SUBJECT: Standards for lawyers appointed for *habeas corpus* appeals in capital cases

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 5 ayes — Keel, Riddle, Ellis, Hodge, Talton

0 nays

4 absent — Denny, Dunnam, P. Moreno, Pena

WITNESSES: For — Keith Hampton, Texas Criminal Defense Lawyers Association

Against — None

BACKGROUND: Defendants sentenced to death in Texas may challenge their convictions in two ways: with a direct appeal, which deals only with errors of law in the original trial and is heard automatically by the Court of Criminal Appeals, and with a *habeas corpus* appeal, which can raise issues outside of the trial record. *Habeas* appeals typically center on constitutional rights, such as the effectiveness of counsel or the satisfactory disclosure of evidence by prosecutors, and may be filed both in state and federal court.

Code of Criminal Procedure, sec. 11.071 establishes guidelines and procedures for providing counsel to indigent defendants for *habeas* appeals in death penalty cases. Convicting courts are required to appoint attorneys for these indigent defendants and to notify the Court of Criminal Appeals of the appointment. The Court of Criminal Appeals is required to adopt rules for the appointment of these attorneys, and convicting courts may appoint an attorney only if the appointment follows rules established by the Court of Criminal Appeals. The Court of Criminal Appeals has established a list of approved attorneys, from which convicting courts make their appointments.

In 2001, the Legislature enacted SB 7 by Ellis et al., which extensively revised the system for appointing attorneys for indigent criminal defendants in non-capital cases. The bill established a Task Force on Indigent Defense to develop policies and standards for legal representation and other services to indigent defendants. The task force is a standing committee of the Texas

Judicial Council with eight ex-officio members, including judges and legislators, and five members appointed by the governor, including judges and attorneys.

DIGEST:

CSHB 615 would require that lawyers appointed for *habeas corpus* appeals of death sentences by indigent defendants meet specific requirements. The bill would move the responsibility for adopting guidelines governing the appointments from the Court of Criminal Appeals to the Task Force on Indigent Defense. The bill would eliminate a requirement that convicting courts get approval of the Court of Criminal Appeals to make these appointments.

An appointed lawyer would have to:

- be a member of the State Bar;
- have proficiency and commitment to providing quality representation;
- have at least five years of experience in trials and appeals;
- have attended specified types of continuing legal education or training; and
- not have been found to have rendered ineffective assistance of counsel on a felony case.

The Task Force on Indigent Defense would have to adopt standards for the appointments that included these requirements within 60 days of this bill's effective date. The task force also would be authorized to keep a list of attorneys qualified for these appointments.

Convicting courts would be authorized to appoint an assistant to the lead attorney appointed for a death penalty appeal. Assisting attorneys would have to be members of the State Bar and not have been found to have given ineffective assistance of counsel on a felony case or appeal, but would not have to meet the other experience and education standards set for lead attorneys.

A court could not appoint for a *habeas* appeal the same attorney who represented the defendant at trial or on direct appeal unless the defendant and attorney requested the appointment and the court found good cause.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2003. Courts would have to begin using the procedures established in CSHB 615 within 75 days of the bill's effective date.

SUPPORTERS SAY:

CSHB 615 would help ensure that competent attorneys were appointed to help indigent defendants with their *habeas corpus* appeals of death sentences. Implementation of the 1995 law intended to ensure that defendants were well represented on *habeas* appeals has resulted in the appointment of some unqualified and inexperienced attorneys. The major revisions enacted in 2001 to the law governing the appointment of counsel for indigents did not deal with these specific issues relating to the appointment of attorneys in *habeas* appeals.

Currently, these attorneys are appointed by convicting courts from a list developed by the Court of Criminal Appeals. However, the list includes attorneys who clearly are not qualified for these appointments, such as those with inactive law licenses or who have had disciplinary cases brought against them and at least one who was dead.

In other instances, lawyers from the list have done an inadequate job of representing their clients. This creates problems in *habeas* appeals since, in most situations, only one state *habeas* appeal is allowed, and a federal appeal can hinge on the quality and content of a state appeal.

CSHB 615 would address these problems by establishing minimum statutory standards for these attorneys to ensure that they met basic qualifications and had relevant, recent experience. It is important to place specific standards in statute so that the minimums are firmly established and are clear and easily available to courts, judges, attorneys, and others. The Task Force on Indigent Defense, which would be required to adopt standards for the attorneys, could then develop any additional qualifications needed within this statutory framework.

