Bail bond forfeitures are governed by Chapter 22 of the Code of Criminal Procedure. If a defendant fails to appear in court when required, a judgment nisi is entered against him and his sureties on the bond. After entry of a judgment nisi, forfeiture proceedings are generally governed by the same rules as govern civil cases. *See* Tex. Code Crim. Proc. art. 22.10; *Roberts v. State*, 729 S.W.2d 624 (Tex. App.—Fort Worth 1988) (citing *Tinker v. State*, 561 S.W.2d 200, 201 (Tex. Crim. App. 1978)). However, the Court of Criminal Appeals and the Supreme Court both consider them to be criminal cases for purposes of review because the bail proceeding is too closely connected to the underlying criminal proceeding to separate them. *See Jeter v. State*, 26 S.W. 49 (Tex. 1894); *Ex parte Burr*, 185 S.W.3d 451, 453 (Tex. Crim. App. 2006); *State ex rel. Vance v. Routt*, 571 S.W.2d 903, 906 (Tex. Crim. App. 1978).

Civil court costs may be assessed in a bail bond forfeiture proceeding after entry of judgment nisi. *Dees v. State*, 865 S.W.2d 461, 462 (Tex. Crim. App. 1993). Intermediate appellate courts have held that all costs traditionally associated with a civil appeal, including the filing fee, should be imposed in an appeal from a bond forfeiture proceeding. *See Olivarez v. State*, 183 S.W.3d 59, 60 (Tex. App.—Waco 2005, no pet.) (per curiam). However, the Attorney General has opined that a bond forfeiture is not a "civil suit" for purposes of Local Government Code §133.154(a), which imposes a $37 filing fee "on the filing of any civil suit" to fund judicial pay raises, because a bond forfeiture is not generally considered to be a "civil case." Op. Tex. Att'y Gen. No. GA-0484, at 3 (2006) (citing *Burr* and *Jeter*). The same opinion concludes that a $4 fee generally required to be paid as court costs by a person "convicted of any offense" under Local Gov't Code §133.105(a) does not apply to bond forfeiture cases because they do not result in a criminal conviction. *Id.* at 4.

The El Paso Court of Appeals gives bond forfeiture cases a "CV" designation whether they are before the Court on direct appeal or in a mandamus proceeding. *See e.g., Safety Nat. Cas. Corp. v. State*, 225 S.W.3d 684 (Tex. App.—El Paso 2006, pet. granted);[2] *In re State ex rel. Rodriguez*, 166 S.W.3d 894 (Tex. App.—El Paso 2005, orig. proceeding). It does so because the cases arise from the trial court's civil docket and the court is required to collect fees and impose costs as in civil cases generally. Tex. R. App. P. 5. However, the Waco Court of Appeals designates them as criminal. *See Olivarez*, 183 S.W.3d at 60-61 (dismissing bail bond forfeiture appeal following appellant's failure to file docketing statement, but suspending Appellate Rule 5 and ordering clerk to "write off all unpaid filing fees in this case"); *but see id.* at 61 (Gray, C.J., dissenting) (objecting to majority's failure to collect filing fees in civil case as required by Rule 5, and to dismissal on unclear grounds); *id.* at 63 (per curiam) (withdrawing judgment of dismissal on rehearing after appellant filed docketing statement and paid filing fee).

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[2]Note, however, that despite the court of appeals' civil designation, a petition for discretionary review was submitted to—and has been granted by—the Court of Criminal Appeals. *See* PD-0413-07 (petition granted June 20, 2007; case submitted November 7, 2007).

IV. Habeas Corpus

The writ of habeas corpus may be used by a person restrained in her liberty may use to test the legality of her custody or restraint. Tex. Code Crim. Proc. art. 11.01. However, it is an extraordinary remedy, available only when there is no other adequate remedy at law, and is not to be used as a substitute for appeal. *Ex parte Weise*, 55 S.W.3d 617, 619 (Tex. Crim. App. 2001). The Texas Constitution provides that the writ of habeas corpus is a writ of right that shall never be suspended, and requires the Legislature to "enact laws to render the remedy speedy and effectual." Tex. Const. art. I, §12. Statutes governing the writ are found in Chapter 11 of the Code of Criminal Procedure, which "applies to all cases of habeas corpus for the enlargement of persons illegally held in custody or in any manner restrained in their personal liberty." Tex. Code Crim. Proc. art. 11.64.

