IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. WR-85,060-01 & WR-85,060-02

EX PARTE ROGER DALE CARTER, Applicant

ON APPLICATIONS FOR WRITS OF HABEAS CORPUS
CAUSE NOS. 09-03-02825-CR-(1) & 09-03-02827-CR-(1)
IN THE 359TH DISTRICT COURT FROM MONTGOMERY COUNTY

ALCALA, J., filed a dissenting opinion in which RICHARDSON, J., joined.

DISSENTING OPINION

This Court's judgment unjustly permits the incarceration of a person under circumstances in which the law absolutely disallows it. The consequence of today's plurality opinion is that Roger Dale Carter, applicant, will have to serve five additional years in prison beyond what the law permits under these circumstances. Applicant's habeas complaint is one founded in the theory that he will be unlawfully confined for five years beyond what the law permits due to the trial court's failure to abide by the terms of Section 3.03 of the Penal Code. Section 3.03 mandates that sentences such as the ones at issue here "shall run concurrently." *See* TEX. PENAL CODE § 3.03(a). The trial court had no discretion to

cumulate applicant's sentences for these offenses that arose from the same criminal transaction and were resolved in the same proceeding. *See id.* Applicant, the State, and the habeas court appear to agree that the trial court's cumulation order violated the mandatory terms of Section 3.03 by ordering that applicant's credit card abuse sentences run consecutively to his burglary sentence.[1] Despite the fact that the interested parties agree that the cumulation order is erroneous, and despite the fact that our Texas Constitution has provided for a habeas remedy for this type of wrongful incarceration, today's plurality opinion denies applicant relief for his unlawful restraint. I disagree with this Court's plurality opinion because it denies applicant's two habeas complaints that provide independent and alternative grounds for habeas relief. Rather than reject applicant's claims, first, I would grant relief to applicant as to his ground that demonstrates that he is unlawfully restrained due to the trial court's wrongful cumulation order. Alternatively, second, I would remand applicant's ground that complains of ineffective assistance of trial and appellate counsel under the rationale that applicant's attorneys failed to challenge the wrongful cumulation order. For these reasons, I respectfully dissent.

I. Habeas Relief is Appropriate For Restraint From Wrongful Cumulation Order

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[1] In its answer to applicant's application, the State conceded that, "[g]iven the proximity in time and the connection between the two offenses, the applicant's charges for burglary of a habitation and credit card abuse likely arose out of the same criminal episode." Thus, the State further conceded that, if this Court were to deem the claim cognizable in a post-conviction writ, applicant "is likely entitled to relief in the form of a deletion of his cumulation order."

It appears that the rationale for denying applicant's habeas claim with respect to the wrongful cumulation of his sentences is founded on two theories: (A) a theory that his claim is not cognizable in a habeas proceeding because it is a statutory-based complaint rather than one asserting a constitutional or jurisdictional violation, and (B) a theory that his claim is procedurally barred because he could have raised this complaint on direct appeal but failed to do so. I disagree with this Court's rationale as to both theories. As to the first theory, I conclude that the cumulation order here, which has the effect of extending applicant's incarceration for five additional years beyond what the law permits under these circumstances, violates applicant's federal constitutional right to due process and, therefore, his complaint constitutes a cognizable basis for habeas relief. With respect to the second theory, I would hold that applicant's request for habeas relief is not procedurally barred because complaints about improper cumulation orders may not be forfeited by mere inaction, regardless of whether the inaction occurs at trial or on appeal.

A. Applicant's Complaint is Cognizable on Habeas as a Due Process Claim

Applicant's challenge of the erroneous cumulation of his sentences is a cognizable basis for habeas relief by which he seeks a remedy for his unlawful restraint from a violation of his federal constitutional rights to due process. After reviewing the general principles governing habeas relief, I provide legal authority to show that applicant's complaint is a cognizable basis for habeas relief.

