

# IN THE COURT OF CRIMINAL APPEALS OF TEXAS

Misc. Docket No. 19-003

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## ORDER PROPOSING AMENDMENTS TO TEXAS RULE OF APPELLATE PROCEDURE 73.7 AND PROPOSING THE ADOPTION OF TEXAS RULE OF APPELLATE PROCEDURE 73.8

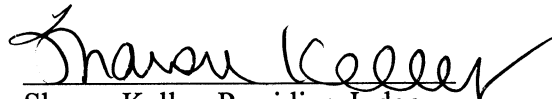
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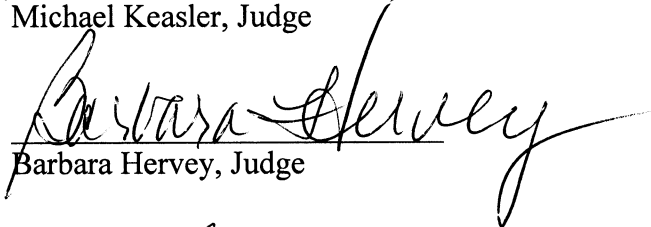
**ORDERED** that:


1. Pursuant to section 22.108 of the Texas Government Code, the Court of Criminal Appeals proposes amendments to Rule of Appellate Procedure 73.7 and proposes the adoption of Rule of Appellate Procedure 73.8 and a comment to Rule 73.
2. These amendments may be changed in response to public comments received before July 15, 2019. Any person may submit written comments to the Court of Criminal Appeals at [txccarulescomments@txcourts.gov](mailto:txccarulescomments@txcourts.gov) or by mail to the Clerk of the Court of Criminal Appeals at P.O. Box 12308, Austin, Texas 78711.
3. 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. send a copy of this order to each elected member of the Legislature; and
  - d. submit a copy of the order for publication in the *Texas Register*.

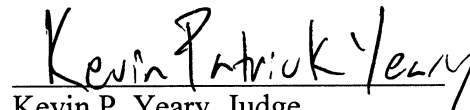
Dated: May 6, 2019.


  
Sharon Keller, Presiding Judge

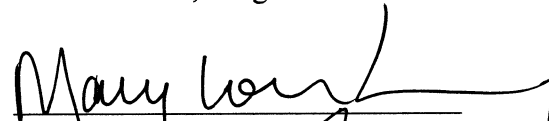
  
Michael Keasler, Judge

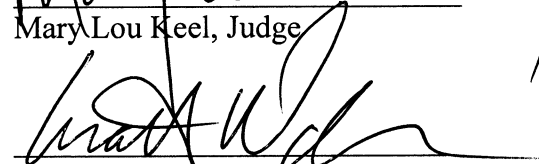
  
Barbara Hervey, Judge

  
Bert Richardson, Judge

  
Kevin P. Yeary, Judge

  
David Newell, Judge

  
Mary Lou Keel, Judge

  
Scott Walker, Judge

  
Michelle Slaughter, Judge

**Rule 73.7. Supplementing or Amending Article 11.07 or Article 11.071 Application Grounds or Providing New Evidence after Case Forwarded to the Court of Criminal Appeals; Motion to Stay Proceedings**

- (a) *Definitions.*
- (1) *Supplemental Application.* A supplemental application adds grounds or content to a previously filed application but will not cure any procedural deficiencies in the previously filed application. Courts will consider a supplemental application in addition to the previously filed application.
  - (2) *Amended Application.* An amended application revises a previously filed application that may be deficient or incorrectly stated. Courts will consider an amended application as a complete substitute for the previously filed application, disregarding the previously filed application.
- (b) *Motion to Supplement or Amend an Application.* To supplement or amend an application after it has been forwarded to the Court of Criminal Appeals, a party must file a motion in the Court of Criminal Appeals that describes:
- (1) the supplemental or amended grounds;
  - (2) why these grounds are cognizable and ripe for review; and
  - (3) why these grounds could not have been presented previously.
- (c) *Motion to Stay Proceedings.* If an application has been forwarded to the Court of Criminal Appeals and a party needs additional time to investigate or present legal claims or additional evidence, the party must file a motion to stay proceedings in the Court of Criminal Appeals. The motion must:
- (1) describe the additional evidence or grounds for relief that could be developed through further investigation;
  - (2) explain the value of any additional evidence;
  - (3) explain why this investigation was not completed before the application was filed; and
  - (4) state a reasonable period of time that the party believes is necessary.
- (d) *Party's Duties if Motion Granted.* If the Court of Criminal Appeals grants a motion to supplement or amend an application, the party must:

- (1) prepare a supplemental or amended application that complies with the requirements of Code of Criminal Procedure Chapter 11 and Rule 73.1 and contains grounds for relief that are cognizable and ripe for review;
  - (2) use the Article 11.07 application form in an Article 11.07 habeas proceeding and note on the first page of the application form whether the document is an “amended” or “supplemental” application; and
  - (3) file the supplemental or amended application and any memorandum of law and other supporting materials with the district clerk of the county of conviction within the time frame designated by the Court of Criminal Appeals.
- (e) *District Clerk’s Duties.* Upon the filing of a supplemental or amended application and/or new evidence under this rule, the district clerk of the county of conviction shall:
- (1) immediately send a copy of the supplemental or amended application, any memorandum of law, and all supporting materials and/or new evidence to the judge assigned to the habeas case and the opposing party; and
  - (2) otherwise comply with the procedures set out in Rule 73.4(b) of these rules, including forwarding to the Court of Criminal Appeals all filed materials not previously forwarded to the Court.
- (f) *Late Motions.* If the Court of Criminal Appeals has finally disposed of the application, the Court will not entertain any motions to supplement or amend the application or stay proceedings.

