

By: Gallego

H.B. No. 1734

A BILL TO BE ENTITLED

AN ACT

1
2 relating to representation of applicants for writs of habeas corpus
3 in cases involving the death penalty.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

5 SECTION 1. Section 2, Article 11.071, Code of Criminal
6 Procedure, is amended to read as follows:

7 Sec. 2. REPRESENTATION BY COUNSEL. (a) An applicant shall
8 be represented by competent counsel unless the applicant has
9 elected to proceed pro se and the convicting trial court finds,
10 after a hearing on the record, that the applicant's election is
11 intelligent and voluntary. An attorney appointed or employed as
12 counsel under this section shall perform all duties required of
13 counsel under this article.

14 (b) If a defendant is sentenced to death the convicting
15 court, immediately after judgment is entered under Article 42.01,
16 shall determine if the defendant is indigent and, if so, whether the
17 defendant desires appointment of counsel for the purpose of a writ
18 of habeas corpus. If the defendant is indigent and requests the
19 convicting court to provide two attorneys to represent the
20 defendant, the court shall provide to the defendant a lead attorney
21 and a second chair attorney.

22 (c) A statewide professional association of criminal
23 defense attorneys that is authorized to receive grants under
24 Section 56.003(f), Government Code, and whose members regularly

1 represent indigent defendants in criminal matters shall establish a
2 death row representation committee to create and maintain a list of
3 attorneys approved for appointment under this section. The
4 committee shall review and update the list of attorneys at least
5 quarterly.

6 (d) At the earliest practical time, but in no event later
7 than 30 days, after the convicting court makes the findings
8 required under Subsections (a) and (b), the convicting court shall
9 appoint competent counsel from the list of attorneys maintained
10 under Subsection (c), unless the applicant elects to proceed pro se
11 or is represented by retained counsel. On appointing counsel under
12 this section, the convicting court shall immediately notify the
13 court of criminal appeals and the death row representation review
14 committee of the appointment, including in the notice a copy of the
15 judgment and the name, address, and telephone number of the
16 appointed counsel or counsels.

17 [~~(d) The court of criminal appeals shall adopt rules for the~~
18 ~~appointment of attorneys as counsel under this section and the~~
19 ~~convicting court may appoint an attorney as counsel under this~~
20 ~~section only if the appointment is approved by the court of criminal~~
21 ~~appeals in any manner provided by those rules.]~~

22 (e) If the court of criminal appeals denies an applicant
23 relief under this article, an attorney appointed under this section
24 to represent the applicant shall, not later than the 15th day after
25 the date the court of criminal appeals denies relief or, if the case
26 is filed and set for submission, the 15th day after the date the
27 court of criminal appeals issues a mandate on the initial

1 application for a writ of habeas corpus under this article, move to
2 be appointed as counsel in federal habeas review under 21 U.S.C.
3 Section 848(q) or equivalent provision or, if necessary, move for
4 the appointment of other counsel under 21 U.S.C. Section 848(q) or
5 equivalent provision. The attorney shall immediately file a copy
6 of the motion with the court of criminal appeals and the death row
7 representation review committee, and if the attorney fails to do
8 so, the court may take any action to ensure that the applicant's
9 right to federal habeas review is protected, including initiating
10 contempt proceedings against the attorney.

11 (f) The convicting court shall reasonably compensate an
12 attorney appointed under this section as provided by Section 2A.

13 (g) An attorney appointed under this section shall inform
14 the applicant of the status of proceedings under this article, and
15 on request shall provide to the applicant a copy of the application.

16 SECTION 2. Section 2A, Article 11.071, Code of Criminal
17 Procedure, is amended to read as follows:

18 Sec. 2A. STATE REIMBURSEMENT; COUNTY OBLIGATION. (a) The
19 state shall reimburse a county for compensation of counsel under
20 Section 2 and payment of expenses under Section 3. The total amount
21 of reimbursement to which a county is entitled under this section
22 for an application under this article may not exceed \$50,000
23 [~~\$25,000~~]. Compensation and expenses in excess of the \$50,000
24 [~~\$25,000~~] reimbursement provided by the state are the obligation of
25 the county.

26 (b) A convicting court seeking reimbursement for a county
27 shall certify to the comptroller of public accounts the amount of

1 compensation that the county is entitled to receive under this
2 section. The comptroller of public accounts shall issue a warrant
3 to the county in the amount certified by the convicting court, not
4 to exceed \$50,000 [~~\$25,000~~].

5 (c) The county shall reimburse an attorney for all time and
6 expenses reasonably necessary for the competent representation of
7 the applicant. If an attorney requests from the county
8 reimbursement for time and expenses [~~The limitation imposed by this~~
9 ~~section on the reimbursement by the state to a county for~~
10 ~~compensation of counsel and payment of reasonable expenses does not~~
11 ~~prohibit a county from compensating counsel and reimbursing~~
12 ~~expenses~~] in an amount that is in excess of the amount the county
13 receives from the state as reimbursement, the county shall
14 reimburse the attorney for the amount requested unless the court
15 makes a finding of fact that the amount sought is unreasonable [~~and~~
16 ~~a county is specifically granted discretion by this subsection to~~
17 ~~make payments in excess of the state reimbursement~~].