1. General Principles for Habeas-Corpus Claims

The broad purpose of the writ of habeas corpus is to provide a vehicle by which a confined person may challenge and receive relief from his unlawful detention or imprisonment. *Ex parte Kerr*, 64 S.W.3d 414, 419 (Tex. Crim. App. 2002) ("The purpose of a writ of habeas corpus is to obtain a speedy and effective adjudication of a person's right to liberation from illegal restraint."); *Ex parte Ramzy*, 424 S.W.2d 220, 223 (Tex. 1968) ("the purpose of the writ of habeas corpus is to obtain a speedy adjudication of a person's right to liberation from illegal restraint").[2]

The Bill of Rights in the Texas Constitution affords applicant an absolute right to request habeas relief under these circumstances. Article I of the Texas Constitution provides, "The writ of habeas corpus is a writ of right, and shall never be suspended. The Legislature shall enact laws to render the remedy speedy and effectual." TEX. CONST. ART. I, § 12. In addition, the Code of Criminal Procedure states that "[e]very provision relating to the writ of habeas corpus shall be most favorably construed in order to give effect to the remedy, and protect the rights of the person seeking relief under it." TEX. CODE CRIM. PROC. art. 11.04.

The writ of habeas corpus has been construed as permitting relief only for violations of fundamental or constitutional rights or jurisdictional defects. *Ex parte McCain*, 67 S.W.3d 204, 210 (Tex. Crim. App. 2002); *see also Ex parte Sadberry,* 864 S.W.2d 541, 542 (Tex.

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See also TEX. CODE CRIM. PROC. art. 11.01 ("The writ of habeas corpus is the remedy to be used when any person is restrained in his liberty. It 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.").

Crim. App. 1993). As I show next, applicant's complaint about the erroneous cumulation order implicates a violation of his federal constitutional right to due process.

2. Unlawful Restraint from Erroneous Cumulation Order is Cognizable

Applicant's challenge to the improper cumulation order is cognizable in his post-conviction habeas application seeking relief in this Court. *See* TEX. CODE CRIM. PROC. art. 11.07. Although the plurality suggests that applicant's complaint asserts a mere statutory violation that does not give rise to a claim of a violation of applicant's fundamental or constitutional rights, I disagree. I would instead hold that an order imposing consecutive sentences when the law clearly disallows it gives rise to a due process violation, and thus a complaint based on such an erroneous cumulation order states a cognizable basis for relief.

In support of this position, I observe that at least one federal appellate court has held that a defendant who was erroneously sentenced to consecutive sentences in violation of state statutory law established a due process violation. *See Toney v. Gammon*, 79 F.3d 693, 699-700 (8th Cir. 1996). In *Toney*, the judge at sentencing imposed two life sentences while operating under the impression that consecutive sentences were statutorily required. *Id.* at 699. The Missouri appellate court upheld Toney's sentences. Later, in another case, the Missouri Supreme Court interpreted the relevant sentencing statute as permitting the trial court discretion in deciding whether to impose sentences concurrently or consecutively under the circumstances of Toney's case. *Id.* In rejecting the State's argument that Toney's claim was not cognizable on habeas because it was a mere statutory violation, the court

acknowledged that, while it is "'not the province of a federal habeas court to reexamine state-court determinations on state-law questions,'" "when a state creates a 'substantial and legitimate [sentencing] expectation[,]' an 'arbitrary deprivation' of such entitlement may create an independent federal constitutional violation." *Id.* (quoting *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980)). In concluding that Toney's claim was cognizable as a due process claim and that he was entitled to relief in the form of resentencing, the court stated,

> Here, the Missouri sentencing statutes are clear. The state legislature, as interpreted by the Missouri Supreme Court, conclusively established that under [the relevant Missouri statute], a defendant will be sentenced to either consecutive or concurrent sentences at the discretion of the sentencing court. Toney has a constitutionally protected liberty interest in the sentence resulting from the exercise of this discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. In this case, the sentencing judge, erroneously believing he had no discretion to do otherwise, imposed two consecutive life sentences. Such an arbitrary disregard of Toney's right to liberty is a denial of due process of law.

Id. at 699-700. The court accordingly remanded the case to the state court for a discretionary determination of whether Toney's sentences should run concurrently or consecutively.

