

By: Ellis, Duncan

S.B. No. 1091

A BILL TO BE ENTITLED

AN ACT

relating to the establishment of the capital writs committee and the office of capital writs and to the appointment and compensation of certain counsel for indigent defendants in a capital case.

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

SECTION 1. Subtitle F, Title 2, Government Code, is amended by adding Chapter 78 to read as follows:

CHAPTER 78. CAPITAL WRITS COMMITTEE AND OFFICE OF CAPITAL WRITS

SUBCHAPTER A. CAPITAL WRITS COMMITTEE

Sec. 78.001. DEFINITIONS. In this subchapter:

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

(2) "Office of capital writs" means the office of capital writs established under Subchapter B.

Sec. 78.002. ESTABLISHMENT OF COMMITTEE; DUTIES. (a) The capital writs committee is established.

(b) The committee shall 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 the position of director.

Sec. 78.003. APPOINTMENT AND COMPOSITION OF COMMITTEE.

(a) The committee is composed of the following five members who are appointed by the president of the State Bar of Texas, with ratification by the executive committee of the State Bar of Texas:

(1) three attorneys who are members of the State Bar of

1 Texas and who are not employed as prosecutors or law enforcement
2 officials, all of whom must have criminal defense experience with
3 death penalty proceedings in this state; and

4 (2) two state district judges, one of whom serves as
5 presiding judge of an administrative judicial region.

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

8 (c) The committee members serve at the pleasure of the
9 president of the State Bar of Texas, and the committee meets at the
10 call of the presiding officer of the committee.

11 Sec. 78.004. RECOMMENDATION AND APPOINTMENT OF DIRECTOR OF
12 OFFICE OF CAPITAL WRITS. (a) The committee shall submit to the
13 court of criminal appeals, in order of the committee's preference,
14 a list of the names of not more than five persons the committee
15 recommends that the court consider in appointing the director of
16 the office of capital writs when a vacancy exists for the position
17 of director. If the committee finds that three or more persons
18 under the committee's consideration are qualified to serve as the
19 director of the office of capital writs, the committee must include
20 at least three names in the list submitted under this subsection.

21 (b) Each person recommended to the court of criminal appeals
22 by the committee under Subsection (a):

23 (1) must exhibit proficiency and commitment to
24 providing quality representation to defendants in death penalty
25 cases, as described by the Guidelines and Standards for Texas
26 Capital Counsel, as published by the State Bar of Texas; and

27 (2) may not have been found by a state or federal court

1 to have rendered ineffective assistance of counsel during the trial
2 or appeal of a death penalty case.

3 (c) When a vacancy for the position exists, the court of
4 criminal appeals shall appoint from the list of persons submitted
5 to the court under Subsection (a) the director of the office of
6 capital writs.

7 [Sections 78.005-78.050 reserved for expansion]

8 SUBCHAPTER B. OFFICE OF CAPITAL WRITS

9 Sec. 78.051. DEFINITIONS. In this subchapter:

10 (1) "Committee" means the capital writs committee
11 established under Subchapter A.

12 (2) "Office" means the office of capital writs
13 established under this subchapter.

14 Sec. 78.052. ESTABLISHMENT; FUNDING. (a) The office of
15 capital writs is established and operates under the direction and
16 supervision of the director of the office.

17 (b) The office shall receive funds for personnel costs and
18 expenses:

19 (1) as specified in the General Appropriations Act;
20 and

21 (2) from the fair defense account under Section
22 71.058, in an amount sufficient to cover personnel costs and
23 expenses not covered by appropriations described by Subdivision
24 (1).

25 Sec. 78.053. DIRECTOR; STAFF. (a) The court of criminal
26 appeals shall appoint a director to direct and supervise the
27 operation of the office. The director serves a four-year term and

1 continues to serve until a successor has been appointed and
2 qualified. The court of criminal appeals may remove the director
3 only for good cause. The director may be reappointed for a second
4 or subsequent term.

5 (b) The director shall employ attorneys and employ or retain
6 licensed investigators and other personnel necessary to perform the
7 duties of the office.

8 (c) The director and any attorney employed by the office may
9 not:

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

13 Sec. 78.054. POWERS AND DUTIES. (a) The office may not
14 accept an appointment under Article 11.071, Code of Criminal
15 Procedure, if:

- 16 (1) a conflict of interest exists;
17 (2) the office has insufficient resources to provide
18 adequate representation for the defendant;
19 (3) the office is incapable of providing
20 representation for the defendant in accordance with the rules of
21 professional conduct; or
22 (4) other good cause is shown for not accepting the
23 appointment.

24 (b) The office may not represent a defendant in a federal
25 habeas review. The office may not represent a defendant in an
26 action or proceeding in state court other than an action or
27 proceeding that:

1 (1) is conducted under Article 11.071, Code of
2 Criminal Procedure;

3 (2) is collateral to the preparation of an application
4 under Article 11.071, Code of Criminal Procedure; or

5 (3) concerns any other post-conviction matter in a
6 death penalty case other than a direct appeal, including an action
7 or proceeding under Article 46.05 or Chapter 64, Code of Criminal
8 Procedure.

