

## **BILL ANALYSIS**

C.S.S.B. 1655  
By: Ellis  
Judiciary  
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 state habeas cases decided between 1995 and 2002 revealed that one out of three death row inmates faces execution without having their case properly investigated by a competent attorney. This lack of quality legal representation is a result of the means by which 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. The performance of Texas capital habeas lawyers is neither regulated nor monitored by any court or government agency. Thus, even if the habeas representation amounts to the functional equivalent of a lawyer sleeping through the trial, the lawyer may nonetheless be reappointed to more cases.

The list of lawyers appointed to habeas has been, and remains, populated by lawyers who appear unqualified, including lawyers: who were serving probated suspensions from the practice of law for neglecting their clients; with no capital experience; with no habeas corpus experience; with mental illness; 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); who filed writs with no cognizable claims (including lawyers who filed verbatim copies of the inmate's direct appeal brief); and even who were deceased.

Despite these failures to provide adequate legal representation, there are no consequences for the attorneys who perform incompetently. They are not always removed from the list of those eligible to take these cases, and the disciplinary committee of the Texas State Bar does not feel it can adequately police attorney performance in these complicated cases.

Providing adequate legal representation is especially important in habeas proceedings because state habeas is the "safety net" designed to catch the innocent and those treated unfairly by the system. Habeas proceedings are opportunities 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 typically 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 can permanently foreclose both state and federal review of any issues or facts overlooked by counsel.

The bill establishes the capital writs committee and creates the Office of Capital Writs to represent defendants in applications for writs of habeas corpus.

### **RULEMAKING AUTHORITY**

Rulemaking authority previously granted to the court of criminal appeals is rescinded in SECTION 9 (Section 2(d), Article 11.071, Code of Criminal Procedure) of this bill.

### **ANALYSIS**

SECTION 1. Adds Chapter 78, Government Code, as follows:

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.

(b) Requires the committee to recommend a director to the court of criminal appeals when a vacancy exists for the position.

Sec. 78.003. APPOINTMENT AND COMPOSITION OF COMMITTEE. (a) Provides that the committee is composed of five members who are appointed, with ratification by the executive committee, by the president of the State Bar of Texas.

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

(c) Provides that members serve at the pleasure of the president of the State Bar of Texas and the committee meets at the call 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. Provides that the committee must at least 3 names if it finds 3 or more person's qualified.

(b) Requires each person recommended to the court by the committee under Subsection (a) to exhibit proficiency and commitment to providing quality representation to defendants in death penalty habeas cases, as described by the Guidelines and Standards for Texas Capital Counsel, as published by the State Bar of Texas.

(c) Requires the court to appoint the director from the list of persons submitted to the court under Subsection (a) when a vacancy exists.

[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 to operate under the direction and supervision of the director.

(b) Requires the office to receive funds for personnel costs and expenses as specified in the General Appropriations Act.

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

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

(c) Prohibits the director and any attorney employed by the office to engage in certain activities.

Sec. 78.054. POWERS AND DUTIES. (a) Prohibits the office from accepting an appointment under Article 11.071, Code of Criminal Procedure, if certain conditions exist.

(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 certain actions or proceedings.

(c) Authorizes the office to independently investigate the financial condition of any person the office is appointed to represent, notwithstanding Article 26.04(p) (authorizing the defendant, the defendant's counsel, or the attorney representing the state to make a move for reconsideration of the determination of indigence or non-indigence if there is a material change in financial circumstances), Code of Criminal Procedure. 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 person is indigent and entitled to representation under this section.

Sec. 78.055. COMPENSATION OF OTHER APPOINTED ATTORNEYS. Requires an attorney, other than the attorney employed by the office, to be compensated as provided by Articles 11.071 and 26.05, Code of Criminal Procedure.

Sec. 78.056 APPOINTMENT LIST. Requires the presiding judges of the administrative judicial regions to maintain a statewide list of competent counsel available for appointment under Section 2(f), Article 11.071, Code of Criminal Procedure, if the office does not accept, or is prohibited from accepting, an appointment. Each attorney on the list must possess the qualifications of Section 78.004(b), Government Code.

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

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

(c) Requires the convicting court to appoint the office or, if the office refuses or is prohibited from accepting an appointment under Section 78.054, Government Code, other competent counsel within a certain time frame, unless the applicant elects to proceed pro se or is represented by retained counsel.

(e) Requires an attorney appointed under this section (Representation by Counsel) to represent the applicant to move for the appointment of, rather than to move to be appointed as, counsel in federal habeas review under 21 U.S.C. Section 848(q) (Appeal in Capital Cases; Counsel for Financially Unable Defendants) or equivalent provision if the court denies an applicant relief under this article (Procedure in Death Penalty Case). Deletes existing text providing, if necessary, the option to 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 refuses 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 office. Requires the court to reasonably compensate as provided by Section 2A (State Reimbursement; County Obligation) an attorney appointed under this section, other than an attorney employed by the office, regardless of whether the attorney is appointed by the convicting court or 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.

SECTION 3. Section 3 amends the Code of Criminal Procedure to exempt the state from the obligation to reimburse counties for compensation, but not certain expenses, of counsel employed by the office of capital writs.

SECTION 4. Section 4 adds a provision to the Code of Criminal Procedure relating to the investigation of the grounds for a writ of habeas corpus in a death penalty case and related expenses, and stating that the section applies to the counsel's investigation of the factual and legal grounds of an application regardless of whether counsel is employed by the office of capital writs.

