

1-1 By: Ellis, et al. S.B. No. 1224
1-2 (In the Senate - Filed March 12, 2003; March 19, 2003, read
1-3 first time and referred to Committee on Criminal Justice;
1-4 April 3, 2003, reported adversely, with favorable Committee
1-5 Substitute by the following vote: Yeas 5, Nays 0; April 3, 2003,
1-6 sent to printer.)

1-7 COMMITTEE SUBSTITUTE FOR S.B. No. 1224 By: Ellis

1-8 A BILL TO BE ENTITLED
1-9 AN ACT

1-10 relating to representation of applicants for writs of habeas corpus
1-11 in cases involving the death penalty.

1-12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-13 SECTION 1. Section 2, Article 11.071, Code of Criminal
1-14 Procedure, is amended to read as follows:

1-15 Sec. 2. REPRESENTATION BY COUNSEL. (a) An applicant shall
1-16 be represented by competent counsel unless the applicant has
1-17 elected to proceed pro se and the convicting trial court finds,
1-18 after a hearing on the record, that the applicant's election is
1-19 intelligent and voluntary. An attorney appointed or employed as
1-20 counsel under this section shall provide competent representation
1-21 during the course of proceedings under this article and shall
1-22 perform all duties required of counsel under this article.

1-23 (b) If a defendant is sentenced to death the convicting
1-24 court, immediately after judgment is entered under Article 42.01,
1-25 shall determine if the defendant is indigent and, if so, whether the
1-26 defendant desires appointment of counsel for the purpose of a writ
1-27 of habeas corpus. This chapter does not prohibit the convicting
1-28 court from appointing an attorney to act as second chair attorney to
1-29 the lead attorney.

1-30 (c)(1) The Texas Judicial Council shall establish a
1-31 committee to create and maintain a statewide list of attorneys
1-32 approved for appointment under this section. The committee shall
1-33 consist of:

1-34 (A) the chair of the Texas Judicial Council;
1-35 (B) two judges who are members of the Texas
1-36 Judicial Council and are appointed to the committee by the chair;
1-37 and

1-38 (C) two professors of law who have knowledge of
1-39 habeas corpus practice and are appointed to the committee by the
1-40 chair.

1-41 (2) In creating and maintaining the statewide list of
1-42 attorneys, the committee shall consider recommendations of
1-43 attorneys made by local selection committees created under Article
1-44 26.052(c) and by the statewide professional association of criminal
1-45 defense attorneys that is authorized to receive grants under
1-46 Section 56.003(f), Government Code, and whose members regularly
1-47 represent indigent defendants in criminal matters.

1-48 (3) The committee shall review and update the list of
1-49 attorneys at least quarterly.

1-50 (d) At the earliest practical time, but in no event later
1-51 than 30 days, after the convicting court makes the findings
1-52 required under Subsections (a) and (b), the convicting court shall
1-53 appoint competent counsel from the list of attorneys maintained
1-54 under Subsection (c), unless the applicant elects to proceed pro se
1-55 or is represented by retained counsel. On appointing counsel under
1-56 this section, the convicting court shall immediately notify the
1-57 court of criminal appeals and the appointment committee established
1-58 under Subsection (c)(1) of the appointment, including in the notice
1-59 a copy of the judgment and the name, address, and telephone number
1-60 of the appointed counsel or counsels.

1-61 [~~(d) The court of criminal appeals shall adopt rules for the~~
1-62 ~~appointment of attorneys as counsel under this section and the~~
1-63 ~~convicting court may appoint an attorney as counsel under this~~

~~section only if the appointment is approved by the court of criminal appeals in any manner provided by those rules.]~~

(e) If the court of criminal appeals denies an applicant relief under this article, an attorney appointed under this section to represent the applicant shall, not later than the 15th day after the date the court of criminal appeals denies relief or, if the case is filed and set for submission, the 15th day after the date the court of criminal appeals issues a mandate on the initial application for a writ of habeas corpus under this article, move to be appointed as counsel in federal habeas review under 21 U.S.C. Section 848(q) or equivalent provision or, if necessary, move for the appointment of other counsel under 21 U.S.C. Section 848(q) or equivalent provision. The attorney shall immediately file a copy of the motion with the court of criminal appeals and the appointment committee established under Subsection (c)(1), and if the attorney fails to do so, the court may take any action to ensure that the applicant's right to federal habeas review is protected, including initiating contempt proceedings against the attorney.