18 SECTION 3. Section 3(b), Article 11.071, Code of Criminal
19 Procedure, is amended to read as follows:

20 (b) Not later than the 30th day before the date the
21 application for a writ of habeas corpus is filed with the convicting
22 court, counsel may file with the convicting court an ex parte,
23 verified, and confidential request for prepayment of expenses,
24 including expert fees, to investigate and present potential habeas
25 corpus claims. The court shall authorize the prepayment of
26 expenses on finding that the expenses are reasonably necessary for
27 the development or investigation of a potential habeas corpus claim

1 ~~[The request for expenses must state:~~

2 ~~(1) the claims of the application to be investigated;~~

3 ~~(2) specific facts that suggest that a claim of~~
4 ~~possible merit may exist; and~~

5 ~~(3) an itemized list of anticipated expenses for each~~
6 ~~claim].~~

7 SECTION 4. Section 5, Article 11.071, Code of Criminal
8 Procedure, is amended by amending Subsections (a) and (b) and
9 adding Subsections (g) and (h) to read as follows:

10 (a) If a subsequent application for a writ of habeas corpus
11 is filed after filing an initial application, a court may not
12 consider the merits of or grant relief based on the subsequent
13 application unless the application contains sufficient specific
14 facts establishing that:

15 (1) the current claims and issues have not been and
16 could not have been presented previously in a timely initial
17 application or in a previously considered application filed under
18 this article or Article 11.07 because the factual or meritorious
19 legal basis for the claim was unavailable on the date the applicant
20 filed the previous application;

21 (2) by a preponderance of the evidence, but for a
22 violation of the United States Constitution no rational juror could
23 have found the applicant guilty beyond a reasonable doubt; ~~[or]~~

24 (3) by clear and convincing evidence, but for a
25 violation of the United States Constitution no rational juror would
26 have answered in the state's favor one or more of the special issues
27 that were submitted to the jury in the applicant's trial under

1 Article 37.071 or 37.0711; or

2 (4) by clear and convincing evidence, the current
3 claims or issues were not raised previously in a timely initial
4 application under this article because the applicant was not
5 represented by competent counsel in filing the previous
6 application.

7 (b) If the convicting court receives a subsequent
8 application asserting specific facts establishing justifications
9 described by Subsection (a)(1), (2), or (3), the clerk of the court
10 shall:

11 (1) attach a notation that the application is a
12 subsequent application;

13 (2) assign to the case a file number that is ancillary
14 to that of the conviction being challenged; and

15 (3) immediately send to the court of criminal appeals
16 a copy of:

17 (A) the application;

18 (B) the notation;

19 (C) the order scheduling the applicant's
20 execution, if scheduled; and

21 (D) any order the judge of the convicting court
22 directs to be attached to the application.

23 (g) A subsequent application for a writ of habeas corpus
24 asserting specific facts establishing justifications described by
25 Subsection (a)(4), returnable to the court of criminal appeals,
26 must be filed in the convicting court not later than the 60th day
27 after the date on which the federal court of appeals denies the

1 applicant relief. The convicting court shall dismiss as an abuse of
2 writ an application filed later than the 60th day after the denial
3 of relief.

4 (h) An applicant may make a prima facie showing of
5 justifications described by Subsection (a)(4) by establishing that
6 the attorney in the initial application for a writ of habeas corpus
7 under this article failed:

8 (1) to properly investigate the factual and legal
9 grounds for the filing of an application for a writ of habeas
10 corpus; or

11 (2) for reasons other than exercising reasonable
12 professional judgment, to exercise due diligence in properly
13 raising and presenting to the convicting court material and
14 cognizable claims that were available in the applicant's case and
15 the proper factual support for those claims.

16 SECTION 5. Section 6, Article 11.071, Code of Criminal
17 Procedure, is amended by adding Subsection (b-1) to read as
18 follows:

19 (b-1) If the convicting court receives notice that the
20 requirements of Section 5(a)(1), (2), or (3) for consideration of a
21 subsequent application have been met, the convicting court shall
22 appoint counsel and provide for the compensation for time
23 previously spent and reimbursement of expenses previously incurred
24 in the same manner as is provided by Sections 2A and 3, regardless
25 of whether the subsequent application is ultimately dismissed.

26 SECTION 6. Section 8(c), Article 11.071, Code of Criminal
27 Procedure, is amended to read as follows:

1 (c) After argument of counsel, if requested by the court,
2 the convicting court, without the assistance of either party, shall
3 make appropriate written findings of fact and conclusions of law
4 not later than the 15th day after the date the parties filed
5 proposed findings or not later than the 45th day after the date the
6 court's determination is made under Subsection (a), whichever
7 occurs first.

8 SECTION 7. Section 9(e), Article 11.071, Code of Criminal
9 Procedure, is amended to read as follows:

10 (e) The parties shall file proposed findings of fact and
11 conclusions of law for the convicting court to consider on or before
12 a date set by the court that is not later than the 30th day after the
13 date the transcript is filed. If the court requests argument of
14 counsel, after argument the court shall, without the assistance of
15 either party, make written findings of fact that are necessary to
16 resolve the previously unresolved facts and make conclusions of law
17 not later than the 15th day after the date the parties file proposed
18 findings or not later than the 45th day after the date the court
19 reporter files the transcript, whichever occurs first.

20 SECTION 8. (a) The statewide association of criminal
21 defense attorneys described by Section 2, Article 11.071, Code of
22 Criminal Procedure, as amended by this Act, shall establish a death
23 row representation committee not later than October 1, 2003, and
24 the death row representation committee shall create an attorney
25 appointment list, as required by Section 2, Article 11.071, not
26 later than January 1, 2004.

27 (b) The change in law made by this Act applies to an initial

1 or subsequent application for a writ of habeas corpus filed on or
2 after January 1, 2004. An application filed before January 1, 2004,
3 is covered by the law in effect when the application was filed, and
4 the former law is continued in effect for this purpose.

5 SECTION 9. This Act takes effect September 1, 2003.