

- SUBJECT:** Revisions to appeals of death sentences and appointment of counsel
- COMMITTEE:** Criminal Jurisprudence — committee substitute recommended
- VOTE:** 5 ayes — Hinojosa, Dunnam, Garcia, Smith, Talton
0 nays
4 absent — Green, Keel, Nixon, Wise
- WITNESSES:** For — Don Stricklin, Harris County District Attorney’s Office
Against — None
On — Michael J. McCormick and Sharon Keller, Texas Court of Criminal Appeals; Rob Kepple, Texas District and County Attorneys Association
- 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, or by a *habeas corpus* appeal, which can raise issues outside of the trial record. *Habeas corpus* 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.

In 1995, the Legislature enacted SB 440 by Montford et al., requiring the Court of Criminal Appeals to appoint and reasonably compensate attorneys for indigent persons who want to apply for a writ of *habeas corpus*. It also sets deadlines for rulings and procedures that are part of the *habeas corpus* appeals process, mandating, for example, that such an appeal be pursued simultaneously with the direct appeal. SB 440 also limited inmates in most cases to one *habeas corpus* appeal.
- DIGEST:** CSHB 1516 would change who appoints attorneys to handle applications for writs of *habeas corpus*; set a cap on state payments; allow for courts to grant extensions to filing deadlines; revise provisions dealing with untimely writs; and revise some deadlines. In addition, the bill would eliminate an existing

provision concerning those who did not have an initial application pending on September 1, 1995.

CSHB 1516 would take effect September 1, 1999, and apply only to applications for writs filed on or after that date.

Appointment and compensation of counsel. CSHB 1516 would require convicting courts — instead of the Court of Criminal Appeals — to appoint lawyers for applications for writs of *habeas corpus* for persons who had not retained counsel or elected to represent themselves. The convicting court would have to notify the Court of Criminal Appeals of an appointment immediately. Convicting courts would have 30 days to appoint the counsel.

The Court of Criminal Appeals would have to adopt rules for the appointment of attorneys and approve appointments as provided by the rules.

The convicting court would have to compensate the appointed attorneys with funds it received from the state. The state would have to reimburse counties for compensating the *habeas* attorneys and for paying eligible expenses. CSHB 1516 would cap the state's reimbursements to counties at \$25,000 for each application. Any compensation or expenses over \$25,000 would be the obligation of the counties. A convicting court would have to certify to the comptroller the amount of compensation to which it was entitled, and the comptroller would pay the county.

CSHB 1516 would remove a current prohibition against appointment of *habeas* attorneys who represented the person at trial or direct appeal unless certain conditions were met. It also would remove a requirement that if the same person is appointed, the court also must appoint a second counsel.

Extension of deadlines. CSHB 1516 would authorize convicting courts to allow one 90-day extension to the *habeas* filing deadline. The extension would have to be for good cause and could be granted only after notice was given and the prosecutor had an opportunity to be heard on the request. Either party could ask the court to hold a hearing on an extension request. If the court did not find that the defendant established good cause for the extension, the request would have to be denied.

The bill would allow a current deadline that requires writs of *habeas corpus* to be filed within 180 days after counsel is appointed or within 45 days after the state's original brief was filed to apply to whichever day was later.

Untimely applications. CSHB 1516 would eliminate current language that refers to untimely petitions and would set up new procedures for dealing with untimely writs. Current law would continue to cover subsequent writs, which could be considered only under limited circumstances. Applications filed after the filing deadlines or after a 90-day extension would be considered untimely.

If the court received an untimely application or if no application had been filed by the filing deadline, the convicting court would have to immediately, and in any event within 10 days, send to the Court of Criminal Appeals a copy of the untimely application with a statement that it was untimely or a statement that no application had been filed.

The Court of Criminal Appeals could require attorneys who filed untimely applications or failed to file an application before the filing deadline to show why they filed an untimely application or failed to file an application. After the attorney's presentation to the court, the court would have three options:

- ! find that good cause had not been shown and dismiss the application;
- ! permit the attorney to continue on the case and establish a new filing deadline that could not be more than 180 days from the date the attorney was allowed to continue on the case; or
- ! appoint a new attorney to the case and establish a new filing deadline for an application that would have to be no more than 270 days after the appointment of the new counsel.

The Court of Criminal Appeals could hold attorneys in contempt if they filed an untimely application or failed to file an application before the filing deadline. Each day after the first day on which the attorney failed to file a timely application could be punished as a separate instance of contempt. In addition or in lieu of contempt, the court could deny counsel compensation.

The Court of Criminal Appeals would have to appoint counsel and establish a new filing date within 270 days of the appointment for each defendant who

filed an untimely application or failed to file an application before September 1, 1999.

Deadlines. CSHB 1516 would change the deadline for the state to answer the writ from 30 days to 120 days after the state received notice of issuance of the writ. It would place a new limit on any extension requested by the state. The extension could be no longer than the 180th day after the state received notice of the writ's issuance.

The bill would change the deadline for the state to hold an evidentiary hearing on unresolved fact issues from the current requirement that courts allow both sides not less than 10 days to prepare and hold a hearing within 30 days of a request. CSHB 1516 would require that hearings be held within 30 days after the court entered an order designating the unresolved issues. The convicting court could postpone the hearing for 30 days for good cause.