Although applicant's underlying challenge is premised on a statutory violation of Section 3.03, I conclude that this violation results in a deprivation of his right to due process under the Fourteenth Amendment to the federal Constitution. *See id.*[3] Given the mandatory

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[3] *See also Moore v. Irvin*, 908 F.Supp. 200, 208 (N.D. N.Y. 1995) ("If the sentence is within statutory limits, a petitioner must show that the state court's sentencing decision was wholly devoid of discretion or amounted to an arbitrary or capricious abuse of discretion, or that an error of law resulted in the improper exercise of the sentencer's discretion and thereby unjustly deprived the

nature of the statutory scheme in Texas that compels concurrent sentences under the circumstances presented in this case, applicant had a substantial and legitimate sentencing expectation and a constitutionally protected liberty interest in his sentences running concurrently. That constitutionally protected liberty interest was violated by the trial court's arbitrary disregard of the mandatory sentencing scheme that must be imposed absent a defendant's intentional or knowing waiver of that scheme.

Here, the facts show that applicant committed burglary and stole several credit cards that he later used to make purchases. Without a plea bargain, but in a single proceeding before the trial court judge, applicant pleaded guilty to burglary of a habitation and two charges of credit card abuse. The trial court sentenced him to fifty years in prison for burglary and five years in prison for each of the credit card offenses. The trial court ordered that the prison terms that were assessed for each of the credit card offenses run concurrently, but it ordered that those sentences be served consecutively to the burglary sentence. It is undisputed that, under the terms of Section 3.03(a), the trial court had no discretion to order that the credit card abuse sentences run consecutively to the burglary sentence, and thus its cumulation order is plainly not authorized under the statutory scheme for punishing offenders under these circumstances.

Applicant's claim falls squarely within the type of complaint that may be remedied in a habeas proceeding in that he is arguing that he is illegally restrained due to the operation

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petitioner of his liberty.") (citing *Haynes v. Butler*, 825 F.2d 921, 924 (5th Cir. 1987); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980)).

of the cumulation order that was entered in clear contravention of the mandatory requirements of Section 3.03, thereby extending the length of his confinement beyond what the law would otherwise permit.[4] The trial court's arbitrary refusal to comply with the applicable law that set forth a sentencing expectation for all people in Texas violated applicant's federal constitutional right to due process. *See id.* I would hold that this type of claim states a cognizable basis for habeas relief stemming from an improper-cumulation order under these circumstances.

B. Habeas Relief Should Not Be Procedurally Barred

In addition to concluding that applicant's claim is not cognizable because it alleges a mere statutory violation rather than a violation of applicant's fundamental or constitutional rights, this Court further concludes that, in any event, applicant's complaint is procedurally barred. This Court's plurality's rationale for applying a procedural bar to this case is that, because applicant could have complained about the cumulation order on direct appeal but he did not, he may not now present this complaint for habeas relief. Although I acknowledge the general principle in our habeas law that prohibits consideration of a claim on post-conviction review if the applicant had the opportunity to raise the issue on appeal, I disagree

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[4] Applicant has asserted that he is unlawfully confined due to the improper cumulation order. Although he has not expressly framed his challenge as a constitutional violation, this Court is obligated to construe *pro se* habeas pleadings liberally so that the right to relief is not unjustly forfeited. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam); *Franklin v. Rose*, 765 F.2d 82, 85 (6th Cir. 1985) ("The allegations of a pro se habeas petition, though vague and conclusory, are entitled to a liberal construction.").

with the application of that general principle to this type of complaint. I explain my reasoning by reviewing the general principle governing the application of a procedural bar to a habeas complaint. I then discuss the basis for my conclusion that this general principle was misapplied by this Court in *Ex parte Townsend* to an improper cumulation order when instead this Court should have applied the exception to the general rule in that case, as it should here. After that, I demonstrate that, rather than provide inconsistent claim-by-claim exceptions to the general rule that a habeas complaint is lost if it could have been raised on direct appeal but was not raised at that juncture, as this Court's precedent does now, we should instead provide a more equitable and consistent approach to determining procedural default on habeas by looking to the escalating category-of-rights framework used to evaluate the requirements for preservation of error at trial. That framework will provide general guidance and a more consistent approach to deciding which rights may be lost on habeas due to inaction on direct appeal and which rights may never be lost. Ultimately, here I conclude that applicant did not waive his right to concurrent sentencing and thus his habeas complaint should not be procedurally barred in the instant proceeding.

