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One Full Bite at the Apple: Defining Competent Counsel in Texas Capital Post-conviction Review

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ONE FULL BITE AT THE APPLE: DEFINING COMPETENT COUNSEL IN TEXAS CAPITAL POST-CONVICTION REVIEW

I. INTRODUCTION

In 1995, the Texas Legislature responded to demands for an overhaul of the cumbersome death penalty appeals process and enacted article 11.071 of the Code of Criminal Procedure.[1] Although the legis-

1. *See* Act of May 24, 1995 (Habeas Corpus Reform Act), 74th Leg., R.S., ch. 319, § 1, 1995 Tex. Gen. Laws 2764, 2764 (amended 1997, 1999) (current version at TEX. CODE CRIM. PROC. ANN. art. 11.071 (Vernon Supp. 2003)); *Ex parte* Kerr, 64 S.W.3d 414, 418 (Tex. Crim. App. 2002) (noting that the Act made three major

lature mandated the right to an attorney on post-conviction habeas corpus review by providing that competent counsel be appointed,[2] the term "competent" has never been defined.[3] This failure raises the issue of whether an attorney appointed to represent a death penalty habeas petitioner should be required to meet the constitutional standard of effectiveness delineated by the Supreme Court in *Strickland v. Washington*.[4] In its simplest form, the question becomes: are defendants in death penalty cases not only entitled to lawyers, but also entitled to competent lawyers? Recently, the Texas Court of Criminal Appeals stayed at least two executions[5] until the court could address whether ineffective assistance of prior habeas counsel is a cognizable claim by a habeas applicant.[6] In early January 2002, the court held in *Ex parte Graves* that even though article 11.071 grants a statutory right to the appointment of competent habeas counsel, it does not give rise to the right to *effective* assistance of that appointed counsel.[7] Thus, in Texas, prior habeas counsel's competency cannot be addressed on habeas corpus review.[8]

This Comment argues that the Texas Court of Criminal Appeals was correct in refusing to engraft a constitutional standard of effective assistance of counsel to post-conviction habeas corpus review. In

changes in Texas law: (1) It created a unitary system for capital post-conviction review where direct appeals and habeas review proceed at roughly the same time; (2) It adopted the abuse of the writ doctrine that generally limits a capital inmate to one application for a habeas writ; and (3) It provided for the appointment of counsel to represent capital inmates in their habeas petitions).

2. Habeas Corpus Reform Act, 74th Leg., R.S., ch. 319, § 1, sec. 2(b), 1995 Tex. Gen. Laws at 2764 (current version at TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(b)). Prior to the enactment of article 11.071, the state of Texas did not appoint attorneys to represent indigent inmates in capital post-conviction proceedings. *See* Act effective Jan. 1, 1966, 59th Leg., R.S., ch. 722, § 1, 1965 Tex. Gen. Laws 317, 344 (current version at TEX. CODE CRIM. PROC. ANN. art. 11.071 (Vernon Supp. 2003)).

3. *See* Mata v. Johnson, 99 F.3d 1261, 1266–67 (5th Cir. 1996) (discussing that although article 11.071, section 2(d) requires the Texas Court of Criminal Appeals to adopt rules and standards governing the qualifications of counsel, the court thus far has not promulgated any standards for the competency of appointed post-conviction counsel in capital cases), *vacated in part by* 105 F.3d 209 (5th Cir. 1997).

4. 466 U.S. 668, 687–88, 691 (1984) (defining the constitutional standard for attorney performance as "reasonably effective assistance" under "prevailing professional norms," and holding that attorney errors will not warrant reversal unless the error affected the judgment).

5. *See* Ed Timms, *Beazley Stay May Not Be About Age: Quality of Counsel in Appeal Affects Other Death-Row Cases*, DALLAS MORNING NEWS, Aug. 17, 2001, at 35A (noting that Napoleon Beazley and three additional unnamed death-row inmates received stays pending the court's decision); *see also* Ed Timms, *Officials Ask for Youthful Killer's Execution*, SEATTLE TIMES, Aug. 19, 2001, at A5 ("Legal experts say that the state appeals court probably issued a stay based on allegations [of] . . . inadequate counsel at one stage in the appeals process . . . .").

6. *Ex parte* Graves, 70 S.W.3d 103, 104–05 (Tex. Crim. App. 2002) (stating that the issue was whether Graves was entitled to have the merits of his ineffective assistance of prior habeas counsel claim heard on a subsequent writ).

7. *Id.* at 117.

8. *See id.* at 105.

reaching the appropriate decision, however, the court failed to provide any guiding standards of competence for appointed capital habeas attorneys.[9] Specifically, the court did not elaborate on either the type or amount of qualifications, experience, or ability necessary for a finding of attorney "competence." The resulting inadequate definition of "competency" for appointed post-conviction counsel in death penalty cases leaves habeas petitioners without a remedy when statutorily mandated, post-conviction review is nullified by grossly deficient, appointed counsel.[10] The solution lies in providing a standard of "competence" through a statutory amendment because the specification of binding attorney qualifications will ensure that capital petitioners receive their "one full bite" at the habeas "apple."[11]

Part II of this Comment provides background information on post-conviction state habeas corpus review by illustrating the function of habeas writs, outlining Texas's statutory writ provisions, and describing the current crisis in post-conviction representation. Part III analyzes the argument for applying Sixth Amendment effective assistance of counsel to a statutory grant of habeas counsel, explaining that even though the Sixth Amendment does not apply to post-conviction proceedings, petitioners attempt to claim the right to effective assistance under the statutory grant of counsel in article 11.071.[12] Part IV explains how the doctrines of finality and abuse of the writ converge to prohibit application of the constitutional effectiveness standard to post-conviction review. Part V concludes that the appropriate solution to the crisis in post-conviction representation lies in the establishment of qualification standards for the appointment of post-conviction counsel, which the Texas Legislature should provide via an amendment to article 11.071 itself.

II. Background: Post-Conviction State Habeas Corpus Review in Capital Cases

A. *Function of Writ of Habeas Corpus*

For centuries, the writ of habeas corpus has occupied an important place in the review of death penalty convictions and sentences.[13] In

9. *See id.* at 114, 117 (stating that "competent counsel" refers to "counsel's qualifications, experience, and abilities at the time of appointment").

10. *See id.* at 114–16. For a discussion of the consequences of inadequate state post-conviction representation at the federal habeas level, see Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 Am. Crim. L. Rev. 1 (2002).

11. *See generally Ex parte* Smith, 977 S.W.2d 610, 612–13 (Tex. Crim. App. 1998) (Baird, J., dissenting) (describing the legislature's intent to limit habeas appeals).

12. Pennsylvania v. Finley, 481 U.S. 551, 557 (1987).

13. *See* Smith v. Bennett, 365 U.S. 708, 712–13 (1961) (concluding that the writ of habeas corpus is "the common law world's 'freedom writ,'" and "'there is no higher duty than to maintain it unimpaired,' . . . and unsuspended, save only in the cases specified in our Constitution") (quoting Bowen v. Johnston, 306 U.S. 19, 26 (1939))

the scheme of post-conviction review, the writ's purpose is to attack the legality of a petitioner's confinement.[14] Guaranteed by both the United States Constitution[15] and the Texas Constitution,[16] the writ of habeas corpus is an extraordinary remedy regarded by the Supreme Court as "'a bulwark against convictions that violate[s] 'fundamental fairness.'"[17] The Court recognized that federal habeas corpus review tests the constitutionality of state court convictions and "'serves as a[n] . . . incentive for trial and appellate courts . . . to conduct their proceedings in a manner consistent with established constitutional standards'" to avoid unlawful detention.[18] Similarly, state court post-conviction proceedings determine whether a petitioner received a fair trial by reviewing the processes that led to the final conviction and sentence.[19] In both state and federal courts, however, the scope of habeas corpus review is limited to jurisdictional defects and denials of constitutional rights.[20] Thus, a petitioner may receive a new trial if post-conviction review either reveals a lack of personal jurisdiction in the trial court or demonstrates that the petitioner's imprisonment fails to conform with the fundamental requirements of due process of law; he is thus "illegally restrained in his liberty or confined."[21]

In general, post-conviction habeas corpus review is neither an appeal nor a direct attack.[22] Rather, it is a "collateral"[23] proceeding,

(citation omitted); Fay v. Noia, 372 U.S. 391, 399–400 (1963) (describing the history and role of habeas corpus review).

14. Burke W. Kappler, *Small Favors: Chapter 154 of the Antiterrorism and Effective Death Penalty Act, the States, and the Right to Counsel*, 90 J. CRIM. L. & CRIMINOLOGY 467, 474 (2000).

15. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

16. TEX. CONST. art. I, § 12 ("The writ of habeas corpus is a writ of right, and shall never be suspended. The Legislature shall enact laws to render the remedy speedy and effectual.").

17. Coleman v. Thompson, 501 U.S. 722, 747 (1991) (quoting Engle v. Isaac, 456 U.S. 107, 126 (1982)).

18. Teague v. Lane, 489 U.S. 288, 306 (1988) (plurality opinion) (quoting Desist v. United States, 394 U.S. 244, 262–63 (1969) (Harlan, J., dissenting)); *see* Letty S. Di Giulio, Note, *Dying for the Right to Effective Assistance of Counsel in State Post-Conviction Proceedings: State Statutes & Due Process in Capital Cases*, 9 B.U. PUB. INT. L.J. 109, 126 (1999).

19. Di Giulio, *supra* note 18, at 114–15 (citing numerous state cases holding that post-conviction review ensures a defendant was not wrongly convicted).

20. *Ex parte* Graves, 70 S.W.3d 103, 109 (Tex. Crim. App. 2002); *see Ex parte* Drake, 883 S.W.2d 213, 215 (Tex. Crim. App. 1994).

21. Charles M. Mallin, *Death Penalty: Texas Law—Subsequent Writs and Abuse of the Writ Doctrine in Texas*, 6 TEX. WESLEYAN L. REV. 151, 152, 171–72 (2000) (discussing the writ of habeas corpus); *see also* TEX. CODE CRIM. PROC. ANN. art. 11.071 (Vernon Supp. 2003) (describing writ of habeas corpus as a "remedy to be used when any person is restrained in his liberty").

22. *See* Pennsylvania v. Finley, 481 U.S. 551, 556–57 (1987). The court noted that collateral review is brought after direct appeal is resolved, and it attacks convictions that have "long since become final upon exhaustion of the appellate process." *Id.* at 555.

occurring either after a petitioner has failed to obtain relief through direct appellate review of his conviction and sentence or when direct appellate review is no longer available because the conviction has become "final."[24] After a death-row inmate is tried and sentenced in state court, the writ of habeas corpus essentially becomes a new proceeding initiated to raise constitutional or jurisdictional challenges that were not previously adjudicated in the original conviction.[25] In setting forth allegations of constitutional or jurisdictional error at trial, sentencing, or appeal, a petitioner may raise new issues and bring evidence of any facts unknown at the time of conviction to the trial court's attention.[26] Thus, by allowing for review of legal errors that might have occurred at trial, state post-conviction review can provide a remedy, even if a conviction is affirmed on direct appeal.[27]

Accordingly, post-conviction review provides a death-row inmate with an important forum to adjudicate claims that he could not adequately raise in the lower courts.[28] Although state habeas corpus provides "a vital link in the capital [appellate] review process,"[29] habeas review is not part of the criminal proceeding itself.[30] Instead, requests for collateral review are civil in nature.[31] Consequently, according to the Supreme Court, a state has no obligation to provide post-conviction review, and even if it does, the Due Process Clause of the Fourteenth Amendment does not require that state to appoint a lawyer as well.[32]

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23. BLACK'S LAW DICTIONARY 255 (7th ed. 1999) ("An attack on a judgment entered in a different proceeding. A petition for a writ of habeas corpus is one type of collateral attack.").

