

SUBJECT: Appeal of death sentences and appointing counsel for indigents

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 5 ayes — Place, Talton, Greenberg, Nixon, Pitts

1 nay — Farrar

1 present, not voting — Pickett

2 absent — Hudson, Solis

SENATE VOTE: On final passage, April 10 — voice vote

WITNESSES: *On House companion bill, HB 3:*

For — Betty Marshall; Linda Kelly; David Botsford, Texas Criminal Defense Lawyers Association

Against — David Botsford, Texas Criminal Defense Lawyers Association; Michael T. Maddi, Schiller Institute

On — Rob Kepple, Texas District and County Attorneys Association; Peggy Griffy, Office of the Attorney General

BACKGROUND: All death sentences in Texas are automatically appealed directly to the Texas Court of Criminal Appeals, the state's highest court for criminal cases. In general, the criminal appeals court decides if errors of law occurred in the trial and if a defendant was deprived of a right guaranteed by statute or the state or federal constitutions. This "direct appeal" is limited to issues raised in the original trial. If a sentence and conviction are upheld, the trial court may set an execution date. Texas courts are required to appoint at least one attorney to defend an indigent defendant charged with a capital felony, and counties are responsible for paying these court-appointed attorneys during the trial and direct appeal.

A death sentence that is upheld by the Texas Court of Criminal Appeals may subsequently be appealed to the U.S. Supreme Court through a petition

for a writ of *certiorari* raising federal constitutional issues that were raised in the direct appeal.

Defendants may also challenge the conviction on grounds of violations of constitutional rights such as the effectiveness of counsel or the satisfactory disclosure of evidence by prosecutors. Such challenges are called *habeas corpus* appeals and can be pursued only after a conviction and death sentence have been affirmed by the Texas Court of Criminal Appeals on direct appeal of the case. Habeas corpus appeals may repeat those issues raised during a direct appeal but may also raise new issues. Art. 1, sec. 12 of the Texas Constitution guarantees the right to the writ of habeas corpus on the state level.

Current state law does not impose any deadlines for filing habeas corpus appeals nor limit the number of times a person may file a habeas appeal. Texas law does not require indigent defendants be provided with legal counsel for making these appeals although some counties do provide counsel in such cases as a discretionary matter. Habeas corpus appeals are filed in the trial court and reviewed directly by the Court of Criminal Appeals.

Federal habeas corpus appeals can also be pursued, but only after state habeas corpus appeals have been exhausted. Representation of indigent defendants in federal habeas corpus proceedings is required by federal statute and paid for by the federal government.

For additional information, see House Research Organization Special Legislative Report, Number 188, *After the Death Sentence: Appeals, Clemency and Representation*, April 4, 1994.

DIGEST: CSSB 440 would require the appointment and compensation of counsel in applications for writs of habeas corpus in death penalty cases; establish time lines for the filings of state habeas corpus applications; set up a system for appointing counsel for trial, direct appeal and appeal to the U.S. Supreme Court; establish guidelines for setting execution dates; and change the schedule for execution times.

CSSB 440 would take effect September 1, 1995, if the comptroller certifies on or before that date that at least \$5 million is appropriated by the 74th Legislature in the general appropriations bill to the Court of Criminal Appeals to compensate attorneys appointed for defendants in death penalty cases and to pay expenses for the cases.

Mandatory appointment, compensation of counsel; payment of expenses

CSSB 440 would require the Court of Criminal Appeals to appoint attorneys for all inmates sentenced to death after September 1, 1995, who are indigent and who want counsel to file a writ of habeas corpus. The Court of Criminal Appeals would appoint the counsel immediately after the final judgment under rules and standards it adopts.

Counsel would also be appointed for inmates sentenced to death before September 1, 1995, if as of that date the inmate did not have an initial habeas application pending and had not been denied relief by the Court of Criminal Appeals. If an attorney is representing an inmate who has an initial habeas application pending on September 1, 1995, the attorney could ask the court to determine if the inmate is indigent and wants an attorney appointed.

The court could not appoint as the habeas counsel the attorney who represented the inmate at trial or direct appeal unless the inmate and the attorney request the appointment or the court finds good cause to make the appointment. If the same attorney who was appointed on trial or direct appeal was appointed, a second attorney would also have to be appointed.

The Court of Criminal Appeals would be required to reasonably compensate from state funds attorneys appointed for habeas applications. The court would also have to appoint and compensate attorneys for late applications approved as "subsequent or untimely."

Attorneys appointed for habeas corpus applications would be able to file with the Court of Criminal Appeals at least 30 days before an application was filed a request for the prepayment of expenses, including expert fees, to investigate the habeas corpus claim. If the request was reasonable and timely, the court would have to grant the request. Counsel could also ask

for reimbursement for expenses, and the court would have to make the reimbursement if the expenses were reasonably necessary and reasonably incurred.

