

By: Ellis, et al.

S.B. No. 1224

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. Subsections (a), (c), and (d), Section 2,
6 Article 11.071, Code of Criminal Procedure, are amended to read as
7 follows:

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

16 (c) At the earliest practical time, but in no event later
17 than 30 days, after the convicting court makes the findings
18 required under Subsections (a) and (b), the convicting court shall
19 appoint competent counsel from the list of qualified attorneys
20 maintained under Subsection (d), unless the applicant elects to
21 proceed pro se or is represented by retained counsel. The
22 convicting court may also appoint an attorney to assist an attorney
23 appointed as lead counsel in the case. On appointing counsel under
24 this section, the convicting court shall immediately notify the

1 court of criminal appeals of the appointment, including in the
2 notice a copy of the judgment and the name, address, and telephone
3 number of the appointed counsel.

4 (d)(1) The Task Force on Indigent Defense [~~court of criminal~~
5 ~~appeals~~] shall adopt standards [~~rules~~] for the appointment of
6 attorneys as counsel under this section, compile and maintain a
7 list of attorneys qualified for appointment, and make the list
8 available to convicting courts [~~and the convicting court may~~
9 ~~appoint an attorney as counsel under this section only if the~~
10 ~~appointment is approved by the court of criminal appeals in any~~
11 ~~manner provided by those rules~~].

12 (2) In adopting the standards required by Subdivision
13 (1), the Task Force on Indigent Defense shall establish minimums
14 for:

15 (A) years of practice;

16 (B) proficiency and commitment to providing
17 quality representation to defendants or applicants seeking relief
18 in death penalty cases;

19 (C) experience in trial, appellate, or habeas
20 corpus proceedings for offenses punished as capital felonies;

21 (D) participation in continuing legal education
22 courses or other training relating to criminal defense or habeas
23 corpus proceedings in capital cases; and

24 (E) permissible history relating to:

25 (i) previous instances of having been found
26 to have rendered ineffective assistance of counsel during the trial
27 or appeal of any felony case; and

1 (ii) disciplinary proceedings before the
2 State Bar of Texas or an equivalent body in another state.

3 (3) The Task Force on Indigent Defense shall adopt a
4 procedure that permits placing on the list of qualified attorneys
5 an attorney who does not meet all requirements of this subsection,
6 but only if the task force determines that the attorney possesses
7 background, knowledge, or experience that would enable the attorney
8 to properly represent an applicant, with due consideration to the
9 seriousness of the possible punishment and the unique and complex
10 nature of the litigation.

11 (4) The convicting court may not appoint an attorney
12 as counsel under this section if the attorney represented the
13 applicant at trial or on direct appeal, unless:

14 (A) the applicant and the attorney request the
15 appointment on the record; and

16 (B) the court finds good cause to make the
17 appointment.

18 SECTION 2. Section 2A, Article 11.071, Code of Criminal
19 Procedure, is amended by adding Subsection (d) to read as follows:

20 (d)(1) Payment may not be made under Subsection (c) until a
21 statement itemizing the services performed is submitted to the
22 convicting court and the convicting court approves the payment. If
23 the convicting court disapproves the amount requested for payment,
24 the convicting court shall enter a finding in writing stating the
25 amount of payment that the court approves and the reason for
26 approving a different amount than the amount requested. If a
27 convicting court approves a payment or disapproves a payment and

1 the attorney does not within three days of notice of the disapproval
2 file an appeal of the disapproval under Subdivision (2), the
3 commissioners court of the county shall pay the amount approved by
4 the convicting court. Payment must be made under this subdivision
5 not later than the 45th day after the date the convicting court
6 approves an amount.

7 (2) The attorney may appeal the disapproval by filing
8 a motion with the presiding judge of the administrative region in
9 which the convicting court is located or may invoke the procedures
10 of a fee dispute committee established by a local bar association
11 and recognized by the State Bar of Texas. If a motion is filed under
12 this subdivision with the presiding judge of an administrative
13 judicial region, the judge shall review the disapproval of payment
14 and determine, with or without a hearing, the appropriate amount of
15 payment. The presiding judge shall approve an amount that the judge
16 determines is proper. The commissioners court of the county served
17 by the convicting court shall pay to the attorney the amount
18 determined to be proper by the presiding judge or fee dispute
19 committee. The payment must be made not later than the 45th day
20 after the later of:

21 (A) the date on which the itemized statement is
22 submitted to the convicting court; or

23 (B) the date on which the presiding judge or fee
24 dispute committee approves a payment amount.