24. *See Finley*, 481 U.S. at 555, 557.

25. *See Ex parte* Bravo, 702 S.W.2d 189, 190 (Tex. Crim. App. 1982) (holding that "constitutional error may be raised for the first time in a post-conviction [habeas writ]"); *see also Ex parte* Elizondo, 947 S.W.2d 202, 205, 209 (Tex. Crim. App. 1996) (en banc) (noting that habeas corpus review is available for constitutional and jurisdictional defects in a judgment of conviction).

26. Di Giulio, *supra* note 18, at 115 (describing post-conviction review as a process for raising issues unknown at the time of trial).

27. Clive A. Stafford Smith & Rémy Voisin Starns, *Folly by Fiat: Pretending That Death Row Inmates Can Represent Themselves in State Capital Post-Conviction Proceedings*, 45 LOY. L. REV. 55, 57 (1999).

28. *Id.* at 88–100. State post-conviction review may be a petitioner's first opportunity to raise claims such as ineffective assistance of trial counsel, prosecutorial misconduct, or newly discovered evidence. *Id.* at 57.

29. McFarland v. Scott, 512 U.S. 1256, 1261 (1994) (Blackmun, J., dissenting), *denying cert. to* 8 F.3d 256 (5th Cir. 1993).

30. Pennsylvania v. Finley, 481 U.S. 551, 556–57 (1987) ("Post-conviction relief is even further removed from the criminal trial than is discretionary direct review.").

31. *Id.* at 557; *see* Fay v. Noia, 372 U.S. 391, 423 (1963) (noting that the writ of habeas corpus is traditionally characterized as an "original . . . civil remedy for the enforcement of the right to personal liberty").

32. *Finley*, 481 U.S. at 557.

B. *Texas's Statutory Scheme for Capital Habeas Corpus Review*

1. Statutory Provisions

Texas Code of Criminal Procedure article 11.071 establishes the exclusive procedure for a writ of habeas corpus application where the applicant seeks relief from a judgment imposing the death penalty.[33] Article 11.071 provides for a "unitary system"[34] of capital post-conviction review, in which a petitioner's direct appeal need not be final before his habeas application is filed.[35] When the direct appeal and collateral processes overlap, the unitary system provides an expedited review process.[36] Prior to the 1995 enactment of article 11.071, death penalty cases proceeded through the appellate system with the mandatory direct appeals occurring first.[37] Then, habeas relief was available in state court if a death-row inmate was unsuccessful in those direct appeals, with final review available from the United States Supreme Court.[38] Under the current article 11.071, after the conclusion of the now concurrent habeas corpus and direct appellate reviews, the only available remedy is petitioning the federal courts for habeas corpus relief.[39] Thus, by enacting article 11.071, the Texas Legislature facilitated speedier executions, but the time frame during which a condemned individual can acquire new evidence of innocence is shortened.[40]

Article 11.071 further limits the scope of habeas corpus review by mandating that an application filed after the 180-day deadline under section 4(a) is presumed untimely.[41] One 90-day extension is possible,

33. TEX. CODE CRIM. PROC. ANN. art. 11.071, § 1 (Vernon Supp. 2003).

34. Joan M. Fisher, *Expedited Review of Capital Post-Conviction Claims: Idaho's Flawed Process*, 2 J. APP. PRAC. & PROCESS 85, 85–86 (2000) (defining "unitary system" as one that "essentially consolidates the direct appeal and state post-conviction process [sic] to eliminate the additional time involved in consideration of collateral attacks").

35. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 4(a) (providing that an application for a habeas writ must be filed "not later than the 180th day after the convicting court appoints counsel . . . , or *not later than the 45th day after the date the state's original brief is filed on direct appeal* . . . , whichever date is later" (emphasis added)); *see also Ex parte* Kerr, 64 S.W.3d 414, 418 (Tex. Crim. App. 2002) (stating that the unitary system is one in which "direct appeals and habeas review proceed[ ] along parallel paths at roughly the same time").

36. *See* Fisher, *supra* note 34, at 87.

37. *See* James C. Harrington & Anne More Burnham, *Texas's New Habeas Corpus Procedure for Death-Row Inmates: Kafkaesque—and Probably Unconstitutional*, 27 ST. MARY'S L.J. 69, 73 (1995).

38. *Id.*; *see also* Fisher, *supra* note 34, at 89 (stating that a majority of the death penalty states rely on a capital review process in which post-conviction review follows both an automatic sentence review by the court of last resort in that state and direct appellate review of error in the trial and sentencing phases).

39. Harrington, *supra* note 37, at 72–73.

40. *Id.* at 73–74.

41. TEX. CODE CRIM. PROC. ANN. art. 11.071, § 4(a), (c) (Vernon Supp. 2003); *see also supra* text accompanying note 35.

however, upon the showing of "good cause."[42] In addition to this time limitation, article 11.071 generally restricts a capital inmate to a single application for state post-conviction habeas corpus review.[43] However, the statute provides three enumerated exceptions to this rule whereby an applicant *may* be allowed to file a subsequent habeas application.[44] Specifically, the court may consider the merits of a subsequent habeas application if that application sufficiently establishes:

> (1) the current claims . . . could not have been presented previously . . . because the factual or legal basis for the claim was unavailable;
> (2) by a preponderance of the evidence . . . no rational juror could have found the applicant guilty beyond a reasonable doubt; or
> (3) by clear and convincing evidence . . . no rational juror would have answered in the state's favor one or more of the special issues.[45]

Thus, although the initial writ application can raise any number of constitutional or jurisdictional issues, consideration of a second application is barred unless an applicant establishes one of the three conditions.[46]

These habeas corpus review limitations greatly expedited the capital post-conviction review process. The Texas Legislature compensated for these strict limitations on both the time and the availability of successive writs[47] by including a mandatory provision instructing the convicting court to appoint counsel for indigent applicants.[48] Article 11.071, section 2A requires the state to reimburse counties up to $25,000 for each indigent defendant's appointed habeas counsel.[49]

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42. TEX. CODE CRIM. PROC. ANN. art. 11.071, § 4(b) ("The convicting court, before the filing date . . . may for good cause shown and after notice and an opportunity to be heard by the attorney representing the state grant one 90-day extension that begins on the filing date . . . under Subsection (a)."); *see, e.g.*, *Ex parte* Ramos, 977 S.W.2d 616, 616 (Tex. Crim. App. 1998) (upholding the trial court's finding of "good cause" where an applicant filed late in reliance on the trial court's incorrect calculation of a deadline).

43. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(a) (stating that unless a subsequent application contains certain specific facts, a court may not consider the merits of the subsequent application).

44. *Id.* § 5(a)(1)–(3).

45. *Id.*

46. *Id.* § 5(a); *see also* Mallin, *supra* note 21, at 167 (discussing the three conditions in which a second habeas application will be considered).

47. *See Ex parte* Davis, 947 S.W.2d 216, 219–21 (Tex. Crim. App. 1996) (en banc) (finding that Texas's expedited post-conviction review passed constitutional muster by rejecting constitutional challenges to article 11.071 based on separation of powers, equal protection, and due process claims).

48. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(c) ("At the earliest practical time, but in no event later than 30 days, . . . the convicting court shall appoint *competent* counsel unless the applicant elects to proceed *pro se* or is represented by retained counsel.") (emphasis added); *id.* § 2(d) (stating that the convicting court's appointment must be "approved by the court of criminal appeals in any manner provided by those rules" adopted for appointment of counsel).

49. *Id.* § 2A(a).

Further, the legislature specified that "[a]n applicant shall be represented by *competent* counsel unless the applicant has elected to proceed pro se."[50] Upon appointment, habeas counsel has a mandatory duty to "investigate expeditiously . . . the factual and legal grounds for the filing of an application for a writ of habeas corpus."[51] Finally, instead of including competency standards in the statute itself, the legislature delegated the task of promulgating rules for the appointment of "competent" counsel to the court of criminal appeals.[52]

2. Judicial Interpretation of Article 11.071

According to the Texas Court of Criminal Appeals, the legislature enacted article 11.071 to prevent repetitious habeas writs.[53] Thus, under the court's interpretation, article 11.071 represents the notion that a death-row inmate has "one full and fair opportunity to present his constitutional or jurisdictional claims."[54] In analyzing this "one full and fair opportunity," the court of criminal appeals has concentrated on the effort of article 11.071 to speed up habeas corpus review, but it has failed to provide guidance concerning the requisites of appointed habeas counsel.[55]

a. Expedited Review

In interpreting article 11.071, Texas courts initially appeared to focus on the effect of the legislature's effort to expedite capital post-conviction review. Soon after article 11.071 became effective, the court of criminal appeals faced state and federal equal protection challenges to Texas's new capital writ scheme.[56] In response, the court concluded in *Ex parte Davis* that article 11.071 merely placed restrictions on how and when a petitioner could exercise his habeas corpus right so that frivolous attempts to invoke the remedy could be thwarted.[57] Noting that article 11.071 was promulgated pursuant to a Texas constitutional mandate to the legislature to "'enact laws to render the [writ] remedy speedy and effectual,'"[58] the court held that the statute merely provides the procedure for rendering the habeas corpus writ, and it neither suspends the right to habeas corpus review

50. *Id.* § 2(a) (emphasis added).
51. *Id.* § 3(a).
52. *Id.* § 2(c) (requiring the appointment of "competent counsel"); *id.* § 2(d) (requiring the court of criminal appeals to adopt rules for the appointment of attorneys as habeas counsel).
53. *Ex parte* Graves, 70 S.W.3d 103, 114 (Tex. Crim. App. 2002).
54. *Ex parte* Kerr, 64 S.W.3d 414, 419 (Tex. Crim. App. 2002).
55. *See id.* at 419–20.
56. *E.g.*, *Ex parte* Davis, 947 S.W.2d 216, 220 (Tex. Crim. App. 1996) (en banc).
57. *See id.* at 219 (rejecting the applicant's argument that "Article 11.071 'suspends' [habeas corpus] rights by limiting a capital applicant to a single habeas corpus application").
58. *Id.* (quoting TEX. CONST. art. I, § 12).

nor violates equal protection or due process.[59] Thus, the statute passed constitutional muster.[60]

Similarly, in *Ex parte Smith*,[61] the Texas Court of Criminal Appeals stated that the "screamingly obvious intent of Article 11.071 is to speed up the habeas corpus procedures for capital cases."[62] Justice Baird, in a scathing dissent, argued that based on the literal text of article 11.071 section 2(a), the "'screamingly obvious' intent . . . was to provide *competent counsel*."[63] Referring to the legislative debates on the proposed article 11.071 in both the House and the Senate, Justice Baird noted the intent of the legislature was to provide petitioners "one full 'bite at the apple'" through which every issue that can possibly be raised will be raised on the first application.[64] By stating that the legislature clearly contemplated that the bite would be a full one,[65] Justice Baird expressed concern that the majority ignored its own failure to fulfill the duty to appoint competent counsel.[66]

b. Requisites of Counsel

Because judicial interpretation of article 11.071 has focused mainly on the expedited post-conviction review, few Texas cases have interpreted the article's provision for appointing habeas counsel. In fact, the meaning of the statutory mandate of "competent counsel" was not addressed by the majority of the court of criminal appeals until *Ex parte Mines*,[67] five years after the enactment of article 11.071.[68] In that case, the court held that "competent" under article 11.071 refers only to a habeas "attorney's qualifications and abilities."[69] The court also noted that habeas counsel has a duty to "investigate expeditiously the factual and legal grounds for an application."[70] *Mines* failed to address, however, whether article 11.071 mandates that appointed counsel be competent, and what "qualifications and abilities" lead to a finding that appointed habeas counsel is "competent."[71] Recently, the court reaffirmed its holding in *Mines*, stating that "competency" con-

