

# 2011 FAIR DEFENSE LAW

*Prepared by the*



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## CODE OF CRIMINAL PROCEDURE

### CHAPTER ONE: GENERAL PROVISIONS

#### Art. 1.051. Right to Representation by Counsel

(a) A defendant in a criminal matter is entitled to be represented by counsel in an adversarial judicial proceeding. The right to be represented by counsel includes the right to consult in private with counsel sufficiently in advance of a proceeding to allow adequate preparation for the proceeding.

(b) For purposes of this article and Articles 26.04 and 26.05 of this code, "indigent" means a person who is not financially able to employ counsel.

(c) An indigent defendant is entitled to have an attorney appointed to represent him in any adversary judicial proceeding that may result in punishment by confinement and in any other criminal proceeding if the court concludes that the interests of justice require representation. Except as otherwise provided by this subsection, if an indigent defendant is entitled to and requests appointed counsel and if adversarial judicial proceedings have been initiated against the defendant, a court or the courts' designee authorized under Article 26.04 to appoint counsel for indigent defendants in the county shall appoint counsel as soon as possible, but not later than the end of the third working day after the date on which the court or the courts' designee receives the defendant's request for appointment of counsel. In a county with a population of 250,000 or more, the court or the courts' designee shall appoint counsel as required by this subsection as soon as possible, but not later than the end of the first working day after the date on which the court or the courts' designee receives the defendant's request for appointment of counsel.

(d) An eligible indigent defendant is entitled to have the trial court appoint an attorney to represent him in the following appellate and post-conviction habeas corpus matters:

(1) an appeal to a court of appeals;

(2) an appeal to the Court of Criminal Appeals if the appeal is made directly from the trial court or if a petition for discretionary review has been granted;

(3) a habeas corpus proceeding if the court concludes that the interests of justice require representation; and

(4) any other appellate proceeding if the court concludes that the interests of justice require representation.

(e) An appointed counsel is entitled to 10 days to prepare for a proceeding but may waive the preparation time with the consent of the defendant in writing or on the record in open court. If a non-indigent defendant appears without counsel at a proceeding after having been given a reasonable opportunity to retain counsel, the court, on 10 days' notice to the defendant of a dispositive setting, may proceed with the matter without securing a written waiver or appointing counsel. If an indigent defendant who has refused appointed counsel in order to retain private counsel appears without counsel after having been given an opportunity to retain counsel, the court, after giving the defendant a reasonable opportunity to request appointment of counsel or, if the defendant elects not to request appointment of counsel, after obtaining a waiver of the right to counsel pursuant to Subsections (f) and (g), may proceed with the matter on 10 days' notice to the defendant of a dispositive setting.

(f) A defendant may voluntarily and intelligently waive in writing the right to counsel. A waiver obtained in violation of Subsection (f-1) or (f-2) is presumed invalid.

(f-1) In any adversary judicial proceeding that may result in punishment by confinement, the attorney representing the state may not:

(1) initiate or encourage an attempt to obtain from a defendant who is not represented by counsel a waiver of the right to counsel; or

(2) communicate with a defendant who has requested the appointment of counsel, unless the court or the court's designee authorized under Article 26.04 to appoint counsel for indigent defendants in the county has denied the request and, subsequent to the denial, the defendant:

(A) has been given a reasonable opportunity to retain and has failed to retain private counsel; or

(B) waives or has waived the opportunity to retain private counsel.

(f-2) In any adversary judicial proceeding that may result in punishment by confinement, the court may

not direct or encourage the defendant to communicate with the attorney representing the state until the court advises the defendant of the right to counsel and the procedure for requesting appointed counsel and the defendant has been given a reasonable opportunity to request appointed counsel. If the defendant has requested appointed counsel, the court may not direct or encourage the defendant to communicate with the attorney representing the state unless the court or the court's designee authorized under Article 26.04 to appoint counsel for indigent defendants in the county has denied the request and, subsequent to the denial, the defendant:

- (1) has been given a reasonable opportunity to retain and has failed to retain private counsel; or
- (2) waives or has waived the opportunity to retain private counsel.

(g) If a defendant wishes to waive the right to counsel for purposes of entering a guilty plea or proceeding to trial, the court shall advise the defendant of the nature of the charges against the defendant and, if the defendant is proceeding to trial, the dangers and disadvantages of self-representation. If the court determines that the waiver is voluntarily and intelligently made, the court shall provide the defendant with a statement substantially in the following form, which, if signed by the defendant, shall be filed with and become part of the record of the proceedings:

"I have been advised this \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_\_, by the (name of court) Court of my right to representation by counsel in the case pending against me. I have been further advised that if I am unable to afford counsel, one will be appointed for me free of charge. Understanding my right to have counsel appointed for me free of charge if I am not financially able to employ counsel, I wish to waive that right and request the court to proceed with my case without an attorney being appointed for me. I hereby waive my right to counsel. (signature of defendant)"

(h) A defendant may withdraw a waiver of the right to counsel at any time but is not entitled to repeat a proceeding previously held or waived solely on the grounds of the subsequent appointment or retention of counsel. If the defendant withdraws a waiver, the trial court, in its discretion, may provide the appointed counsel 10 days to prepare.

