

SUBJECT: Creating office of capital writs for death penalty habeas corpus petitions

COMMITTEE: Judiciary — committee substitute recommended

VOTE: 7 ayes — Hartnett, Homer, Hopson, Alonzo, R. Cook, Goolsby, Hughes
0 nays
2 absent — Gonzales, Krusee

SENATE VOTE: On final passage, April 16 — 30-0

WITNESSES: For — Martha Dickie, State Bar of Texas; (*Registered, but did not testify:* Edwin Colfax, The Justice Project; Andrea Keilen, Texas Defender Services; Andrea Marsh, Texas Fair Defense Project)

Against — None

On — Jim Bethke, Task Force on Indigent Defense; (*Registered, but did not testify:* Carl Reynolds, Office of Court Administration/Texas Judicial Council)

BACKGROUND: Courts must appoint attorneys for indigent criminal defendants, including those facing the death penalty, for both the trial and appeals. Defendants sentenced to death in Texas may challenge their convictions in two ways: with a direct appeal, which deals with errors of law in the original trial and is heard automatically by the Court of Criminal Appeals, or 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 in both 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 must appoint attorneys for these indigent defendants and 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.

DIGEST:

CSSB 1655 would create the office of capital writs to provide legal representation for indigent capital murder defendants who were sentenced to death and were appointed counsel for a writ of habeas corpus. Courts would have to appoint the office to represent indigent capital defendants for habeas writs unless specific conditions in the bill were met.

The bill would take effect September 1, 2007.

Appointments. If a defendant was sentenced to death and the convicting court determined that the defendant was indigent and desired the appointment of counsel for a writ of habeas corpus, the court would be required to appoint the office of capital writs to represent the defendant.

The office would be allowed to represent defendants only in proceedings for writs of habeas corpus, legal motions related to preparing a habeas petition, and other state post-conviction matters. The office could not represent a defendant in a federal habeas review.

The office would be prohibited from accepting an appointment if there was a conflict of interest, if the office had insufficient resources to provide adequate representation, if the office was incapable of providing representation in accordance with the rules of professional conduct, or if there was other good cause.

If the office did not accept the appointment or was prohibited from accepting the appointment under the restrictions in CSSB 1655, the convicting court would be required to appoint an attorney from a list of competent counsel that would be maintained by the presiding judges of the judicial administrative regions. Each attorney on the list would have to exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases as described by the State Bar's publication Guidelines and Standards for Texas Capital Counsel. If an attorney outside of the office of capital writs had to be appointed, that attorney would be compensated as provided by current law. Judges would have to complete their list of competent attorneys by January 1, 2008.

Attorneys working for a public defender's office could be appointed for a writ of habeas corpus only if an attorney from the office of capital writs was not appointed and the attorney from the public defender's office was on the list of competent counsel maintained by the judges.

The office of capital writs would be authorized to investigate the financial condition of anyone it was appointed to represent. Judges could hold hearings to determine if a defendant was indigent and eligible for an appointment under the bill.

Establishment of office of capital writs. The bill would establish a procedure for the selection of the director of the office of capital writs.

A capital writs committee of five members appointed by the president of the State Bar of Texas with ratification by the executive committee of the State Bar would be established. Three of the members would have to be attorneys who were members of the State Bar and who were not employed as prosecutors or law enforcement officials but who had criminal defense experience with the death penalty in Texas. Two members would have to be state district judges, one of whom was a presiding judge of an administrative judicial region. The committee would elect its chair and would serve at the pleasure of the president of the State Bar. Appointments would have to be made by January 15, 2008.

The capital writs committee would have to submit to the Court of Criminal Appeals the names of up to five people whom it would recommend to be director of the office of capital writs. Each person on the list would have to exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases as described by the State Bar's publication Guidelines and Standards for Texas Capital Counsel. The list would have to be submitted by May 15, 2008.

By September 1, 2008, the Court of Criminal Appeals would have to appoint the director from the list submitted by the committee. The director would serve a four-year term and could be reappointed. The Court of Criminal Appeals could remove the director only for good cause.

The director could employ attorneys and licensed investigators. The director and attorneys would be prohibited from having a private practice in criminal law or accepting anything of value not authorized for services rendered under the bill.

SUPPORTERS
SAY:

CSSB 1655 would help ensure that competent attorneys were appointed to help indigent defendants with writs of habeas corpus for death sentences. Because of the finality of a death sentence, the state needs to do all it can to make the appeals process fair and just.