Timetable for filings and decisions

Applications for writs of habeas corpus would have to be filed within 45 days after the state's original brief was filed on direct appeal. A writ filed after the deadline would be presumed to be untimely unless good cause was established.

If a writ was not filed by the deadline, the convicting court would have to conduct a hearing to determine if good cause exists for the delay. A writ could be filed up to 91 days after the deadline if good cause was shown for the untimely filing. An amended or supplemental application filed after the 45-day deadline would be considered untimely unless good cause was established and the application was filed before the 91st-day deadline.

In some circumstances original applications or subsequent amendments could be filed after the 91st-day deadline. These "subsequent or untimely" applications or amendments could be considered by the court only if:

- the claims and issues could not have been presented previously because the factual or legal basis for the claim was unavailable when a previous application was filed or on the filing deadline;
- because of a U.S. constitutional violation and by a preponderance of the evidence no rational juror could have found the applicant guilty; or
- because of a U.S. constitutional violation and by clear and convincing evidence no rational juror would have given the inmate the death sentence.

The bill establishes deadlines for the state responses to the writ application, for convicting courts to identify whether unresolved factual issues exist, for filings of proposed facts and conclusions of law and the convicting court's findings of fact and conclusions of law. The court transcript of a hearing would have to be prepared within 30 days of the hearing.

For inmates with convictions before September 1, 1995, who did not have an original application for a writ pending on September 1, 1995, and have not filed a previous application, the original petition would have to be filed within 180 days of the appointment of counsel or 45 days after the state's original brief was due on direct appeal, whichever was later.

The Court of Criminal Appeals would have to expeditiously review applications for writs of habeas corpus.

Federal habeas review

If the Court of Criminal Appeals denied a writ of habeas corpus, the appointed attorney would have to make a motion within 15 days of the denial to be appointed as counsel for the federal habeas review or to have other counsel appointed.

Appointment of counsel for trial, direct appeal, appeal to U.S. Supreme Court

The administrative judge in each of the state's nine administrative judicial regions would appoint a selection committee of at least four members to adopt qualifications for attorneys who are appointed to death penalty cases. The committee would have to include the administrative judge of the judicial region, at least one district judge, a representative from the local bar association and an attorney board certified in criminal law. A list of the standards and qualified attorneys would have to be posted in each district clerk's office.

The presiding judge of the district court in which a capital murder case is filed would be required to appoint a lead trial attorney from the list to represent an indigent defendant if the death penalty was being sought. The judge would have to appoint a second counsel, who would not have to come from the list, unless there were reasons in the record against the appointment of two counsels. If a county had a public defenders office, attorneys could be appointed under its guidelines.

Appointed counsel would be able to file a request for advance payment of expenses or for reimbursement of expenses, and the court would be required to grant the request if it were reasonable.

After a death sentence was imposed the judge in the convicting court would be required to appoint an attorney for an indigent defendant for direct appeal and appeal to the U.S. Supreme Court for review of the trial record (called writ of certiorari). The court could not appoint a direct appeal attorney who had represented the defendant during the trial unless requested by both the attorney and the defendant and the court found good cause. Attorneys appointed for trial and direct appeal would be paid by the counties.

Scheduling of execution date

If a timely application for a writ of habeas corpus was filed, a convicting court would be prohibited from setting an execution date before the Court of Criminal Appeals rules on the writ. If a timely application is not filed or good cause is not shown for an untimely application, the convicting court could set an execution date.

The first execution date could not be earlier than the 91st day after the convicting court entered an order to set the execution. A subsequent execution date could not be set earlier than the 31st day after the convicting court entered an order to set the execution. The convicting court could modify or withdraw the execution date if it determined that additional proceedings were necessary on an subsequent or untimely application.

Execution time

CSSB 440 would require that death sentences be carried out anytime after 6 p.m. on the execution date instead of the current requirement that they be carried out anytime before sunrise on the execution date.

Habeas corpus writs in cases other than death penalty

Courts would be prohibited from considering subsequent applications for habeas corpus writs filed after the final decision was made on an initial

application unless the current claims could not have been presented in the original application because the factual or legal basis for the claim was unavailable or because of a U.S. constitutional violation and by a preponderance of the evidence no rational juror could have found the applicant guilty.

The bill would increase from three to seven days the notice that must be given on a habeas writ application to the state and the defendant's attorney for any hearing by a district judge. The bill would also define confinement for the purpose of non-capital habeas corpus cases.

These changes would apply only to applications for writs filed on or after the September 1, 1995, effective date of the bill.

**SUPPORTERS
SAY:**

CSSB 440 would ensure fair, thorough and timely litigation of death sentences appeals and help restore public confidence in the death penalty. The bill would ensure that capital murder defendants have competent counsel throughout the entire trial and appeals process and establish fair deadlines for the litigation of valid and just claims. The reforms in CSSB 440 could help the state meet proposed federal requirements concerning the provision of counsel and expedited federal review process.

