

## **BILL ANALYSIS**

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C.S.S.B. 1655  
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Criminal Justice  
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Committee Report (Substituted)

### **AUTHOR'S / SPONSOR'S STATEMENT OF INTENT**

Extensive studies, research by the Texas State Bar, and investigative news reports have revealed pervasive flaws in the quality of legal representation for indigent defendants in the state habeas system. For example, a review of state habeas cases decided between 1995 and 2002 revealed that one out of three death row inmates faces execution without having their case properly investigated by a competent attorney. This lack of quality legal representation is a result of the means by which Texas appoints attorneys to represent indigent defendants in state habeas cases, and the lack of regulations on attorneys eligible to be appointed to these cases. Under current Texas law, attorneys in capital habeas cases are appointed by the district court from a statewide list of eligible lawyers maintained by the Texas Court of Criminal Appeals. The performance of Texas capital habeas lawyers is neither regulated nor monitored by any court or government agency. Thus, if the habeas representation amounts to the functional equivalent of a lawyer sleeping through the trial, the lawyer is nonetheless reappointed to more cases and the death-sentenced inmate has no remedy or recourse.

The list of lawyers appointed to habeas has been, and remains, populated by lawyers who are clearly unqualified, including lawyers: who were serving probated suspensions from the practice of law for neglecting their clients; with no capital experience; with no habeas corpus experience; with mental illness; who abandoned their death sentenced clients and waived all federal review of the case because the federal statute of limitations expired (including one lawyer who joined the prosecutor's office and never informed her client); who filed writs with no cognizable claims (including lawyers who filed verbatim copies of the inmate's direct appeal brief); and even who were deceased.

Despite these failures to provide adequate legal representation, there are no consequences for the attorneys who perform incompetently. They are not removed from the list of those eligible to take these cases and the disciplinary committee of the Texas State Bar does not feel it can adequately police attorney performance in these complicated cases. Instead, the same lawyers providing inadequate representation are reappointed in case after case.

Providing adequate legal representation is especially important in habeas proceedings because state habeas represents the most critical stage of the appellate process in death penalty cases: it is the "safety net" designed to catch the innocent and those treated unfairly by the system. Habeas proceedings are a prisoner's only opportunity to raise claims of prosecutorial misconduct, ineffective assistance of trial counsel, or present evidence not developed or discovered during trial--including new evidence of innocence. Not only are state habeas proceedings the appropriate forum for submitting new evidence, they are a prisoner's final opportunity to do so. If a claim for relief is not presented in state habeas, it cannot be considered by the federal courts except in extraordinary circumstances--even when the claim is clearly meritorious and undermines all confidence in the outcome of the trial. Any omissions by habeas counsel permanently foreclose both state and federal review of any issues or facts overlooked by counsel.

C.S.S.B. 1655 establishes the capital writs committee of the Texas Judicial Council and creates the Office of Capital Writs to represent defendants in applications for writs of habeas corpus.

### **RULEMAKING AUTHORITY**

Rulemaking authority previously granted to the court of criminal appeals is rescinded in SECTION 9 (Section 2(d), Article 11.071, Code of Criminal Procedure) of this bill.

## **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Section 71.060(c), Government Code, to require that any qualification standards adopted by the Task Force on Indigent Defense (task force) be consistent with any applicable standards adopted under Subchapter F, rather than Article 26.052(d) (relating to certain required qualifications for attorneys appointed to represent indigent defendants in capital cases in which the death penalty is sought), Code of Criminal Procedure.

SECTION 2. Amends Chapter 71, Government Code, by adding Subchapters E and F, as follows:

### **SUBCHAPTER E. CAPITAL WRITS COMMITTEE**

Sec. 71.071. DEFINITIONS. Defines "committee" and "office of capital writs."

Sec. 71.072. ESTABLISHMENT OF COMMITTEE; DUTIES. (a) Establishes the capital writs committee (committee) as a standing committee of the Texas Judicial Council (council).

(b) Requires the committee to oversee the creation of the office of capital writs (office) and to recommend to the Court of Criminal Appeals (court) a director for the office of capital writs (director).

Sec. 71.073. APPOINTMENT AND COMPOSITION OF COMMITTEE. (a) Provides that the committee is composed of five specific members who are appointed by and serve at the pleasure of the president of the State Bar of Texas.

(b) Requires the committee to elect one member of the committee to serve as the presiding officer of the committee.

Sec. 71.074. RECOMMENDATION AND APPOINTMENT OF DIRECTOR OF OFFICE OF CAPITAL WRITS. (a) Requires the committee to submit to the court, in order of the committee's preference, a list of the names of not fewer than three and not more than five persons the committee recommends that the court consider in appointing the director.

(b) Requires each person recommended to the court by the committee under Subsection (a) to exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases, as described by the Guidelines and Standards for Texas Capital Counsel, as published by the State Bar of Texas.

(c) Requires the court to appoint the director from the list of persons submitted to the court under Subsection (a).

[Reserves Sections 71.075-71.090 for expansion.]

### **SUBCHAPTER F. OFFICE OF CAPITAL WRITS**

Sec. 71.091. DEFINITIONS. Defines "committee" and "office."

Sec. 71.092. ESTABLISHMENT; FUNDING. (a) Establishes the office of capital writs as a standing committee of the council to operate under the direction and supervision of the director.

