

By: Ellis, Duncan

S.B. No. 1091

Substitute the following for S.B. No. 1091:

By: Miklos

C.S.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. To be employed by the director, an attorney  
8 may not have been found by a state or federal court to have rendered  
9 ineffective assistance of counsel during the trial or appeal of a  
10 death penalty case.

11 (c) The director and any attorney employed by the office may  
12 not:

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

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

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

27 (b) The office may not represent a defendant in a federal

1 habeas review. The office may not represent a defendant in an action  
2 or proceeding in state court other than an action or proceeding  
3 that:

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

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

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

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

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

23 Sec. 78.056. APPOINTMENT LIST. (a) The presiding judges of  
24 the administrative judicial regions shall maintain a statewide list  
25 of competent counsel available for appointment under Section 2(f),  
26 Article 11.071, Code of Criminal Procedure, if the office does not  
27 accept or is prohibited from accepting an appointment under Section

1 78.054. Each attorney on the list:

2 (1) must exhibit proficiency and commitment to  
3 providing quality representation to defendants in death penalty  
4 cases; and

5 (2) may not have been found by a state or federal court  
6 to have rendered ineffective assistance of counsel during the trial  
7 or appeal of a death penalty case.

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

11 SECTION 2. Sections 2(b), (c), (e), and (f), Article  
12 11.071, Code of Criminal Procedure, are amended to read as follows:

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

21 (c) At the earliest practical time, but in no event later  
22 than 30 days, after the convicting court makes the findings  
23 required under Subsections (a) and (b), the convicting court shall  
24 appoint the office of capital writs or, if the office of capital  
25 writs does not accept or is prohibited from accepting an  
26 appointment under Section 78.054, Government Code, other competent  
27 counsel under Subsection (f), unless the applicant elects to

1 proceed pro se or is represented by retained counsel. On appointing  
2 counsel under this section, the convicting court shall immediately  
3 notify the court of criminal appeals of the appointment, including  
4 in the notice a copy of the judgment and the name, address, and  
5 telephone number of the appointed counsel.

6 (e) If the court of criminal appeals denies an applicant  
7 relief under this article, an attorney appointed under this section  
8 to represent the applicant shall, not later than the 15th day after  
9 the date the court of criminal appeals denies relief or, if the case  
10 is filed and set for submission, the 15th day after the date the  
11 court of criminal appeals issues a mandate on the initial  
12 application for a writ of habeas corpus under this article, move for  
13 the appointment of [~~to be appointed as~~] counsel in federal habeas  
14 review under 18 U.S.C. Section 3599 [~~21 U.S.C. Section 848(g) or~~  
15 ~~equivalent provision or, if necessary, move for the appointment of~~  
16 ~~other counsel under 21 U.S.C. Section 848(g) or equivalent~~  
17 ~~provision~~]. The attorney shall immediately file a copy of the  
18 motion with the court of criminal appeals, and if the attorney fails  
19 to do so, the court may take any action to ensure that the  
20 applicant's right to federal habeas review is protected, including  
21 initiating contempt proceedings against the attorney.

22 (f) If the office of capital writs does not accept or is  
23 prohibited from accepting an appointment under Section 78.054,  
24 Government Code, the [~~The~~] convicting court shall appoint counsel  
25 from a list of competent counsel maintained by the presiding judges  
26 of the administrative judicial regions under Section 78.056,  
27 Government Code. The convicting court shall reasonably compensate

1 as provided by Section 2A an attorney appointed under this section,  
2 other than an attorney employed by the office of capital writs,  
3 regardless of whether the attorney is appointed by the convicting  
4 court or was appointed by the court of criminal appeals under prior  
5 law. An attorney appointed under this section who is employed by  
6 the office of capital writs shall be compensated in accordance with  
7 Subchapter B, Chapter 78, Government Code.

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

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

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

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

25 SECTION 5. Sections 4A(e) and (f), Article 11.071, Code of  
26 Criminal Procedure, are amended to read as follows:

27 (e) Sections 2A and 3 apply to compensation and



1 reimbursement of counsel appointed under Subsection (b)(3) in the  
2 same manner as if counsel had been appointed by the convicting  
3 court, unless the attorney is employed by the office of capital  
4 writs, in which case the compensation of that attorney is governed  
5 by Subchapter B, Chapter 78, Government Code.

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

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

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

21 (1) authorize only the judges of the county courts,  
22 statutory county courts, and district courts trying criminal cases  
23 in the county, or the judges' designee, to appoint counsel for  
24 indigent defendants in the county;

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

27 (3) ensure that each indigent defendant in the county

1 who is charged with a misdemeanor punishable by confinement or with  
2 a felony and who appears in court without counsel has an opportunity  
3 to confer with appointed counsel before the commencement of  
4 judicial proceedings;

5 (4) require appointments for defendants in capital  
6 cases in which the death penalty is sought to comply with any  
7 applicable ~~[the]~~ requirements under Articles 11.071 and [Article]  
8 26.052;

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

14 (6) ensure that appointments are allocated among  
15 qualified attorneys in a manner that is fair, neutral, and  
16 nondiscriminatory.

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

19 (3) "Office of capital writs" means the office of  
20 capital writs established under Subchapter B, Chapter 78,  
21 Government Code.

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

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

27 (1) an attorney employed by the office of capital

1 writs is not appointed in the case; and

2 (2) the attorney employed by the public defender's  
3 office is on the list of competent counsel maintained under Section  
4 78.056, Government Code.

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

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

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

18 (2) reasonable and necessary time spent out of court  
19 on the case, supported by any documentation that the court  
20 requires;

21 (3) preparation of an appellate brief and preparation  
22 and presentation of oral argument to a court of appeals or the Court  
23 of Criminal Appeals; and

24 (4) preparation of a motion for rehearing.

25 SECTION 10. Section 71.058, Government Code, is amended to  
26 read as follows:

27 Sec. 71.058. FAIR DEFENSE ACCOUNT. The fair defense

1 account is an account in the general revenue fund that may be  
2 appropriated only to:

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

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

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

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

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

18 (c) Not later than May 15, 2010, the capital writs committee  
19 shall submit to the Court of Criminal Appeals the list of candidates  
20 for the position of the director of the office of capital writs.

21 (d) Not later than September 1, 2010, the Court of Criminal  
22 Appeals shall appoint the director of the office of capital writs  
23 under Chapter 78, Government Code, as added by this Act.

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