CSHB 1516 would require attorneys to file immediately copies of motions asking to be appointed as counsel for federal *habeas* review with the Court of Criminal Appeals. If the attorney did not do so, the court could take any action to ensure that the defendant's right to federal *habeas* review was protected, including initiating contempt proceedings against the attorney.

SUPPORTERS
SAY:

CSHB 1516 would move authority for appointment of counsel for filing *habeas* writs authority to a more appropriate entity, set a reasonable cap on the state's payments, and deal with problems that have occurred with deadlines and restrictions in current law. CSHB 1516 would eliminate language concerning those who did not have an initial application pending on September 1, 1995, because these cases have been handled.

Appointment and compensation of counsel. CSHB 1516 would move the responsibility for appointing attorneys for writs to a more appropriate authority, the trial court. The Court of Criminal Appeals should not have these responsibilities, since it also must rule on the cases being appealed. Trial courts should appoint the attorneys because they are more familiar with the cases and the capabilities of attorneys. The trial courts would appoint attorneys under general rules set by the Court of Criminal Appeals from a list of attorneys kept by the court.

CSHB 1516 would set a fair cap on state payment in these cases. Complaints about the level of funding for cases and about payments made to attorneys are based on overly generous estimates of the “proper” compensation for working on a *habeas corpus* appeal. The \$25,000 cap is reasonable and adequate to cover attorneys fees and expenses. CSHB 1516 only would limit state payments in these cases. Counties would be free to pay additional fees if they desired. Rules prohibiting lawyers from sharing funds with non-lawyers would not apply in these cases.

Removing a statutory prohibition against certain attorneys being appointed to file a writ would allow the Court of Criminal Appeals to establish rules with more flexibility to govern this situation.

Extension of deadlines. CSHB 1516 would allow courts to grant attorneys a 90-day deadline extension before application for a writ of *habeas corpus* was considered untimely. This would allow an escape valve from the deadlines in current law and would give courts some discretion to handle cases in which there might be a legitimate reason for an extension or in which an honest mistake might have been made. It is important to ensure that the state *habeas* writ is done properly because it can have implications for the federal appeal.

CSHB 1516 also would fill a gap in current law and would allow action if an attorney failed to file an application at all. CSHB 1516 would allow the court to appoint a new attorney and then set a deadline for that attorney to file a writ.

Untimely applications. CSHB 1516 would separate rules governing subsequent writs from those governing untimely writs so that the courts could have some leeway in dealing with untimely writs. CSHB 1516 would increase flexibility in dealing with untimely writs by giving the Court of Criminal Appeals three options to handle them, including allowing a new attorney to be appointed to a case.

CSHB 1516 would require the Court of Criminal Appeals to appoint counsel and establish filing deadlines for some cases to ensure that these cases were handled fairly and properly.

Deadlines. CSHB 1516 would help ensure that cases do not linger unnecessarily by imposing a stricter deadline on the state to answer writs and by limiting extensions that the state could request. Setting stricter deadlines for evidentiary hearings would eliminate unnecessary delays in the progression of an appeal.

Requiring attorneys to let the Court of Criminal Appeals know that they have asked to be appointed counsel for federal *habeas* review would allow the court to ensure that attorneys follow through with their statutory obligation.

OPPONENTS
SAY:

Appointment and compensation of counsel. The function of appointing attorneys to file writs of *habeas corpus* should not rest with trial courts because, in the past, there have been problems with the quality of their appointments. The appointments could be made by the local committees authorized by Code of Criminal Procedure, art. 26.052, which help select trial and direct appeal attorneys in some death penalty cases. Or, the decisions could be left with the Court of Criminal Appeals, because it sees the work of numerous attorneys and knows which attorneys are qualified and appropriate for individual cases.

A cap of \$25,000 on payment for a case would be arbitrary and too low to pay for both the attorney and expenses on a case. Hundreds of hours are necessary to prepare an adequate writ of *habeas corpus* in a capital murder case, including reading the *voir dire* and trial records, interviewing witnesses, and researching and writing the appeal. Although the wide variation in cases makes estimating an average workload difficult, in some extraordinary cases, attorneys fees could be higher than the cap.

It also would be inappropriate to cap investigation and expert witnesses' expenses, given the complexity of capital murder cases and the need to have experts analyze evidence and investigate witnesses. It would be more appropriate to allow each case to be handled individually. In addition, setting one cap for both the attorney and the expenses could place the lawyer in violation of ethical rules that prohibit the sharing of funds with non-lawyers.

Extension of deadlines. Rather than setting more deadlines and guidelines, a better approach would be to allow courts the flexibility to make deadline decisions individually in each case.

NOTES:

The committee substitute made numerous changes to the original bill, including:

- ! adding the requirement that attorneys notify the Court of Criminal Appeals when they file a motion to be appointed counsel in federal habeas;
- ! eliminating a provision that, on request of an attorney, the convicting court could order the attorney who represented the defendant at trial or on direct appeal to produce files; and
- ! setting the 10-day deadline for convicting courts to notify the Court of Criminal Appeals and the prosecutor about an untimely application.