SUBJECT: Forfeiture of good time when inmates file frivolous writs of habeas corpus

COMMITTEE: Corrections — favorable, without amendment

VOTE: 4 ayes — Madden, D. Jones, Haggerty, R. Allen

2 nays — Hochberg, Noriega

1 absent — McReynolds

WITNESSES: For — John Bradley

Against — Keith Hampton, Texas Criminal Defense Lawyers Association

On — Carl Reynolds, Texas Department of Criminal Justice

BACKGROUND: Under Government Code, sec. 498.0045, the Texas Department of Criminal Justice (TDCJ) must forfeit varying amounts of good conduct time if a court in a final order dismisses a lawsuit brought by an inmate as frivolous or malicious. The law applies to inmates in TDCJ facilities and those in county jails awaiting transfer to TDCJ after conviction or because they have had their probation, parole, or mandatory supervision revoked.

TDCJ must forfeit 60 days of good conduct time upon a second order dismissing a suit as frivolous or malicious, 120 days upon receiving a third order, and 180 days upon receiving four or more orders.

Good conduct time is used in determining when inmates are eligible to be reviewed for parole or release on discretionary mandatory supervision, or, in some cases, when they must be released under mandatory supervision.

Writs of *habeas corpus* are used to order that someone be brought before the court to determine if that person is lawfully imprisoned or should be set free. They typically center on potential violations of 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, art. 11.07, details the procedures for applications of writs of *habeas corpus* in non-death penalty felony cases.

In September 2004, the Texas Court of Criminal Appeals concluded in, *Ex Parte George William Rieck, Jr.* (No. 74,799) that Government Code, sec. 498.0045, requiring TDCJ to forfeit good conduct time if an inmate filed repeated frivolous lawsuits, does not apply to Code of Criminal Procedure art. 11.07, *habeas corpus* writ proceedings.

DIGEST:

HB 681 would include proceedings arising from applications of writs of habeas corpus, if they were frivolous or malicious, among the type of lawsuits that could trigger the requirements that TDCJ forfeit inmates' good conduct time.

The bill would take effect September 1, 2005, and apply only to a forfeiture of good conduct time based on the filing of a writ of habeas corpus on or after that date.

SUPPORTERS SAY:

HB 681 is necessary to help curb the large number of frivolous writs of habeas corpus filed with the Court of Criminal Appeals each year. Time spent by staff and justices dealing with frivolous writs wastes judicial resources and takes time that would better be spent examining meritorious writs. Current law provides no disincentive to filing frivolous writs of habeas corpus, and HB 681 would provide that disincentive. HB 681 would help Texas better use its judicial resources, even if it applied to only a limited number of inmates.

In fiscal 2004, almost 5,000 writs of habeas corpus were filed with the Court of Criminal Appeals, and almost 600 were dismissed because they violated the current requirements that allow subsequent writs after the initial one only in limited circumstances, according to the court. Most likely it would be some subset of these 600 that could be considered frivolous under the bill. Abuse of writ orders seldom are issued by the court, so the number of abuse of writ orders entered by the court to prison inmates for whom abuse of writ orders previously had been entered does not indicate how many frivolous writs are filed.

HB 681 would codify a practice that many in the criminal justice system thought already occurred. Since the enactment of the 1995 law dealing with frivolous inmate lawsuits, many assumed that TDCJ was taking away good conduct time for repeated filing of frivolous writs of habeas corpus. However, TDCJ has interpreted the 1995 law as applying only to frivolous civil lawsuits and not to frivolous writs of habeas corpus. Also, in

September 2004, the Court of Criminal Appeals ruled that the 1995 law did not apply to writs of habeas corpus.

HB 681 would address this situation specifically by requiring TDCJ to forfeit good conduct time of inmates who filed repeated frivolous writs of habeas corpus. HB 681 would extend the state's policy in Code of Criminal Procedure, art. 11.07, which generally limits writs of habeas corpus filed after an initial one.

HB 681 would not infringe on the right of anyone to challenge the constitutionality of his or her incarceration. No one would be prohibited from filing a writ. HB 681 would not have a chilling effect on anyone's filing of legitimate, non-frivolous writs because it would apply only to frivolous writs.

As with current law regarding lawsuits, the bill would require that good conduct time be forfeited only upon a second or subsequent frivolous writ to ensure that an inmate had adequate notice that the inmate was filing frivolous lawsuits. The penalty imposed by HB 681 for filing a frivolous writ is only a small disincentive that would require the loss of only a small number of good conduct days, not all of them, and would make no change to anyone's court-imposed sentence.

The court could establish parameters or guidelines for determining when a writ was frivolous and a system for informing TDCJ if an inmate had filed a frivolous writ. The court would not automatically consider sloppy or poorly written writs to be frivolous. The Court of Criminal Appeals is a competent, experienced body that knows the difference between writs that are not written with the greatest of legal skill and those that are frivolous.

An example of a writ that could be considered frivolous would be one in which the same inmate had filed numerous writs alleging the same thing, perhaps ineffective assistance of counsel, or if an inmate filed as a writ of habeas corpus a complaint that should be part of a civil lawsuit.

OPPONENTS SAY:

Texas should not do anything that could have a chilling effect on the right of a person to file a writ of habeas corpus. Being able to file a challenge to one's incarceration is a fundamental right that helps define the U.S. justice system, and the state should not create disincentives to exercising this right. Those who believe their confinement is illegal may have no where to turn to challenge that incarceration and seek redress except to file a writ of

habeas corpus. These writs are not analogous to civil lawsuits that challenge the type of food inmates are served or their recreation amenities, and inmates filing them should not be subject to the same disincentives used to discourage those lawsuits. When civil lawsuits are resolved, the inmates would, for example, either get new recreation amenities or not. With writs of habeas corpus, inmates would either remain incarcerated or be set free.

HB 681 would present the danger that legitimate writs of habeas corpus that were poorly written or not done exactly to form would be labeled frivolous and result in an inmate being punished by having good conduct time taken away. In at least two cases, Texas inmates who later were found innocent had filed repeated writs arguing for their innocence, and according to one, at one time a prosecutor requested that the Court of Criminal Appeals cite him for abuse of writ.

HB 681 would not define frivolous, and it would be unfair to put the burden on inmates to make the difficult determination about what the court would consider frivolous, especially when many inmates who file repeated writs are mentally ill or mentally retarded.

No evidence exists to suggest a huge problem with frivolous writs. Although the Court of Criminal Appeals dismissed almost 600 writs in fiscal 2004 because those writs did not meet the statutory guidelines for filing writs subsequent to a first one, there is no way of knowing how many of those were frivolous. In fiscal 2004, the Court of Criminal Appeals entered only four abuse of writ orders to inmates to whom they previously had entered abuse of writ orders.

It is unclear that HB 681 would have much effect because it would apply only to a limited number of inmates. For inmates convicted of certain serious, violent offenses listed in Code of Criminal Procedure, art. 42.12 sec. 3g (often called "3g" offenders), good conduct time is meaningless because they must serve a certain portion of their sentences without the consideration of good conduct time before being eligible to be considered for parole. These offenders make up about 40 percent of TDCJ's inmates. Another group, state jail felons, do not receive good conduct time, and others are in categories for which good conduct time is meaningless.

NOTES:

The companion bill, SB 695 by Ogden, passed the Senate by 29-1 (Barrientos) on April 11 and is pending in the House Corrections

Committee. SB 695 also would make current law on frivolous lawsuits apply to writs of habeas corpus and would define a writ as frivolous if it were brought for the purpose of abusing judicial resources.