9 (c) Notwithstanding Article 26.04(p), Code of Criminal
10 Procedure, the office may independently investigate the financial
11 condition of any person the office is appointed to represent. The
12 office shall report the results of the investigation to the
13 appointing judge. The judge may hold a hearing to determine if the
14 person is indigent and entitled to representation under this
15 section.

16 Sec. 78.055. COMPENSATION OF OTHER APPOINTED ATTORNEYS. If
17 it is necessary that an attorney other than an attorney employed by
18 the office be appointed, that attorney shall be compensated as
19 provided by Articles 11.071 and 26.05, Code of Criminal Procedure.

20 Sec. 78.056. APPOINTMENT LIST. (a) The presiding judges
21 of the administrative judicial regions shall maintain a statewide
22 list of competent counsel available for appointment under Section
23 2(f), Article 11.071, Code of Criminal Procedure, if the office
24 does not accept or is prohibited from accepting an appointment
25 under Section 78.054. Each attorney on the list must exhibit
26 proficiency and commitment to providing quality representation to
27 defendants in death penalty cases, as described by the Guidelines

1 and Standards for Texas Capital Counsel, as published by the State
2 Bar of Texas.

3 (b) The Office of Court Administration of the Texas Judicial
4 System and the Task Force on Indigent Defense shall provide
5 administrative support necessary under this section.

6 SECTION 2. Subsections (b), (c), (e), and (f), Section 2,
7 Article 11.071, Code of Criminal Procedure, are amended to read as
8 follows:

9 (b) If a defendant is sentenced to death the convicting
10 court, immediately after judgment is entered under Article 42.01,
11 shall determine if the defendant is indigent and, if so, whether the
12 defendant desires appointment of counsel for the purpose of a writ
13 of habeas corpus. If the defendant desires appointment of counsel
14 for the purpose of a writ of habeas corpus, the court shall appoint
15 the office of capital writs to represent the defendant as provided
16 by Subsection (c).

17 (c) At the earliest practical time, but in no event later
18 than 30 days, after the convicting court makes the findings
19 required under Subsections (a) and (b), the convicting court shall
20 appoint the office of capital writs or, if the office of capital
21 writs does not accept or is prohibited from accepting an
22 appointment under Section 78.054, Government Code, other competent
23 counsel under Subsection (f), unless the applicant elects to
24 proceed pro se or is represented by retained counsel. On appointing
25 counsel under this section, the convicting court shall immediately
26 notify the court of criminal appeals of the appointment, including
27 in the notice a copy of the judgment and the name, address, and

1 telephone number of the appointed counsel.

2 (e) If the court of criminal appeals denies an applicant
3 relief under this article, an attorney appointed under this section
4 to represent the applicant shall, not later than the 15th day after
5 the date the court of criminal appeals denies relief or, if the case
6 is filed and set for submission, the 15th day after the date the
7 court of criminal appeals issues a mandate on the initial
8 application for a writ of habeas corpus under this article, move for
9 the appointment of [~~to be appointed as~~] counsel in federal habeas
10 review under 21 U.S.C. Section 848(q) or equivalent provision [~~or,~~
11 ~~if necessary, move for the appointment of other counsel under 21~~
12 ~~U.S.C. Section 848(q) or equivalent provision~~]. The attorney shall
13 immediately file a copy of the motion with the court of criminal
14 appeals, and if the attorney fails to do so, the court may take any
15 action to ensure that the applicant's right to federal habeas
16 review is protected, including initiating contempt proceedings
17 against the attorney.

18 (f) If the office of capital writs does not accept or is
19 prohibited from accepting an appointment under Section 78.054,
20 Government Code, the [~~The~~] convicting court shall appoint counsel
21 from a list of competent counsel maintained by the presiding judges
22 of the administrative judicial regions under Section 78.056,
23 Government Code. The convicting court shall reasonably compensate
24 as provided by Section 2A an attorney appointed under this section,
25 other than an attorney employed by the office of capital writs,
26 regardless of whether the attorney is appointed by the convicting
27 court or was appointed by the court of criminal appeals under prior

1 law. An attorney appointed under this section who is employed by
2 the office of capital writs shall be compensated in accordance with
3 Subchapter B, Chapter 78, Government Code.

4 SECTION 3. Subsection (a), Section 2A, Article 11.071, Code
5 of Criminal Procedure, is amended to read as follows:

6 (a) The state shall reimburse a county for compensation of
7 counsel under Section 2, other than for compensation of counsel
8 employed by the office of capital writs, and for payment of expenses
9 under Section 3, regardless of whether counsel is employed by the
10 office of capital writs. The total amount of reimbursement to which
11 a county is entitled under this section for an application under
12 this article may not exceed \$25,000. Compensation and expenses in
13 excess of the \$25,000 reimbursement provided by the state are the
14 obligation of the county.