In the long run, this bill would promote justice and save the state money. Requiring the appointment of counsel for state habeas corpus claims and using state funds to compensate them would ensure defendants have a competent defense, reducing later claims about ineffective counsel. This change, coupled with the application deadlines established in the bill, could reduce by at least two years the average time, now about eight years, spent on death row. It costs the state about \$25,000 a year to keep a felon on death row during appeals, and the total average legal costs to appeal a capital sentence in state and federal court can exceed \$2 million, by one estimate. The fiscal note estimates a cost of about \$1.2 million in fiscal 1996, but savings to the state in the years after that.

Mandatory appointment, compensation of counsel; payment of expenses

The automatic, timely appointment of legal representation would expedite habeas corpus appeals, promote justice and increase efficiency in the court

system. Since there is no mandatory appointment of counsel for habeas corpus proceedings, indigent defendants are usually represented by volunteer attorneys. This volunteer force of attorneys is not large enough to ensure that the growing death-row population receives timely and qualified representation. At times, about 20 percent of Texas' approximately 400-inmate death row has not had attorneys.

It is only fair that defendants be provided with competent, adequately paid attorneys. Having the Court of Criminal Appeals appoint attorneys would allow counsel to be chosen from throughout the state. Allowing the court to set standards and rules for the appointments would ensure that qualified persons are appointed. CSSB 440 would be contingent on the appropriation of funds to ensure that defendants would be provided with paid counsel. The estimates used to determine how much funding would be necessary used average pay and time spent on these types of cases.

Allowing for the payment of expenses, including expert fees, to investigate habeas corpus claims, would ensure that defendants are provided with the resources to mount a fair and thorough defense.

Timetable for filings and decisions

CSSB 440 would eliminate unnecessary procedural delays in considering death sentence appeals and set a realistic schedule for the full and fair resolution of all claims. This would prevent death row inmates from delaying their executions indefinitely by filing virtually unlimited numbers of habeas corpus appeal petitions often designed solely to postpone executions. Appeals of death sentences in Texas drag out, on the average, about eight years. This delay is unfair to both families of victims and offenders.

Deadlines in habeas corpus proceedings would be similar to deadlines used in other legal proceedings. Deadlines are especially needed for capital cases, the only litigation in which the party seeking redress has little interest in pursuing the claim; if nothing is done, the inmate serves a de facto life sentence. Currently, execution dates often drive the filing of appeals, leading to last-minute scrambles to find an attorney and make the filing.

The timeline established in SB 440 would not infringe on a defendant's ability to raise habeas corpus issues because the grounds for virtually all of these appeals are known after a trial and are rarely discovered during the appeals process. The best time to raise these issues is immediately after they occur. Requiring the habeas corpus application to be filed 45 days after the state has filed its brief in the direct appeal in most cases would be about 18 months after a trial has concluded. This is ample time for attorneys to prepare and file an application for habeas corpus review. CSSB 440 could shorten the process in death penalty cases by about two years.

CSSB 440 would not result in a conflict between a defendant's direct appeal attorney and the attorney working on the state habeas corpus application. Because the habeas corpus application would not be due until 45 days after the state has filed its brief on direct appeal, the habeas corpus attorney would be able to evaluate the work of trial attorney. In addition, if good cause was established, issues could also be raised after the 45-day deadline.

In addition, the bill contains provisions allowing applications to be filed after the deadline if good cause is shown and for "untimely or subsequent" petitions to be filed if the factual or legal basis for the claim could not fairly have been litigated earlier or if there has been a miscarriage of justice. These exceptions would allow for claims of actual innocence to be introduced and reviewed.

Appointment of counsel for trial, direct appeal, appeal to U.S. Supreme Court

Minimum standards for lawyers appointed for trial, direct appeal and appeal to the U.S. Supreme Court would ensure defendants have competent counsel and would recognize that it takes special skills to represent a defendant in a capital case. It is only fair that defendants be provided with competent representation. In turn, this could reduce appeals litigation by curbing constitutional challenges to the competency of defense attorneys. CSSB 440 would ensure local input into the process by having committees appointed by the administrative judge in each administrative judicial region set the standards for appointment.

Scheduling of execution dates

Execution dates should not be set until the Court of Criminal Appeals rules on the habeas corpus appeal. Current practice allowing the dates to be set after a sentence and conviction are upheld creates undue time pressure to file appeals and would be unnecessary with the filing deadlines imposed by this bill. Using execution dates to force attorneys to file appeals creates unnecessary litigation over execution stays and wastes court resources.