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

(e) Provides that Sections 2A (State Reimbursement; County Obligation) and 3 (Investigation of Grounds for Application) apply to compensation and reimbursement of counsel appointed under Subsection (b)(3) (relating to the authorization of the court to appoint new counsel and a filing date for the application) 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 attorney is compensated in accordance with 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 attorney is compensated in accordance with Subchapter B, Chapter 78, Government Code.

SECTION 6. Amends Article 26.04(b), Code of Criminal Procedure, to make conforming changes.

SECTION 7. Amends Article 26.044(a), Code of Criminal Procedure, by adding Subdivision (3) to define "office of capital writs."

SECTION 8. Amends Article 26.044, Code of Criminal Procedure, by adding Subsection (n), to authorize a public defender 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 appointed is on the list of competent counsel maintained by the regional presiding judges.

SECTION 9. Amends Article 26.05(a), Code of Criminal Procedure, to make a conforming change.

SECTION 10. Repealer: Section 2(d) (requiring the court to adopt rules for the appointment of attorneys), Article 11.071, Code of Criminal Procedure.

SECTION 11. (a) Requires the presiding judges of the administrative judicial regions to complete the statewide list of competent counsel available to represent defendants in applications for writs of habeas corpus no later than January 1, 2008.

(b) Requires the president of the State Bar of Texas to appoint the members of the committee, not later than January 15, 2008.

(c) Requires the committee to submit to the court the list of candidates for the position of the director, not later than May 15, 2008.

(d) Requires the court to employ the director under Subchapter B, Chapter 78, Government Code, as added by this Act, not later than September 1, 2008.

**EFFECTIVE DATE**

September 1, 2007.

## **COMPARISON OF ORIGINAL TO SUBSTITUTE**

The substitute deletes Section 1 of the bill (relating to qualification standards adopted by the Task Force on Indigent Defense) as engrossed by the senate. The substitute enacts provisions by adding a new Chapter 78 to the Government Code in lieu of the amendments to Chapter 71 of the Government Code contained in the original bill. The substitute strikes a provision making the capital writs committee a standing committee of the Texas Judicial Council and a provision stating that the committee shall oversee the creation of the office of capital writs. The substitute adds language requiring that the members be ratified by the executive committee of the state bar and meet at the call of the presiding officer of the committee. The provision for composition of the committee is amended by striking the provision for an appellate judge member and adding a provision for two state district judge members, one of which must be a serving presiding judge of a judicial region. The provision relating to the list of recommendations for director of the office of capital writs the committee must send to the court of criminal appeals is amended in the substitute by changing the requirement that such list contain no fewer than three or more than five persons to the limitation that it contain no more than five names. The substitute also adds the provision that if three or more persons under the committee's consideration are qualified to serve as the director of the office, the committee must include at least three names in the list submitted. The substitute limits the time when the court of criminal appeals shall appoint a director of the office to a time when a vacancy for the position exists. The substitute strikes a provision referring to the office of capital writs as a standing committee of the judicial council. The substitute provides that the court of criminal appeals shall appoint a director where the original bill provides that the court shall employ a director. The substitute adds provisions stating that the director continues to serve until a successor has been appointed and qualified, that the court of criminal appeals may remove the director only for good cause, and that the director may be reappointed for a second or subsequent term. The substitute amends the limitation on acceptance of things of value by an attorney for service to the office to things permitted by law rather than permitted by the subchapter, as provided in the original bill. The provision relating to powers and duties of the office is altered in the substitute to provide that the office may not accept an appointment under circumstances set forth in the list contained in the statute, from the original which made the acceptance discretionary. The provision relating to prohibitions on the office is amended in the substitute to permit representation of a defendant in a direct appeal. The substitute amends the provision relating to compensation of appointed attorneys by adding a provision that the attorneys be compensated as provided by Article 11.071, Code of Criminal Procedure in addition to the provision referenced in the original bill. The substitute strikes language in the original which provided that the court may not appoint the office to represent a defendant in an application for a writ of habeas corpus if the court has previously appointed other counsel in the case or the defendant had previously retained counsel for such purpose in the case. The provision relating to the appointment list is amended in the substitute to provide that the presiding judges of the administrative judicial regions shall maintain a statewide list of competent counsel available for appointment if the office does not accept or is prohibited from accepting appointment. The original bill provides that the office maintains this list and makes no reference to statewide coverage.

Sections 3 and 4 of the substitute contain provisions not found in the original bill. Section 3 amends the Code of Criminal Procedure to exempt the state from the obligation to reimburse counties for compensation, but not certain expenses, of counsel employed by the office of capital writs. Section 4 adds a provision to the Code of Criminal Procedure relating to the investigation of the grounds for a writ of habeas corpus in a death penalty case and related expenses, and stating that the section applies to the counsel's investigation of the factual and legal grounds of an application regardless of whether counsel is employed by the office of capital writs.

Section 6 of the substitute adds a reference to Article 11.071 not contained in the original bill in a provision relating to procedures for appointing counsel.

Section 7 of the substitute makes a conforming change.

Section 8 of the substitute changes the provision in the original bill by adding the limitation that an attorney employed by a public defender's office may not be appointed with respect to an application for a writ of habeas corpus if the attorney is not on the list of competent death penalty habeas attorneys maintained by the presiding judges of the judicial regions under the provisions of the act.

Section 11 of the substitute adds a provision not found in the original bill stating that the presiding judges of the administrative judicial regions shall complete the statewide list of competent counsel not later than January 1, 2008.