59. *Id.*
60. *See id.* at 221.
61. 977 S.W.2d 610 (Tex. Crim. App. 1998) (en banc).
62. *Id.* at 611.
63. *Id.* at 614 (Baird, J., dissenting).
64. *Id.* at 612–13 (Baird, J., dissenting).
65. *Id.* (Baird, J., dissenting).
66. *Id.* at 614 (Baird, J., dissenting). Judge Baird argued that Smith was denied his "'one bite at the apple'" not through his own fault, but because the court appointed less than competent counsel. *Id.* Judge Baird found that Smith's counsel was "less than competent" because he filed Smith's application for habeas corpus relief 129 days late. *See id.*
67. 26 S.W.3d 910 (Tex. Crim. App. 2000) (en banc).
68. *Id.* at 910, 912 (holding that a capital *defendant* need not be competent to assist his attorney in filing an application for a habeas corpus writ).
69. *Id.* at 912.
70. *Id.*
71. *See id.*

cerns habeas counsel's experience, ability, and qualifications at the time of appointment.[72]

In *Ex parte Graves*, the court of criminal appeals finally extinguished habeas applicants' false hopes that effective representation is constitutionally guaranteed on post-conviction habeas corpus review.[73] The court concluded that although article 11.071 mandates a statutory right to appointed competent counsel, it grants neither a statutory nor a constitutional right to the *effective* assistance of that counsel.[74] Instead, the *Graves* court reasoned that while the writ is a constitutional remedy for illegal confinement, Texas is not required by either the federal or Texas constitutions to appoint and compensate counsel to pursue habeas relief.[75] Finally, the court expanded the *Mines* analysis of competency and held that article 11.071 concerns only the initial appointment of habeas counsel and not the final product of representation or the services rendered by "competent" counsel.[76] Nevertheless, the court's expanded analysis failed in one crucial aspect: it did not include the specific types of qualifications, amount of experience, and types of abilities required from a "competent" habeas attorney.[77]

The *Graves* court faced a prime opportunity to fulfill the statutory mandate of article 11.071(d) and adopt binding rules for the appointment of habeas attorneys. Unfortunately, the court again neglected its duty to provide a workable definition of "competent" counsel and the standards necessary to appoint the same.[78] Texas case law reveals that the court of criminal appeals has completely failed to adopt any articulable competency standards.[79] For example, under the 1995 version of article 11.071,[80] the court's system for evaluating the qualifications of counsel consisted only of reviewing *questionnaires* completed

72. *See Ex parte* Graves, 70 S.W.3d 103, 114 (Tex. Crim. App. 2002).

73. *See id.* at 113 (holding that there is "no constitutional right to effective assistance of counsel" on habeas corpus writ in Texas).

74. *Id.* at 117.

75. *Id.* at 111.

76. *See id.* at 114.

77. *See id.* at 114, 117 (stating that "competent counsel" refers to "counsel's qualifications, experience, and abilities at the time of appointment").

78. *See id.* at 114 & n.45.

79. *See, e.g.*, Mata v. Johnson, 99 F.3d 1261, 1266–67 (5th Cir. 1996) (holding that Texas's mechanism for providing competent post-conviction counsel did not meet the Antiterrorism and Effective Death Penalty Act (AEDPA) provisions for expedited federal habeas corpus review because it did not provide explicit competency standards), *vacated in part by* 105 F.3d 209 (5th Cir. 1997); *see also Graves*, 70 S.W.3d at 114 (limiting the definition of "competent" to qualifications, abilities, and experience at the time of appointment).

80. Habeas Corpus Reform Act, 74th Leg., R.S., ch. 319, § 1, sec. 2(d), 1995 Tex. Gen. Laws 2764, 2764 (amended 1997, 1999) (current version at TEX. CODE CRIM. PROC. ANN. art. 11.071 (Vernon Supp. 2003)) (stating that the court of criminal appeals shall appoint competent post-conviction habeas counsel under rules adopted by that court).

and submitted by prospective counsel.[81] This informal process assigned individual judges of the court of criminal appeals to a particular geographic region of the state to review applicants from that area.[82] Although it was intended to ensure competence, in reality, the process did not fulfill the statutory mandate to adopt rules and standards governing qualifications of counsel.[83] Instead, the court's system resulted in a list of attorneys who were eligible for appointment based mainly on whether the court "fe[lt] comfortable with" the attorneys.[84] The legislature attempted to remedy this inadequate informal process in 1999 by amending article 11.071 to transfer appointing authority to the convicting court.[85] However, Texas still has no articulable standards for determining whether it is providing adequate, appointed counsel on state post-conviction review.[86]

C. *Current Crisis in Capital Post-Conviction Representation*

Legal minds regard capital post-conviction habeas procedure as peculiarly complex, specialized, and time-consuming work.[87] Habeas representation demands a diverse range of experience by requiring an attorney to bridge the "'horizontal divide between trial and appellate experience [as well as] the vertical divide between federal and state law and courts[, but] [f]ew lawyers are equally at home on all sides of these divides.'"[88] One commentator queried "whether 'competent

81. *See Mata*, 99 F.3d at 1267 (describing the "flexible" Texas appointment system as unsatisfactory due to a lack of binding standards and a failure to mandate post-conviction experience).

82. Mark Ballard, *New Habeas Scheme Off to Slow Start*, TEX. LAW, Jan. 8, 1996, at 1, 20 (reporting that attorneys were asked to fill out applications asking "for five references and a list of criminal cases handled").

83. *See id.* The Texas Court of Criminal Appeals Presiding Judge, Michael McCormick, noted that eligibility for appointment in capital habeas cases does not require any appellate experience or "special training." *Id.*

84. *Id.*

85. *See* Act of May 20, 1999, 76th Leg., R.S., ch. 803, § i, sec. 2(d), 1999 Tex. Gen. Laws 3431, 3431 (current version at TEX. CODE CRIM. PROC. ANN. art. 11.071 (Vernon Supp. 2003)); *Ex parte* Graves, 70 S.W.3d 103, 115 & n.51 (Tex. Crim. App. 2002) (stating that the legislature based the change on the proposition that the convicting court has more knowledge of the competence of potential habeas counsel than the court of criminal appeals and can better determine both the willingness and availability of habeas counsel to serve); *id.* at 121–22 (Price, J., dissenting) (noting that the legislature "sought to improve the quality of representation" by requiring "that appointment of counsel be made by the convicting court instead of [the court of criminal appeals]").

86. *See Graves*, 70 S.W.3d at 122 (Price, J., dissenting). The convicting courts appoint habeas counsel based on the "rules" adopted by the court of criminal appeals, but those rules only consist of a "list of attorneys eligible for appointment." Thus, the convicting courts' basis for the appointment decisions is a list of attorneys originally created and maintained by the court of criminal appeals. *Id.* (Price, J., dissenting).

87. Di Giulio, *supra* note 18, at 119.

88. *Id.* (quoting Laurin A. Wollan, Jr., *Representing the Death Row Inmate: The Ethics of Advocacy, Collateral Style*, *in* FACING THE DEATH PENALTY 92, 98–99 (Michael L. Radelet ed., 1989)).

representation' is even possible" in post-conviction representation.[89] For example, an attorney preparing a petition for post-conviction habeas corpus review must not only have knowledge of constitutional law, but that attorney must also understand the facts of the case and perform a thorough investigation based on an understanding of the legal significance of those facts.[90] Unfortunately, many lawyers appointed to represent petitioners on post-conviction review lack even a basic understanding of habeas corpus law.[91]

In addition to ignorance of habeas procedure, the lack of guiding qualification standards leads to the appointment of post-conviction counsel who are grossly deficient. Despite the statutory provision requiring appointment of "competent" habeas counsel, many lawyers initially appointed by the court of criminal appeals to represent capital habeas applicants lacked any death penalty or habeas corpus experience.[92] Soon after the 1995 enactment of article 11.071, troubling instances emerged where post-conviction counsel gave deficient representation. For example, in one case, appointed habeas counsel spent fewer than fifty hours on the case, performed no investigation, filed a seventeen-line writ citing only three cases, and provided no citations to the trial record.[93] In another case, appointed habeas counsel filed an application that cited no cases and presented no analysis of the law.[94] One habeas attorney, after filing a writ that failed to raise any issues attacking the validity of his client's conviction or sentence, later admitted under oath that he was not competent to represent that

89. *Id.* at 119 n.80.

90. Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 71 (1990).

91. *See id.* at 71 n.179. "'Habeas corpus is as unfamiliar to a lot of lawyers as atomic physics.'" *Id.* (quoting John C. Godbold, *Pro Bono Representation of Death Sentenced Inmates*, 42 REC. ASS'N B. CITY N.Y. 859, 863 (1987)).

92. *See* Christy Hoppe, *Death Row Inmates Get Lawyers Before Deadline, but Attorneys Lack Expertise, Some Say*, DALLAS MORNING NEWS, Apr. 24, 1997, at 17A (reporting that most appointed habeas attorneys had never handled a post-conviction case and noting a comment by one habeas attorney that eighty percent of the appointed lawyers were "in over their heads"); *see also* Janet Elliott, *Beazley Lawyer Admits Botching Initial Appeal*, HOUS. CHRON., Aug. 15, 2001, at 21A (stating that "[Napoleon] Beazley's case was one of the first handled under [the] 1995 habeas reform law" and reporting that Beazley's appointed habeas attorney had never handled a death-row appeal and admitted to inadequately investigating and briefing the case).

93. *Ex parte* Martinez, 977 S.W.2d 589, 589 & n.2 (Tex. Crim. App. 1998) (Baird, J., dissenting) (referring to deficient representation by the habeas counsel appointed by the Texas Court of Criminal Appeals and stating his opposition to the en banc decision that the case should not be remanded to the habeas court for a determination of whether Martinez received effective assistance of counsel), *aff'd*, 255 F.3d 229 (5th Cir. 2001); *see also* Ballard, *supra* note 82, at 20 (reporting that an "average petition for a writ of habeas corpus in a capital case requires about 400 hours of work").

94. *Ex parte* Wolfe, 977 S.W.2d 603, 603 (Tex. Crim. App. 1998) (Baird, J., dissenting) (arguing that the court should remand to habeas court to determine whether applicant received effective assistance of counsel on habeas application).

client under article 11.071.[95] In that instance, the attorney had been licensed for a mere two years and had no experience in either trying or appealing capital cases.[96]

In each of the cases illustrated above, the court of criminal appeals dismissed the writ and refused either to remand to the habeas court for a determination of whether habeas counsel provided "effective" representation or to stay the applicant's scheduled execution.[97] The lack of standards governing court-appointed capital post-conviction counsel often leads to the appointment of unqualified counsel.[98] As a result, many Texas death-row inmates fail to receive statutorily mandated post-conviction review of their convictions and sentences because they did not have qualified court-appointed counsel.[99] Thus, when a writ of habeas corpus is denied because of an appointed post-conviction counsel's deficient performance, what is the condemned inmate's remedy?

III. What Is "Competent" Counsel? An Analysis of a Petitioner's Claim for Relief

A. *Right to "Effective" Assistance of Counsel on Post-Conviction Review*

The remedy analysis begins with a determination of whether capital habeas petitioners have a Sixth Amendment constitutional right to counsel and the concomitant right to the effective assistance of that counsel.[100] In seeking the full range of rights to counsel under the

95. *See Ex parte* Kerr, 977 S.W.2d 585, 585 (Tex. Crim. App. 1998) (Overstreet, J., dissenting). Judge Overstreet noted that counsel admitted he erroneously believed Kerr's conviction was not final when the application was due, and therefore no issues could be raised attacking the validity of his conviction or sentence. *Id.* Judge Overstreet then argued that Kerr's execution should be stayed because Kerr had not been "afforded his legal right to apply for habeas corpus relief." *Id.* (Overstreet, J., dissenting).

