

SENATE BILL 1679

By Jackson

AN ACT to amend Tennessee Code Annotated, Title 39, Chapter 11 and Title 40, Chapter 30, Part 2, and to enact the "Tennessee Death Penalty Representation Services Act of 2009".

WHEREAS, virtually all defendants who are sentenced to death in Tennessee are indigent; and

WHEREAS, it is a bedrock principle that all criminal defendants, whether rich or poor, have the fundamental right to effective assistance of counsel and a fair and impartial trial, particularly when their lives are at stake; and

WHEREAS, death is different, and because of the unique character of sentencing hearings and jury selection in capital cases, combined with the highly complicated and continuously developing nature of capital punishment law, effective defense representation in capital cases requires specialized expertise and resources; and

WHEREAS, while there are excellent capital defense lawyers in Tennessee who have provided effective defense representation in capital cases, in too many capital cases the quality of defense representation has fallen far below acceptable standards, as has been recognized independently by the Tennessee Bar Association (2004) and the American Bar Association (2007); and

WHEREAS, poor defense representation in capital trials leads to unfair and inaccurate results and numerous reversals of convictions and sentences, undermines the public's confidence in Tennessee's capital punishment system, and generates prolonged delays and expensive post-conviction litigation at great cost to the public, the victims' family members, the courts and the other participants in the system; and

WHEREAS, ineffective capital defense representation creates a situation that is unfair to jurors who are asked to make the ultimate decision regarding the defendant's life often without having heard a fair presentation of all of the evidence necessary to such a decision; and

WHEREAS, deficient defense representation in capital cases is caused by a number of factors, including the following:

(1) Excessive workloads for defense counsel, including excessive caseloads for members of the public defender offices;

(2) Inadequate compensation for appointed private defense counsel (see Tenn. Sup. Ct. R. 13. § 3(j), (k));

(3) The absence of qualitative, skill-based standards for the qualification of counsel appointed to defend capital cases (see Tenn. Sup. Ct. R. 13. § 3(c), (d), (g));

(4) The absence of adequate and enforceable standards of care for the performance, compensation, and workload of capital defense counsel (see generally Tenn. Sup. Ct. R. 13. §§ 1, 3; see also Tenn. Sup. Ct. R. 13. § 1(a)(2));

(5) The absence of any program to recruit and expand the pool of qualified and available attorneys to defend capital cases, and the inability to recruit attorneys from outside of Tennessee to serve as appointed defense counsel in capital cases (see Tenn. Sup. Ct. R. 13. § 3(b)(1));

(6) Insufficient training, consultation and litigation support for capital defense attorneys (see Tenn. Sup. Ct. R. 13. § 3(c) - (e), (g)-(h), § 4(a), § 5);

(7) The failure in a timely manner to appoint qualified counsel and assemble a capital defense team in a death eligible cases until the prosecutor files its notice of intent to seek the death penalty (see Tenn. Sup. Ct. R. 13. § 3(a));

(8) Arbitrary and unreasonable geographic and compensation restrictions on the retention of experts and investigative services in capital cases, including mitigation

specialists, mental health experts, forensics experts, investigators, and other services necessary to an effective defense (see Tenn. Sup. Ct. R. 13. § 5(b)(1), (d)); and

(9) The absence of an agency independent from the judiciary to perform the necessary capital defense counsel recruiting, consulting, supporting, standard-setting, appointing, and resource allocating functions; and

WHEREAS, to help cure these and other deficiencies in the defense function in capital cases, an independent authority system should be implemented to administer and oversee the delivery of effective defense services in Tennessee capital cases; and

WHEREAS, the experience of other states shows that a properly structured independent authority system would improve the general quality of defense representation in capital cases which, in turn, would improve the fairness and accuracy of capital trials and would help reduce post-conviction litigation, costs and delays in capital cases; now, therefore,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 39, Chapter 11, is amended by adding the following as a new Part 8:

Section 39-11-801. This part shall be known and may be cited as the “Tennessee Death Penalty Representation Services Act of 2009.”