The writ itself "is an order issued by a court or judge of competent jurisdiction, directed to any one having a person in his custody, or under his restraint, commanding him to produce such person, at a time and place named in the writ, and show why he is held in custody or under restraint." Tex. Code Crim. Proc. art. 11.02. A petition for writ of habeas corpus must state that the applicant is illegally restrained in his liberty, and by whom; include a copy of the order of confinement and a prayer for relief; and be supported by allegations sworn to be true by the applicant. art. 11.14. The writ must be granted "without delay" by the judge receiving it, unless it is manifest that the applicant is entitled to no relief. *Id.* art. 11.15. The writ is issued to the person having custody of the applicant, who then must make a return admitting whether the applicant is in his custody and showing authority for his detention. *Id.* art. 11.02, .27, .30. After the person confining the applicant brings the applicant before the court, the applicant is no longer detained on the original warrant or process, but under the authority of the habeas corpus. *Id.* art. 11.31, 32. After examining the return and hearing any testimony offered, the court shall, "according to the facts and circumstances of the case, proceed either to remand the party into custody, admit him to bail or discharge him." *Id.* art. 11.44. If it appears that there is no legal basis to maintain the applicant's confinement, the applicant must be discharged. *Id.* art. 11.40.

An initial distinction must be drawn between what are typically known as "post-conviction" writ applications, *see id.* arts. 11.07, .071, and other habeas proceedings. (For purposes of this memo, I include in the "post-conviction" category habeas petitions filed by confinees indicted on misdemeanor and felony charges, *see id.* arts. 11.08 - .09, as well as petitions filed by convicted defendants seeking relief from community supervision orders, *see id.* art. 11.072, since both likewise directly relate to a criminal prosecution.) Chapter 11 applies to all habeas petitions, not merely to post-conviction habeas petitions. *Id.* art. 11.64. While post-conviction applications always fall on the criminal side of the docket, with other habeas applications the court's jurisdiction depends on the nature of the underlying proceeding. However, this distinction is not always clear in the case law; moreover, habeas corpus proceedings are difficult to label, as the Court of Criminal Appeals has acknowledged.[3]

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[3]The Court of Criminal Appeals in *Rieck* discussed the general difficulty in labeling habeas proceedings:

A. Post-Conviction Habeas Applications

"[W]hen a person is confined for violating a criminal statute and files an application for a writ of habeas corpus challenging his confinement, the proceeding is criminal, not civil, in nature. *Aranda v. District Clerk*, 207 S.W.3d 785, 786 (Tex. Crim. App. 2006) (per curiam); *Ex parte Davis*, 542 S.W.2d 192, 198 (Tex. Crim. App.1976); *see also Ex parte Rieck*, 144 S.W.3d 510, 516 (Tex. Crim. App. 2004) ("Such proceedings are categorized as 'criminal' for jurisdictional purposes, and the Texas Rules of Civil Procedure do not ordinarily apply"). Post-conviction habeas petitions are under the criminal jurisdiction of the district courts and the Court of Criminal Appeals. *See* Tex. Code Crim. Proc. art. 11.07 (post-conviction habeas for felony convictions in which death penalty has not been assessed); *id.* art. 11.071 (post-conviction habeas for death penalty cases). The courts of appeals do not have jurisdiction to grant post-conviction habeas relief. *See id.* art. 11.05.

B. Restraints of Liberty Resulting from Actions Other than Criminal Conviction

The remainder of this section addresses habeas petitions filed by persons whose liberty has been restrained for reasons other than being convicted of or indicated for a crime. Perhaps the most commonly-seen example of non-conviction-based confinement is confinement for contempt of court.

