

SUBJECT: Providing court-appointed counsel for certain writs of habeas corpus

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 5 ayes — Herrero, Moody, Leach, Shaheen, Simpson

0 nays

2 absent — Canales, Hunter

SENATE VOTE: On final passage, April 23 — 30-0

WITNESSES: (*On House companion bill, HB 1346*)

For — Alex Bunin, Harris County Public Defender; Elizabeth Henneke, Texas Criminal Justice Coalition; (*Registered, but did not testify*: Kristin Etter, Texas Criminal Defense Lawyers Association; Scott Henson, Texas Criminal Justice Coalition; Thomas Ratliff, Harris and Fort Bend County Criminal Lawyers Association; Charles Reed, Dallas County Commissioners Court; Matt Simpson, ACLU of Texas)

Against — None

On — Wesley Shackelford, Texas Indigent Defense Commission

BACKGROUND: Writs of habeas corpus are a way to challenge the constitutionality of a criminal conviction or the process that resulted in a conviction or sentence. Code of Criminal Procedure, art. 11.071 provides for court-appointed counsel to assist with applications for writs of habeas corpus for indigent defendants who desire counsel and have been sentenced to death. Art. 11.072 gives the judge discretion whether to provide court-appointed counsel to assist with applications for writs of habeas corpus for defendants sentenced to probation.

Code of Criminal Procedure, art. 1.051 defines “indigent” as someone who is not financially able to employ counsel, and art. 26.04(m) lists factors that courts may consider when determining indigency, including

income, assets, outstanding obligations, dependents, and spousal income.

Under Code of Criminal Procedure, art. 26.05, attorneys appointed to represent criminal defendants receive compensation based on the time and labor required of them, the complexity of the case, and the experience and ability of appointed counsel. Judges of county courts, statutory county courts, and district courts are required to adopt fee schedules for payments to court-appointed attorneys.

**DIGEST:**

SB 662 would require courts to appoint attorneys to represent indigent defendants who sought relief on writs of habeas corpus from convictions that imposed penalties other than death or that ordered probation if the state represented to the convicting court that the defendant:

- was not guilty;
- was guilty of only a lesser offense; or
- was convicted or sentenced under a law that had been found unconstitutional by the court of criminal appeals or the U.S. Supreme Court.

Attorneys could be appointed to represent defendants in the process of filing writs of habeas corpus or in proceedings based on the applications for writs. Attorneys appointed under this bill would be compensated at the same rate as attorneys appointed to represent criminal defendants at trial.

This 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, 2015, and would apply to a writ application regardless of when the offense for which the applicant was in custody was committed.

**SUPPORTERS  
SAY:**

SB 662 would expedite the release of defendants for certain cases in which a district attorney agreed that a defendant should be released because the defendant was innocent, was guilty of a lesser offense, or the law under which the defendant was convicted had been declared void. The cost savings from expedited release could negate the additional cost of

appointing counsel.

This bill would protect constitutional rights to a fair trial and defense proceedings for indigent defendants. Although judges currently have discretion whether to appoint counsel in these cases, some judges choose not to appoint counsel. The bill would cover certain limited circumstances in which appointment of counsel should be mandatory. When a defendant is found to be innocent or guilty of a lesser offense, he or she should have the opportunity to have the convictions overturned or the sentence reduced, regardless of whether the defendant could afford a lawyer.

OPPONENTS  
SAY:

SB 662 would remove a judge's discretion on whether to appoint counsel for writs of habeas corpus for indigent defendants. By automatically appointing an attorney, the bill might deprive the defendant of a chance to appear in front of a judge until later in the process than if the defendant appeared to have counsel appointed. Appearing in front of a judge earlier would provide an earlier opportunity for a judge to dismiss the case if necessary. Shortcutting this important process might harm defendants who had been found innocent or guilty of a lesser included offense.

This bill would be unnecessary because judges almost always grant the appointment of the attorney in those few cases involving eligible defendants in writ of habeas corpus cases for non-capital offenses. A new mandate to appoint counsel for all of these cases should not be imposed because of isolated incidents. SB 662 also could be considered an unfunded mandate on counties that would require judges to appoint counsel in all these habeas cases without additional funds.

NOTES:

The House companion bill, HB 1346 by Alonzo, was passed by the House on May 12 and referred to the Senate Administration Committee on May 19.