(i) Except as otherwise provided by this subsection, if an indigent defendant is entitled to and requests

appointed counsel and if adversarial judicial proceedings have not been initiated against the defendant, a court or the courts' designee authorized under Article 26.04 to appoint counsel for indigent defendants in the county shall appoint counsel immediately following the expiration of three working days after the date on which the court or the courts' designee receives the defendant's request for appointment of counsel. If adversarial judicial proceedings are initiated against the defendant before the expiration of the three working days, the court or the courts' designee shall appoint counsel as provided by Subsection (c). In a county with a population of 250,000 or more, the court or the courts' designee shall appoint counsel as required by this subsection immediately following the expiration of one working day after the date on which the court or the courts' designee receives the defendant's request for appointment of counsel. If adversarial judicial proceedings are initiated against the defendant before the expiration of the one working day, the court or the courts' designee shall appoint counsel as provided by Subsection (c).

(j) Notwithstanding any other provision of this section, if an indigent defendant is released from custody prior to the appointment of counsel under this section, appointment of counsel is not required until the defendant's first court appearance or when adversarial judicial proceedings are initiated, whichever comes first.

(k) A court or the courts' designee may without unnecessary delay appoint new counsel to represent an indigent defendant for whom counsel is appointed under Subsection (c) or (i) if:

- (1) the defendant is subsequently charged in the case with an offense different from the offense with which the defendant was initially charged; and
- (2) good cause to appoint new counsel is stated on the record as required by Article 26.04(j)(2).

#### Commentary

A defendant's right to counsel under Art. 1.051(c) and the Sixth Amendment to the U.S. Constitution must be affirmatively waived; waiver may not be implied from a defendant's failure to request counsel. If a defendant appears in court without counsel, the judge, before adversary judicial proceedings begin, must examine the defendant to determine if he is aware that he has a right to hire counsel and if he intends to do so. If the defendant is indigent and cannot hire an attorney himself, the

judge must appoint counsel to represent the defendant before conducting any adversary judicial proceedings, unless the defendant “knowingly and voluntarily relinquishes” his right to counsel. *Oliver v. State*, 872 S.W.2d 713, 716 (Tex. Crim. App. 1994).

The goal of Art. 1.051(e) is to ensure that an indigent defendant is represented by counsel that is prepared for the proceeding. *Marin v. State*, 891 S.W.2d 267, 272 (Tex. Crim. App. 1994). When deciding if Art. 1.051(e) has been violated, courts focus on the actual preparation time and not the time between the formal appointment and the date of the proceeding. *Id.* at 270. The 10 days of preparation time may only be waived with the defendant’s written consent or in open court. *Id.* at 269. Failure to satisfy Art. 1.051(e) may be raised on appeal without a previous objection. *Id.* at 268. Violations of Art. 1.051(e) are subject to harm analysis. *Matchett v. State*, 941 S.W.2d 922, 928–29 (Tex. Crim. App. 1996) (superseded by statute, but reasoning followed in *VanNortrick v. State*, 227 S.W.3d 706, 709–710 (Tex. Crim. App. 2007)) If a defendant is re-indicted and the difference in indictments is negligible, counsel is not entitled to 10 additional days to prepare for the newer indictment. *Marin*, 891 S.W.2d at 271. If the defendant is represented by more than one attorney, Art 1.051(e) is satisfied if at least one of the attorneys is given 10 days to prepare. *Id.*; *Roney v. State*, 632 S.W.2d 598, 601 (Tex. Crim. App. 1982). If a defendant’s only appointed attorney gets replaced with another appointed attorney, the new attorney must be given 10 days to prepare for the proceeding. *Marin*, 891 S.W.2d at 268.

Contempt proceedings may result in the deprivation of a defendant’s liberty. As a result, trial courts have a duty to inform defendants of their rights to be represented by counsel and to appoint counsel to represent the defendants if they are found to be indigent. *Ex parte Gonzales*, 945 S.W.2d 830, 836–37 (Tex. Crim. App. 1997).

The right to counsel guaranteed by the Sixth Amendment and Art. 1.051 does not attach prior to the initiation of adversarial judicial proceedings. *United States v. Gouveia*, 467 U.S. 180, 188 (1984); *accord Kirby v. Illinois*, 406 U.S. 682, 688–9 (1972); *Forte v. State*, 707 S.W.2d 89, 91 (Tex. Crim. App. 1986). The Supreme Court has since stated that a “defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings...” *Rothgery v. Gillespie County*, 554 U.S. 191, 213 (2008). In

*Rothgery*, the Court held that an Art. 15.17 hearing qualifies as an initiation of adversarial judicial proceedings and signals attachment. *Id.* at 212. Police may still interrogate defendants after the right to counsel attaches as long as the officers first read the accused their *Miranda* rights and obtain a waiver of counsel as permitted under *Miranda*. *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625, which forbade police to initiate interrogation of a criminal defendant once he had invoked his right to counsel at an arraignment or similar proceeding).