1. Contempt

A court of appeals lacks jurisdiction to review a contempt order on direct appeal. *See Tex. Animal Health Comm'n v. Nunley*, 647 S.W.2d 951, 952 (Tex. 1983). Instead, a contempt order involving confinement may be reviewed by writ of habeas corpus.

The Supreme Court's authority to issue writs of habeas corpus is statutorily limited to restraints of liberty resulting from incidents in civil cases. *See* Tex. Gov't Code §22.002(e) ("The

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> To the extent that the criminal nature of a proceeding might be a stumbling block to characterizing the proceeding as a lawsuit, it should be observed that most jurisdictions have traditionally regarded habeas corpus as a civil remedy, even when the relief sought is from confinement in the criminal justice system. Yet courts have struggled with how to characterize habeas proceedings and have sometimes characterized them as "neither civil nor criminal but rather *sui generis*" or "an exercise of special constitutional and statutory jurisdiction." The United States Supreme Court has conceded that habeas corpus proceedings are characterized as "civil" but called that label "gross and inexact," stating that, "Essentially, the proceeding is unique." And while a habeas proceeding is considered in Texas to be separate from the criminal prosecution—being a collateral, rather than direct, attack on the judgment of conviction—Texas has gone further in eschewing the civil label for habeas proceedings arising from criminal prosecutions or convictions. Such proceedings are categorized as "criminal" for jurisdictional purposes, and the Texas Rules of Civil Procedure do not ordinarily apply.
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> *Ex parte Rieck*, 144 S.W.3d 510, 515-16 (Tex. Crim. App. 2004) (holding that statute allowing for forfeiture of good conduct time for the filing of frivolous lawsuits does not apply to habeas corpus proceedings) (citations omitted).

supreme court or a justice of the supreme court . . . may issue a writ of habeas corpus when a person is restrained in his liberty by virtue of an order, process, or commitment issued by a court or judge on account of the violation of an order, judgment, or decree previously made, rendered, or entered by the court or judge in a civil case.").[4] The courts of appeals likewise have jurisdiction to issue writs of habeas corpus when a person's liberty is restrained due to violation of a court order in a civil case.[5] Thus, habeas petitions filed by persons imprisoned for reasons other than being convicted of a crime are treated as civil matters if the underlying proceeding in which the behavior took place was civil in nature. *See In re Gawerc*, 165 S.W.3d 314 (Tex. 2005) (civil contempt for violation of child support orders); *Ex parte Sanchez*, 703 S.W.2d 955 (Tex. 1986) (denying habeas relief to court reporter held in contempt by court of appeals for failing to timely file reporter's record in civil case on appeal, when failure was partially due to reporter's imprisonment for failing to timely file record in criminal prosecution; and noting Court of Criminal Appeals' denial of reporter's habeas petition in connection with criminal case). The courts of appeals designate such habeas petitions as civil regardless of whether the *contempt* is civil in nature,[6] *see, e.g.. Ex parte Wong*, No. 08-06-00227-CV, 2006 WL 2844405 (Tex. App.—El Paso 2006, orig. proceeding) (civil contempt for non-compliance with divorce decree); criminal, *see, e.g., In re McGonagill*, No. 02-07-034-CV, 2007 WL 704888

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[4] The Texas Constitution grants both the Supreme Court and the Court of Criminal Appeals the power to issue writs of habeas corpus, mandamus, procedendo, certiorari, and other writs. *Compare* Tex. Const. art. V, §3(a) ("The Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law, and under such regulations as may be prescribed by law, the said courts and the Justices thereof may issue the writs of mandamus, procedendo, certiorari and such other writs, as may be necessary to enforce its jurisdiction. The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State."), *with id.* art. V, §5 ("Subject to such regulations as may be prescribed by law, the Court of Criminal Appeals and the Judges thereof shall have the power to issue the writ of habeas corpus, and, in criminal law matters, the writs of mandamus, procedendo, prohibition, and certiorari. The Court and the Judges thereof shall have the power to issue such other writs as may be necessary to protect its jurisdiction or enforce its judgments.").