96. Stephen B. Bright, *Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor when Life and Liberty Are at Stake*, 1997 Ann. Surv. Am. L. 783, 804. *But see Ex parte* Kerr, 64 S.W.3d 414, 420 (Tex. Crim. App. 2002) (finding counsel competent and qualified to handle Kerr's case at the time of appointment, despite counsel's blatant error in filing Kerr's initial habeas writ).

97. *See supra* notes 93–95.

98. McFarland v. Scott, 512 U.S. 1256, 1256, 1261 (1994) (Blackmun, J., dissenting) (addressing a crisis in state post-conviction representation where legal counsel available to capital defendants is "woefully inadequate" and describing the state of post-conviction representation in Texas in 1993 as "desperate"), *denying cert. to* 8 F.3d 256 (5th Cir. 1993).

99. *See, e.g.*, *Kerr*, 977 S.W.2d at 585 (Overstreet, J., dissenting) (arguing that the court's refusal to stay Kerr's execution was a "farce and travesty" of his legal right to habeas relief and stating that the court would have "blood on its hands" for allowing the execution to go forward).

100. *See generally* McMann v. Richardson, 397 U.S. 759, 771 & n.14 (1970) ("It has long been recognized that the right to counsel is the right to effective assistance of counsel.").

Sixth Amendment, numerous death-row habeas applicants file subsequent writs, claiming that the failure of their article 11.071 habeas attorney to assert valid claims in the initial writ application deprived them of effective assistance of counsel.[101] Although the Sixth Amendment right to counsel does not apply to capital post-conviction review,[102] Texas death-row habeas petitioners conclude that the right is mandated by Texas's statutory grant of "competent" counsel.[103] Essentially, the argument attempts to bootstrap the constitutional guarantee of effectiveness to the provision of article 11.071, requiring the appointment of "competent" counsel on post-conviction review.[104]

1. No Constitutional Right to Counsel

Under the Sixth Amendment to the U.S. Constitution,[105] the right to counsel is *guaranteed* only at the trial stage "[i]n all criminal prosecutions."[106] Because the Sixth Amendment only identifies the rights available to a criminal defendant in preparing for trial and at the trial itself, the Supreme Court rejected the notion that it includes any right to appeal.[107] Therefore, the Sixth Amendment does not apply to indigent prisoners who apply for state post-conviction collateral relief.[108] Consequently, the Supreme Court refused to require states to appoint counsel when prisoners mount collateral attacks on their convictions.[109] As a matter of legislative policy, states may choose to provide counsel at all stages of judicial review, but the Supreme Court

101. *See, e.g.*, *Ex Parte* Graves, 70 S.W.3d 103, 110 (Tex. Crim. App. 2002) (representing applicant's third post-conviction writ); *Kerr*, 64 S.W.3d at 415 (claiming ineffective assistance of counsel in a subsequent application for writ of habeas corpus).

102. Coleman v. Thompson, 501 U.S. 722, 752–53 (1991); *see* Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (refusing to establish a constitutional right to counsel on habeas corpus review).

103. *E.g.*, *Graves*, 70 S.W.3d at 113 (arguing that counsel's performance must be "constitutionally effective" because article 11.071 creates a statutory right to "competent" counsel on habeas review).

104. *Id.*

105. U.S. CONST. amend. VI (providing that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence").

106. Gideon v. Wainwright, 372 U.S. 335, 339–40 (1963); *see also* Ross v. Moffit, 417 U.S. 600, 610 (1974) (refusing to find that the Due Process Clause requires states to provide counsel on discretionary appeals to state supreme courts); Douglas v. California, 372 U.S. 353, 356–58 (1963) (requiring appointment of counsel for indigent defendants on "*first appeal* . . . as . . . of right" based on the Due Process and Equal Protection Clauses).

107. Martinez v. Court of Appeal of California, 528 U.S. 152, 159–60 (2000) (holding that the Sixth Amendment does not apply to appellate proceedings and that the right to appeal is a creature created by statute).

108. *See* Pennsylvania v. Finley, 481 U.S. 551, 555 (holding that states have no obligation to provide post-conviction review and rejecting suggestion that right to counsel be established on discretionary appeals).

109. *Id.*

makes it clear that neither the Due Process nor the Equal Protection Clauses of the Fourteenth Amendment require it.[110]

Although the Court's refusals to recognize a right to counsel on discretionary post-conviction appeals initially applied only to non-capital, post-conviction proceedings,[111] the Supreme Court extended its line of reasoning to capital, post-conviction review in *Murray v. Giarratano*.[112] Thus, even an indigent inmate who is facing the death penalty has no Sixth Amendment right to appointed counsel on state habeas corpus review.[113] According to the Supreme Court's reasoning, there can be no deprivation of the effective assistance of habeas counsel because no constitutional right to counsel exists on capital post-conviction review.[114] Therefore, a death-row inmate cannot claim that his habeas counsel gave constitutionally ineffective assistance of counsel on his initial writ application.[115] Instead, an applicant must rely on the statutory guarantee of counsel under article 11.071, section 2(a) when claiming the right to effective assistance of counsel on post-conviction review.[116]

2. The Claimed Right Under Article 11.071

Acting within its discretion to develop procedures to assist prisoners in seeking post-conviction review,[117] the Texas Legislature affords a writ of habeas corpus to a death-row inmate as a matter of right.[118] The contested issue is whether that *statutory right* necessarily includes

110. *Id.* at 555–56; *see also* Murray v. Giarratano, 492 U.S. 1, 13 (1989) (plurality opinion) (O'Connor, J., concurring) (noting that states have "considerable discretion in assuring that those imprisoned in their jails obtain meaningful access to the judicial process").

111. *See Finley*, 481 U.S. at 556–57.

112. 492 U.S. at 7, 12 (finding no constitutional right to counsel in post-conviction proceedings challenging a death sentence).

113. *See id.* at 19–20 (Stevens, J., dissenting). Justice Stevens argued that "[t]he unique nature of the death penalty not only necessitates additional protections during pretrial, guilt, and sentencing phases, but also enhances the importance of the appellate process." *Id.* at 22 (Stevens, J., dissenting).

114. Wainwright v. Torna, 455 U.S. 586, 587–88 (1982) (per curiam).

115. *Id.*; *Ex parte* Graves, 70 S.W.3d 103, 112–13 (Tex. Crim. App. 2002) (citing to the Fifth Circuit's rejection of an applicant's claim of ineffective assistance of counsel in the initial habeas proceeding).

116. TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(a) (Vernon Supp. 2003) (stating that a habeas applicant "shall be represented by *competent* counsel" (emphasis added)).

117. *See generally* Pennsylvania v. Finley, 481 U.S. 551, 559 (1987) (stating that the state legislatures have the power to implement procedures for post-conviction review).

118. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(b) ("If a defendant is sentenced to death the convicting court . . . shall determine if [he] is indigent and, if so, whether [he] desires appointment of counsel for the purpose of a writ of habeas corpus.").

the requirement of effective assistance of counsel.[119] Based on the language of article 11.071 section 2(a), it is argued that the legislature intended to place an effective assistance of counsel requirement on the writ process.[120] Specifically, by both statutorily providing for the appointment of "competent" counsel and directing counsel to investigate all factual and legal claims, petitioners argue that the Texas Legislature mandates that they are entitled to effective assistance of counsel on the same level as that afforded a criminal defendant at trial.[121] Thus, petitioners conclude that the statutory right to appointment of counsel includes the right to "effective" representation.[122]

Texas death-row habeas petitioners also rely on the Due Process Clause of the Fourteenth Amendment to claim that effective assistance of counsel is mandated where counsel is ensured as a matter of right.[123] By creating a writ mechanism under article 11.071, petitioners argue that Texas must afford due process of law to those who take advantage of it.[124] Relying on the language of the Supreme Court, petitioners claim that when a state decides to act in an area where its action has significant discretionary elements, "it must . . . act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause."[125] Thus, by requiring appointment of counsel for death-row inmates pursuing writs of habeas corpus, Texas acted in an area requiring constitutional compliance.[126]

Essentially, due process requires the procedural scheme utilized by the state during habeas corpus review to comport with "fairness."[127]

119. *See* McMann v. Richardson, 397 U.S. 759, 771 & n.14 (1970) (recognizing that the "right to counsel is the right to effective assistance of that counsel"); *e.g.*, *Graves*, 70 S.W.3d at 126 (Johnson, J., dissenting) (quoting the Supreme Court of Iowa, which argued that the statutory grant of post-conviction right to counsel implies that the counsel be effective).

120. *Graves*, 70 S.W.3d at 127 (Johnson, J., dissenting) (noting that the statutory requirement of section 2(a) of "competent" counsel mandates constitutionally effective assistance of habeas counsel).

121. *See, e.g.*, *id.* at 114, 116 (restating Graves's losing argument that a "competent" counsel's performance must be constitutionally effective in habeas proceeding); *Ex parte* Davis, 947 S.W.2d 216, 221 (Tex. Crim. App. 1996) (en banc) (rejecting Davis's argument that because article 11.071 provided for the appointment of "'competent' counsel, [habeas] counsel must be . . . constitutionally 'effective'").

122. *E.g.*, *Graves*, 70 S.W.3d at 113.

123. *E.g.*, *In re* Goff, 250 F.3d 273, 274–76 (stating that Goff claimed a violation of the right to due process under the Fourteenth Amendment after he was appointed "incompetent state habeas counsel"); *see Graves*, 70 S.W.3d at 111–12. The court rejected applicant's claim that ineffective assistance of first habeas counsel deprived him of due process. *Id.* at 113.

124. *See Graves*, 70 S.W.3d at 116.

125. Evitts v. Lucey, 469 U.S. 387, 401 (1985).

126. *See id.*

127. *See id.* at 405 (finding that due process fairness concerns arise when a state provides an appellate system as of right but refuses to offer each defendant a fair opportunity to adjudicate on the merits of his appeal); Ross v. Moffitt, 417 U.S. 600, 609 (1974) ("'[D]ue process' emphasizes fairness between the state and individual . . . .").

In keeping with this notion of fairness, petitioners argue that the Due Process Clause requires Texas to simultaneously confer a right to effective assistance of counsel whenever the state chooses to provide, in a statute, capital defendants with a right to counsel in post-conviction proceedings.[128] Otherwise, the appointment of counsel is an empty formality.[129]

Because petitioners argue that the right to appointed counsel in the statutory guarantee of article 11.071 necessarily entails the right to constitutionally "effective" representation,[130] the next determination concerns the standard of review applicable when subsequent writs claim ineffective assistance of counsel appointed under article 11.071. Specifically, petitioners often argue that the statutory right to habeas counsel in Texas includes the constitutional standard of effective assistance of counsel under *Strickland v. Washington*.[131]

B. *Application of Constitutional Standard of Review*

Based on the presumption that a state-created right to habeas counsel under article 11.071 necessarily includes a guarantee of effective assistance of that counsel, petitioners claim the right to invoke the constitutional standard of *Strickland v. Washington* to review alleged ineffectiveness based on counsel's deficient performance on an initial application.[132] Because no standard of review is enunciated by article 11.071, petitioners argue that adoption of the constitutional standard of effective assistance of counsel is appropriate.[133]

Under *Strickland v. Washington*, the proper standard for attorney performance is "reasonably effective assistance."[134] In presenting a valid claim of "actual ineffectiveness" of retained or appointed counsel, a defendant must not only show deficient performance by counsel,

128. *See Graves*, 70 S.W.3d at 116 (discussing the due process fairness concept as it relates to the Equal Protection Clause); *see also* Di Giulio, *supra* note 18, at 109 (arguing that the Fourteenth Amendment requires a state to recognize the right to effective assistance of counsel when it grants a statutory right to counsel).

