

1-1 By: Ellis, Duncan S.B. No. 1091
1-2 (In the Senate - Filed February 24, 2009; March 13, 2009,
1-3 read first time and referred to Committee on Criminal Justice;
1-4 March 30, 2009, reported adversely, with favorable Committee
1-5 Substitute by the following vote: Yeas 5, Nays 0; March 30, 2009,
1-6 sent to printer.)

1-7 COMMITTEE SUBSTITUTE FOR S.B. No. 1091 By: Ellis

1-8 A BILL TO BE ENTITLED
1-9 AN ACT

1-10 relating to the establishment of the capital writs committee and
1-11 the office of capital writs and to the appointment and compensation
1-12 of certain counsel for indigent defendants in a capital case.

1-13 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-14 SECTION 1. Subtitle F, Title 2, Government Code, is amended
1-15 by adding Chapter 78 to read as follows:

1-16 CHAPTER 78. CAPITAL WRITS COMMITTEE AND OFFICE OF CAPITAL WRITS

1-17 SUBCHAPTER A. CAPITAL WRITS COMMITTEE

1-18 Sec. 78.001. DEFINITIONS. In this subchapter:

1-19 (1) "Committee" means the capital writs committee
1-20 established under this subchapter.

1-21 (2) "Office of capital writs" means the office of
1-22 capital writs established under Subchapter B.

1-23 Sec. 78.002. ESTABLISHMENT OF COMMITTEE; DUTIES. (a) The
1-24 capital writs committee is established.

1-25 (b) The committee shall recommend to the court of criminal
1-26 appeals as provided by Section 78.004 a director for the office of
1-27 capital writs when a vacancy exists for the position of director.

1-28 Sec. 78.003. APPOINTMENT AND COMPOSITION OF COMMITTEE.

1-29 (a) The committee is composed of the following five members who
1-30 are appointed by the president of the State Bar of Texas, with
1-31 ratification by the executive committee of the State Bar of Texas:

1-32 (1) three attorneys who are members of the State Bar of
1-33 Texas and who are not employed as prosecutors or law enforcement
1-34 officials, all of whom must have criminal defense experience with
1-35 death penalty proceedings in this state; and

1-36 (2) two state district judges, one of whom serves as
1-37 presiding judge of an administrative judicial region.

1-38 (b) The committee shall elect one member of the committee to
1-39 serve as the presiding officer of the committee.

1-40 (c) The committee members serve at the pleasure of the
1-41 president of the State Bar of Texas, and the committee meets at the
1-42 call of the presiding officer of the committee.

1-43 Sec. 78.004. RECOMMENDATION AND APPOINTMENT OF DIRECTOR OF

1-44 OFFICE OF CAPITAL WRITS. (a) The committee shall submit to the
1-45 court of criminal appeals, in order of the committee's preference,
1-46 a list of the names of not more than five persons the committee
1-47 recommends that the court consider in appointing the director of
1-48 the office of capital writs when a vacancy exists for the position
1-49 of director. If the committee finds that three or more persons
1-50 under the committee's consideration are qualified to serve as the
1-51 director of the office of capital writs, the committee must include
1-52 at least three names in the list submitted under this subsection.

1-53 (b) Each person recommended to the court of criminal appeals
1-54 by the committee under Subsection (a):

1-55 (1) must exhibit proficiency and commitment to
1-56 providing quality representation to defendants in death penalty
1-57 cases, as described by the Guidelines and Standards for Texas
1-58 Capital Counsel, as published by the State Bar of Texas; and

1-59 (2) may not have been found by a state or federal court
1-60 to have rendered ineffective assistance of counsel during the trial
1-61 or appeal of a death penalty case.

1-62 (c) When a vacancy for the position exists, the court of
1-63 criminal appeals shall appoint from the list of persons submitted