**Rule 73.8 New Evidence after Article 11.07 or Article 11.071 Application Forwarded to the Court of Criminal Appeals in a Filed and Set Case**

- (a) If the Court of Criminal Appeals has filed and set an Article 11.07 or 11.071 application for submission, a party may move that the Court consider new evidence as follows:
- (1) *Motion to Supplement Habeas Record in the Convicting Court.* File in the Court of Criminal Appeals a motion to stay proceedings to supplement the record in the convicting court. In this motion, the party must:
    - (A) describe the new evidence that the party intends to file in the convicting court;
    - (B) explain its evidentiary value; and
    - (C) state why the evidence could not have been filed in the convicting

court before the Court of Criminal Appeals filed and set the application for submission; or

(2) *Motion for Court of Criminal Appeals to Consider New Evidence.* File the new evidence directly in the Court of Criminal Appeals with a motion for the Court to consider the evidence. In this motion, the party must:

- (A) describe the new evidence;
- (B) explain its evidentiary value; and
- (C) state why compelling and extraordinary circumstances exist for the Court to consider the evidence directly.

(b) *District Clerk's Duties.* If the Court of Criminal Appeals grants a motion under subsection (a)(1) and the party then files new evidence in the convicting court, the district clerk of the county of conviction shall:

(1) immediately send a copy of the filed materials to the judge assigned to the habeas case, to the opposing party in the case, and to the Court of Criminal Appeals; and

(2) otherwise comply with the procedures set out in Rule 73.4(b) of these rules.

**Comment to 2019 change:** In general, when an applicant or petitioner files a supplemental or amended Article 11.07 habeas application in the convicting court, the Court of Criminal Appeals will consider the merits of the supplemental or amended application with certain caveats. First, the party must file the supplemental or amended application before the Court of Criminal Appeals has finally disposed of the pending Article 11.07 application. Second, the Court will generally consider a party's supplemental or amended application so long as the pleadings comply with the rules and procedures in Article 11.07 and Rule of Appellate Procedure 73.1, and so long as the claims are otherwise cognizable and ripe for review.

The Court amends Rule 73.7 to explain the procedures for filing a supplemental or amended Article 11.07 or Article 11.071 application and for moving to stay the proceedings for additional investigation and to present additional evidence in light of the Court's precedent. Former Rule 73.7, in turn, is amended and renumbered to become Rule 73.8. This rule explains the procedures for submitting new evidence after an Article 11.07 or Article 11.071 habeas application has been filed and set. If the application has not been filed and set, new Rule 73.7 prescribes the procedure for submitting new evidence.

A party in an Article 11.07 habeas proceeding must use the Article 11.07 application form (Appendix E of these rules) to file a supplemental or amended application. The

party must make a notation on the first page of the application form alerting the court that the application is “supplemental” or “amended.” The Article 11.07 application form is available from the district clerk of the county of conviction and online through the Court of Criminal Appeals’ website. A party in an Article 11.071 habeas proceeding need not use the Article 11.07 form but should nonetheless designate the application as “supplemental” or “amended” with a visible notation on the first page of the application. However, the Court of Criminal Appeals is not bound by this designation. Depending on the circumstances presented, the Court may determine that the application constitutes a subsequent application under Article 11.071 §5 and rule accordingly.

Rule 73.7 provides the procedure for filing a supplemental or amended application, a stay of proceedings, and/or submission of additional evidence *after* the convicting court has made a recommendation on an Article 11.07 or Article 11.071 postconviction habeas application and the application has been forwarded to the Court of Criminal Appeals. If the convicting court has not yet made a recommendation and the clerk of the convicting court has not yet forwarded the initial application to the Court of Criminal Appeals, a party need not obtain the permission of the Court or a stay of proceedings before filing a supplemental or amended application or additional evidence in the convicting court. However, if a party is concerned that the convicting court will order the clerk to forward the habeas case to the Court of Criminal Appeals before the party can file a supplemental or amended application or new evidence in the convicting court, the party may file a motion for stay of proceedings in the convicting court.

If a party files a supplemental or amended application in the convicting court, the convicting court shall consider the supplemental or amended application following the procedures set out in Article 11.07 or Article 11.071 and Rule 73. The clerk of the convicting court must forward a supplemental record containing all materials related to the supplemental or amended application to the Court of Criminal Appeals in compliance with the procedures set out in Rule 73.4. Rules 73.7 and 73.8 do not enlarge the time periods or word or page limits set out in Article 11.07, Article 11.071, and Rules 73.1, 73.4, and 73.5.

Additionally, Rule 73.7 should not be construed to authorize the late-stage dismissal or withdrawal of a habeas application. In general, requests for late-stage dismissals of habeas applications without prejudice are disfavored and will not be permitted unless the applicant makes a showing of good cause. Supplementing or amending an existing application under Rule 73.7, presenting additional evidence, or staying the proceedings for a reasonable period of time may provide suitable alternatives to a late-stage dismissal without prejudice.

If, after the Court of Criminal Appeals has finally disposed of a party’s initial application, the party files a motion to stay proceedings under Rule 73.7(c), a motion to supplement or amend under Rule 73.7(b), or a supplemental or amended application, the Court may dismiss the pleading and/or treat it as a subsequent application under Article 11.07 §4 or Article 11.071 §5.