

By: Ellis

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. 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 provide competent representation
13 during the course of proceedings under this article and shall
14 perform all duties required of counsel under this article.

15 (b) If a defendant is sentenced to death the convicting
16 court, immediately after judgment is entered under Article 42.01,
17 shall determine if the defendant is indigent and, if so, whether the
18 defendant desires appointment of counsel for the purpose of a writ
19 of habeas corpus. This chapter does not prohibit the convicting
20 court from appointing an attorney to act as second chair attorney to
21 the lead attorney.

22 (c) The 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 SECTION 2. Section 2A, Article 11.071, Code of Criminal
14 Procedure, is amended by amending Subsections (a) and (b) and
15 adding Subsection (d) to read as follows:

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

23 (b) A convicting court seeking reimbursement for a county
24 shall certify to the comptroller of public accounts the amount of
25 compensation that the county is entitled to receive under this
26 section. The comptroller of public accounts shall issue a warrant
27 to the county in the amount certified by the convicting court, not

1 to exceed \$50,000 [~~\$25,000~~].

2 (d)(1) Payment may not be made under Subsection (c) until a
3 statement itemizing the services performed is submitted to the
4 convicting court and the convicting court approves the payment. If
5 the convicting court disapproves the amount requested for payment,
6 the convicting court shall enter a finding in writing stating the
7 amount of payment that the court approves and the reason for
8 approving a different amount than the amount requested. If a
9 convicting court approves a payment or disapproves a payment and
10 the attorney does not within three days file an appeal of the
11 disapproval under Subdivision (2), the commissioners court of the
12 county shall pay the amount approved by the convicting court.
13 Payment must be made under this subdivision not later than the 45th
14 day after the date the convicting court approves an amount.

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

1 after the day on which the itemized statement is submitted to the
2 convicting court or the day on which the presiding judge or fee
3 dispute committee approves a payment amount, whichever date is
4 later.

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

7 (b) Not later than the 30th day before the date the
8 application for a writ of habeas corpus is filed with the convicting
9 court, counsel may file with the convicting court an ex parte,
10 verified, and confidential request for prepayment of expenses,
11 including expert fees, to investigate and present potential habeas
12 corpus claims. The court shall authorize the prepayment of
13 expenses on finding that the expenses are reasonably necessary for
14 the investigation of a potentially meritorious habeas corpus claim
15 that could entitle the applicant to relief [~~The request for~~
16 ~~expenses must state:~~

- 17 [~~(1) the claims of the application to be investigated,~~
18 [~~(2) specific facts that suggest that a claim of~~
19 ~~possible merit may exist, and~~
20 [~~(3) an itemized list of anticipated expenses for each~~
21 ~~claim].~~

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

25 (a) If a subsequent application for a writ of habeas corpus
26 is filed after filing an initial application, a court may not
27 consider the merits of or grant relief based on the subsequent

1 application unless the application contains sufficient specific
2 facts establishing that:

3 (1) the current claims and issues have not been and
4 could not have been presented previously in a timely initial
5 application or in a previously considered application filed under
6 this article or Article 11.07 because the factual or meritorious
7 legal basis for the claim was unavailable on the date the applicant
8 filed the previous application;

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

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

17 (4) by clear and convincing evidence, the current
18 claims or issues were not raised previously in a timely initial
19 application under this article because the applicant was not
20 represented by competent counsel in filing the previous
21 application.

22 (b) If the convicting court receives a subsequent
23 application asserting specific facts establishing justifications
24 described by Subsection (a)(1), (2), or (3), the clerk of the court
25 shall:

26 (1) attach a notation that the application is a
27 subsequent application;

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

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

5 (A) the application;

6 (B) the notation;

7 (C) the order scheduling the applicant's
8 execution, if scheduled; and

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

11 (g) A subsequent application for a writ of habeas corpus
12 asserting specific facts establishing justifications described by
13 Subsection (a)(4), returnable to the court of criminal appeals,
14 must be filed in the convicting court not later than the 60th day
15 after the day on which the federal court of appeals denies the
16 applicant relief. The convicting court shall dismiss as an abuse of
17 writ an application filed later than the 60th day after the denial
18 of relief.

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

23 (1) to properly investigate the factual and legal
24 grounds for the filing of an application for a writ of habeas
25 corpus; or

26 (2) for reasons other than exercising reasonable
27 professional judgment, to exercise due diligence in properly

1 raising and presenting to the convicting court material and
2 cognizable claims that were available in the applicant's case and
3 the proper factual support for those claims.

4 (i) If an applicant makes the prima facie showing described
5 by Subsection (h), the convicting court shall appoint new counsel
6 to represent the applicant and establish a new filing date for a
7 subsequent application, which may not be later than the 270th day
8 after the day on which the convicting court appointed new counsel.
9 Sections 2A and 3 apply to the compensation and reimbursement of
10 counsel appointed under this subsection.

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

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

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

23 (c) After argument of counsel, if requested by the court,
24 the convicting court, without the assistance of either party, shall
25 make appropriate written findings of fact and conclusions of law
26 not later than the 15th day after the date the parties filed
27 proposed findings or not later than the 45th day after the date the

1 court's determination is made under Subsection (a), whichever
2 occurs first.

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

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

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

22 (b) The change in law made by this Act applies to an initial
23 or subsequent application for a writ of habeas corpus filed on or
24 after January 1, 2004. An application filed before January 1, 2004,
25 is covered by the law in effect when the application was filed, and
26 the former law is continued in effect for that purpose.

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