Even after the initiation of adversarial judicial proceedings the right to counsel attaches only at “critical stages” of adversary judicial proceedings. See *Forte v. State*, 759 S.W.2d 128 (Tex. Crim. App. 1986); *Green v. State*, 872 S.W.2d 717, 720 (Tex. Crim. App. 1994). Critical stages have recently been defined as “proceedings between an individual and agents of the State (whether “formal or informal, in court or out,”) that amount to “trial-like confrontations,” at which counsel would help the accused “in coping with legal problems or . . . meeting his adversary.” *Rothgery*, 554 U.S. 191 at 212 (quoting *United States v. Wade*, 388 U.S. 218, 226 (1967), *United States v. Ash*, 413 U.S. 300, 312–13 (1973)).

The Supreme Court has ruled that a preliminary hearing is a “critical stage” when the hearing allowed the defendant to confront and cross-examine prosecution witnesses. *Gerstein v. Pugh*, 420 U.S. 103, 122–23 (1975) (discussing the Court’s reasoning in *Coleman v. Alabama*, 399 U.S. 1 (1970)). The Court of Criminal Appeals has cited *Gerstein* in determining that an examining trial in Texas is “arguably a critical stage” since it is adversarial in nature. *Green v. State*, 872 S.W.2d at 721. But, the Court has also held that a preliminary hearing that was non-adversarial does not count as a “critical stage” even if probable cause is being determined. *Gerstein*, 420 U.S. at 122. Also, in *Green*, the Court of Criminal Appeals has held that a preliminary initial appearance is not a critical stage because: (1) the defendant was neither required nor asked to plea; (2) the probable cause determination was non-adversarial; (3) an examining trial was not held during that time; and (4) bail was not set. *Green*, 872 S.W.2d at 721–22

In *Wade*, the Supreme Court has ruled that a post-indictment lineup where the accused is physically present is a “critical stage” of prosecution because the confrontation between the accused and victims and witnesses involves dangers and factors “which

might seriously . . . derogate from a fair trial." *Wade*, 288 U.S. at 228, 236–37. But, the Court has held that a post-indictment photographic display where the accused is not physically present is not a "critical stage" since the accused is not present and the setting is not adversarial. *Ash*, 413 U.S. 300 at 317, 321.

An accused's decision on whether or not to submit to a breath test is not a "critical stage" that requires the assistance of counsel. *McCambridge v. State*, 778 S.W.2d 70, 72 (Tex. Crim. App. 1989) (quoting *Forte v. State*, 759 S.W.2d 128, 139 (Tex. Crim. App. 1988)).

In *Wade*, the Supreme Court stated that the Government's scientific analysis of the accused's fingerprints, blood sample, clothing, hair, and other specimens are not critical stages due to the wide availability of knowledge of the scientific techniques and technology. *Wade*, 288 U.S. at 227. Because of this knowledge, the accused can meaningfully confront the Government's case at trial. *Id.* at 228

When appointing counsel, the court is under no obligation to search for an attorney that the defendant finds agreeable. *Webb v. State*, 533 S.W.2d 780, 784 (Tex. Crim. App. 1976) (citing *Viges v. State*, 508 S.W.2d 76, 77 (Tex. Crim. App. 1974)). The accused carries the burden of proof in showing that he is entitled to a change of appointed counsel. *Id.* (citing *King v. State*, 511 S.W.2d 32, 34 (Tex. Crim. App. 1974)). The accused does not have an absolute right to a change of counsel on the day of trial. *Id.* If the accused does request a change of counsel on the date of trial, the court (1) may appoint or allow the accused to retain new counsel; (2) must allow the accused to represent himself if the court denies the accused's request and the accused asserts his right to self-representation even after a proper admonishment from the court; or (3) may compel the accused that does not waive the right to counsel and does not assert his right to self-representation to proceed with the attorney representing the accused. *Burgess v. State*, 816 S.W.2d 424, 428–29 (Tex. Crim. App. 1991).

Trial courts may not force defendants to accept appointed counsel if they knowingly and intelligently waive representation and defend themselves. *Faretta v. California*, 422 U.S. 806, 818 (1975). See also *Webb*, 533 S.W.2d at 783. But, the State may appoint "standby counsel" to be available to assist defendants, even over the defendants' objection, in "overcoming routine procedural or evidentiary obstacles . . . such as introducing evidence or

objecting to testimony." *McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984); See also *Webb*, 533 S.W.2d at 784 (quoting *Faretta*, 422 U.S. at 834).

In order for defendants to represent themselves at trial, the defendants must "knowingly and intelligently" waive their right to counsel. *Faretta*, 422 U.S. at 835; *accord Webb*, 533 at 783. This waiver does not have to be in writing. *Burgess*, 816 S.W.2d at 430. When defendants assert their right to self-representation, the trial court must determine that they fully understand the consequences of waiving their right to representation of counsel by warning and making the defendants aware of "the dangers and disadvantages of self-representation." *Faretta*, 422 U.S. at 835; *accord Burton v. State*, 634 S.W.2d 692, 694 (Tex. Crim. App. 1982), *Webb*, 533 at 785. Furthermore, the trial judge must inform defendants that "there are technical rules of evidence and procedure," and that the defendants will not be given special consideration because they asserted their pro se rights. *Williams v. State*, 252 S.W.3d 353, 356 (Tex. Crim. App. 2008) (quoting *Johnson v. State*, 760 S.W.2d 277, 279 (Tex. Crim. App. 1988)). In determining defendants' abilities to represent themselves, the trial court should not look at whether the defendants "could show 'some skill or expertise,'" but rather at the defendant's background, age, experience, and education. *Burton*, 634 S.W.2d at 694 (citing *Faretta*, 422 U.S. at 835). The trial court may also take into account a defendant's mental capacity by "asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so." *Indiana v. Edwards*, 554 U.S. 164, 177–78 (2008).