Section 39-11-802. The purpose of this part is to ensure effective legal representation for indigent persons charged with a death eligible offense or who have been sentenced to death, including all persons who have been determined to be indigent at any procedural stage. In order to accomplish this purpose, it is the intent of the general assembly that this part:

(1) Improve the quality of representation and ensure the independence of counsel in death penalty cases;

(2) Establish effective qualification and performance standards for the delivery of services in death penalty cases;

(3) Establish effective policies and procedures for the delivery of defense services in death penalty cases;

(4) Generate reliable statistical information in order to evaluate the services provided and funds expended in death penalty cases;

(5) Recruit qualified counsel to handle death penalty cases, seeking to provide the best available legal representation to defendants and petitioners in such cases; provide training, consultation, and litigation support to appointed counsel; and provide direct representation as counsel of record in selected death penalty cases as necessary and appropriate with regard for the workload, the availability of qualified and effective counsel, and the need to establish a standard of care in the defense of death penalty cases;

(6) Enhance oversight of the delivery of defense representation services in death penalty cases with a view toward improving the quality of such services; and

(7) Administer the delivery of legal services in death penalty cases in the most efficient and cost effective manner without sacrificing quality.

Section 39-11-803. As used in this part, unless the context otherwise requires:

(1) "ABA Guidelines" means the most recent version of the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases;

(2) "Appointed counsel" means an attorney appointed to represent an indigent party in a death penalty case;

(3) "Appointed private counsel" means an appointed counsel other than a public defender, an employee of a public defender, an employee of the office, or an employee of any of the units;

(4) "Capital indigent defense fund" means the fund, funded by appropriations by the general assembly on an annual basis, to be administered by the executive director as provided for in this part;

(5) "Collateral proceedings" means all proceedings initiated by or against a death sentenced person after the conclusion of the direct appeal, including but not limited to post-conviction proceedings, state habeas corpus proceedings, United States supreme court certiorari proceedings, competency and conservatorship proceedings, petitions for writ of error coram nobis, proceedings under the Post-Conviction DNA Analysis Act of 2001, and petitions or requests for clemency;

(6) "Commission" means the commission of the office of death penalty representation services;

(7) "Death penalty eligible" includes a person accused of a crime for which the death penalty could be sought;

(8) "Death penalty case" means any case in which a person is either potentially death eligible, unless the district attorney general has filed with the court a non-revocable notice that a case will not be prosecuted as a death penalty case, or a person has been sentenced to death and shall include all proceedings from the time of arrest through all collateral proceedings;

(9) "Executive director" means the executive director of the office of death penalty representation services;

(10) "Office" means the office of death penalty representation services;

(11) "Professional persons" means any professionals who may be retained by appointed counsel in death penalty cases including but not limited to investigators, forensic experts, mental health professionals, mitigation specialists, jury consultants, and consulting or testifying experts;

(12) "Trial and direct appeal" includes all proceedings from the time of arrest through the trial resulting in one or more convictions and death sentences, the direct appeal from such convictions or sentences through the court of criminal appeals and the supreme court, and certiorari proceedings in the United States Supreme Court; and

(13) "Unit" refers to any of the units established by the executive director under this part, including a trial-appellate unit and a post-conviction unit.

Section 39-11-804.

(a) The commission of the office of death penalty representation services is created and shall consist of nine (9) members.

(b)

(1) The members of the commission shall be appointed as follows:

(A) The chief justice of the Tennessee supreme court shall appoint one (1) member. The initial appointment by the chief justice shall be for a term of three (3) years.

(B) The speaker of the house of representatives shall appoint one (1) member. The initial appointment by the speaker of the house of representatives shall be for a term of two (2) years;

(C) The speaker of the senate shall appoint one (1) member. The initial appointment by the speaker of the senate shall be for a term of two (2) years;

(D) The district public defenders conference shall appoint three (3) members. The initial appointments by the district public defenders conference shall be for terms of one (1), two (2) and three (3) years respectively;

(E) The Tennessee bar association shall appoint one (1) member. The initial appointment by the Tennessee bar association shall be for a term of one (1) year; and

(F) The Tennessee association of criminal defense lawyers shall appoint two (2) members. The initial appointments by the Tennessee association of criminal defense lawyers shall be for terms of one (1) and three (3) years respectively.

(2) At the expiration of the initial terms, appointment for all commission members shall be for three (3) years and shall be made by the appointing authorities designated in subdivision (b)(1).

(3) The commission shall elect a commission chair from among its members for a term of two (2) years.

