

## **BILL ANALYSIS**

C.S.S.B. 1091  
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Criminal Jurisprudence  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

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 the state habeas cases decided between 1995 and 2002 revealed that one out of three death row inmates face execution without having their case properly investigated by a competent attorney.

Research by the Texas State Bar has revealed troubling recurring flaws that undermine the integrity of Texas' capital post-conviction process.

This lack of quality legal representation is a result of how 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. Because the Court of Criminal Appeals has interpreted Article 11.071, Code of Criminal Procedure, reference to "competent" counsel as related to only the qualifications of the lawyer prior to appointment, the performance of Texas capital habeas lawyers is neither regulated nor monitored by any court or governmental agency. Thus, if the habeas representation amounts to the functional equivalent of a lawyer sleeping through trial, the lawyer is nonetheless reappointed to more cases and the death-sentence inmate has no remedy or recourse.

The list of lawyers appointed to habeas cases 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; lawyers with no capital experience; lawyers with no habeas corpus experience; lawyers with mental illness; lawyers 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); and lawyers who filed writs with no cognizable claims (including lawyers who filed verbatim copies of the inmate's direct appeal brief and even lawyers 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 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.

When lawyers failed to understand the nature of habeas proceedings, fail to carry out their statutorily mandated duty to thoroughly investigate the cases, or otherwise fail to represent their clients, death sentences are unreliable because mistakes are not caught and corrected. A 2002 study revealed that lawyers failed to investigate and present non-record evidence in 39 percent of Texas capital habeas cases. To put it starkly: if six of the Texas death row prisoners who were exonerated and released went through the current system, at least two would have been processed through and executed without investigation into their cases and there would be no outward indication of the miscarriage of justice.

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 area 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—in all but the rarest of circumstances—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.

Under current law, attorneys in capital habeas corpus cases are appointed by the district court from a statewide list of eligible lawyers maintained by the Texas Court of Criminal Appeals.

C.S.S.B. 1091 creates a Capital Writs Committee and an Office of Capital Writs.

### **RULEMAKING AUTHORITY**

Rulemaking authority previously granted to the Court of Criminal Appeals is rescinded in SECTION 10 (Article 11.071, Code of Criminal Procedure) of this bill.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Subtitle F, Title 2, Government Code, by adding Chapter 78, as follows:

#### CHAPTER 78. CAPITAL WRITS COMMITTEE AND OFFICE OF CAPITAL WRITS

##### SUBCHAPTER A. CAPITAL WRITS COMMITTEE

Sec. 78.001. DEFINITIONS. Defines "committee" and "office of capital writs."

Sec. 78.002. ESTABLISHMENT OF COMMITTEE; DUTIES. (a) Establishes the capital writs committee (committee).

(b) Requires the committee to recommend to the Court of Criminal Appeals, as provided by Section 78.004, a director for the office of capital writs when a vacancy exists for that position.

Sec. 78.003. APPOINTMENT AND COMPOSITION OF COMMITTEE. (a) Sets forth the composition and manner of appointment of the committee.

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

(c) Provides that the committee members serve at the pleasure of the president of the State Bar of Texas (State Bar), and the committee meets at the calling of the presiding officer of the committee.

Sec. 78.004. RECOMMENDATION AND APPOINTMENT OF DIRECTOR OF OFFICE OF CAPITAL WRITS. (a) Requires the committee to submit to the Court of Criminal Appeals, in order of the committee's preference, a list of the names of not more than five persons the committee recommends that the court consider in appointing the director of the office of capital writs when a vacancy exists for the position of director. Requires the committee, if the committee finds that three or more persons under the committee's consideration are qualified to serve as the director of the office of capital writs, to include at least three names in the list submitted under this subsection.

(b) Provides that each person recommended to the Court of Criminal Appeals by the committee under Subsection (a) is required 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, and is prohibited from having been found by a state or federal court to have rendered ineffective assistance of counsel during the trial or appeal of a death penalty case.