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

27 (b) Not later than the 30th day before the date the

1 application for a writ of habeas corpus is filed with the convicting
2 court, counsel may file with the convicting court an ex parte,
3 verified, and confidential request for prepayment of expenses,
4 including expert fees, to investigate and present potential habeas
5 corpus claims. The court shall authorize the prepayment of
6 expenses on finding that the expenses are reasonably necessary for
7 the investigation of a potentially meritorious habeas corpus claim
8 that could entitle the applicant to relief [~~The request for~~
9 ~~expenses must state:~~

- 10 ~~[(1) the claims of the application to be investigated;~~
- 11 ~~[(2) specific facts that suggest that a claim of~~
- 12 ~~possible merit may exist; and~~
- 13 ~~[(3) an itemized list of anticipated expenses for each~~
- 14 ~~claim].~~

15 SECTION 4. Section 5, Article 11.071, Code of Criminal
16 Procedure, is amended by amending Subsection (a) and adding
17 Subsection (g) to read as follows:

18 (a) If a subsequent application for a writ of habeas corpus
19 is filed after filing an initial application, a court may not
20 consider the merits of or grant relief based on the subsequent
21 application unless the application contains sufficient specific
22 facts establishing that:

- 23 (1) the current claims and issues have not been and
- 24 could not have been presented previously in a timely initial
- 25 application or in a previously considered application filed under
- 26 this article or Article 11.07 because the factual or legal basis for
- 27 the claim was unavailable on the date the applicant filed the

1 previous application;

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

5 (3) by clear and convincing evidence, but for a
6 violation of the United States Constitution no rational juror would
7 have answered in the state's favor one or more of the special issues
8 that were submitted to the jury in the applicant's trial under
9 Article 37.071 or 37.0711; or

10 (4) by clear and convincing evidence:

11 (A) the applicant was represented by incompetent
12 counsel during the initial application;

13 (B) as a direct result of the incompetence, a
14 meritorious claim or issue raised in the current application was
15 not raised in the initial application; and

16 (C) the claim or issue alleges sufficient facts
17 that, if proven in the convicting court, could entitle the
18 applicant to relief.

19 (g) A subsequent application for a writ of habeas corpus
20 asserting specific facts establishing justifications described by
21 Subsection (a)(4), returnable to the court of criminal appeals,
22 must be filed in the convicting court not later than the 60th day
23 after the date on which the federal court of appeals denies the
24 applicant relief. The court of criminal appeals shall dismiss as an
25 abuse of writ an application filed later than the 60th day after the
26 denial of relief.

27 SECTION 5. Section 6, Article 11.071, Code of Criminal

1 Procedure, is amended by adding Subsection (b-1) to read as
2 follows:

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

10 SECTION 6. Subsection (c), Section 71.060, Government Code,
11 is amended to read as follows:

12 (c) Any qualification standards adopted by the Task Force on
13 Indigent Defense under Subsection (a) that relate to the
14 appointment of counsel in a death penalty case must be consistent
15 with the standards specified under Section 2, Article 11.071, or
16 Article 26.052(d), Code of Criminal Procedure, as appropriate. An
17 attorney who is identified by the task force as not satisfying
18 performance or qualification standards adopted by the task force
19 under Subsection (a) may not accept an appointment in a capital
20 case.

21 SECTION 7. Subsection (f), Section 4A, Article 11.071, Code
22 of Criminal Procedure, is repealed.

23 SECTION 8. The Task Force on Indigent Defense shall adopt
24 standards and create and maintain an attorney appointment list as
25 required by Section 2, Article 11.071, Code of Criminal Procedure,
26 as amended by this Act, not later than January 1, 2004.

27 SECTION 9. A convicting court that appoints counsel under

1 Section 2, Article 11.071, Code of Criminal Procedure, on or after
2 January 1, 2004, shall appoint the counsel in conformity with this
3 Act. Counsel appointed under Section 2, Article 11.071, Code of
4 Criminal Procedure, before January 1, 2004, must be appointed in
5 conformity with Section 2, Article 11.071, as that section existed
6 when the appointment was made, and the former law is continued in
7 effect for that purpose.

8 SECTION 10. This Act takes effect September 1, 2003.