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

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

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

(2) The attorney may appeal the disapproval by filing a motion with the presiding judge of the administrative region in which the convicting court is located or may invoke the procedures of a fee dispute committee established by a local bar association and recognized by the State Bar of Texas. If a motion is filed under this subdivision with the presiding judge of an administrative judicial region, the judge shall review the disapproval of payment and determine, with or without a hearing, the appropriate amount of payment. The presiding judge shall approve an amount that the judge determines is proper. The commissioners court of the county served by the convicting court shall pay to the attorney the amount determined to be proper by the presiding judge or fee dispute committee. The payment must be made not later than the 45th day after the date on which the itemized statement is submitted to the convicting court or the date on which the presiding judge or fee dispute committee approves a payment amount, whichever date is later.

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) the application;

(B) the notation;

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

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

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

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

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

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

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

4-1 counsel appointed under this subsection.

4-2 SECTION 5. Section 6, Article 11.071, Code of Criminal
4-3 Procedure, is amended by adding Subsection (b-1) to read as
4-4 follows:

4-5 (b-1) If the convicting court receives notice that the
4-6 requirements of Section 5(a)(1), (2), or (3) for consideration of a
4-7 subsequent application have been met, the convicting court shall
4-8 appoint counsel and provide for the compensation for time
4-9 previously spent and reimbursement of expenses previously incurred
4-10 in the same manner as is provided by Sections 2A and 3, regardless
4-11 of whether the subsequent application is ultimately dismissed.

4-12 SECTION 6. Subsection (c), Section 8, Article 11.071, Code
4-13 of Criminal Procedure, is amended to read as follows:

4-14 (c) After argument of counsel, if requested by the court,
4-15 the convicting court, without the assistance of either party, shall
4-16 make appropriate written findings of fact and conclusions of law
4-17 not later than the 15th day after the date the parties filed
4-18 proposed findings or not later than the 45th day after the date the
4-19 court's determination is made under Subsection (a), whichever
4-20 occurs first.

4-21 SECTION 7. Subsection (e), Section 9, Article 11.071, Code
4-22 of Criminal Procedure, is amended to read as follows:

4-23 (e) The parties shall file proposed findings of fact and
4-24 conclusions of law for the convicting court to consider on or before
4-25 a date set by the court that is not later than the 30th day after the
4-26 date the transcript is filed. If the court requests argument of
4-27 counsel, after argument the court shall, without the assistance of
4-28 either party, make written findings of fact that are necessary to
4-29 resolve the previously unresolved facts and make conclusions of law
4-30 not later than the 15th day after the date the parties file proposed
4-31 findings or not later than the 45th day after the date the court
4-32 reporter files the transcript, whichever occurs first.

4-33 SECTION 8. (a) The Texas Judicial Council shall establish
4-34 an appointment committee, as required by Subdivision (1),
4-35 Subsection (c), Section 2, Article 11.071, Code of Criminal
4-36 Procedure, as amended by this Act, not later than October 1, 2003,
4-37 and the committee shall create an attorney appointment list, as
4-38 required by Section 2, Article 11.071, Code of Criminal Procedure,
4-39 as amended by this Act, not later than January 1, 2004.

4-40 (b) The change in law made by this Act applies to an initial
4-41 or subsequent application for a writ of habeas corpus filed on or
4-42 after January 1, 2004. An application filed before January 1, 2004,
4-43 is covered by the law in effect when the application was filed, and
4-44 the former law is continued in effect for that purpose.

4-45 SECTION 9. This Act takes effect September 1, 2003.

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