



Misc. Docket No. 11-003

## IN THE COURT OF CRIMINAL APPEALS OF TEXAS

*To ensure that all appropriate state and federal courts, officials, and parties shall have an adequate opportunity to review and resolve legal and factual issues concerning an impending execution, the Court of Criminal Appeals has adopted Miscellaneous Rule 11-003, effective immediately. This rule is modeled upon an analogous rule adopted by the Fifth Circuit Court of Appeals.*

SIGNED AND ENTERED this 30th day of June, 2011.

Sharon Keller, Presiding Judge  
Lawrence E. Meyers, Judge  
Tom Price, Judge  
Paul Womack, Judge  
Cheryl Johnson, Judge  
Michael Keasler, Judge  
Barbara Hervey, Judge  
Cathy Cochran, Judge  
Elsa Alcalá, Judge

Miscellaneous Rule 11-003

## PROCEDURES IN DEATH PENALTY CASES INVOLVING REQUESTS FOR STAY OF EXECUTION AND RELATED FILINGS IN TEXAS STATE TRIAL COURTS AND THE COURT OF CRIMINAL APPEALS

1. *Time Requirements for Habeas Petitions or Other Motions.* Inmates sentenced to death who seek a stay of execution or who wish to file a subsequent writ application or other motion seeking any affirmative relief from, or relating to, a death sentence must exercise reasonable diligence in timely filing such requests. A motion for stay of execution, or any other pleading relating to a death sentence, must be filed in the proper court at least seven days before the date of the scheduled execution date (exclusive of the scheduled execution date). A pleading shall be deemed untimely if it is filed in the proper court fewer than seven days before the scheduled execution date. For example, a request for a stay of execution filed at 8:00 a.m. on a Wednesday morning when the execution is scheduled for the following Wednesday at 6:00 p.m. is untimely.

2. *Special Requirements for Untimely Petitions or Other Motions.* Counsel who seek to file an untimely motion for a stay of execution or who wish to file any other untimely pleading requesting affirmative relief in an impending execution case, must attach to the proposed filing a detailed explanation stating under oath, subject to the penalties of perjury, the reason for the delay and why counsel found it physically, legally, or factually impossible to file a timely request, motion, or other pleading. Counsel is required to show good cause for the untimely filing.

3. *Sanctions.* Counsel who fails to attach a sworn detailed explanation to an untimely filing or who fails to adequately justify the necessity for an untimely filing shall be sanctioned. Such sanctions include, but are not limited to (1) referral to the Chief Disciplinary Counsel of the State Bar of Texas; (2) contempt of court; (3) removal from the list of Tex. Code Crim. Proc. Art. 11.071 list of attorneys; (4) restitution of costs incurred by the opposing party; and (5) any other sanction allowed by law (see, e.g., Tex. R. Civ. P. 215.2). ✪

## ORDER AMENDING TEXAS RULES OF APPELLATE PROCEDURE

It is hereby ordered that:

1. Pursuant to Texas Government Code §§22.108 and 22.109, the Texas Rules of Appellate Procedure are amended as noted in the attached documents. Rules 50, 68.2, 68.3, 68.7, 68.8, 68.9, 68.10, 68.11, 79.2.
2. These amended rules, including changes made after public comments, take effect on September 1, 2011.
3. This order supercedes Misc. Docket No. 11-002, which was signed April 14, 2011.
4. The Clerk is directed to:
  - a. file a copy of this order with the Secretary of State;
  - b. cause a copy of this order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;
  - c. submit a copy of this order for publication in the *Texas Register*.

SIGNED AND ENTERED this 12th of July, 2011.

Sharon Keller, Presiding Judge  
Lawrence E. Meyers, Judge  
Tom Price, Judge  
Paul Womack, Judge  
Cheryl Johnson, Judge  
Michael Keasler, Judge  
Barbara Hervey, Judge  
Cathy Cochran, Judge  
Elsa Alcalá, Judge

## AMENDMENTS TO THE RULES OF APPELLATE PROCEDURE

### ~~Rule 50. Reconsideration on Petition for Discretionary Review~~

~~Within 60 days after a petition for discretionary review is filed with the clerk of the court of appeals that delivered the decision, the justices who participated in the decision may, as provided by subsection (a), reconsider and correct or modify the court's opinion or judgment. Within the same period of time, any of the justices who participated in the decision may issue a concurring or dissenting opinion.~~

