

By: Ellis, Duncan

S.B. No. 1655

A BILL TO BE ENTITLED

AN ACT

1  
2 relating to the establishment of the capital writs committee of the  
3 Texas Judicial Council and the creation of the office of capital  
4 writs.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

6 SECTION 1. Subsection (c), Section 71.060, Government Code,  
7 is amended to read as follows:

8 (c) Any qualification standards adopted by the Task Force on  
9 Indigent Defense under Subsection (a) that relate to the  
10 appointment of counsel in a death penalty case must be consistent  
11 with any applicable ~~[the]~~ standards adopted ~~[specified]~~ under  
12 Subchapter F ~~[Article 26.052(d), Code of Criminal Procedure]~~. An  
13 attorney who is identified by the task force as not satisfying  
14 performance or qualification standards adopted by the task force  
15 under Subsection (a) may not accept an appointment in a capital  
16 case.

17 SECTION 2. Chapter 71, Government Code, is amended by  
18 adding Subchapters E and F to read as follows:

19 SUBCHAPTER E. CAPITAL WRITS COMMITTEE

20 Sec. 71.071. DEFINITIONS. In this subchapter:

21 (1) "Committee" means the capital writs committee  
22 established under this subchapter.

23 (2) "Office of capital writs" means the office of  
24 capital writs established under Subchapter F.

1       Sec. 71.072. ESTABLISHMENT OF COMMITTEE; DUTIES. (a) The  
2 capital writs committee is established as a standing committee of  
3 the council.

4       (b) The committee shall:

5           (1) oversee the creation of the office of capital  
6 writs; and

7           (2) recommend to the court of criminal appeals a  
8 director for the office of capital writs.

9       Sec. 71.073. APPOINTMENT AND COMPOSITION OF COMMITTEE.

10       (a) The committee is composed of the following five members who  
11 are appointed by and serve at the pleasure of the president of the  
12 State Bar of Texas:

13           (1) three attorneys who are members of the State Bar of  
14 Texas and who are not employed as prosecutors or law enforcement  
15 officials, one of whom must have knowledge of and experience with  
16 habeas corpus proceedings in this state;

17           (2) one state district judge; and

18           (3) one state appellate judge who is not a member of  
19 the court of criminal appeals.

20       (b) The committee shall elect one member of the committee to  
21 serve as the presiding officer of the committee.

22       Sec. 71.074. RECOMMENDATION AND APPOINTMENT OF DIRECTOR OF  
23 OFFICE OF CAPITAL WRITS. (a) The committee shall submit to the  
24 court of criminal appeals, in order of the committee's preference,  
25 a list of the names of not fewer than three and not more than five  
26 persons the committee recommends that the court consider in  
27 appointing the director of the office of capital writs.

1       (b) Each person recommended to the court of criminal appeals  
2 by the committee under Subsection (a) must exhibit proficiency in  
3 and commitment to providing quality representation to defendants in  
4 death penalty cases, as described by the Guidelines and Standards  
5 for Texas Capital Counsel, as published by the State Bar of Texas.

6       (c) The court of criminal appeals shall appoint from the  
7 list of persons submitted to the court under Subsection (a) the  
8 director of the office of capital writs.

9       [Sections 71.075-71.090 reserved for expansion]

10       SUBCHAPTER F. OFFICE OF CAPITAL WRITS

11       Sec. 71.091. DEFINITIONS. In this subchapter:

12       (1) "Committee" means the capital writs committee  
13 established under Subchapter E.

14       (2) "Office" means the office of capital writs  
15 established and operated under this subchapter.

16       Sec. 71.092. ESTABLISHMENT; FUNDING. (a) The office of  
17 capital writs is established as a standing committee of the council  
18 and operates under the direction and supervision of the director of  
19 the office.

20       (b) The office shall receive funds for personnel costs and  
21 expenses as specified in the General Appropriations Act.

22       Sec. 71.093. DIRECTOR; STAFF. (a) The court of criminal  
23 appeals shall employ a director to direct and supervise the  
24 operation of the office. The director serves a four-year term.

25       (b) The director shall employ attorneys, licensed  
26 investigators, and other personnel necessary to perform the duties  
27 of the office.

1        (c) The director and any attorney employed by the office may  
2 not:

- 3            (1) engage in the private practice of criminal law; or  
4            (2) accept anything of value not authorized by this  
5 chapter for services rendered under this subchapter.

6        Sec. 71.094. POWERS AND DUTIES. (a) The office may refuse  
7 an appointment under Article 11.071, Code of Criminal Procedure,  
8 only if:

- 9            (1) a conflict of interest exists;  
10           (2) the office has insufficient resources to provide  
11 adequate representation for the defendant;  
12           (3) the office is incapable of providing  
13 representation for the defendant in accordance with the rules of  
14 professional conduct; or  
15           (4) the office shows other good cause for refusing the  
16 appointment.