2-1 to the court under Subsection (a) the director of the office of
2-2 capital writs.
2-3 [Sections 78.005-78.050 reserved for expansion]
2-4 SUBCHAPTER B. OFFICE OF CAPITAL WRITS
2-5 Sec. 78.051. DEFINITIONS. In this subchapter:
2-6 (1) "Committee" means the capital writs committee
2-7 established under Subchapter A.
2-8 (2) "Office" means the office of capital writs
2-9 established under this subchapter.
2-10 Sec. 78.052. ESTABLISHMENT; FUNDING. (a) The office of
2-11 capital writs is established and operates under the direction and
2-12 supervision of the director of the office.
2-13 (b) The office shall receive funds for personnel costs and
2-14 expenses:
2-15 (1) as specified in the General Appropriations Act;
2-16 and
2-17 (2) from the fair defense account under Section
2-18 71.058, in an amount sufficient to cover personnel costs and
2-19 expenses not covered by appropriations described by Subdivision
2-20 (1).
2-21 Sec. 78.053. DIRECTOR; STAFF. (a) The court of criminal
2-22 appeals shall appoint a director to direct and supervise the
2-23 operation of the office. The director serves a four-year term and
2-24 continues to serve until a successor has been appointed and
2-25 qualified. The court of criminal appeals may remove the director
2-26 only for good cause. The director may be reappointed for a second
2-27 or subsequent term.
2-28 (b) The director shall employ attorneys and employ or retain
2-29 licensed investigators and other personnel necessary to perform the
2-30 duties of the office.
2-31 (c) The director and any attorney employed by the office may
2-32 not:
2-33 (1) engage in the private practice of criminal law; or
2-34 (2) accept anything of value not authorized by law for
2-35 services rendered under this subchapter.
2-36 Sec. 78.054. POWERS AND DUTIES. (a) The office may not
2-37 accept an appointment under Article 11.071, Code of Criminal
2-38 Procedure, if:
2-39 (1) a conflict of interest exists;
2-40 (2) the office has insufficient resources to provide
2-41 adequate representation for the defendant;
2-42 (3) the office is incapable of providing
2-43 representation for the defendant in accordance with the rules of
2-44 professional conduct; or
2-45 (4) other good cause is shown for not accepting the
2-46 appointment.
2-47 (b) The office may not represent a defendant in a federal
2-48 habeas review. The office may not represent a defendant in an
2-49 action or proceeding in state court other than an action or
2-50 proceeding that:
2-51 (1) is conducted under Article 11.071, Code of
2-52 Criminal Procedure;
2-53 (2) is collateral to the preparation of an application
2-54 under Article 11.071, Code of Criminal Procedure; or
2-55 (3) concerns any other post-conviction matter in a
2-56 death penalty case other than a direct appeal, including an action
2-57 or proceeding under Article 46.05 or Chapter 64, Code of Criminal
2-58 Procedure.
2-59 (c) Notwithstanding Article 26.04(p), Code of Criminal
2-60 Procedure, the office may independently investigate the financial
2-61 condition of any person the office is appointed to represent. The
2-62 office shall report the results of the investigation to the
2-63 appointing judge. The judge may hold a hearing to determine if the
2-64 person is indigent and entitled to representation under this
2-65 section.
2-66 Sec. 78.055. COMPENSATION OF OTHER APPOINTED ATTORNEYS. If
2-67 it is necessary that an attorney other than an attorney employed by
2-68 the office be appointed, that attorney shall be compensated as
2-69 provided by Articles 11.071 and 26.05, Code of Criminal Procedure.

3-1 Sec. 78.056. APPOINTMENT LIST. (a) The presiding judges
 3-2 of the administrative judicial regions shall maintain a statewide
 3-3 list of competent counsel available for appointment under Section
 3-4 2(f), Article 11.071, Code of Criminal Procedure, if the office
 3-5 does not accept or is prohibited from accepting an appointment
 3-6 under Section 78.054. Each attorney on the list must exhibit
 3-7 proficiency and commitment to providing quality representation to
 3-8 defendants in death penalty cases, as described by the Guidelines
 3-9 and Standards for Texas Capital Counsel, as published by the State
 3-10 Bar of Texas.

3-11 (b) The Office of Court Administration of the Texas Judicial
 3-12 System and the Task Force on Indigent Defense shall provide
 3-13 administrative support necessary under this section.

3-14 SECTION 2. Subsections (b), (c), (e), and (f), Section 2,
 3-15 Article 11.071, Code of Criminal Procedure, are amended to read as
 3-16 follows:

3-17 (b) If a defendant is sentenced to death the convicting
 3-18 court, immediately after judgment is entered under Article 42.01,
 3-19 shall determine if the defendant is indigent and, if so, whether the
 3-20 defendant desires appointment of counsel for the purpose of a writ
 3-21 of habeas corpus. If the defendant desires appointment of counsel
 3-22 for the purpose of a writ of habeas corpus, the court shall appoint
 3-23 the office of capital writs to represent the defendant as provided
 3-24 by Subsection (c).

3-25 (c) At the earliest practical time, but in no event later
 3-26 than 30 days, after the convicting court makes the findings
 3-27 required under Subsections (a) and (b), the convicting court shall
 3-28 appoint the office of capital writs or, if the office of capital
 3-29 writs does not accept or is prohibited from accepting an
 3-30 appointment under Section 78.054, Government Code, other competent
 3-31 counsel under Subsection (f), unless the applicant elects to
 3-32 proceed pro se or is represented by retained counsel. On appointing
 3-33 counsel under this section, the convicting court shall immediately
 3-34 notify the court of criminal appeals of the appointment, including
 3-35 in the notice a copy of the judgment and the name, address, and
 3-36 telephone number of the appointed counsel.