~~(a) If the court's original opinion or judgment is corrected or modified, that opinion or judgment is withdrawn and the modified or corrected opinion or judgment is substituted as the opinion or judgment of the court. No further opinions may be issued by the court of appeals. The original petition for discretionary review is not dismissed by operation of law, unless the filing party files a new petition in the court of appeals. In the alternative, the petitioning party shall submit to the court of appeals copies of the corrected or modified opinion or judgment as an amendment to the original petition.~~

~~(b) Any party may then file with the court of appeals a new petition for discretionary review seeking review of the corrected or modified opinion or judgment, including any dissents or concurrences, under Rule 68.2.~~

#### Notes and Comments

Comment to 2011 change: Rule 50 is abolished. Motions for rehearing serve the same purpose.

### 68.2. Time to File Petition

(a) *First Petition.* The petition must be filed within 30 days after either the day the court of appeals' judgment was rendered or the day the last timely motion for rehearing or timely motion for en banc reconsideration was overruled by the court of appeals.

#### Notes and Comments

Comment to 2011 change: The amendment to Rule 68.2(a) resolves timely filing questions concerning motions for en banc reconsideration by including those motions in calculating time to file.

### 68.3. Where to File Petition

~~(a) The petition and all copies of the petition must be filed with the clerk of the court of appeals, but if the State's Prosecuting Attorney files a petition, the State's Prosecuting Attorney may file the copies of the petition—but not the original—with the clerk of the Court of Criminal Appeals, instead of with the court of appeals clerk.~~



(b) *Petition Filed in Court of Appeals.* If a petition is mistakenly filed in the court of appeals, the petition is deemed to have been filed the same day with the clerk of the Court of Criminal Appeals, and the court of appeals clerk must immediately send the petition to the clerk of the Court of Criminal Appeals.

#### Notes and Comments

Comment to 2011 change: Rule 68.3 is changed to require petitions for discretionary review to be filed in the Court of Criminal Appeals rather than in the court of appeals. With the deletion of Rule 50, there is no reason to file petitions in the court of appeals. Rule 68.3(b) is added to address and prevent the untimely filing of petitions for discretionary review that are incorrectly filed in the court of appeals rather than in the Court of Criminal Appeals.

### 68.7. Court of Appeals Clerk's Duties

- ~~(a) *On Filing of the Petition.* Upon receiving the petition, the court of appeals clerk must file the original petition and note the filing on the docket.~~
- ~~(b) *Reply.* The opposing party has 30 days after the timely filing of the petition in the court of appeals to file a reply to the petition with the clerk of the court of appeals. Upon receiving a reply to the petition, the clerk for the court of appeals must file the reply and note the filing on the docket.~~
- ~~(c) *Sending Petition and Reply to Court of Criminal Appeals.* Unless a petition for discretionary review is dismissed under Rule 50, Within 15 days of receiving notice of the filing of a petition for discretionary review from the clerk of the Court of Criminal Appeals, the clerk of the court of appeals must, ~~within 60 days after the petition is filed,~~ send to the clerk of the Court of Criminal Appeals ~~the petition and any copies furnished by counsel, the reply, if any, and any copies furnished by counsel, together with the record, copies of the any motions filed in the case, and copies of any judgments, opinions, and orders of the court of appeals.~~ The clerk need not forward any nondocumentary exhibits unless ordered to do so by the Court of Criminal Appeals.~~

#### Notes and Comments

Comment to 2011 change: Rule 68.7(a) and (b) are deleted and (c) is amended to reflect changes consistent with filing the petition and reply in the Court of Criminal Appeals rather than in the court of appeals, and to order the record to be sent to the Court of Criminal Appeals. Additionally, Rule 68.7(c) is amended to delete reference to Rule 50, which is abolished.

### 68.8. Court of Criminal Appeals Clerk's Duties on Receipt of Petition

~~Upon receipt of the record from the court of appeals, the clerk of the Court of Criminal Appeals will file the record and enter the filing on the docket. The clerk of the Court of Criminal Appeals will receive a petition for discretionary review, file the petition and the accompanying record from the court of appeals, note the filing of the petition and record on the docket, and notify the parties by U.S. Mail of the filing. The Court may dispense with notice and grant or refuse the petition immediately upon its filing.~~

#### Notes and Comments

Comment to 2011 change: Rule 68.8 is amended to reflect changes consistent with filing the petition in the Court of Criminal Appeals.