1. General Principles Underlying Procedural Bar in Habeas Context

This Court denies habeas relief to applicant, not because he is wrong about the merits of his challenge, but instead because this Court decides that he should have raised his complaint before now by presenting it on direct appeal. The underlying rationale for applying a procedural bar to claims that are raised on habeas when the defendant has failed

to assert his rights on appeal is to disallow habeas proceedings to operate as a substitute for appellate proceedings. *See Ex parte Nelson*, 137 S.W.3d 666, 667 (Tex. Crim. App. 2004) ("We have said countless times that habeas corpus cannot be used as a substitute for appeal, and that it may not be used to bring claims that could have been brought on appeal."). In short, this Court holds that, because direct-appeal counsel could have challenged the improper cumulation order on direct appeal but he did not, that inaction on appeal forfeits applicant's right to challenge the cumulation order through a habeas application.

Although this Court has historically noted the general concept that a habeas writ is an extraordinary remedy that cannot be used as a substitute for appeal,[5] we have never applied that rule literally and across-the-board in all contexts. Under this Court's existing precedent, the general rule—if a complaint was available to be raised on direct appeal, then an applicant must complain about that matter at that juncture, and he loses the right to complain about it on habeas if he has not done that—is far from absolute. If the rule was absolute, then habeas relief would be limited to rare cases in which it was impossible for an appellate attorney to have obtained relief. Even jurisdictional challenges and all constitutional challenges would

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See Ex parte Groves, 571 S.W.2d 888, 890 (Tex. Crim. App. 1978) ("Habeas corpus is an extraordinary remedy; and, ordinarily, neither a trial court nor this Court, either in the exercise of our original or appellate jurisdiction, should entertain an application for writ of habeas corpus where there is an adequate remedy at law. . . . Moreover, we have consistently held that habeas corpus will not lie as a substitute for an appeal. However, these rules are not absolute."); *see also Ex parte Wilcox*, 79 S.W.2d 321, 321 (Tex. Crim. App. 1935) ("Habeas corpus is an extraordinary writ, and the general rule is that it does not lie where relief may be had, or could have been procured by resort to another remedy.").

be forever lost whenever an appellate attorney could have obtained relief. Yet, this Court permits habeas relief in some such cases under our existing precedent. *See, e.g., Ex parte Moss*, 446 S.W.3d 786, 788 (Tex. Crim. App. 2014) (discussing availability of jurisdictional claims on habeas); *Ex parte Rich*, 194 S.W.3d 508, 511 (Tex. Crim. App. 2006) (discussing availability of illegal-sentence claim on habeas which can be "raised at any time"); *Ex parte Denton*, 399 S.W.3d 540, 544 (Tex. Crim. App. 2013) (discussing availability of some double-jeopardy claims on habeas and stating that, "[b]ecause of the fundamental nature of the double-jeopardy protections, a double-jeopardy claim may be raised for the first time on appeal or on collateral attack" under certain conditions) (citing *Langs v. State*, 183 S.W.3d 680, 687 (Tex. Crim. App. 2006); *Gonzalez v. State*, 8 S.W.3d 640, 643 (Tex. Crim. App. 2000)). Thus, although this Court suggests that even constitutional claims may be lost under the general rule that requires an applicant to have asserted his complaint on direct appeal if he had the opportunity to do so, in practice we do not apply that rule to all constitutional claims, and we are inconsistent about which constitutional claims may be lost under that rationale.

In the instant situation that pertains to a clearly unauthorized cumulation order, I would hold that, as with some other types of constitutional claims, this type of claim properly falls under the exception to the general rule and, therefore, habeas relief for this type of claim is not procedurally barred even when it could have been but was not raised on direct appeal. As I have explained above, the trial court had no discretion to order consecutive sentences

