# IN THE COURT OF CRIMINAL APPEALS OF TEXAS

**NO. AP-77,096**

**LUCKY WARD, Appellant**

**v.**

**THE STATE OF TEXAS**

**ON DIRECT APPEAL FROM THE TRIAL COURT'S DENIAL OF AN APPLICATION FOR A PRETRIAL WRIT OF HABEAS CORPUS AND MOTION FOR STAY FILED IN CAUSE NO. 1297205 IN THE 183RD JUDICIAL DISTRICT COURT HARRIS COUNTY**

***Per curiam.***

**O P I N I O N**

On March 30, 2020, we received appellant's notice of appeal from the trial court's denial of a pretrial writ of habeas corpus and motion for stay of trial. The notice of appeal indicates that appellant stands charged by indictment with capital murder in the 183rd District Court and the State is seeking a sentence of death. The notice states that appellant's pretrial writ of habeas corpus challenged the constitutionality of Code of Criminal Procedure Article

37.071, § 2(b)(1) (the future dangerousness special issue), "on its face."[1]

On February 17, 2020, before swearing in the jury, the district court denied appellant's writ and request for a stay of his trial. That same day, appellant filed his notice of appeal in the Harris County District Clerk's office. *See* TEX. R. APP. P. 25.2 (b), (c) (providing that "appeal is perfected by timely filing a sufficient notice of appeal" which is "in writing and filed with the trial court clerk"). On February 27, 2020, the district court certified appellant's right to appeal. *See id.* at (d) ("If the defendant is the appellant, the record must include the trial court's certification of the defendant's right of appeal[.]").

A defendant who has been confined after indictment for a felony offense—but not yet finally convicted—may file a writ of habeas corpus in the district court pursuant to Article 11.08. *See* Art. 11.08; *see also* TEX. CONST. art. V, § 8 (stating that district judges "have the power to issue writs necessary to enforce their jurisdiction"); *Jordan v. State*, 54 S.W.3d 783, 786 (Tex. Crim. App. 2001) ("A writ of habeas corpus may be filed under Article 11.08 or 11.09 even though a person has not been finally convicted of an offense."). If a trial court denies relief on the merits, the defendant may file an interlocutory appeal. *Ex parte McCullough*, 966 S.W.2d 529, 531 (Tex. Crim. App. 1998).[2] The trial court clerk must then "prepare and certify the clerk's record and . . . send the clerk's record . . . to the appellate court within 15 days after the notice of appeal is filed." TEX. R. APP. P. 31.1.

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[1] Unless otherwise indicated, any reference to "articles" is to the Texas Code of Criminal Procedure.

[2] Whether an appellant's "grounds for relief are cognizable is another matter." *Id.*

The Texas Constitution controls where such an appeal should be filed: "The appeal of all cases in which the death penalty *has been assessed* shall be to the Court of Criminal Appeals. The appeal of *all other criminal cases* shall be to the Courts of Appeal as prescribed by law." TEX. CONST. Art. V, § 5(b) (emphasis added). We have held that this language creates a "jurisdictional distinction" based on whether the "death penalty has been assessed." *See Sisk v. State*, 131 S.W.3d 492, 497 (Tex. Crim. App. 2004). Thus, though an intermediate court of appeals may have jurisdiction over a properly filed appeal of the denial of a capital murder defendant's pretrial writ, this Court does not.[3]

The record before us shows that, when appellant filed his pretrial writ, he had been indicted for capital murder but not sentenced to death. This Court does not have jurisdiction over this appeal. Therefore, the appeal is dismissed.

Delivered: June 17, 2020
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[3] *But see* TEX. R. APP. P. 68.1 ("On petition by any party, the Court of Criminal Appeals may review a court of appeals' decision in a criminal case.").