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SENATE BILL 500

**44TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 1999**

INTRODUCED BY

L. Skip Vernon

AN ACT

RELATING TO THE COURTS; ESTABLISHING PROCEDURES FOR AN  
APPLICATION FOR A WRIT OF HABEAS CORPUS SEEKING RELIEF FROM A  
JUDGMENT IMPOSING A PENALTY OF DEATH.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. WRIT OF HABEAS CORPUS--APPLICATION TO DEATH  
PENALTY CASE. --Notwithstanding other provision of law,  
Sections 1 through 10 of this act establish procedures for an  
application of a writ of habeas corpus in which the applicant  
seeks relief from a judgment imposing a penalty of death.

Section 2. REPRESENTATION BY COUNSEL. --

A. An applicant shall be represented by competent  
counsel unless the applicant proceeds pro se and the  
convicting court finds, after a hearing on record, that the  
applicant's decision to proceed pro se is intelligent and

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1 voluntary.

2 B. If an applicant is sentenced to death on or  
3 after July 1, 1999, the convicting court, immediately after  
4 judgment is entered, shall determine if the defendant is  
5 indigent and, if so, whether the applicant desires appointment  
6 of counsel for the purpose of a writ of habeas corpus. If an  
7 applicant who is sentenced to death does not have an initial  
8 application for a writ of habeas corpus pending on July 1,  
9 1999, and has not been denied relief by the supreme court in  
10 an initial habeas corpus proceeding, the convicting court, as  
11 soon as practicable, shall determine whether the defendant is  
12 indigent and, if so, whether the defendant desires the  
13 appointment of counsel for the purpose of a writ of habeas  
14 corpus.

15 C. Immediately after the convicting court makes  
16 the findings provided in Subsections A, B and I of this  
17 section, the clerk of the convicting court shall forward to  
18 the supreme court:

- 19 (1) a copy of the judgment;
- 20 (2) a list containing the name, address and  
21 telephone number of each counsel of record for the applicant  
22 at trial and on direct appeal; and
- 23 (3) for an applicant who proceeds pro se,  
24 findings made by the convicting court on the voluntariness of  
25 the applicant's decision to proceed pro se.

1           D. Unless an applicant proceeds pro se or retains  
2 counsel, the supreme court shall, under rules and standards  
3 adopted by the court, appoint competent counsel at the  
4 earliest practicable time after receipt of the documents  
5 pursuant to Subsection C of this section.

6           E. The supreme court shall not appoint counsel  
7 under this section if the counsel represented the applicant at  
8 trial or on direct appeal, unless:

9                   (1) the applicant and the counsel request the  
10 appointment on the record; or

11                   (2) the court finds good cause to make the  
12 appointment.

13           F. If counsel is the same person appointed to  
14 represent the applicant on appeal, the supreme court shall  
15 appoint a second counsel to assist in the preparation of the  
16 writ of habeas corpus.

17           G. If the supreme court denies an applicant relief  
18 pursuant to Sections 1 through 10 of this act, counsel  
19 appointed under this section to represent the applicant shall,  
20 not later than the fifteenth day after the date the supreme  
21 court denies relief, move to be appointed as counsel in  
22 federal habeas review pursuant to 21 U.S.C. Section 848(q) or  
23 equivalent provision or, if necessary, move for the  
24 appointment of other counsel pursuant to 21 U.S.C. Section  
25 848(q) or equivalent provision.

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1           H. The supreme court shall reasonably compensate  
2 counsel appointed by the court under this section from state  
3 funds. The court shall appoint and reasonably compensate  
4 counsel for representation in a subsequent or untimely  
5 application for a writ of habeas corpus if the court  
6 determines that the requirements of Section 5 of this act  
7 allowing consideration of the application have been satisfied.

8           I. If an attorney is representing an inmate under  
9 a sentence of death for an initial application for a writ of  
10 habeas corpus pending on July 1, 1999, the attorney may  
11 request that the convicting court determine if the applicant  
12 is indigent and, if so, whether the applicant desires  
13 appointment of counsel for the purpose of the writ of habeas  
14 corpus.

15           Section 3. INVESTIGATION OF GROUNDS FOR APPLICATION. --

16           A. On appointment, counsel shall investigate,  
17 before and after the appellate record is filed in the supreme  
18 court, the factual and legal grounds for the filing of an  
19 application for a writ of habeas corpus.