here, and the trial judge's arbitrary disregard of applicant's right to concurrent sentences rises to the level of a due process violation. *See Toney*, 79 F.3d at 699-700. Because this case involves a constitutional violation that actually extends the amount of time that applicant will spend in prison, this is the type of weighty circumstance that would justify an exception to the normal rule that record-based claims may not be litigated on habeas. In my view, to apply a procedural bar under such circumstances places form over function to such a degree that it completely undermines the nature and purpose of post-conviction habeas relief to provide a remedy for unlawful confinement. *See Kerr*, 64 S.W.3d at 419. Moreover, I cannot see that the State has any legitimate interest in applicant remaining incarcerated for an additional five years beyond what Texas law clearly permits. *See Denton*, 399 S.W.3d at 545 (in the course of explaining why some double-jeopardy claims are cognizable on habeas, observing that the State has "no legitimate interest in maintaining a conviction when it is clear on the face of the record that the conviction was obtained in contravention of constitutional double-jeopardy protections"). Under a proper view of this Court's precedent, therefore, this Court should apply the exception to the general rule and permit habeas relief for a clearly improper cumulation order, even when appellate counsel failed to present that issue on direct appeal. This Court denies relief by applying the precedent of a case that in my view was wrongly decided, so I address that decision next.

2. *Ex parte Townsend* Should Be Abrogated

In applying a procedural bar to this case, this Court relies on the general principles

discussed above, which were applied to a defendant in the context of a wrongful cumulation order in *Ex parte Townsend*, in which this Court denied relief to Townsend. 137 S.W.3d 79, 81-82 (Tex. Crim. App. 2004). I conclude that *Townsend*'s application of that general theory in the context of a wrongful cumulation order was erroneous and that this Court's plurality opinion errs by continuing to rely on *Townsend* as its support for denying habeas relief through the application of a procedural bar based on his failure to assert this complaint on direct appeal. Although I agree with this Court's plurality opinion to the extent that it holds that an appellate complaint about a wrongful cumulation order is a waivable-only right that may not be forfeited or lost on appeal by inaction at trial, I disagree with this Court's opinion to the extent that it holds that a habeas complaint about a wrongful cumulation order may be forfeited or lost on habeas by inaction on appeal. I would hold that, in accordance with the category-of-error framework that this Court has set forth to resolve preservation requirements for trial errors on appeal, this type of complaint may not be forfeited or lost on habeas in an initial application by inaction on direct appeal and that it may be raised in the first instance on habeas. To explain my analysis, I review (a) *Townsend*'s application of a procedural bar based on inaction on direct appeal to a habeas complaint about a wrongful cumulation order, (b) the category-of-error framework that this Court has created to resolve preservation requirements for trial errors on appeal, and (c) the reasons why this Court's jurisprudence would benefit from harmonizing *Townsend* with the category-of-error framework so that rights that are determined to be either waivable-only or non-waivable under that framework

are not forfeited on habeas by mere inaction on appeal.

a. This Court's Precedent in *Ex parte Townsend*

In *Townsend*, this Court held that, "when a defendant has an adequate remedy at law, the merits of his claim may not be reviewed on application for a writ of habeas corpus." *Townsend,* 137 S.W.3d at 81-82. Townsend had pleaded guilty to a drug offense and was sentenced to ten years' imprisonment, but, as an alternative to prison, he was sent to the Texas Department of Criminal Justice Special Alternative Incarceration Program ("Boot Camp"). *Id.* at 80. After Townsend's successful completion of boot camp, the trial court suspended the remainder of his sentence and placed him on probation. *Id*. Around one year after being placed on probation, Townsend was convicted of murder and sentenced to sixty years' imprisonment. *Id*. The trial court also revoked his probation and imposed the previously suspended ten-year sentence. *Id*. The trial court issued a cumulation order that resulted in the ten-year drug sentence being stacked on the sixty-year murder sentence. *Id*.