It is unlikely that a court would invalidate Art. 1.051(c) on equal protection grounds because the distinction between indigent persons in populous and less populous counties is subject only to a rational basis test, and the legislature could have reasonably decided that more populous counties have more attorneys and other resources necessary to allow the appointment of counsel for an indigent criminal defendant in a shorter period of time than less populous counties with fewer resources. *Op. Tex. Att'y Gen. JC-0549* (2002).

It is unlikely that a court would find the Art. 1.051 indigence standard, because of its relative flexibility from one county to the next, violative on its face of the state and federal guarantees of equal protection because the indigence standard will necessarily vary in different counties due to varying incomes and cost of living measures in the counties. *Id.*

## **CHAPTER 11: HABEAS CORPUS**

### **Art. 11.071. Procedure in Death Penalty Case**

#### **Sec. 1. Application to Death Penalty Case**

Notwithstanding any other provision of this chapter, this article establishes the procedures for an application for a writ of habeas corpus in which the applicant seeks relief from a judgment imposing a penalty of death.

#### **Sec. 2. Representation by Counsel**

(a) An applicant shall be represented by competent counsel unless the applicant has elected to proceed pro se and the convicting trial court finds, after a hearing on the record, that the applicant's election is intelligent and voluntary.

(b) If a defendant is sentenced to death the convicting court, immediately after judgment is entered under Article 42.01, shall determine if the defendant is indigent and, if so, whether the defendant desires appointment of counsel for the purpose of a writ of habeas corpus. If the defendant desires appointment of counsel for the purpose of a writ of habeas corpus, the court shall appoint the office of capital writs to represent the defendant as provided by Subsection (c).

(c) At the earliest practical time, but in no event later than 30 days, after the convicting court makes the findings required under Subsections (a) and (b), the convicting court shall appoint the office of capital writs or, if the office of capital writs does not accept or is prohibited from accepting an appointment under Section 78.054, Government Code, other competent counsel under Subsection (f), unless the applicant elects to proceed pro se or is represented by retained counsel. On appointing counsel under this section, the convicting court shall immediately notify the court of criminal appeals of the appointment, including in the notice a copy of the judgment and the name, address, and telephone number of the appointed counsel.

(d) The court of criminal appeals shall adopt rules for the appointment of attorneys as counsel under this section and the convicting court may appoint an attorney as counsel under this section only if the appointment is approved by the court of criminal appeals in any manner provided by those rules. The rules must require that an attorney appointed as lead counsel under this section 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.

(e) If the court of criminal appeals denies an applicant relief under this article, an attorney appointed under this section to represent the applicant shall, not later than the 15th day after the date the court of criminal appeals denies relief or, if the case is filed and set for submission, the 15th day after the date the court of criminal appeals issues a mandate on the initial application for a writ of habeas corpus under this article, move for the appointment of counsel in federal habeas review under 18 U.S.C. Section 3599. The attorney shall immediately file a copy of the motion with the court of criminal appeals, and if the attorney fails to do so, the court may take any action to ensure that the applicant's right to federal habeas review is protected, including initiating contempt proceedings against the attorney.

(f) If the office of capital writs does not accept or is prohibited from accepting an appointment under Section 78.054, Government Code, the- convicting court shall appoint counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions under Section 78.056, Government Code. The convicting court shall reasonably compensate as provided by Section 2A an attorney appointed under this section, other than an attorney employed by the office of capital writs, regardless of whether the attorney is appointed by the convicting court or was appointed by the court of criminal appeals under prior law. An attorney appointed under this section who is employed by the office of capital writs shall be compensated in accordance with Subchapter B, Chapter 78, Government Code.

#### **Sec. 2A. State Reimbursement; County Obligation**

(a) The state shall reimburse a county for compensation of counsel under Section 2, other than for compensation of counsel employed by the office of capital writs, and for payment of expenses under Section 3, regardless of whether counsel is employed by the office of capital writs. The total amount of reimbursement to which a county is entitled under this section for an application under this article may not exceed \$25,000. Compensation and expenses in excess of the \$25,000 reimbursement provided by the state are the obligation of the county.

(b) A convicting court seeking reimbursement for a county shall certify to the comptroller of public accounts the amount of compensation that the

county is entitled to receive under this section. The comptroller of public accounts shall issue a warrant to the county in the amount certified by the convicting court, not to exceed \$25,000.

(c) The limitation imposed by this section on the reimbursement by the state to a county for compensation of counsel and payment of reasonable expenses does not prohibit a county from compensating counsel and reimbursing expenses in an amount that is in excess of the amount the county receives from the state as reimbursement, and a county is specifically granted discretion by this subsection to make payments in excess of the state reimbursement.