20           B. Not later than the thirtieth day before the  
21 date the application for a writ of habeas corpus is filed with  
22 the convicting court, counsel may file with the supreme court  
23 an ex parte, verified and confidential request for prepayment  
24 of expenses, including expert fees, to investigate and present  
25 potential habeas corpus claims. The request for expenses must

1 state:

2 (1) the claims of the application to be  
3 investigated;

4 (2) specific facts that suggest that a claim  
5 of possible merit may exist; and

6 (3) an itemized list of anticipated expenses  
7 for each claim.

8 C. The court shall grant a request for expenses in  
9 whole or in part if the request for expenses is timely and  
10 reasonable. If the court denies in whole or in part the  
11 request for expenses, the court shall briefly state the  
12 reasons for the denial in a written order provided to the  
13 applicant.

14 D. Counsel may incur expenses for habeas corpus  
15 investigation, including expenses for experts, without prior  
16 approval by the supreme court. On presentation of a claim for  
17 reimbursement, which may be presented ex parte, the court  
18 shall order reimbursement of counsel for expenses if the  
19 expenses are reasonably necessary and reasonably incurred. If  
20 the court denies in whole or in part the request for expenses,  
21 the court shall briefly state the reasons for the denial in a  
22 written order provided to the applicant. The applicant may  
23 request reconsideration of the denial for reimbursement.

24 E. Materials submitted to the court under this  
25 section are a part of the court's record.

1           Section 4.   FILING OF APPLICATION. --

2           A.   An application for a writ of habeas corpus,  
3   returnable to the supreme court, must be filed in the  
4   convicting court not later than the one hundred eightieth day  
5   after the date the supreme court appoints counsel under  
6   Section 2 of this act or not later than the forty-fifth day  
7   after the date the appellee's original brief is filed on  
8   direct appeal with the supreme court.  If an applicant who was  
9   convicted before July 1, 1999 does not have an initial  
10   application for a writ of habeas corpus pending on July 1,  
11   1999 and has not previously filed an application for a writ of  
12   habeas corpus, the applicant's initial application must be  
13   filed not later than the one hundred eightieth day after the  
14   date the supreme court appoints counsel under Section 2 of  
15   this act or not later than the forty-fifth day after the date  
16   the appellee's original brief is filed on direct appeal,  
17   whichever is later.

18           B.   An application filed after the filing date that  
19   is applicable to the applicant under Subsection A of this  
20   section is presumed untimely unless the applicant establishes  
21   good cause by showing particularized justifying circumstances.

22           C.   If counsel has been appointed and a timely  
23   application is not filed on or before the applicable filing  
24   date under Subsection A of this section, the convicting court  
25   shall, before the eleventh day after the applicable filing

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1 date under Subsection A of this section, conduct a hearing and  
2 determine if good cause exists for either the untimely filing  
3 of an application or other necessary action.

4 D. If the convicting court finds the applicant  
5 failed to establish good cause for the delay, the court shall:

- 6 (1) make appropriate findings of fact;  
7 (2) enter an order to that effect;  
8 (3) direct the clerk of the court to enter a  
9 notation that the petition is untimely; and  
10 (4) send a copy of the petition, findings and  
11 notation to the supreme court as provided in Section 5 of this  
12 act.

13 E. If the convicting court finds that the  
14 applicant has established good cause for the delay, the  
15 convicting court shall proceed as if the application was  
16 timely filed.

17 F. Notwithstanding Subsection B, C or E of this  
18 section, an applicant cannot establish good cause for the  
19 untimely filing of an application filed after the ninety-first  
20 day after the applicable filing date pursuant to Subsection A  
21 of this section.

22 G. Failure to file an application before the  
23 ninety-first day after the filing date applicable to the  
24 applicant pursuant to Subsection A of this section constitutes  
25 a waiver of all grounds for relief that were available to the

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1 applicant before the last date on which an application could  
2 be timely filed, except as provided in Section 5 of this act.

3 H. If an amended or supplemental application is  
4 not filed within the time specified pursuant to Subsection A  
5 of this section, the supreme court shall treat the application  
6 as a subsequent or untimely application for a writ of habeas  
7 corpus pursuant to Section 5 of this act, unless the  
8 applicant:

9 (1) establishes good cause by showing  
10 particularized justifying circumstances for not raising in the  
11 initial application the facts or claims contained in the  
12 amended or supplemental application; and

13 (2) the amended or supplemental application  
14 is filed before the ninety-first day after the filing date  
15 applicable to the applicant in Subsection A of this section.