[5] Section 22.201(d) provides:

> Concurrently with the supreme court, the court of appeals of a court of appeals district in which a person is restrained in his liberty, or a justice of the court of appeals, may issue a writ of habeas corpus when it appears that the restraint of liberty is by virtue of an order, process, or commitment issued by a court or judge because of the violation of an order, judgment, or decree previously made, rendered, or entered by the court or judge in a civil case. Pending the hearing of an application for a writ of habeas corpus, the court of appeals or a justice of the court of appeals may admit to bail a person to whom the writ of habeas corpus may be granted.

Tex. Gov't Code §22.201(d).

[6] Contempt proceedings are "quasi-criminal in nature" and "should conform as nearly as practicable to those in criminal cases." *Sanchez*, 703 S.W.2d at 957.

(Tex. App.—Fort Worth 2007, orig. proceeding) (criminal contempt for disobedience of court orders in divorce case); or both, *see, e.g., In re Garza*, No. 04-04-00140-CV, 2004 WL 839671 (Tex. App.—San Antonio 2004, orig. proceeding) (civil and criminal contempt for attorney's disobedience of discovery orders).

The Court of Criminal Appeals, by contrast, has broad statutory authority to grant habeas relief. *See* Tex. Code Crim. Proc. art. 11.05.[7] This includes the power to grant habeas relief to persons jailed for contempt that occurred during criminal proceedings. *See Ex parte Gibson*, 811 S.W.2d 594 (Tex. Crim. App. 1991) (granting habeas relief to prosecutor found in criminal contempt for remarks to judge during criminal trial); *Ex parte Curtis*, 568 S.W.2d 363 (Tex. Crim. App. 1978).

Notably, article 11.05 does not include the courts of appeals among the courts authorized to issue writs of habeas corpus. Given this omission, and Gov't Code §22.221(d)'s limitation on habeas jurisdiction to violations of orders in civil cases, several courts of appeals have concluded that they lack jurisdiction to issue a writ of habeas corpus to address a restraint of liberty resulting from contempt in a criminal proceeding. The El Paso Court of Appeals has stated:

> This Court's jurisdiction is not dependent upon characterization of the contempt proceeding as a civil case, nor is our jurisdiction limited to matters of civil contempt. Rather, our jurisdiction is limited by Section 22.221(d) to those situations in which the alleged contemnor violated an order, judgment or decree previously made, rendered, or entered by the court or judge in a civil case. Thus, under Section 22.221(d), this Court would have original habeas corpus jurisdiction to hear matters involving either civil contempt or criminal contempt, or both, so long as the order, judgment, or decree violated had been entered in a civil case. Applying that test to the facts before us, we find that the contempt judgment and Relator's subsequent restraint are not based upon a violation of an order entered by the trial court in a civil case. Rather, the order Relator was found to have violated, namely, an order to appear for trial, was entered in a criminal proceeding. Thus, this Court does not have original habeas corpus jurisdiction and we dismiss the petition for want of jurisdiction.

Ex parte Hawkins, 885 S.W.2d 586 (Tex. App.—El Paso 1994, orig. proceeding). The Beaumont Court of Appeals has reached a similar conclusion. *See Ex parte Powell*, 883 S.W.2d 775, 778 (Tex. App.—Beaumont 1994, orig. proceeding) (dismissing habeas petition of mother found in contempt of court and imprisoned for making false statement in connection withdrawal of funds in court registry set aide for use of minor daughter) ("Since the acts of contempt committed by the Relator were in fact criminal in nature, and did not arise from a violation of an order, judgment or decree in a civil case, the Court of Appeals does not have the power to issue a Writ of Habeas Corpus in this case nor to inquire into the punishment assessed against Relator."). *But see Gonzalez v. State*, 187

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[7]Article 11.05 provides: "The Court of Criminal Appeals, the District Courts, the County Courts, or any Judge of said Courts, have power to issue the writ of habeas corpus; and it is their duty, upon proper motion, to grant the writ under the rules prescribed by law."