(d) The comptroller shall reimburse a county for the compensation and payment of expenses of an attorney appointed by the court of criminal appeals under prior law. A convicting court seeking reimbursement for a county as permitted by this subsection shall certify the amount the county is entitled to receive under this subsection for an application filed under this article, not to exceed a total amount of \$25,000.

### **Sec. 3. Investigation of Grounds for Application**

(a) On appointment, counsel shall investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus.

(b) Not later than the 30th day before the date the application for a writ of habeas corpus is filed with the convicting court, counsel may file with the convicting court an ex parte, verified, and confidential request for prepayment of expenses, including expert fees, to investigate and present potential habeas corpus claims. The request for expenses must state:

- (1) the claims of the application to be investigated;
- (2) specific facts that suggest that a claim of possible merit may exist; and
- (3) an itemized list of anticipated expenses for each claim.

(c) The court shall grant a request for expenses in whole or in part if the request for expenses is timely and reasonable. If the court denies in whole or in part the request for expenses, the court shall briefly

state the reasons for the denial in a written order provided to the applicant.

(d) Counsel may incur expenses for habeas corpus investigation, including expenses for experts, without prior approval by the convicting court or the court of criminal appeals. On presentation of a claim for reimbursement, which may be presented ex parte, the convicting court shall order reimbursement of counsel for expenses, if the expenses are reasonably necessary and reasonably incurred. If the convicting court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant. The applicant may request reconsideration of the denial for reimbursement by the convicting court.

(e) Materials submitted to the court under this section are a part of the court's record.

(f) This section applies to counsel's investigation of the factual and legal grounds for the filing of an application for a writ of habeas corpus, regardless of whether counsel is employed by the office of capital writs.

### **Sec. 4. Filing of Application**

(a) An application for a writ of habeas corpus, returnable to the court of criminal appeals, must be filed in the convicting court not later than the 180th day after the date the convicting court appoints counsel under Section 2 or not later than the 45th day after the date the state's original brief is filed on direct appeal with the court of criminal appeals, whichever date is later.

(b) The convicting court, before the filing date that is applicable to the applicant under Subsection (a), may for good cause shown and after notice and an opportunity to be heard by the attorney representing the state grant one 90-day extension that begins on the filing date applicable to the defendant under Subsection (a). Either party may request that the court hold a hearing on the request. If the convicting court finds that the applicant cannot establish good cause justifying the requested extension, the court shall make a finding stating that fact and deny the request for the extension.

(c) An application filed after the filing date that is applicable to the applicant under Subsection (a) or (b) is untimely.

(d) If the convicting court receives an untimely application or determines that after the filing date that is applicable to the applicant under Subsection (a) or (b) no application has been filed, the convicting court immediately, but in any event within 10 days, shall send to the court of criminal appeals and to the attorney representing the state:

- (1) a copy of the untimely application, with a statement of the convicting court that the application is untimely, or a statement of the convicting court that no application has been filed within the time periods required by Subsections (a) and (b); and
- (2) any order the judge of the convicting court determines should be attached to an untimely application or statement under Subdivision (1).

(e) A failure to file an application before the filing date applicable to the applicant under Subsection (a) or (b) constitutes a waiver of all grounds for relief that were available to the applicant before the last date on which an application could be timely filed, except as provided by Section 4A.

#### **Sec. 4A. Untimely Application; Application Not Filed**

(a) On command of the court of criminal appeals, a counsel who files an untimely application or fails to file an application before the filing date applicable under Section 4(a) or (b) shall show cause as to why the application was untimely filed or not filed before the filing date.

(b) At the conclusion of the counsel's presentation to the court of criminal appeals, the court may:

- (1) find that good cause has not been shown and dismiss the application;
- (2) permit the counsel to continue representation of the applicant and establish a new filing date for the application, which may be not more than 180 days from the date the court permits the counsel to continue representation; or
- (3) appoint new counsel to represent the applicant and establish a new filing date for the application, which may be not more than 270 days after the date the court appoints new counsel.

(c) The court of criminal appeals may hold in contempt counsel who files an untimely application or fails to file an application before the date required by Section 4(a) or (b). The court of criminal appeals may punish as a separate instance of contempt each day after the first day on which the counsel fails to timely file the application. In addition to or in lieu of holding counsel in contempt, the court of criminal appeals may enter an order denying counsel compensation under Section 2A.

(d) If the court of criminal appeals establishes a new filing date for the application, the court of criminal appeals shall notify the convicting court of that fact and the convicting court shall proceed under this article.

(e) Sections 2A and 3 apply to compensation and reimbursement of counsel appointed under Subsection (b)(3) in the same manner as if counsel had been appointed by the convicting court, unless the attorney is employed by the office of capital writs, in which case the compensation of the attorney is governed by Subchapter B, Chapter 78, Government Code.