129. *See, e.g.*, *Evitts*, 469 U.S. at 397 ("[A] right to counsel on appeal . . . would be a futile gesture unless it comprehended the right to effective assistance of counsel."); *Graves*, 70 S.W.3d at 126 (Johnson, J., dissenting) (reasoning that the provision of counsel without any requirement of effectiveness is an empty gesture).

130. *See, e.g.*, *Graves*, 70 S.W.3d at 114; *Ex parte* Mines, 26 S.W.3d 910, 911–13 (Tex. Crim. App. 2000) (en banc) (holding that a petitioner does not have a right to claim constitutionally ineffective representation in state habeas proceedings).

131. *See, e.g.*, *Graves*, 70 S.W.3d at 104–05, 113 (arguing that Graves was entitled to have the merits of his constitutional ineffective assistance of prior habeas counsel claim heard on a subsequent writ); *see generally* Strickland v. Washington, 466 U.S. 668, 687–88 (1984) (stating that counsel's "reasonably effective assistance" is measured by objective standards of reasonableness under "prevailing professional norms").

132. *See, e.g.*, *Graves*, 70 S.W.3d at 113; *Mines*, 26 S.W.3d at 912–13.

133. *See, e.g.*, *Graves*, 70 S.W.3d at 112, 114 & n.45; *see also* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 11 (Vernon Supp. 2003).

134. *Strickland*, 466 U.S. at 687–88.

but a defendant must also suffer sufficient prejudice because of counsel's deficient performance.[135] The Court adopted the following two-part test to review claims of ineffective assistance of counsel: (1) whether "counsel's performance was deficient," measured by "an objective standard of reasonableness" under "prevailing professional norms," and if deficient representation is found, (2) whether that deficiency prejudiced the defendant's trial, measured by a reasonable probability that the result would have been different had counsel's performance been effective.[136]

Thus, to show ineffective assistance of habeas counsel under the *Strickland* standard, first a petitioner would be required to establish, for example, that habeas counsel failed to consult with him or her on important decisions, failed to keep him or her informed, or failed to use such "skill and knowledge" as would render the post-conviction process a reliable avenue of review.[137] Upon this initial showing, the petitioner then would be required to demonstrate a reasonable probability that, but for habeas counsel's deficient representation, his or her initial habeas application would have contained sufficient allegations demonstrating his or her illegal confinement, the writ would have been granted, and he or she would have received a new trial.[138] In reviewing habeas counsel's performance under *Strickland*, "judicial scrutiny of counsel's performance must be highly deferential," and the "performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances."[139]

Arguably, numerous Texas death-row petitioners could demonstrate instances of "actual ineffectiveness" of habeas counsel.[140] To date, however, the court of criminal appeals has refused to remand any matter to the habeas court for a determination of whether a petitioner received effective assistance of habeas counsel under *Strickland*.[141] The court finally resolved the issue in *Ex parte Graves* by

135. *See id.* at 693.

136. *See id.* at 687–88, 694; Cardenas v. State, 30 S.W.3d 384, 391 (Tex. Crim. App. 2000) (en banc) (stating that ineffective performance is that which deviates from prevailing professional norms, and that deficiency must prejudice trial); Hernandez v. State, 726 S.W.2d 53, 57–58 (Tex. Crim. App. 1986) (en banc) (noting that the right to counsel is not the right to error-free counsel).

137. *See Strickland*, 466 U.S. at 688.

138. *See id.* at 694 ("The [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."); *see also Graves*, 70 S.W.3d at 128 (Johnson, J., dissenting) (arguing that a petitioner could prevail under the *Strickland* test by "demonstrating that there is a reasonable probability that, had *habeas* counsel performed effectively, the applicant would have been entitled to relief in the earlier *habeas* proceeding").

139. *Strickland*, 466 U.S. at 688–89.

140. *See supra* notes 88–97 and accompanying text.

141. *See, e.g.*, *Ex parte* Martinez, 977 S.W.2d 589, 590 (Tex. Crim. App. 1998) (Baird, J., dissenting) (arguing that the case should be remanded to the habeas court for a determination of whether Martinez received effective assistance of counsel),

holding that absent a constitutional right to counsel in habeas proceedings, Texas petitioners have no right to constitutionally effective assistance of post-conviction counsel.[142] Thus, the court of criminal appeals specifically refused to apply the *Strickland* standard of effectiveness to habeas counsel in Texas.[143] An analysis of the following purposes of article 11.071 illustrates that the *Graves* court reached the correct conclusion.

IV. WHY THE CONSTITUTIONAL CLAIM FAILS WHEN APPLIED TO CAPITAL HABEAS CORPUS REVIEW

A. *"Competent" Counsel Is No Constitutional Mandate*

The Texas Court of Criminal Appeals correctly held that allowing the petitioners to invoke a claim of effective assistance of appointed habeas counsel is a statutory right and not a constitutional mandate, and thus impliedly refused to apply the *Strickland* standard.[144] First, the legislature's provision mandating appointment of "competent" counsel on post-conviction habeas corpus review does not imply a constitutional right to counsel under the Sixth Amendment.[145] Second, because there is no constitutional right to counsel in state post-conviction proceedings, habeas counsel cannot be constitutionally ineffective under the standard established in *Strickland v. Washington*.[146] Thus, a petitioner has no constitutional right to challenge

aff'd, 255 F.3d 229 (5th Cir. 2001); *Ex parte* Wolfe, 977 S.W.2d 603, 603 (Tex. Crim. App. 1998) (Baird, J., dissenting) (arguing that the matter should be remanded to the habeas court to determine whether applicant received effective assistance of counsel on habeas application).

142. *Graves*, 70 S.W.3d at 113 (concluding that article 11.071 did not create a constitutional right to effective assistance of counsel and specifically declining to "turn a legislative act of grace into a constitutional right").

143. *See id.*

144. *See id.* at 113, 117. Judge Johnson, in the dissent, suggests that the *Strickland* test is the appropriate standard when determining effective assistance of appointed habeas counsel; the *Strickland* standard for attorney performance is that the assistance must be reasonably effective. *Id.* at 127 & n.3 (Johnson, J., dissenting).

145. *See id.* at 117; *see also* Coleman v. Thompson, 501 U.S. 722, 752–53 (1991); Murray v. Giarratano, 492 U.S. 1, 12 (1989) (plurality opinion) (noting that there is no constitutional right to an attorney in state post-conviction proceedings); Pennsylvania v. Finley, 481 U.S. 551, 556 (1987) (noting that the Pennsylvania Constitution, not the United States Constitution, has granted access to counsel in a post-conviction proceeding).

146. *See, e.g.*, Beazley v. Johnson, 242 F.3d 248, 271 (5th Cir. 2001) (holding that despite petitioner's argument that meaningful post-conviction review was rendered impossible due to habeas counsel's heavy caseload, no constitutional right to habeas counsel exists in state collateral proceedings, and Beazley could not claim a constitutional violation); *see generally* Strickland v. Washington, 466 U.S. 668, 687–88 (1984) (stating that the constitutional "reasonably effective assistance" of counsel is measured by objective standards of reasonableness under "prevailing professional norms").

the effectiveness of habeas counsel on post-conviction review.[147]

Despite petitioners' arguments to the contrary, the Supreme Court also rejected the notion "that when a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must assume."[148] Instead, in its discretion, a state may choose to provide "assistance of counsel without requiring the full panoply of procedural protections that the Constitution requires be given to defendants who are in a fundamentally different position—at trial and on first appeal as of right."[149] Texas made a valid decision to grant habeas petitioners assistance of counsel, but that act of legislative grace does not trigger a constitutional right to effective representation in habeas proceedings.[150]

Further, the court of criminal appeals specifically rejected the argument that the Texas Constitution grants more rights on habeas corpus review than does the federal Constitution.[151] As such, there is no right to post-conviction habeas counsel under Article I, Section 10 of the Texas Constitution.[152] On the other hand, even if the *Graves* court had determined that the constitutional standard of effective assistance applied to a statutory grant of "competent" counsel, such relief would be inconsistent with the article 11.071 goals of providing both finality and one full review of a death-row inmate's conviction and sentence.[153]

B. *Successive Writs Claiming Ineffective Assistance of Counsel Undermine Purposes of Article 11.071*

1. Doctrine of Finality

Successive habeas writs undermine the principle of finality of criminal judgments. The Supreme Court observed that, despite its importance in the scheme of capital post-conviction review, "'the Great Writ entails significant costs.'"[154] The most significant of those costs

147. *See* Evitts v. Lucey, 469 U.S. 387, 394, 396–97 & n.7 (1985) (stating that a defendant is entitled to effective assistance of counsel only on first appeal of right).

148. *Finley*, 481 U.S. at 559.

149. *Id.*

150. *Graves*, 70 S.W.3d at 112–13.

151. *Ex parte* Mines, 26 S.W.3d 910, 913 (Tex. Crim. App. 2000) (en banc) (holding that the Texas Constitution provides no right to counsel in post-conviction habeas corpus proceedings).

152. *See* TEX. CONST. art. I, § 10 (providing that "[i]n all criminal prosecutions, the accused . . . shall have the right of being heard by himself or counsel").

153. *See Graves*, 70 S.W.3d at 114, 116 (stating that the legislature enacted article 11.071 to prevent repetitious writs); *Ex parte* Kerr, 64 S.W.3d 414, 419 (Tex. Crim. App. 2002) (concluding that the legislature intended article 11.071 to allow death-row inmates "one full and fair opportunity to present . . . constitutional or jurisdictional claims in accordance with the procedures of the statute").

154. Coleman v. Thompson, 501 U.S. 722, 747–48 (1991) (quoting Engle v. Isaac, 456 U.S. 107, 126 (1982)).

is the loss of finality in criminal litigation by both state and federal collateral review of state convictions.[155] If the Texas Court of Criminal Appeals recognized ineffective assistance of counsel claims on post-conviction review, then such claims would go on *ad infinitum*.[156] Thus, the doctrine of finality would be eroded by allowing continued litigation concerning habeas counsel's performance on the first habeas writ and any subsequent writs.[157]

When considering the proper scope of habeas corpus review, it must be emphasized that the writ's primary purpose is to determine the "'legality of the restraint under which a person is held.'"[158] The Supreme Court determined that the writ's scope cannot be defined simply by referring to a "'perceived need'" to ensure a criminal defendant receives "'a trial free of constitutional error.'"[159] Instead, interests of finality must be considered in defining the scope of habeas review.[160] These interests prevent broadening post-conviction habeas review under article 11.071 to include a *Strickland* standard of effectiveness. First, post-conviction collateral review "extends the ordeal of trial for both society and the accused,"[161] both of whom have an interest in the certainty that comes with an end to criminal litigation.[162] Second, allegations of deficient performance by counsel in state habeas proceedings are even further removed from the merits of the trial than the collateral review itself.[163] Litigation concerning the performance of habeas counsel reduces not only the finality of the trial conviction but also the finality of the direct appellate proceedings.[164]

155. *Id.* at 748.

156. *See Graves*, 70 S.W.3d at 115 ("A claim of ineffective assistance of the prior habeas counsel would simply be the gateway though which endless and repetitious writs would resurrect."); *see also* Robbins, *supra* note 90, at 25 n.32 (stating that recognition of ineffective assistance of habeas counsel would lead to an endless stream of claims).

157. *Graves*, 70 S.W.3d at 117.

158. *Kerr*, 64 S.W.3d at 419 (quoting 39 AM. JUR. 2D *Habeas Corpus* § 1 (1999)).

159. Teague v. Lane, 489 U.S. 288, 308 (1989) (plurality opinion) (arguing that due to principles of finality, application of constitutional rules not in effect at the time a conviction became final are restricted on habeas corpus review) (quoting Kuhlmann v. Wilson, 477 U.S. 436, 447 (1986) (plurality opinion)).