17        (b) The office may not represent a defendant in a federal  
18 habeas review. The office may not represent a defendant in an  
19 action or proceeding in state court other than an action or  
20 proceeding that:

- 21           (1) is conducted under Article 11.071, Code of  
22 Criminal Procedure;  
23           (2) is collateral to the preparation of an application  
24 under Article 11.071, Code of Criminal Procedure; or  
25           (3) concerns any other post-conviction matter,  
26 including an action or proceeding under Article 46.05 or Chapter  
27 64, Code of Criminal Procedure.

1        (c) Notwithstanding Article 26.04(p), Code of Criminal  
2 Procedure, the office may independently investigate the financial  
3 condition of any person the office is appointed to represent. The  
4 office shall report the results of the investigation to the  
5 appointing judge. The judge may hold a hearing to determine if the  
6 person is indigent and entitled to representation under this  
7 article.

8        (d) The court may not appoint the office to represent a  
9 defendant in an application for a writ of habeas corpus if:

10            (1) the court has previously appointed counsel other  
11 than the office under this section in the case; or

12            (2) the defendant has previously retained counsel to  
13 represent the defendant in an application for a writ of habeas  
14 corpus in the case.

15        (e) The office shall maintain a list of competent counsel  
16 available for appointment under Section 2(f), Article 11.071, Code  
17 of Criminal Procedure, if the office refuses an appointment under  
18 Subsection (a) or is prohibited from accepting an appointment under  
19 Subsection (d).

20        Sec. 71.095. COMPENSATION OF OTHER APPOINTED ATTORNEYS. If  
21 it is necessary that an attorney other than an attorney employed by  
22 the office be appointed, that attorney shall be compensated as  
23 provided by Article 26.05, Code of Criminal Procedure.

24        SECTION 3. Subsections (b), (c), (e), and (f), Section 2,  
25 Article 11.071, Code of Criminal Procedure, are amended to read as  
26 follows:

27        (b) If a defendant is sentenced to death the convicting

1 court, immediately after judgment is entered under Article 42.01,  
2 shall determine if the defendant is indigent and, if so, whether the  
3 defendant desires appointment of counsel for the purpose of a writ  
4 of habeas corpus. If the defendant desires appointment of counsel  
5 for the purpose of a writ of habeas corpus, the court shall appoint  
6 the office of capital writs to represent the defendant as provided  
7 by Subsection (c).

8 (c) At the earliest practical time, but in no event later  
9 than 30 days, after the convicting court makes the findings  
10 required under Subsections (a) and (b), the convicting court shall  
11 appoint the office of capital writs or, if the office of capital  
12 writs refuses or is prohibited from accepting an appointment under  
13 Section 71.094, Government Code, other competent counsel, unless  
14 the applicant elects to proceed pro se or is represented by retained  
15 counsel. On appointing counsel under this section, the convicting  
16 court shall immediately notify the court of criminal appeals of the  
17 appointment, including in the notice a copy of the judgment and the  
18 name, address, and telephone number of the appointed counsel.

19 (e) If the court of criminal appeals denies an applicant  
20 relief under this article, an attorney appointed under this section  
21 to represent the applicant shall, not later than the 15th day after  
22 the date the court of criminal appeals denies relief or, if the case  
23 is filed and set for submission, the 15th day after the date the  
24 court of criminal appeals issues a mandate on the initial  
25 application for a writ of habeas corpus under this article, move for  
26 the appointment of [~~to be appointed as~~] counsel in federal habeas  
27 review under 21 U.S.C. Section 848(q) or equivalent provision [~~or~~

1 ~~if necessary, move for the appointment of other counsel under 21~~  
2 ~~U.S.C. Section 848(q) or equivalent provision].~~ The attorney shall  
3 immediately file a copy of the motion with the court of criminal  
4 appeals, and if the attorney fails to do so, the court may take any  
5 action to ensure that the applicant's right to federal habeas  
6 review is protected, including initiating contempt proceedings  
7 against the attorney.

8 (f) If the office of capital writs refuses or is prohibited  
9 from accepting an appointment under Section 71.094, Government  
10 Code, the [The] convicting court shall appoint counsel from a list  
11 of competent counsel maintained by the office of capital writs. The  
12 convicting court shall reasonably compensate as provided by Section  
13 2A an attorney appointed under this section, other than an attorney  
14 employed by the office of capital writs, regardless of whether the  
15 attorney is appointed by the convicting court or was appointed by  
16 the court of criminal appeals under prior law. An attorney  
17 appointed under this section who is employed by the office of  
18 capital writs shall be compensated in accordance with Subchapter F,  
19 Chapter 71, Government Code.