(f) Notwithstanding any other provision of this article, the court of criminal appeals shall appoint counsel and establish a new filing date for application, which may be no later than the 270th day after the date on which counsel is appointed, for each applicant who before September 1, 1999, filed an untimely application or failed to file an application before the date required by Section 4(a) or (b). Section 2A applies to the compensation and payment of expenses of counsel appointed by the court of criminal appeals under this subsection, unless the attorney is employed by the office of capital writs, in which case the compensation of that attorney is governed by Subchapter B, Chapter 78, Government Code.

#### **Sec. 5. Subsequent Application**

(a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

- (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was

unavailable on the date the applicant filed the previous application;

(2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or

(3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

(b) If the convicting court receives a subsequent application, the clerk of the court shall:

(1) attach a notation that the application is a subsequent application;

(2) assign to the case a file number that is ancillary to that of the conviction being challenged; and

(3) immediately send to the court of criminal appeals a copy of:

(A) the application;

(B) the notation;

(C) the order scheduling the applicant's execution, if scheduled; and

(D) any order the judge of the convicting court directs to be attached to the application.

(c) On receipt of the copies of the documents from the clerk, the court of criminal appeals shall determine whether the requirements of Subsection (a) have been satisfied. The convicting court may not take further action on the application before the court of criminal appeals issues an order finding that the requirements have been satisfied. If the court of criminal appeals determines that the requirements have not been satisfied, the court shall issue an order dismissing the application as an abuse of the writ under this section.

(d) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date

described by Subsection (a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

(e) For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

(f) If an amended or supplemental application is not filed within the time specified under Section 4(a) or (b), the court shall treat the application as a subsequent application under this section.

## **Sec. 6. Issuance of Writ**

(a) If a timely application for a writ of habeas corpus is filed in the convicting court, a writ of habeas corpus, returnable to the court of criminal appeals, shall issue by operation of law.

(b) If the convicting court receives notice that the requirements of Section 5 for consideration of a subsequent application have been met, a writ of habeas corpus, returnable to the court of criminal appeals, shall issue by operation of law.

(b-1) If the convicting court receives notice that the requirements of Section 5(a) for consideration of a subsequent application have been met and if the applicant has not elected to proceed pro se and is not represented by retained counsel, the convicting court shall appoint, in order of priority:

(1) the attorney who represented the applicant in the proceedings under Section 5, if the attorney seeks the appointment;

(2) the office of capital writs, if the office represented the applicant in the proceedings under Section 5 or otherwise accepts the appointment; or

(3) counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions under Section 78.056, Government Code, if the office of capital writs:

(A) did not represent the applicant as described by Subdivision (2); or

(B) does not accept or is prohibited from accepting the appointment under Section 78.054, Government Code.

(b-2) Regardless of whether the subsequent application is ultimately dismissed, compensation and reimbursement of expenses for counsel appointed under Subsection (b-1) shall be provided as described by Section 2, 2A, or 3, including compensation for time previously spent and reimbursement of expenses previously incurred with respect to the subsequent application.

(c) The clerk of the convicting court shall:

- (1) make an appropriate notation that a writ of habeas corpus was issued;
- (2) assign to the case a file number that is ancillary to that of the conviction being challenged; and
- (3) send a copy of the application by certified mail, return receipt requested, to the attorney representing the state in that court.

(d) The clerk of the convicting court shall promptly deliver copies of documents submitted to the clerk under this article to the applicant and the attorney representing the state.

## **Sec. 7. Answer to Application**

(a) The state shall file an answer to the application for a writ of habeas corpus not later than the 120th day after the date the state receives notice of issuance of the writ. The state shall serve the answer on counsel for the applicant or, if the applicant is proceeding pro se, on the applicant. The state may request from the convicting court an extension of time in which to answer the application by showing particularized justifying circumstances for the extension, but in no event may the court permit the state to file an answer later than the 180th day after the date the state receives notice of issuance of the writ.

(b) Matters alleged in the application not admitted by the state are deemed denied.

## **Sec. 8. Findings of Fact Without Evidentiary Hearing**

(a) Not later than the 20th day after the last date the

state answers the application, the convicting court shall determine whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist and shall issue a written order of the determination.

(b) If the convicting court determines the issues do not exist, the parties shall file proposed findings of fact and conclusions of law for the court to consider on or before a date set by the court that is not later than the 30th day after the date the order is issued.

(c) After argument of counsel, if requested by the court, the convicting court shall make appropriate written findings of fact and conclusions of law not later than the 15th day after the date the parties filed proposed findings or not later than the 45th day after the date the court's determination is made under Subsection (a), whichever occurs first.

(d) The clerk of the court shall immediately send to:

(1) the court of criminal appeals a copy of the:

(A) application;

(B) answer;

(C) orders entered by the convicting court;

(D) proposed findings of fact and conclusions of law; and

(E) findings of fact and conclusions of law entered by the court; and

(2) counsel for the applicant or, if the applicant is proceeding pro se, to the applicant, a copy of:

(A) orders entered by the convicting court;

(B) proposed findings of fact and conclusions of law; and

(C) findings of fact and conclusions of law entered by the court.

## **Sec. 9. Hearing**

(a) If the convicting court determines that controverted, previously unresolved factual issues material to the legality of the applicant's confinement

exist, the court shall enter an order, not later than the 20th day after the last date the state answers the application, designating the issues of fact to be resolved and the manner in which the issues shall be resolved. To resolve the issues, the court may require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection.