### 68.9. Reply

The opposing party has 15 days after the timely filing of the petition in the Court of Criminal Appeals to file a reply to the petition with the clerk of the Court of Criminal Appeals.

#### Notes and Comments

Comment to 2011 change: This Rule is added so that any reply will be filed in the Court of Criminal Appeals since the petition is also filed in the Court of Criminal Appeals.

### 68.10. Amendment

Upon motion ~~the~~ petition or a reply may be amended or supplemented ~~within 30 days after the original petition was filed in the court of appeals Court of Criminal Appeals or at any time when justice requires.~~ The record may be amended in the Court of Criminal Appeals under the same circumstances and ~~in the same manner as in the court of appeals.~~

#### Notes and Comments

Comment to 2011 change: This Rule is changed to reflect the filing of the petition and any reply in the Court of Criminal Appeals. Thus, the rule is also changed to require a motion and to delete a time frame because the petition will be filed in the Court of Criminal Appeals.

### 68.11. Service on State Prosecuting Attorney

In addition to the service required by Rule 9.5, service of the petition, the reply, and any amendment or supplementation of a petition or reply must be made on the State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711.

#### Notes and Comments

Comment to 2011 change: The address for the State Prosecuting Attorney is deleted because it has changed and may change again.

#### 79.2. Contents

- (a) The motion must briefly and distinctly state the grounds and arguments relied on for rehearing.
- (b) A motion for rehearing an order that grants discretionary review may not be filed.
- (c) A motion for rehearing an order that refuses ~~or dismisses~~ a petition for discretionary review may be grounded only on substantial intervening circumstances or on other significant circumstances which are specified in the motion. Counsel must certify that the motion is so grounded and that the motion is made in good faith and not for delay.
- (d) A motion for rehearing an order that denies habeas corpus relief under Code of Criminal Procedure, articles 11.07 or 11.071, may not be filed. The Court may on its own initiative reconsider the case.

#### Notes and Comments

Comment to 2011 change: Rule 79.2(c) is amended so that it applies only to petitions for discretionary review that are refused. Additionally, the certification requirement is changed to encompass a broader basis for rehearing.

#### VERIFICATION

This application must be verified or it will be dismissed for non-compliance. For verification purposes, an applicant is a person filing the application on his or her own behalf. A petitioner is a person filing the application on behalf of an applicant, for example, an applicant's attorney. An inmate is a person who is in custody.

The inmate applicant must sign either the "Oath Before a Notary Public" before a notary public or the "Inmate's Declaration" without a notary public. If the inmate is represented by a licensed attorney, the attorney may sign the "Oath Before a Notary Public" as petitioner and then complete "Petitioner's Information." A non-inmate applicant must sign the "Oath Before a Notary Public" before a notary public unless he is rep-



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# TEXAS COURT OF CRIMINAL APPEALS

resented by a licensed attorney, in which case the attorney may sign the verification as petitioner.

A non-inmate non-attorney petitioner must sign the "Oath Before a Notary Public" before a notary public and must also complete "Petitioner's Information." An inmate petitioner must sign either the "Oath Before a Notary Public" before a notary public or the "Inmate's Declaration" without a notary public and must also complete the appropriate "Petitioner's Information."

## OATH BEFORE A NOTARY PUBLIC

STATE OF TEXAS

COUNTY OF \_\_\_\_\_

\_\_\_\_\_, being duly sworn, under oath says: "I am the applicant/ petitioner (circle one) in this action and know the contents of the above application for a writ of habeas corpus and, according to my belief, the facts stated in the application are true."

\_\_\_\_\_  
Signature of Applicant/Petitioner (circle one)

SUBSCRIBED AND SWORN TO BEFORE ME THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Signature of Notary Public

## PETITIONER'S INFORMATION

Petitioner's printed name: \_\_\_\_\_

State bar number, if applicable: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Telephone: \_\_\_\_\_

Fax: \_\_\_\_\_

## INMATE'S DECLARATION

I, \_\_\_\_\_, am the applicant/ petitioner (circle one) and being presently incarcerated in \_\_\_\_\_, declare under penalty of perjury that, according to my belief, the facts stated in the above application are true and correct.

Signed on \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Signature of Applicant/Petitioner (circle one)

## PETITIONER'S INFORMATION

Petitioner's printed name: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Telephone: \_\_\_\_\_

Fax: \_\_\_\_\_

Signed on \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Signature of Petitioner