S.W.3d 166 (Tex. App.—Waco 2006, orig. proceeding) (per curiam) (granting habeas relief to petitioner jailed on criminal contempt for violating bond condition in underlying drug prosecution).

It is not clear whether a court of appeals has jurisdiction to consider an appeal of a trial court's denial of a petition for habeas relief. An application for writ of habeas corpus filed in an appellate court is an original proceeding, and therefore presumably not appealable. *See* Tex. R. App. P. 52.1. However, it appears that a court of appeals may have appellate jurisdiction to consider an appeal of a trial court's denial of habeas relief. *See In re Commitment of Richards*, 202 S.W.2d 779 (Tex. App.—Beaumont 2006, no pet.) (holding that court lacked jurisdiction over direct appeal of biennial review order, and affirming trial court's denial of application for writ of habeas corpus); *Ex parte Woodall*, 154 S.W.3d 698 (Tex. App.—El Paso 2004, pet. ref'd) (affirming trial court's denial of habeas petition filed by smoker fined for violation of municipal anti-smoking ordinance).

2. Other Non-Conviction-Based Restraints on Liberty

A person's liberty also may be restrained under the sexually violent predator statute, which allows a court to place restrictions on a person's liberty though "outpatient civil commitment." *See* Tex. Health & Safety Code ch. 841; *In re Fisher*, 164 S.W.3d 637 (Tex. 2005) (concluding that the sexually violent predator statute is civil in nature, not punitive, and therefore due process does not require competence to stand trial). Restrictions imposed through outpatient civil commitment may be subject to challenge through habeas corpus. *See Richards*, 202 S.W.2d 779 (holding that court lacked jurisdiction over direct appeal of biennial review order, and affirming trial court's denial of application for writ of habeas corpus); *but see id.* at 794 (Gaultney, J., dissenting) (opining that court had jurisdiction over direct appeal, and that supervision and treatment requirements at issue were not proper subject of habeas proceeding under the circumstances) ("In my view, the majority's approach unnecessarily complicates the review process for commitment orders and makes the extraordinary habeas remedy the ordinary method for challenging commitment requirements.").

C. Conclusion

The distinctions between post-conviction habeas petitions and non-conviction habeas petitions—and of the latter type between civil and criminal matters—are not clearly explained in either the Code of Criminal Procedure. However, the only area where the case law appears to be in tension is to what extent the courts of appeals have jurisdiction over habeas applications filed by a person held in contempt in a criminal proceeding. By statute, the courts of appeals apparently lack such jurisdiction, although at least one court has concluded otherwise, and others have considered appeals of a trial court's denial of habeas relief. Also, the statutory outpatient civil commitment procedures for sexually violent predators are relatively new and have resulted in some disagreement as to the availability of habeas relief from liberty restrictions imposed under Chapter 841.

V. Expunction of Arrest Records

"A statutory expunction proceeding is civil rather than criminal in nature." *In re Expunction of J.A.*, 186 S.W.3d 592, 596 (Tex. App.—El Paso 2006, no pet.). The Supreme Court presumably

has jurisdiction of appellate expunction proceedings. *See State v. Beam*, 226 S.W.3d 392 (Tex. 2007); *Ex parte Elliot*, 815 S.W.2d 251 (Tex. 1991).

In *Ex parte Paprskar*, the Court of Criminal Appeals dismissed for lack of jurisdiction an appeal of a denied motion to expunge arrest records. 573 S.W.2d 525 (Tex. Crim. App. 1978). The court noted that Tex. Const. art. V, §5, gives the Court appellate jurisdiction over criminal cases only, and concluded that this was not a criminal case because there were no criminal penalties attached to the proceeding, it was not brought by or in the name of the State, and the defendant was not charged with a crime. It also declined to treat the matter as a habeas corpus application. Absent a statute authorizing appeal, the court concluded that it lacked jurisdiction. *See also Ex parte Burr*, 185 S.W.3d 451, 453 (Tex. Crim. App. 2006) (citing *Paprskar* and noting that expunction of arrest records is one type of proceeding related to a criminal case that itself is not criminal in nature).