3-37 (e) If the court of criminal appeals denies an applicant
 3-38 relief under this article, an attorney appointed under this section
 3-39 to represent the applicant shall, not later than the 15th day after
 3-40 the date the court of criminal appeals denies relief or, if the case
 3-41 is filed and set for submission, the 15th day after the date the
 3-42 court of criminal appeals issues a mandate on the initial
 3-43 application for a writ of habeas corpus under this article, move for
 3-44 the appointment of [to be appointed as] counsel in federal habeas
 3-45 review under 21 U.S.C. Section 848(q) or equivalent provision [or,
 3-46 if necessary, move for the appointment of other counsel under 21
 3-47 U.S.C. Section 848(q) or equivalent provision]. The attorney shall
 3-48 immediately file a copy of the motion with the court of criminal
 3-49 appeals, and if the attorney fails to do so, the court may take any
 3-50 action to ensure that the applicant's right to federal habeas
 3-51 review is protected, including initiating contempt proceedings
 3-52 against the attorney.

3-53 (f) If the office of capital writs does not accept or is
 3-54 prohibited from accepting an appointment under Section 78.054,
 3-55 Government Code, the [The] convicting court shall appoint counsel
 3-56 from a list of competent counsel maintained by the presiding judges
 3-57 of the administrative judicial regions under Section 78.056,
 3-58 Government Code. The convicting court shall reasonably compensate
 3-59 as provided by Section 2A an attorney appointed under this section,
 3-60 other than an attorney employed by the office of capital writs,
 3-61 regardless of whether the attorney is appointed by the convicting
 3-62 court or was appointed by the court of criminal appeals under prior
 3-63 law. An attorney appointed under this section who is employed by
 3-64 the office of capital writs shall be compensated in accordance with
 3-65 Subchapter B, Chapter 78, Government Code.

3-66 SECTION 3. Subsection (a), Section 2A, Article 11.071, Code
 3-67 of Criminal Procedure, is amended to read as follows:

3-68 (a) The state shall reimburse a county for compensation of
 3-69 counsel under Section 2, other than for compensation of counsel

4-1 employed by the office of capital writs, and for payment of expenses
4-2 under Section 3, regardless of whether counsel is employed by the
4-3 office of capital writs. The total amount of reimbursement to which
4-4 a county is entitled under this section for an application under
4-5 this article may not exceed \$25,000. Compensation and expenses in
4-6 excess of the \$25,000 reimbursement provided by the state are the
4-7 obligation of the county.

4-8 SECTION 4. Section 3, Article 11.071, Code of Criminal
4-9 Procedure, is amended by adding Subsection (f) to read as follows:

4-10 (f) This section applies to counsel's investigation of the
4-11 factual and legal grounds for the filing of an application for a
4-12 writ of habeas corpus, regardless of whether counsel is employed by
4-13 the office of capital writs.

4-14 SECTION 5. Subsections (e) and (f), Section 4A, Article
4-15 11.071, Code of Criminal Procedure, are amended to read as follows:

4-16 (e) Sections 2A and 3 apply to compensation and
4-17 reimbursement of counsel appointed under Subsection (b)(3) in the
4-18 same manner as if counsel had been appointed by the convicting
4-19 court, unless the attorney is employed by the office of capital
4-20 writs, in which case the compensation of that attorney is governed
4-21 by Subchapter B, Chapter 78, Government Code.

4-22 (f) Notwithstanding any other provision of this article,
4-23 the court of criminal appeals shall appoint counsel and establish a
4-24 new filing date for application, which may be no later than the
4-25 270th day after the date on which counsel is appointed, for each
4-26 applicant who before September 1, 1999, filed an untimely
4-27 application or failed to file an application before the date
4-28 required by Section 4(a) or (b). Section 2A applies to the
4-29 compensation and payment of expenses of counsel appointed by the
4-30 court of criminal appeals under this subsection, unless the
4-31 attorney is employed by the office of capital writs, in which case
4-32 the compensation of that attorney is governed by Subchapter B,
4-33 Chapter 78, Government Code.

