SUBJECT: Qualifications of appointed counsel for indigent defendants in capital cases

COMMITTEE: Criminal Jurisprudence — favorable, as amended

VOTE: 6 ayes — Keel, Riddle, Denny, Hodge, Pena, Reyna

1 nay — Raymond

2 absent — Escobar, P. Moreno

WITNESSES: For — None

Against — Bill Beardall, Equal Justice Center; Andrea Marsh, American Civil Liberties Union of Texas; Gary J. Hart; John Niland, Texas Defenders Service; Gary Taylor.

On — Jim Bethke, Task Force on Indigent Defense; Shannon Edmonds, Texas District and County Attorneys Association; Sharon Keller, Wesley Shackelford, 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.

The Code of Criminal Procedure, art. 26.052(d)(2) establishes minimum requirements for attorneys appointed to represent indigent defendants facing death sentences at trial and direct appeal. A local selection committee in each administrative judicial region must adopt standards for these appointed attorneys that meet the minimum statutory requirements. The statute requires that attorneys:

- be members of the State Bar of Texas
- have proficiency and commitment to providing quality representation;
- have at least five years experience in criminal litigation;
- have experience as lead defense counsel in a significant number of felony cases, including homicide trials and other second-degree or first-degree felony trials or capital trials
- have trial experience using and challenging mental health or forensic expert witnesses and investigating and presenting mitigating evidence at a death penalty trial; and
- have participated in continuing legal education or other death penalty training courses.

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 must adopt rules for the appointment of these attorneys, and convicting courts may appoint an attorney only if the appointment follows these rules. The Court of Criminal Appeals has established a list of approved attorneys from which convicting courts make their appointments.

In 2001, the Legislature revised the system for appointing attorneys for indigent criminal defendants. The bill established a Task Force on Indigent Defense to develop policies and standards for legal representation and other services to indigent defendants. The standards developed by the Task Force for appointment of counsel in death penalty cases have to be consistent with standards specified by the Code of Criminal Procedure.

DIGEST:

HB 268, as amended, would establish separate requirements for attorneys appointed for the trial and direct appeal stages of death penalty cases involving indigent defendants and would establish statutory requirements for attorneys appointed for habeas corpus appeals. It also would change the qualifications for attorneys to be appointed at the trial and appellate stages.

Trial and direct appeal. HB 268 would change the minimum standards for attorneys representing indigent defendants in death penalty cases. Unlike current law, the bill would distinguish the required qualifications

of an attorney in the trial and appellate stages in a death penalty case. Every lead defense attorney still would be required to meet the following qualifications as outlined in the current law:

- The attorney would have to be a member of the State Bar of Texas;
- The attorney would have to exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases; and
- The attorney would have to have participated in continuing legal education courses or other training relating to criminal defense in death penalty cases

HB 268 would prohibit the appointment of an attorney found to have rendered ineffective assistance of counsel during the trial or appeal of any criminal case.

HB 268 would expand qualifications to include a larger pool of attorneys qualified to serve as attorneys at the *trial* stage in several ways:

- An attorney with five years of appellate litigation experience would qualify, in addition to attorneys with trial experience, if the attorney also met the other requirements.

- Experience as a defense attorney no longer would be required. Under HB 268, a former prosecutor who had tried a felony case to a verdict as lead prosecutor would qualify.

- An attorney with experience in the cross-examination of a mental health or forensic expert witness as part of a prosecution team and cross-examination experience of mitigation evidence at the penalty phase of trial as part of a prosecution team would qualify if the attorney also met the other requirements.

- HB 268 would qualify those with experience in the presentation or cross-examination of mitigating evidence at the penalty phase of any homicide case, rather than in a death penalty case in particular.

The bill also would require that the lead defense counsel have experience selecting a jury in a death penalty case as part of a prosecution or defense trial team.

While the bill would retain the requirement that qualified attorneys have served as lead counsel in homicide trials, second- or first-degree felonies, or capital felonies, it would remove the requirement that the attorney have tried a "significant number" of those cases.

HB 268 would delete the requirement that an appellate attorney have trial experience. Instead, the attorney would have to have five years experience in criminal trial or appellate litigation. The attorney would have to have participated in (a) the preparation of appellate briefs for the prosecution or defense of at least a second-degree felony, or (b) in drafting appellate opinions as a staff attorney for an appellate court in felony cases of second degree or higher.

A local selection committee would have to amend its standards to conform with changes made by the bill no later than 75 days after the bill's effective date. An attorney appointed to a death penalty case on or after the 75th day after the bill's effective date would have to meet the new standards. An attorney appointed before the 75th day after the effective date would be covered by the law in effect when the attorney was appointed.

Appointments for *habeas corpus* appeals. A lawyer appointed to handle a habeas corpus appeal in a death penalty case 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 criminal trials, appeals or habeas corpus proceedings;
- have attended specified types of continuing legal education or training;
- not have been found to have rendered ineffective assistance of counsel on a criminal case;
- have participated in preparing appellate briefs for the prosecution or defense or in drafting appellate opinions as a staff attorney for an appellate court in felony cases of second degree or higher.

Convicting courts would be authorized to appoint an attorney to assist the lead counsel. The assisting attorney would not need five years experience in trial or appellate litigation or to have experience as a lead prosecutor or lead defense counsel.

A convicting court would have to make appointments conforming to these requirements on or after May 1, 2006.