15 SECTION 4. Section 3, Article 11.071, Code of Criminal
16 Procedure, is amended by adding Subsection (f) to read as follows:

17 (f) This section applies to counsel's investigation of the
18 factual and legal grounds for the filing of an application for a
19 writ of habeas corpus, regardless of whether counsel is employed by
20 the office of capital writs.

21 SECTION 5. Subsections (e) and (f), Section 4A, Article
22 11.071, Code of Criminal Procedure, are amended to read as follows:

23 (e) Sections 2A and 3 apply to compensation and
24 reimbursement of counsel appointed under Subsection (b)(3) in the
25 same manner as if counsel had been appointed by the convicting
26 court, unless the attorney is employed by the office of capital
27 writs, in which case the compensation of that attorney is governed

1 by Subchapter B, Chapter 78, Government Code.

2 (f) Notwithstanding any other provision of this article,
3 the court of criminal appeals shall appoint counsel and establish a
4 new filing date for application, which may be no later than the
5 270th day after the date on which counsel is appointed, for each
6 applicant who before September 1, 1999, filed an untimely
7 application or failed to file an application before the date
8 required by Section 4(a) or (b). Section 2A applies to the
9 compensation and payment of expenses of counsel appointed by the
10 court of criminal appeals under this subsection, unless the
11 attorney is employed by the office of capital writs, in which case
12 the compensation of that attorney is governed by Subchapter B,
13 Chapter 78, Government Code.

14 SECTION 6. Subsection (b), Article 26.04, Code of Criminal
15 Procedure, is amended to read as follows:

16 (b) Procedures adopted under Subsection (a) shall:

17 (1) authorize only the judges of the county courts,
18 statutory county courts, and district courts trying criminal cases
19 in the county, or the judges' designee, to appoint counsel for
20 indigent defendants in the county;

21 (2) apply to each appointment of counsel made by a
22 judge or the judges' designee in the county;

23 (3) ensure that each indigent defendant in the county
24 who is charged with a misdemeanor punishable by confinement or with
25 a felony and who appears in court without counsel has an opportunity
26 to confer with appointed counsel before the commencement of
27 judicial proceedings;

1 (4) require appointments for defendants in capital
2 cases in which the death penalty is sought to comply with any
3 applicable [~~the~~] requirements under Articles 11.071 and [Article]
4 26.052;

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

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

13 SECTION 7. Subsection (a), Article 26.044, Code of Criminal
14 Procedure, is amended by adding Subdivision (3) to read as follows:

15 (3) "Office of capital writs" means the office of
16 capital writs established under Subchapter B, Chapter 78,
17 Government Code.

18 SECTION 8. Article 26.044, Code of Criminal Procedure, is
19 amended by adding Subsection (n) to read as follows:

20 (n) An attorney employed by a public defender's office may
21 be appointed with respect to an application for a writ of habeas
22 corpus only if:

23 (1) an attorney employed by the office of capital
24 writs is not appointed in the case; and

25 (2) the attorney employed by the public defender's
26 office is on the list of competent counsel maintained under Section
27 78.056, Government Code.

1 SECTION 9. Subsection (a), Article 26.05, Code of Criminal
2 Procedure, is amended to read as follows:

3 (a) A counsel, other than an attorney with a public defender
4 or an attorney employed by the office of capital writs, appointed to
5 represent a defendant in a criminal proceeding, including a habeas
6 corpus hearing, shall be paid a reasonable attorney's fee for
7 performing the following services, based on the time and labor
8 required, the complexity of the case, and the experience and
9 ability of the appointed counsel:

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

14 (2) reasonable and necessary time spent out of court
15 on the case, supported by any documentation that the court
16 requires;

17 (3) preparation of an appellate brief and preparation
18 and presentation of oral argument to a court of appeals or the Court
19 of Criminal Appeals; and

20 (4) preparation of a motion for rehearing.

21 SECTION 10. Section 71.058, Government Code, is amended to
22 read as follows:

23 Sec. 71.058. FAIR DEFENSE ACCOUNT. The fair defense
24 account is an account in the general revenue fund that may be
25 appropriated only to:

26 (1) the Task Force on Indigent Defense for the purpose
27 of implementing this subchapter; and

1 (2) the office of capital writs for the purpose of
2 implementing Subchapter B, Chapter 78.

3 SECTION 11. Subsection (d), Section 2, Article 11.071, Code
4 of Criminal Procedure, is repealed, effective January 1, 2010.

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

11 (b) Not later than January 15, 2010, the president of the
12 State Bar of Texas shall appoint the members of the capital writs
13 committee.

14 (c) Not later than May 15, 2010, the capital writs committee
15 shall submit to the court of criminal appeals the list of candidates
16 for the position of the director of the office of capital writs.

17 (d) Not later than September 1, 2010, the court of criminal
18 appeals shall appoint the director of the office of capital writs
19 under Chapter 78, Government Code, as added by this Act.

20 SECTION 13. This Act takes effect September 1, 2009.