

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.

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 and operated under Subchapter B.

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

(b) The committee shall submit to the Court of Criminal Appeals the committee's recommendations for the position of director of the office of capital writs when a vacancy exists for that position.

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 individuals 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 individuals
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 individual recommended to the Court of Criminal
22 Appeals by the committee under Subsection (a) must exhibit
23 proficiency and commitment to providing quality representation to
24 defendants in death penalty cases, as described by the Guidelines
25 and Standards for Texas Capital Counsel, as published by the State
26 Bar of Texas.

27 (c) When a vacancy for the position exists, the Court of

1 Criminal Appeals shall appoint from the list of individuals
2 submitted to the court under Subsection (a) the director of the
3 office of capital writs.

4 [Sections 78.005-78.050 reserved for expansion]

5 SUBCHAPTER B. OFFICE OF CAPITAL WRITS

6 Sec. 78.051. DEFINITIONS. In this subchapter:

7 (1) "Committee" means the capital writs committee
8 established under Subchapter A.

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

11 Sec. 78.052. ESTABLISHMENT; FUNDING. (a) The office of
12 capital writs is established and operates under the direction and
13 supervision of the director of the office.

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

16 Sec. 78.053. DIRECTOR; STAFF. (a) The Court of Criminal
17 Appeals shall appoint a director to direct and supervise the
18 operation of the office. The director serves a four-year term and
19 continues to serve until a successor has been appointed and
20 qualified. The Court of Criminal Appeals may remove the director
21 only for good cause. The director may be reappointed for a second
22 or subsequent term.

23 (b) The director shall employ attorneys and employ or retain
24 licensed investigators and other personnel necessary to perform the
25 duties of the office.

26 (c) The director and any attorney employed by the office may
27 not:

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

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

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

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

- (1) is conducted under Article 11.071, Code of Criminal Procedure;
- (2) is collateral to the preparation of an application under Article 11.071, Code of Criminal Procedure; or
- (3) concerns any other post-conviction matter other than a direct appeal, including an action or proceeding under Article 46.05 or Chapter 64, Code of Criminal Procedure.

(c) Notwithstanding Article 26.04(p), Code of Criminal Procedure, the office may independently investigate the financial

1 condition of any individual the office is appointed to represent.
2 The office shall report the results of the investigation to the
3 appointing judge. The judge may hold a hearing to determine if the
4 individual is indigent and entitled to representation under this
5 section.

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

10 Sec. 78.056. APPOINTMENT LIST. (a) The presiding judges of
11 the administrative judicial regions shall maintain a statewide list
12 of competent counsel available for appointment under Section 2(f),
13 Article 11.071, Code of Criminal Procedure, if the office does not
14 accept or is prohibited from accepting an appointment under Section
15 78.054. Each attorney on the list must possess the qualifications
16 described by Section 78.004(b).

17 (b) The Office of Court Administration and the Task Force on
18 Indigent Defense shall provide administrative support necessary
19 under this section.

20 SECTION 2. Sections 2(b), (c), (e), and (f), Article
21 11.071, Code of Criminal Procedure, are amended to read as follows:

22 (b) If a defendant is sentenced to death the convicting
23 court, immediately after judgment is entered under Article 42.01,
24 shall determine if the defendant is indigent and, if so, whether the
25 defendant desires appointment of counsel for the purpose of a writ
26 of habeas corpus. If the defendant desires appointment of counsel
27 for the purpose of a writ of habeas corpus, the court shall appoint

1 the office of capital writs to represent the defendant as provided
2 by Subsection (c).

3 (c) At the earliest practical time, but in no event later
4 than 30 days, after the convicting court makes the findings
5 required under Subsections (a) and (b), the convicting court shall
6 appoint the office of capital writs or, if the office of capital
7 writs does not accept or is prohibited from accepting an
8 appointment under Section 78.054, Government Code, other competent
9 counsel under Subsection (f), unless the applicant elects to
10 proceed pro se or is represented by retained counsel. On appointing
11 counsel under this section, the convicting court shall immediately
12 notify the court of criminal appeals of the appointment, including
13 in the notice a copy of the judgment and the name, address, and
14 telephone number of the appointed counsel.