On post-conviction habeas review, this Court denied Townsend's claim that the cumulation order was improper. *Id.* Although it found that entering a cumulation order to stack a sentence that Townsend had already begun serving violated constitutional protections against double punishments for the same offense, this Court concluded that Townsend was barred from obtaining relief on habeas because he had failed to raise the issue on appeal. *Id*. at 81-82. This Court explained that there "was nothing to prevent [Townsend] from raising this claim on direct appeal." *Id*. at 81. This Court noted that "[t]he Great Writ should not

be used in matters that should have been raised on appeal" and that "[e]ven a constitutional claim is forfeited if the applicant had the opportunity to raise the issue on appeal." *Id*. Thus, because Townsend had an adequate remedy at law by way of direct appeal and failed to avail himself of that remedy, the extraordinary remedy of habeas was unavailable. *Id*. at 81-82.

b. This Court's Category-of-Error Framework is Instructive

This Court's plurality opinion describes a defendant's right to concurrent sentencing under Section 3.03 as a "waiver-only right"—that is, it is a right that must be implemented unless affirmatively waived by a defendant. *See Ex parte McJunkins*, 954 S.W.2d 39, 40-41 (Tex. Crim. App. 1997) (op. on reh'g); *Marin v. State*, 851 S.W.2d 275, 278-80 (Tex. Crim. App. 1993). I agree with that assessment and that it is proper to consider the category-of-error framework in *Marin v. State* as a basis for discerning the type of right at issue in a habeas complaint. *Marin*, 851 S.W.2d at 278-80. In *Marin*, this Court described three categories of rights: (1) absolute systemic requirements and prohibitions that are nonwaivable, (2) rights of litigants that must be implemented unless expressly waived, and (3) rights that must be insisted upon at trial or, otherwise, nothing is presented for review. *Id.* at 279. The *Marin* court described rights that are waivable only as rights which "cannot be made subject to rules of procedural default because, by definition, they are not forfeitable." *Id.* This Court further described waivable-only rights by stating, "Although a litigant might give [waivable rights] up and indeed, has a right to do so, he is never deemed to have done so in fact unless he says so plainly, freely, and intelligently, sometimes in

writing and always on the record." *Id*. at 280. Furthermore, *Marin* noted that, as a consequence, "failure of the judge to implement [waivable-only rights] at trial is error which might be urged on appeal whether or not it was first urged in the trial court." *Id*.

Although it has discussed *Marin*'s category-of-rights framework to explain why applicant's appellate counsel could have and should have complained on appeal about the wrongful cumulation order despite trial counsel's failure to preserve that complaint for appeal, this Court's plurality opinion then ignores that framework for purposes of procedural default on habeas. This is where I part with this Court's decision in this case. I would apply the *Marin* category-of-rights framework to applicant's complaint about the improper cumulation order and determine that his complaint is not subject to a procedural bar in this case. Furthermore, because it conflicts with this approach as to improper cumulation orders, I would overrule *Townsend*.

Townsend determined that a *Marin* category-two waiver-only right was forfeited on habeas by mere inaction on direct appeal. The implication from this Court's holding in *Townsend* is that rights that are category-two, waiver-only rights on direct appeal are treated the same as mere category-three forfeitable rights on habeas—both are subject to procedural default if they are not vindicated on direct appeal. In fact, because *Townsend* simply recited the general rule of procedural default on habeas without acknowledging that there are exceptions to that rule, *Townsend* gave the appearance that there are no exceptions to the application of a procedural bar on habeas based on the failure to present an issue on direct

appeal—and this would include even category-one rights that may not be waived or forfeited, and category-two waivable-only rights, as here. I conclude that *Townsend*'s failure to exempt those rights from the rule of procedural default on habeas makes it incompatible with the suggestion in *Marin* that, because of the very nature and importance of the rights at stake, category-two rights, for example, could not be forfeited by mere inaction. *Compare Townsend,* 137 S.W.3d at 81-82, *with Marin*, 851 S.W.2d at 279-80. For this reason, I conclude that *Townsend* was wrongly decided. Furthermore, in practice, I observe that this Court has inconsistently and without explanation permitted exceptions to the general rule that bars consideration of a claim on habeas if it could have been raised on direct appeal, but we have not clearly explained our rationale for applying an exception rather than the general rule. I, therefore, propose that this Court provide some consistency to our jurisprudence for habeas cases by applying the *Marin* category-of-rights framework to provide a general outline for the application of procedural bars in habeas cases.

c. This Court's Jurisprudence Should Be Harmonized

In general, I would seek to adopt a system that harmonizes the *Marin* framework with this Court's jurisprudence with respect to procedural default in the habeas-corpus context. Thus, in general, for cognizable habeas corpus matters that implicate category-three forfeitable rights, a defendant's failure to complain at trial or on appeal would result in a procedural bar against habeas relief. But, for matters that implicate category-two waivable-only rights, I would hold that a defendant's failure to complain at trial or on appeal does not

result in a procedural bar against habeas relief, unless the record shows that a defendant has intentionally or knowingly waived those rights at trial or on appeal. Furthermore, for cognizable habeas matters that are category-one rights, there would never be a procedural bar to habeas relief in an initial application.