Current law requiring district courts to appoint attorneys from a list maintained by the Court of Criminal Appeals has resulted in the appointment of some lawyers who clearly are unqualified and inexperienced and some who have done substandard work. The list of attorneys who may be appointed includes some serving probated suspensions of their licenses, some with no capital experience and no habeas corpus experience, some with mental illness, and some who have filed no cognizable claims. In addition, the work of the lawyers is not monitored or evaluated, so incompetent lawyers can continue to be appointed to cases. One investigation found cases in which lawyers filed appeals copied from other unrelated cases and some who filed claims that repeatedly had been denied. This creates problems in habeas appeals because, 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.

CSSB 1655 would address these problems by creating a state public defender's office to represent indigent defendants in their writs of habeas corpus. The office of capital writs would have a pool of talented professionals who could handle these highly technical, specialized cases. This would help the state meet its obligation that death penalty cases be handled fairly and competently with consistent representation throughout the state.

Giving judges the responsibility for the list of attorneys who could be appointed if there were a conflict of interest would improve the current system that has the Court of Criminal Appeals maintaining a list. The requirement that attorneys on the lists maintained by judges of administrative regions exhibit proficiency and commitment to providing quality representation as outlined in State Bar guidelines would help ensure competency in cases in which the office of capital writs had a conflict of interest.

Having qualified and experienced lawyers working these writs would result in a more efficient and effective system for handling death penalty appeals. It would address the problem of incompetent attorneys wasting

the resources of the criminal justice system by raising issues that were improper or by making other errors. It is appropriate for CSSB 1655 to be limited to writs of habeas corpus because it is the most difficult to find competent attorneys to perform this challenging, technical, and specialized part of the death penalty appeals process.

CSSB 1655 also would go far in addressing the problem of compensation for attorneys currently appointed for these cases. In many cases, judges cap the compensation for these appointed attorneys at the state-funded level of \$25,000, which is inadequate in almost every case. Also, courts sometimes deny claims for reimbursement for investigatory expenses. An office of professionals dedicated to this work could be adequately compensated through their salaries, and the office would have resources for investigations. According to the fiscal note, CSSB 1655 would cost the state in fiscal 2008-09 about \$58,000 in addition to the \$500,000 currently spent for court-appointed habeas attorneys for capital writs. If necessary, the Legislature could revisit the issue of compensation after the office of capital writs had been in operation.

The bill would establish a system for hiring the director of the office of capital writs that would remove the selection from undue influence by any one party. A State Bar committee would submit a list of qualified candidates from which the Court of Criminal Appeals would choose a director, and the director could be removed only for good cause. This would keep the selection at arms length from the Court of Criminal Appeals, which considers the writs, and would insulate the director from arbitrary removal.

The bill would enact recommendations by the State Bar Task Force on Habeas Counsel Training and would put Texas in line with the vast majority of other death penalty states that have publicly funded offices of specialized lawyers to handle these cases. It also would mirror the structure in many prosecutors' offices that have divisions specializing in habeas corpus work. By improving the appeals process in death penalty cases, the bill could help change some of the negative press that Texas has received concerning its implementation of the death penalty.

**OPPONENTS
SAY:**

CSSB 1655 would not go far enough in addressing the need for higher compensation for attorneys working on death penalty cases. Attorneys outside of the office of capital writs who were appointed to a case due to a conflict of interest still would be under the cap for cases and still could

have requests for expenses denied. The fiscal note on the bill could be underestimating the resources needed to operate the office adequately.

Under the bill, the Court of Criminal Appeals would make the final decision on the director of the office of capital writs, something that could present a conflict of interest, or the appearance of one, because it also considers the writs of habeas corpus.

**OTHER
OPPONENTS
SAY:**

CSSB 1655 would not go far enough in addressing the problems with appointed attorneys in capital cases. While the bill would help with writs of habeas corpus, which come at the very end of the process, it would be better to institute a statewide defender's office or other reforms earlier in the process for trials and direct appeals.

NOTES:

The House committee substitute made several changes to the Senate-passed version of the bill, including: requiring the office, instead of allowing it, to refuse certain appointments; and giving responsibility for the list of attorneys who could be appointed if the office had a conflict of interest to the judges of administrative judicial regions, instead of to the office of capital writs.

According to the fiscal note, the bill would have a cost of \$557,837 to the state, but because the state already spends \$500,000 for death penalty representation in these cases, the net cost would be \$57,837 for fiscal 2008-09. The LBB assumes the office would handle 12 cases per year, with private attorneys appointed for another four cases, and that the office of capital writs would need 4.5 FTEs.

A related bill, SB 528 by Seliger, which would revise the standards for attorneys appointed to represent indigent defendants in capital murder cases, also has been postponed until today.