16 Section 5. SUBSEQUENT OR UNTIMELY APPLICATION. --

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

24 (1) the current claims and issues have not  
25 been and could not have been presented previously in a timely



1 initial application or in a previously considered application  
2 because the factual or legal basis for the claim was  
3 unavailable:

4 (a) on the date the applicant filed the  
5 previous application; or

6 (b) if the applicant did not file an  
7 initial application, on or before the last date for the timely  
8 filing of an initial application;

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

13 (3) by clear and convincing evidence, but for  
14 a violation of the United States constitution no rational  
15 juror would have answered in the state's favor for one or more  
16 of the special issues that were submitted to the jury in the  
17 applicant's trial pursuant to Section 31-20A-5 NMSA 1978.

18 B. If the convicting court receives a subsequent  
19 application or an untimely initial application, the clerk of  
20 the court shall:

21 (1) attach a notation that the application is  
22 a subsequent or untimely initial application;

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

25 (3) immediately send to the supreme court a

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1 copy of:

2 (a) the application;

3 (b) the notation;

4 (c) the order scheduling the  
5 applicant's execution, if scheduled; and

6 (d) any order the judge of the  
7 convicting court directs to be attached to the application.

8 C. On receipt of the copies of the documents from  
9 the clerk, the supreme court shall determine whether the  
10 requirements of Subsection A of this section have been  
11 satisfied. The convicting court may not take further action  
12 on the application before the supreme court issues an order  
13 finding that the requirements have been satisfied. If the  
14 supreme court determines that the requirements have not been  
15 satisfied, the court shall issue an order dismissing the  
16 application as an abuse of the writ pursuant to this section.

17 D. For purposes of Paragraph (1) of Subsection A  
18 of this section, a legal basis of a claim is unavailable on or  
19 before a date described in that paragraph if the legal basis  
20 was not recognized by or could not have been reasonably  
21 formulated from a final decision of the United States supreme  
22 court, a court of appeals of the United States or a court of  
23 appellate jurisdiction of this state on or before that date.

24 E. For purposes of Paragraph (1) of Subsection A  
25 of this section, a factual basis of a claim is unavailable on

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1 or before a date described by that paragraph if the factual  
2 basis was not ascertainable through the exercise of reasonable  
3 diligence on or before that date.

4 Section 6. ISSUANCE OF WRIT.--

5 A. If a timely application for a writ of habeas  
6 corpus is filed in the convicting court, a writ of habeas  
7 corpus, returnable to the supreme court, shall be issued by  
8 operation of law.

9 B. If the convicting court receives notice that  
10 the requirements for consideration of a subsequent or untimely  
11 application have been met, as provided in Section 5 of this  
12 act, a writ of habeas corpus, returnable to the supreme court,  
13 shall be issued by operation of law.

14 C. The clerk of the convicting court shall:

15 (1) make an appropriate notation that a writ  
16 of habeas corpus was issued;

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

19 (3) send a copy of the application by  
20 certified mail, return receipt requested, to the attorney  
21 representing the state in the convicting court.

22 D. The clerk of the convicting court shall  
23 promptly deliver copies of documents submitted to the clerk  
24 pursuant to Sections 1 through 10 of this act to the applicant  
25 and the attorney representing the state.

1           Section 7. ANSWER TO APPLICATION. --

2           A. The state shall file an answer to the  
3 application for a writ of habeas corpus not later than the  
4 thirtieth day after the date the state receives notice of  
5 issuance of the writ. The state shall serve the answer on  
6 counsel for the applicant or, if the applicant is proceeding  
7 pro se, on the applicant. The state may request from the  
8 convicting court an extension of time in which to answer the  
9 application by showing particularized justifying circumstances  
10 for the extension.

11           B. Matters alleged in the application not admitted  
12 by the state are deemed denied.

13           Section 8. FINDINGS OF FACT WITHOUT EVIDENTIARY  
14 HEARING. --

15           A. Not later than the twentieth day after the last  
16 date the state answers the application, the convicting court  
17 shall determine whether controverted, previously unresolved  
18 factual issues material to the legality of the applicant's  
19 confinement exist and shall issue a written order of the  
20 determination.

21           B. If the convicting court determines the issues  
22 do not exist, the parties shall file proposed findings of fact  
23 and conclusions of law for the courts to consider on or before  
24 a date set by the court that is not later than the thirtieth  
25 day after the date the order is issued.