Although I recognize that *Marin* was a case addressing preservation of error on direct appeal whereas *Townsend* was a case addressing the cognizability of claims on habeas, I conclude that the reasoning of *Marin* applies equally in the habeas context. In *Marin* this Court explained, while addressing category-two rights, that "[s]ome rights are widely considered so fundamental to the proper functioning of our adjudicatory process as to enjoy special protection in the system. A principle characteristic of these rights is that they cannot be forfeited. That is to say, they are not extinguished by inaction alone." 851 S.W.2d at 278. Given that these rights are so important as to not be subject to forfeiture on direct appeal, it appears to me that this same rationale should apply in the habeas corpus context—the right is too important to be subject to forfeiture on habeas due to inaction on direct appeal. I further note that this Court has recently acknowledged that principles for error preservation on appeal and on collateral review are substantially overlapping, and the preservation "requirement in each context informs the other." *Garza v. State*, 435 S.W.3d 258, 261 (Tex. Crim. App. 2014). In view of this trend in our habeas jurisprudence, I would adopt a system that expressly harmonizes the principles of procedural default on direct appeal and on habeas by holding that category one and two rights are not subject to procedural forfeiture in either

type of proceeding.

In sum, by generally applying the *Marin* framework in accordance with the category of rights that are implicated in a request for habeas relief, I would hold that this Court may apply a procedural bar to category-three rights and to category-two rights that are waived by litigants. This framework, as generally implemented in habeas cases, will provide more consistency in the resolution of these complaints. More importantly, this framework will ensure that category-one rights and non-waived category-two rights that are cognizable for habeas relief will not be forfeited by mere inaction by a defendant or his counsel, and thus this will ensure more just outcomes and better effectuate the Texas constitutional right of habeas corpus.

3. Applicant Did Not Waive His Right to Concurrent Sentencing

The record in this case establishes that this applicant did not waive his right to concurrent sentencing, and thus, as discussed above, I would hold that he cannot forfeit the right to complain about the consecutive sentencing in this habeas litigation merely by his inaction on direct appeal. The fact that another defendant could theoretically have waived his right to concurrent sentences is factually immaterial to this case. *See McJunkins*, 954 S.W.2d at 40. That some theoretical defendant might agree to waive his right to concurrent sentencing is not a reason to deprive applicant of his right to habeas relief under these circumstances in which he did not enter into any such agreement and thus is being unlawfully confined pursuant to the improper cumulation order which, as discussed above, rises to the

level of a violation of his due process rights. I, therefore, would hold that habeas relief may not be denied in this case by the application of a procedural bar.

II. Alternatively, Ineffective Assistance of Counsel Ground Should Be Remanded

An alternative and perhaps simpler way to resolve this case is by considering applicant's pro se pleadings that complain about ineffective assistance of counsel as to trial and appellate counsel's failure to challenge the cumulation order at trial and on appeal, and by remanding that ground for evidentiary development in the habeas court.[6] Under this alternative resolution of the instant claims, I would remand applicant's case to the habeas court for evidentiary development and findings and conclusions as to those claims.

A review of three pleadings filed by applicant, when examined together, clearly reveal that his intent is to present a habeas ground for relief on the basis that trial and appellate counsel were ineffective by failing to challenge the cumulation order. First, in his initial habeas application, in addition to complaining about the cumulation order itself, applicant generally complained about trial counsel's deficient performance by asserting that counsel, for example, failed to explain the punishment range to him and that this prejudiced him by the imposition of harsher punishment.[7] After his initial habeas application was filed,

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Applicant has represented himself pro se throughout this habeas litigation, which has included the filing of his application, his responses to the State's initial proposed findings, the habeas court's proceedings on remand as to the cumulation order, and his objections to factual findings and conclusions of law by that court. Applicant is confined in prison, presumably with limited access to legal resources, such a prison law library.