(b) Requires the office to receive funds for personnel costs and expenses as specified in the General Appropriations Act.

Sec. 71.093. DIRECTOR; STAFF. (a) Requires the court to employ a director to direct and supervise the operation of the office. Provides that the director serves a four-year term.

(b) Requires the director to employ attorneys, licensed investigators, and other personnel necessary to perform the duties of the office.

(c) Prohibits the director and any attorney employed by the office to engage in certain activities.

Sec. 71.094. POWERS AND DUTIES. (a) Authorizes the office to refuse an appointment under Article 11.071, Code of Criminal Procedure, only if certain conditions exist.

(b) Prohibits the office from representing a defendant in a federal habeas review. Prohibits the office from representing a defendant in an action or proceeding in state court other than certain actions or proceedings.

(c) Authorizes the office to independently investigate the financial condition of any person the office is appointed to represent, notwithstanding Article 26.04(p) (authorizing the defendant, the defendant's counsel, or the attorney representing the state to make a move for reconsideration of the determination of indigency or nonindigency if there is a material change in financial circumstances), Code of Criminal Procedure. Requires the office to report the results of the investigation to the appointing judge. Authorizes the judge to hold a hearing to determine if the person is indigent and entitled to representation under this article.

(d) Prohibits the court from appointing the office to represent a defendant in an application for a writ of habeas corpus under certain circumstances.

(e) Requires the office to maintain a list of competent counsel available for appointment under Section 2(f) (relating to the compensation of an appointed attorney), Article 11.071, Code of Criminal Procedure, if the office refuses an appointment under Subsection (a) or is prohibited from accepting an appointment under Subsection (d).

Sec. 71.095. COMPENSATION OF OTHER APPOINTED ATTORNEYS. Requires an attorney, other than the attorney employed by the office, to be compensated as provided by Article 26.05 (Compensation of Counsel Appointed to Defend), Code of Criminal Procedure.

SECTION 3. Amends Sections 2(b), (c), (e), and (f), Article 11.071, Code of Criminal Procedure, as follows:

(b) Requires the court to appoint the office of capital writs to represent the defendant as provided by Subsection (c) if he or she desires appointment of counsel for the purpose of a writ of habeas corpus.

(c) Requires the convicting court to appoint the office or, if the office refuses or is prohibited from accepting an appointment under Section 71.094, Government Code, other competent counsel within a certain time frame, unless the applicant elects to proceed pro se or is represented by retained counsel.

(e) Requires an attorney appointed under this section (Representation by Counsel) to represent the applicant to move for the appointment of, rather than to move to be appointed as, counsel in federal habeas review under 21 U.S.C. Section 848(q) (Appeal in Capital Cases; Counsel for Financially Unable Defendants) or equivalent provision if the court denies an applicant relief under this article (Procedure in Death Penalty Case). Deletes existing text providing, if necessary, the option to move for the appointment of other counsel under 21 U.S.C. Section 848(q) or equivalent provision.

(f) Requires the convicting court, if the office refuses or is prohibited from accepting an appointment under Section 71.094, Government Code, to appoint counsel from a list of competent counsel maintained by the office. Requires the court to reasonably compensate as provided by Section 2A (State Reimbursement; County Obligation) an

attorney appointed under this section, other than an attorney employed by the office, regardless of whether the attorney is appointed by the convicting court or the court of criminal appeals under prior law. Requires an attorney appointed under this section who is employed by the office to be compensated in accordance with Subchapter F, Chapter 71, Government Code.

SECTION 4. Amends Sections 4A(e) and (f), Article 11.071, Code of Criminal Procedure, as follows:

(e) Provides that Sections 2A (State Reimbursement; County Obligation) and 3 (Investigation of Grounds for Application) apply to compensation and reimbursement of counsel appointed under Subsection (b)(3) (relating to the authorization of the court to appoint new counsel and a filing date for the application) in the same manner as if counsel had been appointed by the convicting court, unless the attorney is employed by the office, in which case the attorney is compensated in accordance with Subchapter F, Chapter 71, Government Code.

(f) Provides that Section 2A applies to the compensation and payment of expenses of counsel appointed by the court of criminal appeals under this subsection, unless the attorney is employed by the office, in which case the attorney is compensated in accordance with Subchapter F, Chapter 71, Government Code.

SECTION 5. Amends Article 26.04(b), Code of Criminal Procedure, to make conforming changes.

SECTION 6. Amends Article 26.044(a), Code of Criminal Procedure, by adding Subdivision (3) to define "office of capital writs."

SECTION 7. Amends Article 26.044, Code of Criminal Procedure, by adding Subsection (n), to authorize a public defender to be appointed with respect to an application for a writ of habeas corpus only if an attorney employed by the office is not appointed in the case.

SECTION 8. Amends Article 26.05(a), Code of Criminal Procedure, to make a conforming change.

SECTION 9. Repealer: Section 2(d) (requiring the court to adopt rules for the appointment of attorneys), Article 11.071, Code of Criminal Procedure.

SECTION 10. (a) Requires the president of the State Bar of Texas to appoint the members of the committee, not later than January 15, 2008.

(b) Requires the committee to submit to the court the list of candidates for the position of the director, not later than May 15, 2008.

(c) Requires the court to employ the director under Subchapter F, Chapter 71, Government Code, as added by this Act, not later than September 1, 2008.

SECTION 11. Effective date: September 1, 2007.