160. *Id.*

161. Engle v. Isaac, 456 U.S. 107, 126–27 (1982).

162. Coleman v. Thompson, 501 U.S. 722, 748 (1991) (citing *Engle*, 456 U.S. at 126 (citing Sanders v. United States, 373 U.S. 1, 24–25 (1963))).

163. *See* Pennsylvania v. Finley, 481 U.S. 551, 556–57 (stating that post-conviction relief is even further removed from the criminal trial than discretionary, direct review).

164. *See Ex parte* Drake, 883 S.W.2d 213, 215 (Tex. Crim. App. 1994) ("[H]abeas corpus should generally not be used to re-litigate matters . . . addressed on appeal . . . .").

Texas has a strong interest in the finality of its judgements for another reason.[165] Without principles of finality, capital punishment is deprived of one of its main goals—deterrence.[166] By delaying the finality of criminal convictions, post-conviction habeas review undermines the deterrent function of the criminal justice system.[167] According to the Supreme Court, the fact that a person's life is at stake in capital criminal prosecutions means "'only that 'conventional notions of finality' should not have *as much* place in criminal as in civil litigation, [and] not that they should have *none*.'"[168] Finality becomes a highly emotional issue when the focus concerns the deterrent effect provided by the swift carrying out of capital punishment, especially in the context of death penalty litigation.[169] Because deterrence depends on the expectation that one who violates the law will both "'swiftly and certainly become subject to . . . just punishment,'"[170] the fear is that lengthening the capital appeals process lessens the deterrent effect of capital punishment.[171] Proponents of the death penalty claim that because of the delay associated with habeas appeals, the process already makes a mockery of the death penalty.[172]

The Texas Court of Criminal Appeals recognized in *Graves* that allowing habeas petitioners to claim a right to "effective" habeas counsel on a subsequent writ application would cause "the entire concept of the finality of a criminal conviction [to] fall by the wayside."[173] Texas enacted article 11.071 as a measure to streamline and *shorten* the state's post-conviction process, while still providing full and meaningful review of habeas applications.[174] Thus, the legislature made a decision to deny certain rights in order to facilitate capital punishment, provide finality in death convictions, and thereby serve the de-

165. *See Ex parte* Graves, 70 S.W.3d 103, 108, 117 (Tex. Crim. App. 2002) (noting the convicting courts' emphasis on both deterrence and maintenance of a viable judicial system); *Ex parte* Elizondo, 947 S.W.2d 202, 213 (Tex. Crim. App. 1996) (White, J., dissenting) ("[A] state has a strong interest in punishing the guilty.").

166. *See* Teague v. Lane, 489 U.S. 288, 309 (1989) (plurality opinion).

167. *Graves*, 70 S.W.3d at 108 n.17.

168. *See Teague*, 489 U.S. at 309 (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 150 (1970)).

169. *See* Engle v. Isaac, 456 U.S. 107, 127 & n.32 (1982) (noting that habeas writs "frequently cost society the right to punish admitted offenders").

170. *Id.* at 127 n.32 (quoting Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452 (1963)).

171. *See Graves*, 70 S.W.3d at 117 ("There must come a time when . . . the deterrent effects of certainty and immediacy of punishment outweigh the prisoner's right to endlessly litigate new claims.").

172. Susan L. Karamanian, *Victim's Rights and the Death-Sentenced Inmate: Some Observations and Thoughts*, 29 ST. MARY'S L.J. 1025, 1031 (1998) (noting that the delay associated with habeas appeals offends the two goals of capital punishment: deterrence and swift retribution).

173. *Graves*, 70 S.W.3d at 117.

174. *Ex parte* Kerr, 64 S.W.3d 414, 418–19 (Tex. Crim. App. 2002).

terrent effect intended by capital punishment.[175] Given the scope and purpose of article 11.071, the court of criminal appeals correctly refused to circumvent the legislature's policy decision by permitting capital habeas petitioners to litigate alleged deficiencies of counsel in a previous state habeas proceeding.

2. Abuse-of-Writ Doctrine

There is also a danger that successive habeas applications claiming ineffective assistance of habeas counsel will lead to the writ's abuse. The Texas Court of Criminal Appeals first articulated the "abuse-of-writ" doctrine in *Ex parte Carr*,[176] stating that a habeas petitioner may not be permitted to burden the courts with his habeas litigation.[177] Instead, if a petitioner's grounds would justify the court granting the relief he seeks, he should present those grounds "with dispatch for determination, rather than doling them out one-by-one . . . ."[178] Because the "Great Writ" is too important a matter to be lightly used, petitions must be filed in earnest, and all meritorious contentions should be presented and ruled upon as quickly as possible.[179]

Texas Code of Criminal Procedure article 11.071 section 5(a) follows the spirit of the court's reasoning in *Ex parte Carr* by significantly narrowing an applicant's right to habeas corpus relief, while still allowing all available claims to be raised at one time.[180] Enacted in part to eliminate and prevent prisoner abuse of the capital habeas corpus process, article 11.071 section 5(a) represents "a legislative codification of [the] judicially created 'abuse of the writ doctrine.'"[181] Specifically, section 5(a) pertains to subsequent writs by limiting a death-row inmate to a single habeas corpus application and by "generally bar[ring] the Court of Criminal Appeals from considering a second application for a writ of habeas corpus."[182]

However, Texas's statutory "abuse-of-writ" provision allows three methods by which a petitioner filing a subsequent application can seek

175. *Graves*, 70 S.W.3d at 113, 117 (noting the legislature's discretion to give habeas petitioners assistance of counsel without requiring procedural protections required by the United States Constitution).

176. 511 S.W.2d 523 (Tex. Crim. App. 1974).

177. *Id.* at 525–26 (involving habeas corpus proceeding where habeas petitioner refused to disclose several of his grounds for relief; court held that grounds were waived by petitioner's abuse of the writ).

178. *Id.* at 525.

179. *Id.*

180. TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(a) (Vernon Supp. 2003) (stating that if a petitioner files a subsequent application for a habeas writ after filing his initial application, the court cannot consider the subsequent application's merits unless three specific conditions are met); *see supra* notes 43–46 and accompanying text.

181. *Ex parte* McGinn, 54 S.W.3d 324, 326 (Tex. Crim. App. 2000) (en banc) (McCormick, P.J., concurring) (quoting *Ex parte* Davis, 947 S.W.2d 216, 226 (Tex. Crim. App. 1996) (McCormick, P.J., concurring)).

182. Mallin, *supra* note 21, at 167.

the court's review of its merits.[183] Under article 11.071 section 5(a), the court may consider the merits of a subsequent application if the capital petitioner establishes: "(1) that the claim he raises" in the second application could not have been presented previously because it "was factually or legally 'unavailable'" when the first petition was filed; "(2) but for a federal constitutional violation, no rational juror could have found [the applicant] guilty" (the "actually innocent" standard); "or (3) but for a constitutional violation, no rational juror could have" sentenced the applicant to death.[184]

In urging the court of criminal appeals to consider the merits of a subsequent application for writ of habeas corpus, some death-row inmates, who allege that they received ineffective assistance of habeas counsel on their initial application attempt to invoke the first exception under section 5(a)(1).[185] Under that exception, the ineffective assistance claim raised in the subsequent writ must have been either *factually* or *legally* "unavailable" to the petitioner when the initial application was filed.[186] Based on a superficial examination of article 11.071 section 5(a)(1), it might appear that an ineffective assistance of initial habeas counsel claim might succeed in invoking that statutory exception to the prohibition against subsequent writs.[187] However, a closer reading of the statute shows that such claims attacking habeas counsel's performance must fail.[188]

To correctly interpret Texas's statutory abuse of the writ doctrine, article 11.071 "section 5(a) must be read in conjunction with subsections (d) and (e)."[189] Under subsection (d), the "*legal* basis of a claim is unavailable [if, *before* an applicant's first writ was filed, that] legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a [Texas] court of appellate jurisdiction."[190] Essentially, section 5(d) represents the codification of the "novelty" doctrine, under which a claim's omission may be ex-

183. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(a)(1)–(3).

184. Mallin, *supra* note 21, at 167 (quoting TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(a)(1)–(3)).

185. *See, e.g.*, *Ex parte* Graves, 70 S.W.3d 103, 115 n.48 (Tex. Crim. App. 2002) (noting that Graves's assertion that his claim was "unavailable" when his initial application was filed because his first habeas counsel would not have raised the issue concerning his *own* representation, and therefore, Graves could not have brought his present claim of ineffective assistance of habeas counsel on his first writ).

186. TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(a)(1).

187. *See id.*

188. *See id.*; *e.g.*, *Graves*, 70 S.W.3d at 113, 115 n.48 (refusing to read section 5(a) as referring to a claim of ineffective assistance of counsel in failing to raise factual or legal claims in an earlier habeas writ and concluding that article 11.071 did not create a constitutional right to effective assistance of counsel).

189. Mallin, *supra* note 21, at 167.

190. TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(d) (emphasis added).

cused for cause only if the claim was "so novel that its legal basis is not reasonably available to counsel . . . ."[191]

Section 5(e), on the other hand, concerns the *factual* unavailability of a claim.[192] That section clarifies that a claim's factual basis "is unavailable . . . if [it] was not ascertainable through the exercise of reasonable diligence on or before [the date of the first habeas application]."[193] When interpreting this exception to the abuse of the writ doctrine, it must first be recalled that article 11.071 section 5(e) concerns *collateral* relief, not a trial or direct appeal.[194] Second, habeas corpus in Texas reviews only jurisdictional defects and denial of constitutional rights.[195] Thus, one commentator noted that the interests of finality require a higher burden on subsequent habeas writs than simply proving that the "claim was unavailable and . . . not 'ascertainable through the exercise of reasonable diligence'" when the initial writ was filed.[196] Instead, to be cognizable under subsection (e), a "'factual unavailability' claim must be [based] on newly discovered evidence" and must be of such a type as would demonstrate applicant's actual innocence.[197]

An analysis of article 11.071 section 5(a)(1) illustrates that petitioners who file subsequent writs claiming ineffective assistance of initial habeas counsel cannot establish that the subsequent claims were technically "unavailable" as required by article 11.071 section 5(a).[198] First, although petitioners may contend that certain claims should have been raised in the initial writ, those claims were not factually or legally unavailable when the first application was filed.[199] Rather, petitioners' focus is on habeas counsels' deficient performance in failing

191. *See* Reed v. Ross, 468 U.S. 1, 16 (1984); *see also* Mallin, *supra* note 21, at 168.

192. TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(e).

193. *Id.*

194. *See Ex parte* Graves, 70 S.W.3d 103, 115 & n.48, 117 (Tex. Crim. App. 2002) (emphasizing the tension in habeas corpus jurisprudence between ensuring fundamental fairness to criminal defendants, providing finality, and enhancing deterrence); Mallin, *supra* note 21, at 171. "In a collateral attack, all presumptions favor the truth, accuracy, and fairness of the [petitioner's] conviction and sentence." *Id.* at 172.

195. *Graves*, 70 S.W.3d at 109 (stating that a post-conviction writ must allege and prove the violation of a specific constitutional provision by a preponderance of the evidence); *Ex parte* Drake, 883 S.W.2d 213, 215 (Tex. Crim. App. 1994).

196. Mallin, *supra* note 21, at 171–72.

197. *Id.* at 172.

198. *Graves*, 70 S.W.3d at 115 n.48 (refusing to read section 5(a) as referring to a claim of ineffective assistance of counsel in failing to raise factual or legal claims in an earlier habeas writ and concluding that "unavailability" refers to claims that were unavailable at the time of the original filing); *see also Ex parte* McGinn, 54 S.W.3d 324, 326 (Tex. Crim. App. 2000) (en banc) (McCormick, P.J., concurring) (concluding that the subsequent application did not satisfy the section 5(a) exception because it contained no facts establishing that the claim could not have been presented in initial application).