HB 268 would require the Task Force on Indigent Defense, rather than the Court of Criminal Appeals, to adopt standards for appointment of counsel in a habeas corpus proceeding. The Task Force would have to keep a list of attorneys qualified for appointments in habeas proceedings and make the list available to the convicting court. The Task Force would have to adopt standards by January 1, 2006.

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, 2005.

SUPPORTERS SAY:

HB 268 would raise the bar on indigent defense by improving the qualifications of a defense attorney appointed to a death penalty case. The bill would replace vague guidelines with specific requirements to ensure that only the best and most experienced lawyers were appointed to capital cases.

Current law does not distinguish among the skills necessary for trial, appeal, and habeas corpus proceedings, though each requires a unique set of skills and experience. HB 268 would address this problem by requiring skills and experience unique to the appellate and trial stages of defense. HB 268 would deal with the problem of insufficient number of qualified attorneys to represent indigent capital defendants by expanding the available pool of qualified attorneys. Current law now excludes some of the best defense attorneys available.

HB 268 also would transfer the responsibility of maintaining a list of qualified attorneys to the Task Force, which would be better equipped to gauge the quality and effectiveness of eligible attorneys.

Allowing former prosecutors without defense experience to serve as defense counsel would not weaken the current law. Prosecutors have experience and skills that defense attorneys lack, such as the ability to anticipate the moves of the prosecution. A former prosecutor can foresee how another prosecutor would think and could anticipate a prosecutor's strategy and how a prosecutor would cross-examine a witness. These are valuable skills to the defense. Much of the opposition to this provision

comes from special interests who prefer to keep the pool small to limit to a few those who can defend capital crimes.

One need not have presented mitigation evidence in a death penalty trial to be experienced. Presenting mitigation evidence in a homicide trial is essentially the same as in a death penalty trial in that both require the presentation of character evidence. Requiring experience presenting mitigation evidence only in a death penalty trial unnecessarily excludes many qualified attorneys.

Deleting the requirement for experience with a "significant number" of felony cases would improve, not weaken, current law. All attorneys would have to meet the other standards in the bill, including experience with more than one felony case. Rather than using vague language about how much experience would be required, the bill specifically would outline the standards. It also would strengthen existing standards by requiring an assigned attorney to have experience selecting a jury in a capital trial, the most unique aspect of a death penalty case.

While increasing the standards for defense in a habeas proceeding could force Texas to adopt shorter deadlines for federal cases, this is not a good reason for failing to improve standards. Texas has a duty to provide the best representation possible, regardless of federal law. Moreover, Texas also must never allow those judged to be ineffective counsel to continue to serve as a defense attorneys. To do so would be contrary to the principles of our state and to ensuring quality defense.

OPPONENTS SAY:

HB 268 would weaken minimum standards for attorneys defending capital crimes by, among other things, not requiring appellate and trial attorneys to have defense experience in death penalty cases. This would increase the likelihood that those facing the death penalty would not receive fair trials. Merely expanding the pool of available counsel would not guarantee a larger pool of qualified attorneys. The more responsible route would be to require an attorney to develop skills by serving as second chair in a death penalty trial before acting as lead defense counsel.

Current law requires appointed attorneys to exhibit proficiency in and commitment to representing defendants. HB 268 would render this meaningless by not requiring attorneys to have experience in the unique aspects of defense in a capital trial. Eliminating the requirement that the appointed attorney have prior experience as a defense attorney in a death

penalty case would lead to the appointment of attorneys who lack crucial experience in key aspects of capital trials, such as the investigation and presentation of mitigation evidence.

An important role of the defense counsel is to humanize the defendant by developing and presenting the client's social history, a skill that can take years to develop. Prosecutors do not have experience developing social histories. While a former prosecutor may have excellent trial skills, a prosecutor's job is to dehumanize the defendant, and after doing so for many years an attorney could become entrenched in this role. It is therefore critical that an attorney have defense experience before serving as lead counsel in a death penalty case.

Moreover, the bill would not require experience in examining mitigation evidence in a death penalty case, only a homicide case. This would qualify attorneys without experience in the unique, capital-specific aspects of a death penalty case.

The proposed standards could lead to an upsurge of cases overturned on appeal. The U.S. Supreme Court has ruled that failure properly to develop mitigation evidence could be considered ineffective assistance of counsel. Having no experience in the proper development of mitigation evidence for a capital trial as a defense attorney could lead to mistakes in this stage of the trial.

Eliminating the requirement that the defense attorney have participated in a "significant number" of homicide trials would fail to guarantee that those who qualify have adequate experience. Rather than just adding under-qualified attorneys to the pool, it would be more effective to encourage attorneys to second-chair before serving as lead counsel and to expand education and training.

Disqualifying attorneys found to have rendered ineffective assistance of counsel discourages attorneys from admitting error. This makes the job of the appellate attorneys, who may rely on attorney error for a favorable appeal, exceedingly difficult. Lawyers could make mistakes early in their careers but learn from and provide good representation in the future.

Finally, written standards for appointments in habeas proceedings as outlined in HB 268 could qualify Texas as an "opt-in" state, which would shorten the time for filing a petition. Under federal law, when a state

statutory scheme for representation of indigent capital defendants meets certain standards, federal law cuts in half deadlines in the federal post-conviction proceedings. Late filing has been a problem in Texas capital cases for attorneys who did not understand the federal rules.

NOTES:

The committee amendment would make it mandatory for the Task Force on Indigent Defense to maintain a list of qualified habeas attorneys for the convicting court. It also would extend the deadline for the Task Force to adopt standards for appointing habeas attorney to January 1, 2006, and require convicting courts to appoint counsel in conformity with the bill starting May 1, 2006.