20 SECTION 4. Subsections (e) and (f), Section 4A, Article  
21 11.071, Code of Criminal Procedure, are amended to read as follows:

22 (e) Sections 2A and 3 apply to compensation and  
23 reimbursement of counsel appointed under Subsection (b)(3) in the  
24 same manner as if counsel had been appointed by the convicting  
25 court, unless the attorney is employed by the office of capital  
26 writs, in which case the attorney is compensated in accordance with  
27 Subchapter F, Chapter 71, Government Code.

1           (f) Notwithstanding any other provision of this article,  
 2 the court of criminal appeals shall appoint counsel and establish a  
 3 new filing date for application, which may be no later than the  
 4 270th day after the date on which counsel is appointed, for each  
 5 applicant who before September 1, 1999, filed an untimely  
 6 application or failed to file an application before the date  
 7 required by Section 4(a) or (b). Section 2A applies to the  
 8 compensation and payment of expenses of counsel appointed by the  
 9 court of criminal appeals under this subsection, unless the  
 10 attorney is employed by the office of capital writs, in which case  
 11 the attorney is compensated in accordance with Subchapter F,  
 12 Chapter 71, Government Code.

13           SECTION 5. Subsection (b), Article 26.04, Code of Criminal  
 14 Procedure, is amended to read as follows:

- 15           (b) Procedures adopted under Subsection (a) shall:
- 16               (1) authorize only the judges of the county courts,  
 17 statutory county courts, and district courts trying criminal cases  
 18 in the county, or the judges' designee, to appoint counsel for  
 19 indigent defendants in the county;
- 20               (2) apply to each appointment of counsel made by a  
 21 judge or the judges' designee in the county;
- 22               (3) ensure that each indigent defendant in the county  
 23 who is charged with a misdemeanor punishable by confinement or with  
 24 a felony and who appears in court without counsel has an opportunity  
 25 to confer with appointed counsel before the commencement of  
 26 judicial proceedings;
- 27               (4) require appointments for defendants in capital



1 cases in which the death penalty is sought to comply with any  
2 applicable [the] requirements under Article 26.052 of this code, or  
3 Subchapters E and F, Chapter 71, Government Code;

4 (5) ensure that each attorney appointed from a public  
5 appointment list to represent an indigent defendant perform the  
6 attorney's duty owed to the defendant in accordance with the  
7 adopted procedures, the requirements of this code, and applicable  
8 rules of ethics; and

9 (6) ensure that appointments are allocated among  
10 qualified attorneys in a manner that is fair, neutral, and  
11 nondiscriminatory.

12 SECTION 6. Subsection (a), Article 26.044, Code of Criminal  
13 Procedure, is amended by adding Subdivision (3) to read as follows:

14 (3) "Office of capital writs" means the office of  
15 capital writs established under Subchapter F, Chapter 71,  
16 Government Code.

17 SECTION 7. Article 26.044, Code of Criminal Procedure, is  
18 amended by adding Subsection (n) to read as follows:

19 (n) A public defender may be appointed with respect to an  
20 application for a writ of habeas corpus only if an attorney employed  
21 by the office of capital writs is not appointed in the case.

22 SECTION 8. Subsection (a), Article 26.05, Code of Criminal  
23 Procedure, is amended to read as follows:

24 (a) A counsel, other than an attorney with a public defender  
25 or an attorney employed by the office of capital writs, appointed to  
26 represent a defendant in a criminal proceeding, including a habeas  
27 corpus hearing, shall be paid a reasonable attorney's fee for

1 performing the following services, based on the time and labor  
2 required, the complexity of the case, and the experience and  
3 ability of the appointed counsel:

4 (1) time spent in court making an appearance on behalf  
5 of the defendant as evidenced by a docket entry, time spent in  
6 trial, and time spent in a proceeding in which sworn oral testimony  
7 is elicited;

8 (2) reasonable and necessary time spent out of court  
9 on the case, supported by any documentation that the court  
10 requires;

11 (3) preparation of an appellate brief and preparation  
12 and presentation of oral argument to a court of appeals or the Court  
13 of Criminal Appeals; and

14 (4) preparation of a motion for rehearing.

15 SECTION 9. Subsection (d), Section 2, Article 11.071, Code  
16 of Criminal Procedure, is repealed.

17 SECTION 10. (a) Not later than January 15, 2008, the  
18 president of the State Bar of Texas shall appoint the members of the  
19 capital writs committee.

20 (b) Not later than May 15, 2008, the capital writs committee  
21 shall submit to the court of criminal appeals the list of candidates  
22 for the position of the director of the office of capital writs.

23 (c) Not later than September 1, 2008, the Court of Criminal  
24 Appeals shall employ the director of the office of capital writs  
25 under Subchapter F, Chapter 71, Government Code, as added by this  
26 Act.

27 SECTION 11. This Act takes effect September 1, 2007.