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Applicant pleaded an ineffective assistance of counsel complaint asserting multiple theories, including his assertion that he did not understand that the punishment range had changed without

applicant responded to the initial State's Proposed Findings of Fact and Conclusions of Law. Applicant elaborated in that filing that his ineffective-assistance claim should be construed as including a challenge to trial and appellate counsel's failure to raise the improper cumulation order at trial and on direct appeal.[8] Third, although this Court's remand order had not asked the habeas court to address the merits of applicant's complaint as to the ineffectiveness of counsel in failing to challenge the cumulation order, the State and the habeas court volunteered their assessment of applicant's pleadings with respect to that matter. They opined that he had not presented that complaint in the context of counsel's performance regarding the cumulation order. Applicant responded by re-urging his objection specifying that appellate counsel's performance "fell below a minimal tactic that could have given relief

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notice, that he was not provided notice and an opportunity to be heard concerning the harsher punishment range, that counsel led him to believe that he would be sentenced to fewer than eighteen years in prison, that counsel "failed to preserve egregious errors into the record [and] further denied [applicant] meaningful effective assistance," that counsel failed to timely file a motion for new trial and thus "denied [applicant the] opportunity to develop the record that would have shown counsel's gross ineffectiveness," and that, "by [counsel's] bad acts and willful omissions is proximate causing [sic] [applicant] to be illegally restrained of his rights by the State's use of a void judgment."

[8] Regarding the performance of appellate counsel with respect to the cumulation order, applicant stated that appellate counsel "failed to secure or petition the courts to any errors found in the records and have them properly to be ruled on by the court of criminal appeals therefore neglecting [his] constitutional rights." With respect to the suggestion that his claim should be barred because he had an adequate remedy on appeal, applicant stated, "At no point and time was [applicant] aware of other avenues for an adequate remedy. Trial counsel and appellate counsel failed short in the duties for any proper resolutions in formality. Therefore blindly leading [applicant] into harmful acts." With respect to the suggestion that his pleadings failed to allege ineffectiveness of trial or appellate counsel based on counsel's failure to challenge the stacking order at trial or on appeal, applicant stated, "Being unlearned in the law [applicant] was unaware of all allegations to bring forth otherwise would have done so and at this time request that relief be granted of this cumulated sentences if solely this be the only relief possible."

in these cumulated sentences, but failed to do so, and causing harm" to applicant. He further re-urged his request that "relief be given in this case of cumulated sentences. Due, to the ineffectiveness of both trial and appellate counsels incompetence in this case."

Given that the State has essentially conceded that applicant's cumulation order is improper, and given that this pro se applicant has adequately argued that trial and appellate counsel were ineffective by failing to challenge the cumulation order, this Court should remand his habeas complaint as to counsel's ineffectiveness to permit him to provide evidence supporting his complaint. Under these circumstances, I would hold that the pro se pleadings and the record of this case give rise to a colorable claim of ineffective assistance of both trial and appellate counsel as to their failure to contest the cumulation order, and I would accordingly remand the case for further proceedings as to those claims.

III. Conclusion

It is undisputed that the cumulation order in this case was invalid and that, unless this Court grants habeas relief, applicant will spend an additional five years in prison beyond what the law permits based on the trial court's arbitrary disregard of the mandatory concurrent sentencing scheme that applies to the circumstances of this case. As to the merits of applicant's complaint about the wrongful cumulation order, I conclude that (1) his request constitutes a cognizable basis for habeas relief due to his illegal confinement that is the result of the unlawful cumulation order that violates his due process rights, and (2) his request for habeas relief is not procedurally barred because his challenge to the cumulation order was

not waived by him and this is a right that may not be forfeited by mere inaction. Alternatively, as to applicant's complaint about ineffective assistance of trial and appellate counsel for failing to challenge the cumulation order, I would hold that, liberally construing his pro se pleadings and filings, he has asserted that challenge and this Court should remand it to the habeas court for evidentiary development. Because either alternative would be a more appropriate and just outcome in this case than this Court's denial of relief, I respectfully dissent.

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