199. *See McGinn*, 54 S.W.3d at 331 (Womack, J., concurring) (stating that a court may not consider the merits of a subsequent habeas application unless the issues were legally or factually unavailable at the time the initial application was filed).

to raise those contentions.[200] Second, although habeas counsels' deficient performance was technically unavailable as a claim on the initial writ, that "unavailability" was neither because the legal basis of ineffective assistance was not "recognized by . . . a final decision of the United States Supreme Court" when the applicant filed his initial writ,[201] nor because it was a "factual basis . . . not ascertainable through the exercise of reasonable diligence."[202] In fact, the contention of ineffective assistance could not be raised until *after* initial habeas counsel filed the original writ because such a claim essentially admits that the factual foundations and legal bases were present, but counsel failed to include them in the initial application. Thus, the contention that habeas counsel was deficient on a previous application does not fit within the exception articulated by section 5(a).[203]

Therefore, engrafting a constitutional standard of effective assistance of counsel to post-conviction review would undermine the doctrine of finality. Such a standard would also lead to abuse of the writ by allowing habeas petitioners to bring otherwise barred claims simply by alleging that the writ attorney provided ineffective assistance of counsel.[204] However, without "competent" assistance of counsel, many petitioners lose their opportunity to present meaningful claims when challenging their convictions and death sentences on state habeas corpus review.[205] The solution lies in ensuring that competent counsel is provided in the first place, as qualified counsel will uncover more claims and present them more effectively, thereby reducing the need for successive petitions.[206]

V. Texas Should Adopt Standards of Competency

Because the first habeas application is "essentially the only opportunity a condemned inmate has for habeas review of his confinement

200. *See, e.g., Graves*, 70 S.W.3d at 106 n.6, 107 (claiming that the original habeas counsel was constitutionally ineffective because he failed to include in initial writ allegations that the state suppressed vital evidence); *Ex parte* Kerr, 64 S.W.3d 414, 415–16 (Tex. Crim. App. 2002) (restating Kerr's argument that the original habeas attorney did not provide effective assistance because the initial writ raised no constitutional or jurisdictional claims concerning the fundamental fairness of trial).

201. *See* Tex. Code Crim. Proc. Ann. art. 11.071, § 5(d) (Vernon Supp. 2003); *e.g., Graves*, at 113, 115 n.48 (refusing to read section 5(a) as referring to a claim of ineffective assistance of counsel in failing to raise *legal* claims in an earlier habeas writ).

202. *See* Tex. Code Crim. Proc. Ann. art. 11.071, § 5(e); *e.g., Graves*, at 113, 115 n.48 (refusing to read section 5(a) as referring to a claim of ineffective assistance of counsel in failing to raise *factual* claims in an earlier habeas writ).

203. *Graves*, 70 S.W.3d at 115 n.48; *see* Tex. Code Crim. Proc. Ann. art. 11.071, § 5(a), (d).

204. *Graves*, 70 S.W.3d at 117 (stating that allegations of ineffective assistance of habeas counsel are a "gateway" device that would allow petitioners "to resurrect a procedurally defaulted claim which he failed to bring at the proper time").

205. *See* Robbins, *supra* note 90, at 48–49.

206. *See id.* at 48.

and death sentence,"[207] appointed counsel who assists him in preparing that application must be qualified.[208] Accordingly, article 11.071 mandates the appointment of "competent" post-conviction counsel for indigent capital petitioners. Unfortunately, the statute negates that concession by maintaining no binding qualification standards.[209] The Texas Legislature clearly intended for appointed counsel to provide competent representation in state habeas corpus proceedings; however, it mistakenly relied on the court of criminal appeals to adopt rules and standards governing the appointment of habeas counsel.[210] Consequently, six years after the enactment of article 11.071, no standards of competency have been developed.

While the court of criminal appeals may have promulgated its *own* standards of competence, it has failed to articulate those standards to guide convicting courts in appointing attorneys on post-conviction review under article 11.071 section 2(d).[211] Because only a precise, structured definition of "competent" will maintain the integrity of the Texas habeas corpus statute, legislative action is necessary to effectively provide one full, fair, and final review of death convictions and sentences. The Texas Legislature should amend article 11.071 to include mandatory standards of competency for post-conviction counsel. If the statute were amended in this way, convicting courts would be able to appoint competent counsel who would thoroughly investigate and present all available factual and legal claims, and capital habeas petitioners would have little or no need to file subsequent writs claiming ineffective assistance of habeas counsel.[212] Finally, the suggested criteria would fulfill the legislature's intent to provide quality representation on post-conviction habeas review.

A. *Statutory Construction Analysis of Article 11.071*

Statutory construction analysis illustrates that the Texas Legislature clearly intended for counsel appointed under article 11.071 section 2(a) to be "competent."[213] In ascertaining the nature and scope of the provision of competent counsel under article 11.071, the statutory con-

207. *Ex parte* Murphy, 917 S.W.2d 28, 28 (Tex. Crim. App. 1996) (Baird, J., dissenting).

208. *See Graves*, 70 S.W.3d at 121 (Price, J., dissenting) (arguing that without a requirement that counsel be qualified, "[t]he appointment of counsel is meaningless").

209. *See* Di Giulio, *supra* note 18, at 119.

210. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(d) (Vernon Supp. 2003); *supra* note 3 and accompanying text.

211. Mata v. Johnson, 99 F.3d 1261, 1266–67 (5th Cir. 1996) (stating that the Texas Court of Criminal Appeals has failed to develop adequate standards to ensure appointment of competent counsel), *vacated in part by* 105 F.3d 209 (5th Cir. 1997).

212. *Graves*, 70 S.W.3d at 121 (Price, J., dissenting).

213. *Id.* at 129–30 (Holcomb, J., dissenting) (noting that the legislature intended article 11.071 to guarantee that a death-row inmate will have "competent counsel" to assist in preparing "his one application").

struction analysis begins with the statute's plain language,[214] which states that "[a]n applicant shall be represented by competent counsel."[215] If a term in the statute is not defined, it should be given its plain and ordinary meaning,[216] and extratextual factors may be considered only if the statute's language is ambiguous.[217] Finally, because all words are presumed to have been used by the legislature for a purpose, each word contained in the statute must be given effect if possible.[218]

The plain language of article 11.071 shows the legislature intended to provide more than merely adequate lawyers on capital post-conviction review.[219] By using the modifier "competent" in connection with "counsel," the Texas Legislature clearly intended for capital habeas applicants to be represented in an initial habeas corpus proceeding by qualified lawyers who have sufficient legal knowledge and skills.[220] Because article 11.071 does not define the word "competent," statutory construction analysis allows reliance on dictionary definitions.[221] Thus, a "competent" attorney is one who possesses "[a] basic or minimal ability to do something; qualification" and "[t]he mental ability to understand problems and make decisions."[222]

Further, the legislature's use of the word "shall" in section 2(a) indicates that the provision of competent counsel is mandatory.[223] While the use of "shall" may sometimes be construed as either permissive or mandatory, the word must be given the meaning that will best express the legislature's intent.[224] A review of the legislative history of article 11.071 illustrates that the Texas Legislature intended to provide capi-

214. *See* Brown v. State, 943 S.W.2d 35, 36 (Tex. Crim. App. 1997) (defining the starting point of statutory analysis as the language of the statute itself).

215. TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(a).

216. Boykin v. State, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) (stating that if the meaning of the statutory text should have been plain to the legislators who voted on it, the court will give effect to the plain meaning).

217. *Id.* at 785–86.

218. Rocha v. State, 16 S.W.3d 1, 14 (Tex. Crim. App. 2000) (noting that the court should attempt to give effect to each word, phrase, and clause of a statute); Whitelaw v. State, 29 S.W.3d 129, 131 (Tex. Crim. App. 2000) (stating that under a plain meaning inquiry, it is "generally presume[d] that every word in a statute has been used for a purpose").

219. *See Ex parte* Graves, 70 S.W.3d 103, 115 (Tex. Crim. App. 2002) (stating that the legislature consistently shows great interest in appointment of competent counsel in habeas cases).

220. *See id.* at 130 (Holcomb, J., dissenting) ("Article 11.071's guarantee of 'competent counsel' would be a cruel joke if it did not comprehend the right to the effective assistance of counsel.").

221. *See* Bingham v. State, 913 S.W.2d 208, 209–10 (Tex. Crim. App. 1995) (holding that courts should focus on a common acceptance of "unspecialized" words in connection with the context in which they appear).

222. BLACK'S LAW DICTIONARY 278 (7th ed. 1999).

223. *Cf.* Brinkley v. State, 320 S.W.2d 855, 856 (Tex. Crim. App. 1959) ("'Must' and 'shall' are synonymous and are usually mandatory when used in statutes.").

224. *Id.*

tal petitioners with the mandatory assistance of qualified, competent counsel in preparing their post-conviction writs of habeas corpus, thereby ensuring they receive one full "'bite at the apple.'"[225] Representative Pete Gallego, the House sponsor of the legislation that became article 11.071, affirmed in a May 1995 House floor debate that the legislative intent was to ensure adequate representation and review of capital post-conviction cases.[226] Representative Gallego stated,

> [W]e tell individuals [in this statute] that everything you can possibly raise the first time, we expect you to raise it initially, one bite of the apple, one shot . . . . If you have to stick the kitchen sink in there, put it all in there, and we will go through those claims one at a time and make a decision . . . . The idea is this: *You're going to be able to fund counsel in these instances, and we are going to give you one very well-represented run at a habeas corpus proceeding.*[227]

Accordingly, the court of criminal appeals recognized that article 11.071 rests on the premise that a capital inmate has "one full and fair opportunity to present his [habeas claims]."[228]

Finally, in interpreting a statute, it must be presumed that the legislature included every word in the statute for a purpose, and a court should give effect to each word used.[229] Thus, the legislature's inclusion of the word "competent" in the death-penalty habeas corpus writ scheme illustrates its intent to ensure qualified assistance of counsel on post-conviction review. Because only trial and direct appellate counsel are subject to the constitutional standard of "reasonably effective assistance,"[230] the legislature knew it was necessary to specify the type of representation required by habeas counsel. Significantly, when the legislature recently enacted the Texas Fair Defense Act,[231] it did not qualify the statutory provisions for appointing counsel at trial

225. *See Ex parte* Torres, 943 S.W.2d 469, 473–74 (Tex. Crim. App. 1997) (en banc) (considering legislative debates in the House to determine legislative intent for enactment of article 11.071 and concluding that even though the legislature was limiting a convicted individual to "'one bite at the apple,'" "they clearly contemplated that that bite would be a full one").

226. *Id.* at 474 (quoting Debate on Tex. S.B. 440 on the floor of the House, 74th Leg., R.S. (1995)).

227. Debate on Tex. S.B. 440 on the floor of the House, 74th Leg., R.S. (1995) (statement of Representative Gallego) (emphasis added), *quoted in Ex parte* Graves, 70 S.W.3d 103, 130 (Tex. Crim. App. 2002) (Holcomb, J., dissenting).

228. *Ex parte* Kerr, 64 S.W.3d 414, 419 (Tex. Crim. App. 2002).

229. Rocha v. State, 16 S.W.3d 1, 14 (Tex. Crim. App. 2000).

230. *See* Ross v. Moffit, 417 U.S. 600, 618–19 (1974); Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) ("Any person haled into court . . . cannot be assured a fair trial unless counsel is provided for him.").