It is inappropriate for the Court of Criminal Appeals to have the responsibility for developing standards and maintaining a list for appointed *habeas* attorneys because it also must rule on the petitions from these attorneys and because its main job is to rule on cases. CSHB 615 would give this responsibility to the

Task Force on Indigent defense because it already does a similar job developing policies and standards for the quality of defense services of attorneys appointed for trials. All groups are well represented on the Task Force, including representatives of judges, legislators, defense attorneys, and prosecuting attorneys. Other groups, such as the local selection committees that adopt standards for attorneys appointed to defend indigents in death penalty trials, do not have a statewide focus or experience in the appeals process.

By authorizing the appointment of assistant attorneys for *habeas* appeals, the bill would help these attorneys gain valuable experience while assisting lead attorneys with the massive amount of work involved in these complex appeals. Appointing a second chair in these cases would help address the problem of an insufficient number of qualified attorneys who can handle these appeals and would allow the lead attorney to mentor the assistant. CSHB 615 would not require the appointment of an assistant, only authorize it when a judge found it appropriate.

OPPONENTS SAY:

CSHB 615 should not place into statute specific standards for attorneys appointed for *habeas* appeals in death penalty cases. This would mean that any change to the standards would have to be done through a new law enacted when the Legislature was in session. The standards should be flexible enough to be altered as needed at any time. In addition, statutory minimum standards could become the only standards because those responsible for enacting additional standards would be afraid to deviate from the legislative mandate.

The Task Force on Indigent Defense would not be the best entity to set standards for attorneys appointed for *habeas* appeals in death penalty cases. The task force has existed only since the Legislature enacted SB 7 in 2001, and it is too busy implementing the law dealing with the appointment of attorneys for non-death penalty cases to take on additional duties.

Other groups might be more qualified to maintain the list of attorneys eligible for appointments. For example, the list could be maintained by the local selection committees in each administrative judicial region that adopt standards for attorneys who are appointed to represent indigent defendants in death penalty trials. These committees might know better who was qualified

to be on the appointment list since they are local committees closer to the lawyers and their work.

OTHER OPPONENTS SAY:

Current law should not be changed. The Court of Criminal Appeals is the appropriate entity to develop a list of approved lawyers for appointment in *habeas* cases because it sees the work of numerous attorneys and knows which are qualified.

NOTES:

The committee substitute differs from the bill as introduced by requiring the Task Force on Indigent Defense, rather than the local selection committee in each administrative judicial region, to adopt standards for the appointment of attorneys for *habeas* appeals in death penalty cases. The bill as introduced did not include the specific standards, did not authorize the appointment of an assistant attorney, and did not prohibit the convicting court from appointing the original trial attorney as counsel for a *habeas* appeal, unless specifically requested by the client and attorney.

A related bill, SB 1224 by Ellis, would require the Task Force on Indigent Defense to compile a list of attorneys qualified for these appointments and to establish minimum requirements for the attorneys. SB 1224 would require the Task Force to set minimum requirements for specific types of criteria but would not list any minium years of experience in the statutes. The bill also would allow second state *habeas* appeals to be considered if the applicant had incompetent counsel and certain criteria were met and would require the appointment of attorneys and payment to attorneys for these situations. SB 1224 also would establish a process for payments to attorneys for the habeas appeals in excess of the state contribution, disapprovals of payments, and appeals of the disapprovals. SB 1224 passed the Senate by voice vote (Nelson, Estes recorded nay) on April 16 and has been referred to the House Criminal Jurisprudence Committee.

A related bill, HB 665 by Gallego, would require the Court of Criminal Appeals to establish certain types of criteria for attorneys appointed for death penalty *habeas* appeals and would prohibit courts from appointing to another case attorneys who had filed *habeas* appeals that were untimely or included claims that were not cognizable or who had failed to file at all due to the fault of the attorney. HB 665 has been referred to a subcommittee of the House Criminal Jurisprudence Committee.

A related bill, HB 1734 by Gallego, would raise the cap on the amount the state pays for attorneys appointed for *habeas* appeals in death penalty cases from $25,000 to $50,000. It would allow second state *habeas* appeals to be considered if the defendant had incompetent counsel and certain criteria were met and would require the appointment of attorneys and payment to attorneys in these situations. The bill also would require a statewide professional association of criminal defense attorneys to maintain a list of attorneys for appointment for *habeas* appeals of death penalty cases and allow the appointment of attorneys to assist lead attorneys in *habeas* appeals in death penalty cases. HB 1734 has been referred to a subcommittee of the House Criminal Jurisprudence Committee.