15 (e) If the court of criminal appeals denies an applicant
16 relief under this article, an attorney appointed under this section
17 to represent the applicant shall, not later than the 15th day after
18 the date the court of criminal appeals denies relief or, if the case
19 is filed and set for submission, the 15th day after the date the
20 court of criminal appeals issues a mandate on the initial
21 application for a writ of habeas corpus under this article, move to
22 be appointed as counsel in federal habeas review under 21 U.S.C.
23 Section 848(q) or equivalent provision or, if the attorney is
24 employed by the office of capital writs or it is otherwise
25 necessary, move for the appointment of other counsel under 21
26 U.S.C. Section 848(q) or equivalent provision. The attorney shall
27 immediately file a copy of the motion with the court of criminal

1 appeals, and if the attorney fails to do so, the court may take any
2 action to ensure that the applicant's right to federal habeas
3 review is protected, including initiating contempt proceedings
4 against the attorney.

5 (f) If the office of capital writs does not accept or is
6 prohibited from accepting an appointment under Section 78.054,
7 Government Code, the [The] convicting court shall appoint counsel
8 from a list of competent counsel maintained by the presiding judges
9 of the administrative judicial regions under Section 78.056,
10 Government Code. The convicting court shall reasonably compensate
11 as provided by Section 2A an attorney appointed under this section,
12 other than an attorney employed by the office of capital writs,
13 regardless of whether the attorney is appointed by the convicting
14 court or was appointed by the court of criminal appeals under prior
15 law. An attorney appointed under this section who is employed by
16 the office of capital writs shall be compensated in accordance with
17 Subchapter B, Chapter 78, Government Code.

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

20 (a) The state shall reimburse a county for compensation of
21 counsel under Section 2, other than for compensation of counsel
22 employed by the office of capital writs, and for payment of expenses
23 under Section 3, regardless of whether counsel is employed by the
24 office of capital writs. The total amount of reimbursement to which
25 a county is entitled under this section for an application under
26 this article may not exceed \$25,000. Compensation and expenses in
27 excess of the \$25,000 reimbursement provided by the state are the

1 obligation of the county.

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

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

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

10 (e) Sections 2A and 3 apply to compensation and
11 reimbursement of counsel appointed under Subsection (b)(3) in the
12 same manner as if counsel had been appointed by the convicting
13 court, unless the attorney is employed by the office of capital
14 writs, in which case the compensation of that attorney is governed
15 by Subchapter B, Chapter 78, Government Code.

16 (f) Notwithstanding any other provision of this article,
17 the court of criminal appeals shall appoint counsel and establish a
18 new filing date for application, which may be no later than the
19 270th day after the date on which counsel is appointed, for each
20 applicant who before September 1, 1999, filed an untimely
21 application or failed to file an application before the date
22 required by Section 4(a) or (b). Section 2A applies to the
23 compensation and payment of expenses of counsel appointed by the
24 court of criminal appeals under this subsection, unless the
25 attorney is employed by the office of capital writs, in which case
26 the compensation of that attorney is governed by Subchapter B,
27 Chapter 78, Government Code.

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

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

4 (1) authorize only the judges of the county courts,
5 statutory county courts, and district courts trying criminal cases
6 in the county, or the judges' designee, to appoint counsel for
7 indigent defendants in the county;

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

10 (3) ensure that each indigent defendant in the county
11 who is charged with a misdemeanor punishable by confinement or with
12 a felony and who appears in court without counsel has an opportunity
13 to confer with appointed counsel before the commencement of
14 judicial proceedings;

15 (4) require appointments for defendants in capital
16 cases in which the death penalty is sought to comply with any
17 applicable ~~[the]~~ requirements under Articles 11.071 and [Article]
18 26.052;

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

24 (6) ensure that appointments are allocated among
25 qualified attorneys in a manner that is fair, neutral, and
26 nondiscriminatory.

27 SECTION 7. Article 26.044(a), Code of Criminal Procedure,

1 is amended by adding Subdivision (3) to read as follows:

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

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

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

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

12 (2) the attorney employed by the public defender's
13 office is on the list of competent counsel maintained under Section
14 78.056, Government Code.

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

17 (a) A counsel, other than an attorney with a public defender
18 or an attorney employed by the office of capital writs, appointed to
19 represent a defendant in a criminal proceeding, including a habeas
20 corpus hearing, shall be paid a reasonable attorney's fee for
21 performing the following services, based on the time and labor
22 required, the complexity of the case, and the experience and
23 ability of the appointed counsel:

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

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

4 (3) preparation of an appellate brief and preparation
5 and presentation of oral argument to a court of appeals or the Court
6 of Criminal Appeals; and

7 (4) preparation of a motion for rehearing.

8 SECTION 10. Section 2(d), Article 11.071, Code of Criminal
9 Procedure, is repealed, effective January 1, 2010.

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

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

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

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

25 SECTION 12. This Act takes effect September 1, 2009.