231. Texas Fair Defense Act, 77th Leg., R.S., ch. 906, § 2, 2001 Tex. Gen. Laws 1800, 1800–01 (Vernon) (codified as amended at TEX. CODE CRIM. PROC. ANN. art. 1.051 (Vernon Supp. 2003)).

with the term "competent."[232] Therefore, statutory construction analysis illustrates the legislature intended that appointed post-conviction habeas counsel provide competent, well-qualified representation.

If the legislature amended article 11.071 to include mandatory statutory criteria describing the qualifications required for appointment of habeas counsel, it would fulfill the intent to provide "competent" counsel on post-conviction habeas review. Further, such an amendment would simplify the appointment process and provide the convicting courts with the guidance they need in making such appointments.[233] Texas should follow the lead of other states and amend article 11.071 to provide statutory direction in the appointment of "competent" counsel on post-conviction review.[234] Such action will not only provide the necessary standards of competency to administer the appointment scheme, it will also remove judicial discretion in making such appointments, reduce the number of successive writs attempting to claim ineffective assistance of habeas counsel, and infuse the habeas corpus scheme of review with certainty and consistency.[235]

B. *Suggested Criteria for Appointing "Competent" Counsel*

To ensure that statutorily mandated post-conviction counsel is "competent," the underlying goal of the statutory criteria must be the establishment of "minimum eligibility requirements designed to provide highly qualified and dedicated attorneys to . . . capitally sentenced individuals."[236] To meet this goal, the Texas Legislature should follow the American Bar Association's recommendations for statutory criteria regarding appointment of post-conviction counsel.[237] Those recommendations address the following general areas: (1) the number of years the attorney has been licensed to practice law; (2) the attorney's general level of experience; (3) the attorney's recent experience representing clients in capital cases; (4) any specialized training or education in post-conviction capital habeas litigation; and (5) the attorney's demonstrated capability to perform at the advanced level required by specialized habeas practice, such as recent successful trials or appeals.[238]

Competency standards based on the American Bar Association's proposed general criteria emphasize a habeas lawyer's experience with other cases instead of his or her performance in the present case, and they assume that specialized training will inevitably lead to com-

232. *See* TEX. CODE CRIM. PROC. ANN. art. 1.051 (mandating that "[a] defendant in a criminal matter is entitled to be represented by counsel in an adversarial judicial proceeding").
233. Robbins, *supra* note 90, at 18–19.
234. *See id.* at 19.
235. *See id.* at 23.
236. *Id.* at 19.
237. *See id.* at 19 n.11.
238. *Id.* at 19–20.

petent representation.[239] However, it is imperative for a statute that provides for the appointment of post-conviction counsel to contain provisions prescribing mandatory requirements for the competence of that counsel.[240] Although an attorney who lacks the experience mandated by the statute may nevertheless be qualified to provide competent representation, the proposed criteria will do much more to carry out the legislature's intent than Texas's current appointment practice, which is based on no objective criteria at all.[241] By providing the guidance that is currently lacking in the appointment of capital post-conviction counsel, the criteria will ensure that applicants receive meaningful review of their death convictions by qualified counsel.

A survey of the capital post-conviction habeas statutes enacted by other states provides further guidance for legislative action in Texas. Notably, other than Texas, no states that provide for the *mandatory* appointment of post-conviction counsel appear to qualify that appointment with the directive that such counsel be "competent."[242] As such, those state courts are not required to interpret the meaning and extent of an undefined statutory guarantee. Of the numerous states that statutorily mandate the appointment of counsel on capital post-conviction habeas review, at least four enacted specific standards governing the qualifications of post-conviction counsel[243] which reflect the proposed competency criteria outlined by the American Bar Association.[244]

For example, Arizona's capital post-conviction habeas statute mandates that an attorney appointed to represent a death-row inmate on state post-conviction review must, *inter alia*: (a) have practiced in the

239. *Id.*; *see* Di Giulio, *supra* note 18, at 119 (making the same argument against similar statutory requirements).

240. Robbins, *supra* note 90, at 19.

241. *See generally Ex parte* Graves, 70 S.W.3d 103, 114 n.45 (Tex. Crim. App. 2002). The *Graves* court stated that the convicting courts should assess the professional competence of habeas counsel, and therefore, the *Graves* court refused to promulgate rules or standards to guide in the determination of counsel's qualifications and abilities. *See id.* at 115 n.45; *see also* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(d) (Vernon Supp. 2003).

242. *See, e.g.*, ARIZ. R. CRIM. P. 32.5 cmt. ("Any petition for post-conviction relief filed by a person under sentence of death shall result in the appointment of counsel."); ARK. R. CT. 16-91-202 ("If a capital conviction and sentence are affirmed on direct appeal, the circuit court . . . shall . . . appoint[ ] counsel to represent the petitioner in a post-conviction proceeding . . . ."); IDAHO R. CRIM. P. 44.2 ("Immediately following the imposition of the death penalty, the district judge . . . shall appoint at least one attorney . . . to represent the defendant for the purpose of seeking any post-conviction remedy . . . ."); ILL. R. CRIM. P. 5/122-2.1 ("If the petitioner is under sentence of death and is without counsel . . . the court shall appoint counsel if satisfied that the petitioner has no means to procure counsel.").

243. *See* ARIZ. R. CRIM. P. 6.8(c); CAL. R. CT. 76.6(e); IDAHO R. CRIM. P. 44.3(3)(b); TENN. R. SUP. CT. 13(3)(h).

244. *See* Robbins, *supra* note 90, at 18–27 (discussing the suggested legislative plan for states that want to adopt the ABA guidelines for appointment of competent habeas counsel).

area of state criminal appeals or post-conviction proceedings for at least three years; (b) not have previously represented the capital defendant; (c) have been lead counsel in an appeal or post-conviction proceeding in which a death sentence was imposed within three years immediately preceding the appointment; (d) have attended and completed at least six hours of capital defense training or educational programs within one year prior to the appointment; and (e) generally demonstrate the "proficiency and commitment which exemplify the quality of representation appropriate to capital cases."[245]

Similarly, California's capital post-conviction habeas statute follows the suggested competency criteria by providing that a lawyer appointed as state habeas counsel must have at least the following qualifications: (a) practiced actively in that state for at least four years; (b) served as counsel of record in five completed felony appeals or writ proceedings; (c) completed at least nine hours of habeas corpus defense training within three years before the appointment; and (d) demonstrated proficiency in research, analysis, writing, investigation, and issue identification, determined by three writing samples submitted by the attorney.[246]

In Idaho, post-conviction appointed habeas "counsel must either qualify as 'lead trial counsel'" under the statute, or meet the following objective criteria: (a) familiarity with the rules and procedure of Idaho appellate courts; (b) experience as a post-conviction practitioner with at least three years spent in criminal litigation; (c) service as counsel in a capital post-conviction case; (d) completion of twelve hours of training or educational programs; and (e) demonstration of proficiency and commitment that "exemplify the quality of representation appropriate to capital cases."[247] Also, in Tennessee, appointed capital post-conviction counsel must meet the following minimum qualifications: (a) experience in state post-conviction procedure; (b) a working knowledge of habeas corpus practice, satisfied by six hours of specialized training; and (c) three years of litigation experience in criminal trials and appeals.[248]

Finally, in addition to providing statutory criteria for competency in article 11.071, the Texas Legislature could go further and explicitly disclaim any responsibility for the performance of appointed capital post-conviction counsel.[249] While some states specifically decline by statute to allow claims alleging deficient performance by post-conviction habeas counsel,[250] such "nullifying provisions" seem fundamen-

245. ARIZ. R. CRIM. P. 6.8(c)(1)–(2).
246. CAL. R. CT. 76.6(e)(1)–(5)(A).
247. IDAHO R. CRIM. P. 44.3(3)(b)(1).
248. TENN. R. SUP. CT. 13(3)(g), (h).
249. *See* Di Giulio, *supra* note 18, at 120.
250. *See, e.g.*, MONT. CODE ANN. § 46-21-201(3) (2001) (indicating that violation of the appointment of competent counsel for post-conviction proceedings does not allow a claim for post-conviction relief); N.C. GEN. STAT. § 15A-1419(c)(3) (2002) (mandat-

tally unfair if the competency of such counsel has not first been ensured by statutory criteria that includes qualifications for appointment.[251]

VI. CONCLUSION

Capital post-conviction review is a controversial and complex stage of the capital appeals process. When a death-row inmate applies for habeas corpus relief, he is no longer fighting to prove his innocence, but instead he "is a legally guilty person."[252] Thus, a capital habeas petitioner needs an attorney "not as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt."[253] Even so, no one would argue that indigent capital petitioners should be forced to risk having ill-prepared, inexperienced habeas counsel appointed to represent them, thereby increasing the possibility that one might be executed without the benefit of an important procedural safeguard.[254]

The Texas Court of Criminal Appeals recognized that "a 'potted plant' appointed as counsel is no better than no counsel at all."[255] Although the absence of adequate habeas representation deprives death-sentenced prisoners of meaningful access to state post-conviction remedies, the answer is not bootstrapping a constitutional standard of effectiveness to a statutory right to counsel. Instead, the most effective way to have qualified counsel available in death penalty cases is to have a better system of selecting them.[256] First, under these proposed criteria governing counsel's qualifications, the only time a capital habeas application should be remanded to the habeas court is

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ing that "a claim of ineffective assistance of prior post-conviction counsel [may not] constitute good cause" to excuse the grounds for denial of a motion); OHIO REV. CODE ANN. § 2953.21(I)(2) (Anderson Supp. 2001) ("The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section."); VA. CODE ANN. § 19.2-163.8(D) (Michie Supp. 2002) ("The performance of habeas corpus counsel appointed pursuant to this article shall not form a basis of relief in any subsequent habeas corpus proceeding.").

251. *See* Di Giulio, *supra* note 18, at 12–21.

252. *Ex parte* Elizondo, 947 S.W.2d 202, 213 (Tex. Crim. App. 1996) (White, J., dissenting).

253. *Ex parte* Graves, 70 S.W.3d 103, 110 (Tex. Crim. App. 2002).

254. *See* Robbins, *supra* note 90, at 21–22; *see also* Murray v. Giarratano, 492 U.S. 1, 19–20, 24 (1989) (plurality opinion) (Stevens, J., dissenting) (arguing that the "high incidence of uncorrected error [in capital cases] demonstrates that the meaningful appellate review necessary in a capital case extends beyond the direct appellate process"); Bright, *supra* note 96, at 799 (reporting that death-row inmates have often prevailed on post-conviction review by showing that they were either convicted or sentenced to death in violation of the U.S. Constitution and also reporting that constitutional error was found in forty percent of 361 death sentences reviewed in post-conviction proceedings between 1976 and 1991).

255. *Graves*, 70 S.W.3d at 114.

256. Robbins, *supra* note 90, at 25–26.

if the initial application is actually a "non-writ" because it raised no constitutional or jurisdictional claims concerning the fairness of the underlying trial or the accuracy of the verdict.[257] Finally, this suggested amendment of article 11.071 would accomplish two important goals. First, these proposed criteria would prevent unnecessary delay in the post-conviction process by the appointment of competent, qualified habeas counsel,[258] and second, these proposed criteria would guarantee that capital habeas petitioners receive their statutorily mandated "one full 'bite at the apple'"[259] for collateral review of their conviction and sentence.

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257. *Ex parte* Kerr, 64 S.W.3d 414, 415–16 (Tex. Crim. App. 2002) (holding that applicant's first filing did not qualify as an initial application for a writ of habeas corpus because that filing merely challenged the constitutionality of article 11.071, but it did not challenge either his capital murder conviction or his death sentence).

258. *See Ex parte* Smith, 977 S.W.2d 610, 614 (Tex. Crim. App. 1998) (Baird, J., dissenting) (arguing that the "undeniable outcome of condemned inmates receiving competent counsel is an expedited habeas process").

259. *See id.* at 612–13.