(c) Requires the Court of Criminal Appeals, when a vacancy for the position exists, to appoint from the list of individuals submitted to the court under Subsection (a) the director of the office of capital writs.

[Reserves Sections 78.005-78.050 for expansion.]

#### SUBCHAPTER B. OFFICE OF CAPITAL WRITS

Sec. 78.051. DEFINITIONS. Defines "committee" and "office."

Sec. 78.052. ESTABLISHMENT; FUNDING. (a) Establishes the office of capital writs (office) and provides that the office operates under the direction and supervision of the director of the office.

(b) Requires that the office receive funds for personnel costs and expenses as specified in the General Appropriations Act and from the fair defense account under Section 71.058 (Fair Defense Account), in an amount sufficient to cover personnel costs and expenses not covered by appropriations described by Subdivision (1).

Sec. 78.053. DIRECTOR; STAFF. (a) Requires the Court of Criminal Appeals to appoint a director to direct and supervise the operation of the office. Provides that the director serves a four-year term and continues to serve until a successor has been appointed and qualified. Authorizes the Court of Criminal Appeals to remove the director only for good cause. Authorizes the director to be reappointed for a second or subsequent term.

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

(c) Prohibits the director and any attorney employed by the office from engaging in the private practice of criminal law or accepting anything of value not authorized by law for services rendered under this subchapter.

Sec. 78.054. POWERS AND DUTIES. (a) Prohibits the office from accepting an appointment under Article 11.071 (Procedure in Death Penalty Case), Code of Criminal Procedure, if a conflict of interest exists, the office has insufficient resources to provide adequate representation for the defendant, the office is incapable of providing representation for the defendant in accordance with the rules of professional conduct, or other good cause is shown for not accepting the appointment.

(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 an action or proceeding that is conducted under Article 11.071, Code of Criminal Procedure, is collateral to the preparation of an application under Article 11.071, Code of Criminal Procedure, or concerns any other post-conviction matter in a death penalty case other than a direct appeal, including an action or proceeding under Article 46.05 (Competency to be Executed) or Chapter 64 (Motion for Forensic DNA Testing), Code of Criminal Procedure.

(c) Authorizes the office, notwithstanding Article 26.04(p) (relating to an indigent defendant), Code of Criminal Procedure, to independently investigate the financial condition of any individual the office is appointed to represent. 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 individual is indigent and entitled to representation under this section.

Sec. 78.055. COMPENSATION OF OTHER APPOINTED ATTORNEYS. Requires that, if it is necessary that an attorney other than an attorney employed by the office be appointed, that attorney be compensated as provided by Articles 11.071 and 26.05 (Compensation of Counsel Appointed to Defend), Code of Criminal Procedure.

Sec. 78.056. APPOINTMENT LIST. (a) Requires the presiding judges of the administrative judicial regions to maintain a statewide list of competent counsel available for appointment under Section 2(f) (relating to a requirement of compensation for an appointed attorney), Article 11.071, Code of Criminal Procedure, if the office does not accept or is prohibited from accepting an appointment under Section 78.054. Requires each attorney on the list 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.

(b) Requires the Office of Court Administration of the Texas Judicial System and the Task Force on Indigent Defense to provide administrative support necessary under this section.

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

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

(c) Requires the convicting court, at the earliest practical time, but in no event later than 30 days after the convicting court makes the findings required under Subsections (a) and (b), to appoint the office or, if the office does not accept or is prohibited from accepting an appointment under Section 78.054, Government Code, other competent counsel under Subsection (f), unless the applicant elects to proceed pro se or is represented by retained counsel.