(c) Persons appointed to the commission shall possess significant experience and training in the defense litigation of death penalty cases or shall have demonstrated a strong commitment to quality representation in death penalty defense matters.

(d) No person shall be appointed to or shall serve on the commission while serving as an employee in any of the following offices: the office and the

units of death penalty representation services; the district attorneys general; the district attorneys general conference; law enforcement agencies; the state judiciary; the administrative office of the courts; the attorney general and reporter; the district public defenders; or the district public defenders conference.

(e) In making appointments, the appointing authority shall give due consideration to selecting a body which reflects a diverse mixture with regard to geography, race, and gender.

(f) Each member of the commission shall serve until a successor in office has been appointed. Vacancies shall be filled by appointment by the appointing authority for the unexpired term. Removal of commission members shall be in accordance with policies and procedures adopted by the commission.

(g) The commission shall meet and conduct commission business at least four (4) times each year and at such other times as the commission or its chair deem necessary or appropriate. A quorum for purposes of conducting commission business shall be a majority of the members of the commission. The meetings shall be called and conducted in accordance with by-laws, consistent with this part, to be prepared and adopted by the commission. The by-laws shall contain meeting attendance requirements for members of the commission.

(h) All members of the commission are entitled to vote on any matters coming before the commission unless otherwise provided by this part or by rules adopted by the commission concerning voting on matters in which a member has, or appears to have, a financial or other interest.

(i) The executive director of the office of death penalty representation services shall attend all commission meetings except those relating to removal or reappointment of the executive director or allegations of misconduct by the

executive director. The executive director shall not vote on any matter decided by the commission.

(j) Commission members shall not receive compensation but are entitled to reimbursement in accordance with the comprehensive travel regulations as promulgated by the department of finance and administration and approved by the attorney general and reporter.

(k) Any member of the commission who is otherwise qualified may be appointed to represent a defendant or petitioner in a death penalty case, provided that such member may not deliberate upon or vote on any matter that comes before the commission that refers to or directly affects such case.

Section 39-11-805.

(a) The commission shall appoint the executive director of the office of death penalty representation services. The commission shall consult with the chief justice of the supreme court and director of the administrative office of the courts in selecting an executive director, but shall have final authority in making the appointment. The executive director shall be an attorney in good standing with the Tennessee supreme court and shall possess significant experience and training in the defense litigation of death penalty cases and shall have demonstrated a strong commitment to quality representation in death penalty defense matters.

(b) The principal duties of the commission are:

(1) To oversee and review the performance of the office of death penalty representation services to ensure that its operations are complying with the ABA Guidelines;

(2) To consult with the executive director;

(3) To advocate for the executive director and the office in carrying out the mission of providing the best available defense representation in death penalty cases meeting the standards set by the executive director pursuant to this part;

(4) To advocate for the executive director and the office in establishing reasonable annual budgets for carrying out this mission; and

(5) To assist the executive director and the office in maintaining their relationships with the executive, legislative and judicial branches of government.

(c) The commission shall approve and recommend to the general assembly an annual budget for the office of death penalty representation services and for the post-conviction and trial-appellate units established by the executive director; and the commission shall oversee the expenditure of funds made available to the office and the units.

(d) The commission shall consult with and monitor the performance of the executive director with regard to the development and implementation of the qualification, performance, compensation and workload standards, consistent with the ABA Guidelines, applicable to appointed counsel and professional persons in death penalty cases.

(e) The commission shall determine the salary level of the executive director and shall give its advice and consent with regard to the salary levels which the executive director proposes for the employees of the office and the directors and employees of the units. If the commission and the executive director elect, the executive director, the unit directors or attorneys and other personnel employed by the office and the units, in whole or in part, may be

compensated in compliance with an established state pay schedule and may be paid from funds appropriated for that purpose.

(f) The commission shall adopt such other rules and procedures as it deems necessary for the conduct of business by the commission and the office.

Section 39-11-806.

(a) The office of death penalty representation services is created and will be administered by the executive director selected by the commission.

(b) The office shall have all powers necessary and proper to fulfill its duties under this part including, but not limited to, entering into contracts, owning property, and accepting funds, grants, and gifts from any public or private source to pay expenses incident to implementing its purposes.

(c) The executive director shall assist the commission in preparing and presenting to the general assembly the annual budgets for the office and the units.