(b) The convicting court shall hold the evidentiary hearing not later than the 30th day after the date on which the court enters the order designating issues under Subsection (a). The convicting court may grant a motion to postpone the hearing, but not for more than 30 days, and only if the court states, on the record, good cause for delay.

(c) The presiding judge of the convicting court shall conduct a hearing held under this section unless another judge presided over the original capital felony trial, in which event that judge, if qualified for assignment under Section 74.054 or 74.055, Government Code, may preside over the hearing.

(d) The court reporter shall prepare a transcript of the hearing not later than the 30th day after the date the hearing ends and file the transcript with the clerk of the convicting court.

(e) The parties shall file proposed findings of fact and conclusions of law for the convicting court to consider on or before a date set by the court that is not later than the 30th day after the date the transcript is filed. If the court requests argument of counsel, after argument the court shall make written findings of fact that are necessary to resolve the previously unresolved facts and make conclusions of law not later than the 15th day after the date the parties file proposed findings or not later than the 45th day after the date the court reporter files the transcript, whichever occurs first.

(f) The clerk of the convicting court shall immediately transmit to:

- (1) the court of criminal appeals a copy of:
  - (A) the application;
  - (B) the answers and motions filed;
  - (C) the court reporter's transcript;
  - (D) the documentary exhibits introduced into evidence;

(E) the proposed findings of fact and conclusions of law;

(F) the findings of fact and conclusions of law entered by the court;

(G) the sealed materials such as a confidential request for investigative expenses; and

(H) any other matters used by the convicting court in resolving issues of fact; and

(2) counsel for the applicant or, if the applicant is proceeding pro se, to the applicant, a copy of:

(A) orders entered by the convicting court;

(B) proposed findings of fact and conclusions of law; and

(C) findings of fact and conclusions of law entered by the court.

(g) The clerk of the convicting court shall forward an exhibit that is not documentary to the court of criminal appeals on request of the court.

## **Sec. 10. Rules of Evidence**

The Texas Rules of Criminal Evidence apply to a hearing held under this article.

## **Sec. 11. Review by Court of Criminal Appeals**

The court of criminal appeals shall expeditiously review all applications for a writ of habeas corpus submitted under this article. The court may set the cause for oral argument and may request further briefing of the issues by the applicant or the state. After reviewing the record, the court shall enter its judgment remanding the applicant to custody or ordering the applicant's release, as the law and facts may justify.

*Addition of Sec. 6 (b-1) and (b-2) effective Jan. 1, 2012 (HB 1646, §3). Section 2 of HB 1646 provides: "The change in law made by this Act applies to a subsequent application for a writ of habeas corpus filed on or after Jan. 1, 2012. A subsequent application filed before Jan. 1, 2012, is covered by the law in effect when the application was filed, and the former law is continued in effect for that purpose."*

#### 2011 Legislative Note

HB 1646 adds Sec. 6 (b-1) to require the convicting court to appoint counsel for successor writs of habeas corpus in death penalty cases, provided that the Court of Criminal Appeals determines that the writ meets the requirements authorized by statute and if the applicant has not elected to proceed pro se and has not retained counsel. It provides an order of priority that the convicting court should use in appointing counsel.

HB 1646 adds Sec. 6 (b-2) to require payment of fees and expenses for counsel appointed to represent applicants under Sec. 6 (b-1), even if the case gets dismissed. Compensation must also cover time previously spent and reimbursement of expenses previously incurred with respect to the subsequent application.

#### Commentary

There is no federal or state constitutional right to counsel for writs of habeas corpus. *Ex parte Graves*, 70 S.W.3d 103, 111 (Tex. Crim. App. 2002) (citing *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)). So, it follows that there is no constitutional right to have effective counsel for habeas proceedings. *Id.* But, the Habeas Corpus Reform Act of 1995 created a statutory right to “competent” counsel in habeas proceedings. *Id.* at 113.

Since competency of prior habeas counsel is not a cognizable issue for habeas corpus review, claims that previous habeas counsel was not “competent” cannot fulfill the requirements of Art. 11.071 Sec. 5 for a subsequent writ. *Id.* at 104–05. If an applicant brings such a complaint, the Court of Criminal Appeals can dismiss the writ under Art. 11.071 Sec 5(c) as an abuse of the writ. *Id.* at 105.

In Texas, the competency of counsel in habeas proceedings is determined by the counsel’s qualifications, experience, and abilities at the initial appointment of counsel and not by the final product of representation. *Id.* at 114; accord *Ries v. Quarterman*, 522 F.3d 517, 526 (5th Cir. 2008). In *Ex parte Graves*, the Court of Criminal Appeals stated that allowing claims of ineffective assistance of the previous counsel in habeas proceedings would create endless and repetitious writs. *Ex parte Graves*, 70 S.W.3d at 115.

Applicants for a post-conviction writ of habeas corpus do not have to be competent to assist habeas counsel since they do not have many of the same rights as they did at trial. *Ex parte Mines*, 26 S.W.3d 910, 914–15 (Tex. Crim. App. 2000).

