

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

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 8 ayes — Gallego, Hodge, Kent, Miklos, Moody, Pierson, Vaught, Vo

3 nays — Christian, Fletcher, Riddle

SENATE VOTE: On final passage, April 9 — 31-0, on Local and Uncontested Calendar

WITNESSES: For — (*Registered, but did not testify*: Edwin Colfax, The Justice Project; Samuel England, ACLU of Texas; Katherlene Levels, Texas Criminal Justice Coalition; Andrea Marsh, Texas Fair Defense Project; Andrew Rivas, Texas Catholic Conference)

Against — None

On — Shannon Edmonds, Texas District and County Attorneys Association; (*Registered, but did not testify*: Jim Bethke, Task Force on Indigent Defense)

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, 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 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 1091 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 repeal the current duty of the Court of Criminal Appeals to adopt rules for the appointment of attorneys for the indigent for habeas corpus writs.

Appointments. If a defendant were sentenced to death and the convicting court determined that the defendant were 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 in death penalty cases only in proceedings for state writs of habeas corpus, legal motions related to preparing a habeas petition, and other state post-conviction matters other than a direct appeal. The office could not represent a defendant in a federal habeas review.

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

If the office did not accept the appointment or was prohibited from accepting the appointment under the restrictions in CSSB 1091, 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.

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, 2010. 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, 2010.

The capital writs committee would have to submit to the Court of Criminal Appeals the names of up to five people 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, 2010.

By September 1, 2010, 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 would employ attorneys, licensed investigators, and other personnel to run the office. 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. They also could not have been found by a court to have rendered ineffective assistance of counsel during a death penalty trial or appeal.

The office would receive funds from the fair defense account to cover personnel costs and expenses, through the general appropriations act.

The bill would take effect September 1, 2009.

**SUPPORTERS
SAY:**

CSSB 1091 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, and a capital writs office would help Texas meet this goal.

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 case experience and no habeas corpus experience, some with mental illness, and some who have filed writs with no cognizable claims. There have been cases of lawyers filing verbatim copies of an inmate's direct appeal, and those who have filed appeals copied from other unrelated cases. In addition, the work of the lawyers is not monitored or evaluated, so incompetent lawyers can continue to be appointed to cases. This creates problems for the defendant 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 1091 would address these problems by creating a state office to represent indigent defendants in their writs of habeas corpus. The Office of Capital Writs would have a staff 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.

Having qualified and experienced lawyers working on these writs would result in a more efficient and effective system for handling death penalty appeals. The office could provide better training and resources for these lawyers. 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. A centralized capital writs office would be more accountable and would relieve the Court of Criminal Appeals of the responsibility of overseeing this process.

It would be appropriate for CSSB 1091 to be limited to writs of habeas corpus because it is most difficult to find competent attorneys to perform this challenging, technical, and specialized part of the death penalty appeals process.

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 would help ensure competency in cases in which the Office of Capital Writs had a conflict of interest.

CSSB 1091 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.

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 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 prosecutor's 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 and make death sentences in Texas more reliable and trusted.

Funding for CSSB 1091 would come from the fair defense account to which the \$500,000 currently spent for court court-appointed habeas attorneys for capital writs would be added under a contingency amendment in Article 11 of the House-passed version of the state budget for fiscal 2010-11. While the bill could result in a less money being sent to counties for indigent defense services, the reduction would be only a small fraction of those funds, and any reduction to individual counties would be even smaller. The reduction would be only a small portion of the increase that the fair defense account realized in recent years.

Creating a statewide office would lead to more efficiencies in government and a better utilization of resources. The duties of the office would be narrowly drawn, which would keep the office from expanding its work to involve working against the death penalty. In addition, the Legislature would have oversight of the office, including through the appropriations process, to address any concerns with its work.

OPPONENTS
SAY:

Creating a statewide Office of Capital Writs is unnecessary. The current system for handling writs of habeas corpus in death penalty cases is working, and CSSB 1091 would unnecessarily add to state bureaucracy. The bill could result in a state office of government attorneys negatively biased toward the death penalty. If this occurred, it could be hard to abolish the office because governmental entities traditionally are difficult to eliminate and tend to grow in scope to justify their continued existence.

OTHER
OPPONENTS
SAY:

This bill could result in a diversion to the new Office of Capital Writs of funds currently being sent to counties for indigent defense services. Also, it 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 a compensation cap.

Under the bill, the Court of Criminal Appeals would make the final decision on the director of the Office of Capital Writs, which could present a conflict of interest, or the appearance of one, because it also considers the writs of habeas corpus.

NOTES:

The committee substitute added provisions requiring that the attorneys working in the Office of Capital Writs not have been found by a court to have rendered ineffective assistance of counsel during a death penalty trial or appeal.

According to the fiscal note, CSSB 1091 would result in a reduction in the fair defense account of \$994,520, and an increase in the general revenue fund of \$500,000 in fiscal 2010-11. A contingency rider in Article 11 of the House-passed version of the budget for fiscal 2010-11 would appropriate \$500,000 from general revenue and \$494,520 from the fair defense account for the Office of Capital Writs. The fiscal note assumes 9.5 FTEs would handle 12 cases per year.