SUBJECT: Standards for attorneys representing indigent defendants in capital cases

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 5 ayes — Peña, Vaught, Riddle, Escobar, Mallory Caraway

0 nays

4 absent — Hodge, Moreno, Pierson, Talton

SENATE VOTE: On final passage, April 12 — 31-0, on Local and Uncontested Calendar

WITNESSES: For — (*Registered, but did not testify*: Dominic Gonzales, Texas Criminal Justice Coalition; Angelo Zottarelli, Bexar County)

Against — None

BACKGROUND: Courts must appoint attorneys for indigent criminal defendants, including those facing the death penalty, for both the trial and any 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 courts.

Code of Criminal Procedure, Art. 26.052(d)(2) establishes minimum requirements for attorneys appointed to represent indigent defendants facing possible 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. These minimum requirements establish that attorneys must:

- be a member of the State Bar of Texas;
- exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases;

- have not been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any capital case;
- have at least five years of experience in criminal litigation;
- have tried to verdict as lead defense counsel a significant number of felony cases, including homicide trials and other trials for offenses punishable as second- or first-degree felonies or capital felonies;
- have experience using or challenging mental health or forensic expert witnesses and investigating and presenting mitigating evidence at the penalty phase of a death penalty trial; and
- have participated in continuing legal education courses or other training relating to criminal defense in death penalty cases.

DIGEST:

SB 528 would establish separate sets of requirements for trial attorneys and appellate attorneys in death penalty cases.

The bill would lay out specific requirements for appellate attorneys in death penalty cases. Instead of a requirement of having tried to verdict as lead defense counsel a significant number of felony cases, including homicide trials and other trials for offenses punishable as second- or first-degree felonies or capital felonies, SB 528 would require appellate attorneys to have authored a significant number of appellate briefs, including appellate briefs for homicide cases and other cases involving offenses punishable as capital felonies or felonies of the first degree or certain other serious and violent "3g) offenses listed in Code of Criminal Procedure, art. 42.12, sec. 3g(a)(1).

SB 528 also would remove the requirement that an attorney have at least five years of experience in criminal litigation and replace it with a requirement of at least five years of criminal law experience.

SB 528 would require that trial attorneys and appellate attorneys in death penalty cases could not have been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any capital case unless the conduct underlying the finding failed to reflect accurately the attorney's current ability to provide effective representation.

SB 528 would take effect on September 1, 2007. A local selection committee would be directed to amend standards previously adopted by the committee to conform with these revised requirements not later than the 75th day after the effective date of the bill. SB 528 would apply only

to an attorney appointed to a death penalty case on or after the 75th day after the effective date.

SUPPORTERS SAY:

By establishing different requirements for trial and appellate attorneys in death penalty cases, SB 528 would expand the pool of qualified attorneys available to do appellate work. Current law requires that all attorneys in death penalty cases, both trial and appellate, have tried to a verdict as lead defense counsel a significant number of felony cases. However, because of the different nature of the work of appellate and trial attorneys, not all qualified appellate attorneys have extensive trial experience. SB 528 would allow otherwise qualified appellate attorneys to represent defendants in appeals of death penalty cases. Not only would the bill expand the pool of available appellate attorneys, it likely would improve that pool as well.

Changing the requirement that trial and appellate attorneys have at least five years of experience in criminal litigation to a requirement that they have at least five years of criminal law experience would clear up ambiguity about whether an attorney must have litigated criminal law cases. The definition under current law excludes highly qualified candidates like law professors or criminal court clerks. In addition, this change would give more discretion to local selection boards concerning whom they admit to practice trial and appellate law in death penalty cases.

The bill would allow local selection committees to reinstate attorneys who had earlier been removed from the lists because of findings of ineffective assistance of counsel. Current law places a permanent ban on attorneys found to have rendered ineffective assistance of counsel in a capital case or appeal. Disqualifying these attorneys discourages attorneys from admitting error, which makes the job of the appellate attorneys, who may rely on attorney error for a favorable appeal, exceedingly difficult. Lawyers might have made mistakes early in their careers but learned from them and be able to provide good representation in the future. By allowing local selection committees the flexibility to consider if the conduct underlying the finding failed to reflect accurately the attorney's current ability to provide effective representation, good attorneys who had rebuilt practices and reestablished their reputations in the legal community again would be able to contribute productively to a serious and nuanced field of law.

OPPONENTS SAY:

Merely expanding the pool of available attorneys would not guarantee a larger pool of qualified attorneys. The more responsible route would be to require these attorneys to develop skills by serving as second chairs in a death penalty trial before acting as lead defense counsels or appellate attorneys. To be an effective advocate on appeal, an appellate attorney must have some understanding of what takes place in trials. The best way to assure that is to require them to have participated in felony cases, from start to finish.

Attorneys owe a fiduciary duty to their clients — the highest duty recognized by law. A finding of ineffective assistance of counsel reflects a breach of that duty. Considering the gravity of death penalty cases, the attorneys who have broken that duty should not be trusted with that responsibility again.

NOTES:

A related bill, SB 1655 by Ellis and Duncan, which would create an office of capital writs to represent indigent defendants in filing death penalty habeas corpus petitions, also has been postponed until today.