Expunction of arrest records is governed by Code of Criminal Procedure art. 55.01. At least two other Texas statutes provide for judicial expunction in particular circumstances and do not require institution of a lawsuit, but would presumably be considered civil matters in light of *Paprskar*. *See* Tex. Code Crim. Proc. art. 45.055 (authorizing, after applicant's 18th birthday, expunction of conviction for failure to attend school and related records, upon payment of $30 fee to defray cost of notifying state agencies); Tex. Alco. Bev. Code §106.12 (authorizing, after applicant's 21st birthday, expunction of conviction for violation of Alcoholic Beverage Code and related records, upon payment of $30 fee to defray cost of notifying state agencies).

VI. Juvenile Cases

Juvenile cases are civil in nature. *L.G.R. v. State*, 724 S.W.2d 775, 776 (Tex. 1987); *In re J.R.R..*, 696 S.W.2d 382 (Tex.1985); *In re B.P.H.*, 83 S.W.3d 400, 405 (Tex. App.—Fort Worth 2002, no pet.). Accordingly, they "remain on the civil side of our justice system unless transferred to a criminal court." *Ex parte Valle*, 104 S.W.3d 888, 890 (Tex. Crim. App. 2003) (dismissing for want of jurisdiction habeas application of juvenile adjudicated as delinquent for committing capital murder; because juvenile adjudication is not a criminal conviction, statutory post-conviction habeas provisions inapplicable).

VII. Other Proceedings Ancillary to Criminal Prosecution

A. Matters Considered Criminal

1. Sex offender registration

An appeal of a trial court's denial of a registered sex offender's motion for non-publication of home address pursuant to statutory endangerment exception is a criminal matter. *Ex parte Burr*, 185 S.W.3d 451, 453-54 (Tex. Crim. App. 2006).

2. Post-conviction DNA testing

A post-conviction motion for DNA testing under Chapter 64 of the Code of Criminal Procedure is a criminal matter. *See Kutzner v. State*, 75 S.W.3d 427, 429 (Tex. Crim. App. 2002) (citing *Jeter*); *accord Rose v. State*, 198 S.W.3d 271, 272 (Tex. App.—San Antonio 2006, p.d.r. ref'd) (designating inmate's appeal from post-conviction DNA hearing as criminal case) ("A hearing on post-conviction DNA testing is a collateral attack on a judgment comparable to a habeas corpus proceeding.").

3. Appointment and compensation of defense counsel for indigents

The provision for appointment and compensation of attorneys to represent indigents in criminal law matters is a criminal law matter. *Weiner v. Dial*, 653 S.W.2d 786, 787 (Tex. Crim. App. 1983); *see also Burr*, 185 S.W.3d at 453 (citing *Wiener*).

4. Request for medical records

The Waco Court of Appeals dismissed for want of jurisdiction an inmate's appeal of an order, filed under the cause number of his criminal case and submitted to the court that convicted him, denying his request for certain medical records he apparently sought in connection with a potential civil suit against state and county officials. *See Reyes v. State*, 166 S.W.3d 333, 335 (Tex. App.—Waco 2005, no pet.) (Vance, J., concurring) (explaining original decision dismissing appeal, and interpreting additional filings as petition for discretionary review); *but see id.* at 333 (Gray, J., dissenting) (objecting to designation of appeal as criminal case, explaining that dismissal was appropriate for any of several reasons, and suggesting that court should treat Reyes's "petition for Coram Nobis" as motion for rehearing, grant the writ and withdraw the original opinion and judgment, and order cause number changed to reflect civil designation).