(e) Requires an attorney appointed under this section to represent the applicant, under certain circumstances, if the Court of Criminal Appeals denies an applicant relief under this article, to, within certain time frames, move for the appointment of other counsel under 21 U.S.C. Section 848(q) or equivalent position, rather than move to be appointed as counsel or, if necessary, 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 does not accept or is prohibited from accepting an appointment under Section 78.054, Government Code, to appoint counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions under Section 78.056, Government Code. Requires the convicting court to reasonably compensate as provided by Section 2A an attorney appointed under this section, other than an attorney employed by the office regardless of whether the attorney appointed by the convicting court or was appointed by 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 B, Chapter 78, Government Code. Makes a nonsubstantive change.

SECTION 3. Amends Section 2A(a), Article 11.071, Code of Criminal Procedure, to require the state to reimburse a county for compensation of counsel under Section 2, other than for compensation of counsel employed by the office, and for payment of expenses under Section 3, regardless of whether counsel is employed by the office.

SECTION 4. Amends Section 3, Article 11.071, Code of Criminal Procedure, by adding Subsection (f), to provide that this section applies to counsel's investigation of the factual and legal grounds for the filing of an application for a writ of habeas corpus, regardless of whether counsel is employed by the office.

SECTION 5. Amends Section 4A(e) and (f), Article 11.071, Code of Criminal Procedure, as follows:

(e) Provides that Sections 2A and 3 apply to compensation and reimbursement of counsel appointed under Subsection (b)(3) 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 compensation of that attorney is governed by Subchapter B, Chapter 78, 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 compensation of that attorney is governed by Subchapter B, Chapter 78, Government Code.

SECTION 6. Amends Article 26.04(b), Code of Criminal Procedure, to require that procedures adopted under Subsection (a) require that appointments for defendants in capital cases in which the death penalty is sought comply with any applicable requirements under Articles 11.071 and 26.052, rather than the requirements under Article 26.052.

SECTION 7. Amends Article 26.044(a), Code of Criminal Procedure, to define "office of capital writs."

SECTION 8. Amends Article 26.044, Code of Criminal Procedure, by adding Subsection (n), to authorize an attorney employed by a public defender's office 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 and the attorney employed by the public defender's office is on the list of competent counsel maintained under Section 78.056, Government Code.

SECTION 9. Amends Article 26.05(a), Code of Criminal Procedure, to require a counsel, other than an attorney employed by the office, appointed to represent a defendant in a criminal proceeding, to be paid a reasonable attorney's fee for performing certain services.

SECTION 10. Amends Section 71.058, Government Code, as follows:

Sec. 71.058. FAIR DEFENSE ACCOUNT. Provides that the fair defense account is an account in the general revenue fund that is authorized to be appropriated only to the Task Force on Indigent Defense for the purpose of implementing this subchapter and the office for the purpose of implementing Subchapter B, Chapter 78.

SECTION 11. Repealer: Section 2(d) (relating to the court of criminal appeals adopting rules for the appointment of attorneys as counsel), Article 11.071, Code of Criminal Procedure, effective January 1, 2010.

SECTION 12. (a) Requires the presiding judges of the administrative judicial regions, not later than January 1, 2010, in accordance with Section 78.056, Government Code, as added by this Act, to complete the statewide list of competent counsel available for appointment to represent defendants in applications for writs of habeas corpus.

(b) Requires the president of the State Bar, not later than January 15, 2010, to appoint the members of the capital writs committee.

(c) Requires the capital writs committee, not later than May 15, 2010, to submit to the Court of Criminal Appeals the list of candidates for the position of the director of the office.

(d) Requires the Court of Criminal Appeals, not later than September 1, 2010, to appoint the director of the office under Chapter 78, Government Code, as added by this Act.

SECTION 13. Effective date: September 1, 2009.

**EFFECTIVE DATE**

September 1, 2009.

**COMPARISON OF ORIGINAL TO SUBSTITUTE**

The substitute amends SECTION 1 under Section 78.053(b) DIRECTOR; STAFF to state that all attorneys employed by the director may not have been found to have rendered ineffective assistance of counsel during the trial or appeal of a death penalty case.