(d) The executive director shall establish, with the advice of the commission, standards for the qualifications and training of counsel for defendants or petitioners in capital cases and for professionals retained by counsel in capital cases; performance standards for such counsel and professional persons; caseload and workload standards for such counsel; and compensation standards for such counsel and professional persons. These standards shall be consistent with the ABA Guidelines.

(e) The executive director shall conduct, sponsor or approve specialized training programs for attorneys representing defendants or petitioners in death penalty cases and, where appropriate, for professional persons employed by such attorneys.

(f) The executive director shall collect and maintain data and information necessary to properly administer the budget of the office and the units and to supervise the legal representation of indigent defendants and petitioners in death penalty cases, including comprehensive information regarding homicide cases.

(g) The executive director shall establish a trial-appellate unit and a post-conviction unit, and such other units as the executive director deems advisable with the approval of the commission. The executive director shall appoint the directors of these units who shall be attorneys in good standing with the Tennessee supreme court and shall possess significant experience and training in the defense litigation of death penalty cases and shall have demonstrated a strong commitment to quality representation in death penalty defense matters according to the standards developed by the executive director. The trial-appellate unit shall operate as two divisions, a trial division and an appellate division.

(h) Upon the establishment of the post-conviction unit and appointment of the director of such unit, all functions currently performed by the post-conviction commission and the post-conviction defender pursuant to the Post-Conviction Defender Commission Act, compiled in title 40, chapter 30, part 2, shall be assumed, respectively, by the commission created under this part and by the executive director and the post-conviction unit director, at which time the post-conviction defender commission shall terminate and the office of the post-conviction defender shall be closed. Thereupon, the Post-Conviction Defender Act, compiled in title 40, chapter 30, party 2, shall be repealed. The existing budget for the office of the post-conviction defender shall be transferred to the post-conviction defender unit created under this part to be administered by the

executive director. The employees of the office of the post-conviction defender may be transferred to the post-conviction unit in the discretion of the executive director and the director of that unit. The transfer of duties from the office of the post-conviction defender to the post-conviction unit shall be conducted in a manner consistent with the ethical considerations that apply to existing attorney-client relationships.

(i) The executive director shall advise and consult with the directors of the units and shall monitor and supervise the units to ensure that the work of the units complies with the ABA Guidelines and the standards established by the executive director.

(j) The director of each unit shall assist the executive director and the commission in preparing and submitting to the general assembly the budget for the office.

Section 39-11-807.

(a) The executive director shall establish an account for maintaining the capital indigent defense fund. This fund shall exist for payment of approved compensation and expense reimbursement to appointed private counsel and to professional persons retained by appointed counsel, along with other reasonably necessary or appropriate expenditures for the legal representation of indigent defendants or petitioners in death penalty cases. With the advice and consent of the commission, the executive director shall develop compensation standards for appointed private counsel. Initially, this fund shall be established with funds allocated and transferred from the indigent defense fund maintained and administered by the administrative office of the courts, and the amount of funds so transferred shall be determined by the amount the administrative office of the

courts otherwise would have allocated to fund death penalty cases. Once the capital indigent defense fund is established with funds transferred from the indigent defense fund administered by the administrative office of the courts, the capital indigent defense fund will be independent of and separate from any fund maintained or administered by the administrative office of the courts.

(b) The executive director shall administer the capital indigent defense fund, shall accept applications made by counsel representing indigent defendants in a death penalty case for authorization to retain professional persons or other resources and for payment for such services and resources out of the capital indigent defense fund, and shall rule upon those applications. With the advice and consent of the commission, the executive director shall develop compensation standards for professional persons and shall develop procedures and guidelines for requests for compensation and resource services to be paid out of the capital indigent defense fund.

(c) Any adverse ruling by the executive director regarding compensation or resources may be appealed by appointed counsel to the court presiding over the case in an ex parte proceeding.

(d) This section shall pre-empt any preexisting rules or statutes regarding the same subject matter.

39-11-808.

(a) Applying the standards established by the executive director, the directors of the units shall perform the duties described in this section.

(b) The trial-appellate and post-conviction units shall recruit counsel with the qualifications and resources necessary to effectively represent indigent defendants and petitioners in death penalty cases.