The guidelines established in this bill are realistic and fair, allowing a date to be set 91 days after the convicting court enters an order to set the execution and allowing for modification and withdraws of the dates.

Execution time

Moving execution times to after 6 p.m. instead of before sunrise would eliminate all-night vigils and court activity before an execution.

Habeas corpus writs in cases other than death penalty

CSSB 440 would apply the same standards for considering subsequent applications for habeas corpus appeals in non-capital cases. This would ensure that all claims are litigated promptly. Exceptions would be made for claims that could not have been presented earlier because the factual or legal basis was unavailable or if there had been a miscarriage of justice.

OPPONENTS
SAY:

CSSB 440 would improperly and inefficiently dovetail direct and habeas corpus appeals, limit the ability of defendants to raise all issues in their case and would not result in significant reductions in litigation time in capital cases.

Mandatory appointment, compensation of counsel; payment of expenses

CSSB 440 would do nothing to ensure counsel would be fairly compensated but instead would allow the Court of Criminal Appeals to set the compensation standards. If counsel are not adequately compensated at rates higher than those estimated when figuring the cost of this bill, defendants would not receive adequate counsel. It would be better for an

entity other than the Court of Criminal Appeals to appoint the attorneys to ensure there is no chilling effect on those who are appointed.

Timetable for filings and decisions

Direct and habeas corpus appeals should be pursued consecutively, not concurrently. The "unitary" appeal procedure set up in CSSB 440 would be inefficient, unrealistic and could unconstitutionally fuse two different constitutional practices.

Requiring a habeas corpus brief to be filed while the direct appeal is still going on would limit the defendant's ability to identify and raise constitutional issues. Errors of procedure or evidence and constitutional violations often are revealed only during the direct appeal process, and forcing a habeas corpus appeal to be filed before that process is over could result in inadequate research and preparation. If a direct appeal results in a death sentence being overturned — as about 10 percent to 15 percent do — the work done and state resources spent on the habeas corpus appeal would be wasted.

SB 440 could unconstitutionally impair the client-attorney relationship because two attorneys who could have different interests would be working on the case at the same time. Conflicts could arise because the habeas corpus appeal attorney would be working on an appeal affected by the work done by the direct-appeal attorney.

CSSB 440 would not significantly speed up the consideration of habeas corpus appeals because convicting courts would have little incentive to spend time and resources hearing the habeas corpus appeal up to until the direct appeal is finished

Habeas corpus appeals are a right that should not be limited. Ample time is needed to file, consider and rule on often complex pleadings that can literally mean life or death. Evidence may surface a decade or more after a murder conviction, as in the well-known cases of Randall Adams and Clarence Brandley both of whom were released after many years on death row when new evidence came to light absolving them of their alleged offenses. About 40 percent of all death sentences that are appealed on

procedural or constitutional grounds are reversed, according to one study. Successive, repetitive habeas corpus appeals by an inmate are already limited since courts become less receptive to each successive appeal and usually review these claims quickly.

Appointment of counsel for trial, direct appeal, appointment to U.S. Supreme Court

It could be difficult to develop workable standards for selecting attorneys in capital cases. For example, requiring membership in a criminal defense association might not ensure that a lawyer is qualified, while allowing only specialists in capital cases to take the cases might be a burden in rural judicial regions without a large pool of potential appointees. Standards could inappropriately restrict judges who would have freedom to appoint counsel for trial and direct appeal.

Scheduling of execution dates

Instead of allowing execution dates to be set after the Court of Criminal Appeals rules on a habeas corpus writ, SB 440 should prohibit them from being set until after federal decisions in capital appeals.

Habeas corpus writs in cases other than death penalty

There is no need to apply the restriction on subsequent applications used for habeas corpus applications to non-capital cases. In non-capital cases defendants want to have a case resolved so that they can be released. The state should not restrict these applications since it does not provide attorneys for non-capital defendants' habeas corpus claims.

OTHER
OPPONENTS
SAY:

Timetable for filings and decisions

Because of the problems presented by filing a habeas corpus appeal while the direct appeal is going on, the deadlines should begin after the Court of Criminal Appeals rules on the direct appeal.

NOTES:

The committee substitute made numerous changes to the Senate-passed version of the bill, including:

- making the bill contingent on a \$5 million appropriation;
- adding a statement that the Legislature encourages district courts to make use of state of the art technology for making and preparing transcripts in capital case;
- requiring the Court of Criminal Appeals to appoint attorneys for subsequent or untimely applications, if the necessary conditions are met;
- requiring, instead of allowing, the court to grant a request for timely and reasonable expenses ;
- setting a deadline for the convicting court to conduct a hearing to determine if good cause exists for the filing of a late application; and
- allowing late applications for other necessary actions in addition to good cause.

The companion bill, HB 3 by Gallego et al., has been reported favorably from the House Criminal Jurisprudence Committee.