1 C. After argument of counsel, if requested by the  
2 court, the convicting court shall make appropriate written  
3 findings of fact and conclusions of law not later than the  
4 fifteenth day after the date the parties filed proposed  
5 findings or not later than the forty-fifth day after the date  
6 the court's determination is made under Subsection A of this  
7 section, whichever occurs first.

8 D. The clerk of the court shall immediately send  
9 to:

- 10 (1) the supreme court a copy of the:  
11 (a) application;  
12 (b) answer;  
13 (c) orders entered by the convicting  
14 court;  
15 (d) proposed findings of fact and  
16 conclusions of law; and  
17 (e) findings of fact and conclusions of  
18 law entered by the court; and

19 (2) counsel for the applicant or, if the  
20 applicant is proceeding pro se, to the applicant, a copy of:

- 21 (a) orders entered by the convicting  
22 court;  
23 (b) proposed findings of fact and  
24 conclusions of law; and  
25 (c) findings of fact and conclusions of

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1 law entered by the court.

2 Section 9. HEARING--RULES OF EVIDENCE. --

3 A. If the convicting court determines that  
4 controverted, previously unresolved factual issues material to  
5 the legality of the applicant's confinement exist, the court  
6 shall enter an order, not later than the twentieth day after  
7 the last date the state answers the application, designating  
8 the issues of fact to be resolved and the manner in which the  
9 issues shall be resolved. To resolve the issues, the court  
10 may require affidavits, depositions, interrogatories and  
11 evidentiary hearings and may use personal recollection.

12 B. The convicting court shall allow the applicant  
13 and the state not less than ten days to prepare for an  
14 evidentiary hearing. The parties may waive the preparation  
15 time. If the state or the applicant requests that an  
16 evidentiary hearing be held within thirty days after the date  
17 the court ordered the hearing, the hearing shall be held  
18 within that period unless the court states, on the record,  
19 good cause for delay.

20 C. The presiding judge of the convicting court  
21 shall conduct a hearing held under this section unless another  
22 judge presided over the original capital felony trial and is  
23 qualified for assignment, in which event that judge may  
24 preside over the hearing.

25 D. The court reporter shall prepare a transcript

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1 of the hearing not later than the thirtieth day after the date  
2 the hearing ends and file the transcript with the clerk of the  
3 convicting court.

4 E. The parties shall file proposed findings of  
5 fact and conclusions of law for the convicting court to  
6 consider on or before a date set by the court that is not  
7 later than the thirtieth day after the date the transcript is  
8 filed. If the court requests argument of counsel, after  
9 argument the court shall make written findings of fact that  
10 are necessary to resolve the previously unresolved facts and  
11 make conclusions of law not later than the fifteenth day after  
12 the date the parties file proposed findings or not later than  
13 the forty-fifth day after the date the court reporter files  
14 the transcript, whichever occurs first.

15 F. The clerk of the convicting court shall  
16 immediately transmit to:

- 17 (1) the supreme court a copy of:  
18 (a) the application;  
19 (b) the answers and motions filed;  
20 (c) the court reporter's transcript;  
21 (d) the documentary exhibits introduced  
22 into evidence;  
23 (e) the proposed findings of fact and  
24 conclusions of law;  
25 (f) the findings of fact and

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- 1 conclusions of law entered by the court;
- 2 (g) the sealed materials, such as a
- 3 confidential request for investigative expenses; and
- 4 (h) other matters used by the
- 5 convicting court in resolving issues of fact; and
- 6 (2) counsel for the applicant or, if the
- 7 applicant is proceeding pro se, to the applicant, a copy of:
- 8 (a) orders entered by the convicting
- 9 court;
- 10 (b) proposed findings of fact and
- 11 conclusions of law; and
- 12 (c) findings of fact and conclusions of
- 13 law entered by the court.

14 G. The clerk of the convicting court shall forward  
15 an exhibit that is not documentary to the supreme court on  
16 request of the court.

17 H. The Rules of Evidence apply to a hearing held  
18 pursuant to Sections 1 through 10 of this act.

19 Section 10. REVIEW BY SUPREME COURT. --The supreme court  
20 shall review all applications for a writ of habeas corpus  
21 submitted pursuant to Sections 1 through 10 of this act. The  
22 court may set the cause for oral argument and may request  
23 further briefing of the issues by the applicant or the state.  
24 After reviewing the record, the court shall enter its judgment  
25 remanding the applicant to custody or ordering the applicant's



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release, as the law and facts may justify.