(c) When an indigent or potentially indigent person is charged with a death eligible offense, the district public defender in the judicial district in which the charge is made shall give prompt written notice of such charge to the trial-appellate unit director. This notice shall be given on the same day that any attorney or staff member employed by the district public defender first becomes aware of the charge. Notice to the trial-appellate unit director shall be given by telephone and immediately followed by written notice. Upon receipt of such notice, the trial-appellate unit director shall make an immediate preliminary assessment of the likelihood that the case may be prosecuted as a capital case. The trial-appellate unit director shall implement such other notice procedures as may be appropriate, and the clerks of the trial courts and judicial commissioners, where applicable, shall cooperate in complying with reasonable notice procedures that may be implemented by the unit director. If the district attorney general files with the court a non-revocable notice that a case will not be prosecuted as a death penalty case, then the case will be removed from the authority of the executive director and the unit directors for purposes of the appointment of counsel and the provision of compensation and resources from the capital indigent defense fund, and the case thereafter will be treated as one not eligible for a death sentence.

(d) The trial-appellate unit director shall appoint counsel to represent indigent defendants charged with capital eligible offenses in the trial and direct appeal stages. The director shall appoint only qualified counsel, according to the standards set by the executive director, and shall seek to appoint the best available counsel. In making such appointments, the trial-appellate unit shall consult with the district public defender in the judicial district where the case has

been initiated. If the trial-appellate unit director does not affirmatively make such appointment within two business days of the arrest or detention of the indigent or potentially indigent person being charged with a death eligible offense, the presiding court shall provisionally appoint the best qualified and available counsel, giving first consideration to the district public defender. This appointment will be effective until such time as the trial-appellate unit director has an opportunity to consider the appointment options and appoints other counsel to the case. The trial-appellate unit director shall consider any recommendations from the district public defender and the presiding judge regarding the appointment of counsel. All appointments by the trial-appellate unit director shall be subject to the approval of the executive director.

(e) At the pre-trial and trial stages in death penalty cases, the trial-appellate unit director may appoint as either lead counsel or co-counsel, or both, any attorney deemed by the director to be qualified and available for appointment, including attorneys from the trial division of the trial-appellate unit, all subject to the approval of the executive director. At the direct appeal stage in death penalty cases, it is presumed that the trial-appellate unit director, in the exercise of the director's discretion and with the approval of the executive director, will appoint an attorney from the appellate division of the trial-appellate unit together with an attorney who was appointed at the trial stage unless such attorneys would have a conflict of interest or an excessive caseload.

(f) The post-conviction unit director shall appoint counsel to represent indigent petitioners in all state collateral proceedings. Such appointments are to be anticipated and may be made before conclusion of the direct appeal. The post-conviction unit director may appoint in any collateral proceedings, as either

lead counsel or co-counsel, or both, any attorney deemed by the director to be qualified and available for appointment, including attorneys from the post-conviction unit, subject to the approval of the executive director. The post-conviction unit director shall appoint only qualified counsel, according to the standards set by the executive director, and shall seek to appoint the best available counsel.

(g) In the discretion of the post-conviction unit director, with the approval of the executive director, the post-conviction unit director may appoint one (1) or more members of the unit or private counsel to represent, without additional compensation or expense reimbursement from state funds, any indigent death sentenced person for the purpose of instituting, prosecuting or defending collateral proceedings in federal court. Compensation and expense reimbursement may be provided by federal statute or rule or other non-state funding source.

(h) The trial-appellate unit shall provide litigation support and consultation to appointed counsel in death penalty cases in the trial and direct appeal stage, and the post-conviction unit shall provide litigation support and consultation to appointed counsel in collateral proceedings.

(i) The appointing unit director, with the advice and consent of the executive director, may replace appointed counsel in a case if necessary or appropriate to protect the interests of the client and to ensure that the client receives the best available legal representation that meets the standards established by the executive director.

(j) This section shall preempt any preexisting rules or statutes regarding the same subject matter.

SECTION 2. Tennessee Code Annotated, Title 40, Chapter 30, Part 2, is amended by deleting the part in its entirety.

SECTION 3. For purposes of appointing members of the commission, this act shall take effect upon becoming a law, the public welfare requiring it. For all other purposes, it shall take effect on July 1, 2009, the public welfare requiring it.