4-34 SECTION 6. Subsection (b), Article 26.04, Code of Criminal
4-35 Procedure, is amended to read as follows:

4-36 (b) Procedures adopted under Subsection (a) shall:
4-37 (1) authorize only the judges of the county courts,
4-38 statutory county courts, and district courts trying criminal cases
4-39 in the county, or the judges' designee, to appoint counsel for
4-40 indigent defendants in the county;

4-41 (2) apply to each appointment of counsel made by a
4-42 judge or the judges' designee in the county;

4-43 (3) ensure that each indigent defendant in the county
4-44 who is charged with a misdemeanor punishable by confinement or with
4-45 a felony and who appears in court without counsel has an opportunity
4-46 to confer with appointed counsel before the commencement of
4-47 judicial proceedings;

4-48 (4) require appointments for defendants in capital
4-49 cases in which the death penalty is sought to comply with any
4-50 applicable [the] requirements under Articles 11.071 and [Article]
4-51 26.052;

4-52 (5) ensure that each attorney appointed from a public
4-53 appointment list to represent an indigent defendant perform the
4-54 attorney's duty owed to the defendant in accordance with the
4-55 adopted procedures, the requirements of this code, and applicable
4-56 rules of ethics; and

4-57 (6) ensure that appointments are allocated among
4-58 qualified attorneys in a manner that is fair, neutral, and
4-59 nondiscriminatory.

4-60 SECTION 7. Subsection (a), Article 26.044, Code of Criminal
4-61 Procedure, is amended by adding Subdivision (3) to read as follows:

4-62 (3) "Office of capital writs" means the office of
4-63 capital writs established under Subchapter B, Chapter 78,
4-64 Government Code.

4-65 SECTION 8. Article 26.044, Code of Criminal Procedure, is
4-66 amended by adding Subsection (n) to read as follows:

4-67 (n) An attorney employed by a public defender's office may
4-68 be appointed with respect to an application for a writ of habeas
4-69 corpus only if:

5-1 (1) an attorney employed by the office of capital
5-2 writs is not appointed in the case; and

5-3 (2) the attorney employed by the public defender's
5-4 office is on the list of competent counsel maintained under Section
5-5 78.056, Government Code.

5-6 SECTION 9. Subsection (a), Article 26.05, Code of Criminal
5-7 Procedure, is amended to read as follows:

5-8 (a) A counsel, other than an attorney with a public defender
5-9 or an attorney employed by the office of capital writs, appointed to
5-10 represent a defendant in a criminal proceeding, including a habeas
5-11 corpus hearing, shall be paid a reasonable attorney's fee for
5-12 performing the following services, based on the time and labor
5-13 required, the complexity of the case, and the experience and
5-14 ability of the appointed counsel:

5-15 (1) time spent in court making an appearance on behalf
5-16 of the defendant as evidenced by a docket entry, time spent in
5-17 trial, and time spent in a proceeding in which sworn oral testimony
5-18 is elicited;

5-19 (2) reasonable and necessary time spent out of court
5-20 on the case, supported by any documentation that the court
5-21 requires;

5-22 (3) preparation of an appellate brief and preparation
5-23 and presentation of oral argument to a court of appeals or the Court
5-24 of Criminal Appeals; and

5-25 (4) preparation of a motion for rehearing.

5-26 SECTION 10. Section 71.058, Government Code, is amended to
5-27 read as follows:

5-28 Sec. 71.058. FAIR DEFENSE ACCOUNT. The fair defense
5-29 account is an account in the general revenue fund that may be
5-30 appropriated only to:

5-31 (1) the Task Force on Indigent Defense for the purpose
5-32 of implementing this subchapter; and

5-33 (2) the office of capital writs for the purpose of
5-34 implementing Subchapter B, Chapter 78.

5-35 SECTION 11. Subsection (d), Section 2, Article 11.071, Code
5-36 of Criminal Procedure, is repealed, effective January 1, 2010.

5-37 SECTION 12. (a) Not later than January 1, 2010, in
5-38 accordance with Section 78.056, Government Code, as added by this
5-39 Act, the presiding judges of the administrative judicial regions
5-40 shall complete the statewide list of competent counsel available
5-41 for appointment to represent defendants in applications for writs
5-42 of habeas corpus.

5-43 (b) Not later than January 15, 2010, the president of the
5-44 State Bar of Texas shall appoint the members of the capital writs
5-45 committee.

5-46 (c) Not later than May 15, 2010, the capital writs committee
5-47 shall submit to the court of criminal appeals the list of candidates
5-48 for the position of the director of the office of capital writs.

5-49 (d) Not later than September 1, 2010, the court of criminal
5-50 appeals shall appoint the director of the office of capital writs
5-51 under Chapter 78, Government Code, as added by this Act.

5-52 SECTION 13. This Act takes effect September 1, 2009.

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