B. Matters Considered Civil

1. Forfeiture of contraband property

A proceeding for forfeiture of property derived from a criminal offense is a civil proceeding. *See Ex parte Rogers*, 804 S.W.2d 945, 948 (Tex. App.—Dallas 1990, orig. proceeding); *see also Burr*, 185 S.W.3d at 453 (citing *Rogers*). Similarly, *in rem* forfeiture proceedings under Article 18.18(b) of the Code of Criminal Procedure, which applies to certain contraband when "there is no prosecution or conviction following seizure," are of a civil nature and the rules of civil procedure apply. Tex. Code Crim. Proc. art. 18.18(b); *see id.* art. 59.05(b) (All cases under this chapter ["Forefeiture of Contraband"] shall proceed to trial in the same manner as in other civil cases."); *Hardy v. State*, 102 S.W.2d 123, 126-27 (Tex. 2003); *F & H Invs., Inc. v. State*, 55 S.W.3d 663, 667-68 (Tex. App.—Waco 2001, no pet.).

2. Malicious prosecution

Although arising from criminal proceedings, malicious prosecution is a civil matter over which the Supreme Court has jurisdiction. *See In re Bexar County Crim. Dist. Attorney's Office*, 224 S.W.3d 182 (Tex. 2007); *Kroger Tex. Ltd. P'Ship v. Suberu*, 216 S.W.3d 788 (Tex. 2006).

3. Application for restoration of property

The Code of Criminal Procedure provides that upon the conclusion of a prosecution for theft or other illegal acquisition of property, the court shall order the property returned to its owner. Tex. Code Crim. Proc. art. 47.02. The Code of Criminal Appeals has held that it lacks jurisdiction over an appeal from an order denying an application for restoration of property under article 47.02. *See Bretz v. State*, 508 S.W.2d 97 (Tex. Crim. App. 1974). The concurring opinion noted that "Texas law books are replete with confusing overlap, necessitated by the two courts of last resort." *Id.* at 98-99 (Roberts, J., concurring).

VIII. Inconsistent Docketing of Original Proceedings in the Courts of Appeals

An additional factor that complicates the problem of clearly defining civil versus criminal matters is that the courts of appeals are not all consistent about how cases are docketed. For example, in the Second, Third, and Fourteenth Courts of Appeals, every original proceeding is given a civil ("CV") designation. *See, e.g.*, *In re Hancock*, No. 02-06-431-CV, 212 S.W.3d 922 (Tex. App.—Fort Worth 2007, orig. proceeding). This currently appears to be the generally accepted practice among most of the courts of appeals. However, some courts of appeals give criminal ("CR") designations to original proceedings related to criminal cases.[8] *See In re Goad*, No. 10-07-00331-CR, 2008 WL 191637 (Tex. App.—Waco 2008, orig. proceeding); *In re Hearon*, 10-07-00183-CR, 228 S.W.3d 466 (Tex. App.—Waco 2007, orig. proceeding); *In re Hayes*, No. 01-05-00899-CR, 2005 WL 2989878 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding); *In re State*, No. 08-03-00004-CR, 116 S.W.3d 376 (Tex. App.—El Paso 2003, orig. proceeding); *In re State*, No. 08-01-00203-CR, 50 S.W.3d 100 (Tex. App.—El Paso 2001, orig. proceeding).

The *In re Hayes* case cited above is particularly instructive, because the petitioner, a TDCJ inmate, filed similar mandamus petitions in numerous courts of appeals, in each case apparently seeking mandamus relief against the trial-court clerk for failing to file his tort claims against the director of TDCJ. The Waco Court of Appeals docketed Hayes's mandamus petition as a criminal case, but its memorandum opinion notes the disposition of Hayes's similar petitions by the Houston [Fourteenth], San Antonio, Texarkana, Amarillo, and Corpus Christi Courts of Appeals, each of which gave Hayes's mandamus petition a civil designation. *See In re Hayes*, No. 10-05-00304-CR, 2005 WL 2044924 (Tex. App.—Waco 2005, orig. proceeding) (listing cases).

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[8]Peggy Culp, Clerk of the Seventh Court of Appeals, reports that in deciding whether to give an original proceeding a "CR" or "CV" designation, the Amarillo court attempts to ascertain which court of last resort would have jurisdiction over the case.