State and federal courts share concurrent habeas corpus jurisdiction to review the constitutional legitimacy of a conviction or death sentence obtained in state court. *Ex parte Moreno*, 245 S.W.3d 419, 428 (Tex. Crim. App. 2008).

Applicants may not have their subsequent writs considered by state courts unless they show newly available facts or law that was not available for their previous writ. *Ex parte Hood*, 304 S.W.3d 397, 406 (Tex. Crim. App. 2007). If the claims involve previously available law or facts then the court is required by statute to dismiss the application as an abuse of writ. *Id.*; accord *Emery v. Johnson*, 139 F.3d 191, 195 (5th Cir. 1997). Federal courts may grant applicants’ claims only if the Texas Court of Criminal Appeals clearly misapplied established federal law. *Ex parte Hood*, 304 S.W.3d at 406.

A medical examiner’s indication that scientific research conducted after he testified in the habeas applicant’s murder trial would have prevented him from being able to determine with a reasonable degree of medical certainty the cause of death of the victim was enough to satisfy the requirements of Section 5(a). See *Ex parte Henderson*, 246 S.W.3d 690, 692 (Tex. Crim. App. 2007).

Section 5(a)’s abuse of writ provision has been viewed as an “adequate and independent” procedural ground for procedural default purposes in federal courts. *Aguilar v. Dretke*, 428 F.3d 526, 33 (5th Cir. 2005). Federal courts will not apply the procedural default unless the last state court to consider the claim “clearly and expressly” relied on an independent and adequate state ground. *Ex parte Emery*, 139 F.3d at 195 (citing *Coleman v. Thompson*, 501 U.S. 722, 735 (1991)). If the procedural default applies, federal habeas review of the claim is barred unless the applicant “can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Ex parte Aguilar*, 428 F.3d at 532–33 (5th Cir. 2005) (quoting *Coleman*, 501 U.S. at 750).

The court evaluates the old and new evidence, whether or not it would be admitted under the rules of evidence at trial. *Ex parte Reed*, 271 S.W.3d at 733–34 (quoting *House v. Bell*, 547 U.S. 518, 537–38 (2006)). The court, taking the new record and witness credibility into account, then decides how reasonable jurors would decide. *Id.* (quoting *House*, 547 U.S. at 538–39).

In habeas proceedings where applicants raise an *Atkins* claim that they are mentally retarded and cannot be executed, the applicants bear the burden of proving, by a preponderance of the evidence, that they are mentally retarded. *Ex parte Briseno* 135 S.W.3d 1, 29-30 (Tex. Crim. App. 2001).

Applicants that file late after relying in good faith on a mistaken calculation of a deadline by a court may still have their petitions considered. *Ex parte Ramos*, 977 S.W.2d 616, 617 (Tex. Crim. App. 1998). An application for an extension of a habeas deadline must be filed and ruled on before the original deadline. *Ex parte Reynoso*, 257 S.W.3d 715, 720 (Tex. Crim. App. 2008). If the original deadline falls on a weekend or holiday, the applicant may file the habeas writ on the next business day. *Id.* at 722. But, applicants that were granted an extension must file the habeas writ on the actual date of deadline, whether or not it falls on a weekend or holiday. *Id.*

A defendant is not entitled to have a jury decide the question of mental retardation. See *Ex parte Lewis*, 223 S.W.3d 372 (Tex. Crim. App. 2006). If a jury decides the issue, the same jury from the guilt/innocence phase may determine whether a defendant is mentally retarded. *Neil v. State*, 256 S.W.3d 264, 272 (Tex. Crim. App. 2008).

Art. 11.071 does not contain any provisions for pre-writ discovery. Since courts have no jurisdiction over post-conviction matters until an application for writ of habeas corpus is filed, the courts have no jurisdiction to order discovery before an application is filed. *Ex parte Lockhart*, 868 S.W.2d 346, 347 (Tex. Crim. App. 1993); *State ex rel. Vance v. Hatten*, 508 S.W.2d 625, 628 (Tex. Crim. App. 1974).

A defendant's right to discovery is generally limited to information that is exculpatory, material, admissible, in the possession of the State, and unknown to the defendant. See *Inness v. State*, 606 S.W.2d 306, 313 (Tex. Crim. App. 1980); See also *Cooks v. State*, 844 S.W.2d 697, 737 (Tex. Crim. App. 1992); See also *Havard v. State*, 800 S.W.2d 195, 204 (Tex. Crim. App. 1989). Primary resources of law authorizing discovery in habeas proceedings are: 1) the due process clause of the 14<sup>th</sup> Amendment; 2) Art. 11.071 Sections 3 and 9; 3) Ch. 39, Code of Criminal Procedure; 4) the Public Information Act, Government Code Ch. 552; and 5) the Freedom of Information Act, 5 U.S.C. Section 552.

Late filing of a habeas corpus application in a death penalty case is permitted only if the claims could not have been presented timely or if there was a violation of the United States Constitution, but for the applicant would not have been found guilty or sentenced to death. *Ex parte Smith*, 977 S.W.2d 610, 611 (Tex. Crim. App. 1998).

## CHAPTER FOURTEEN: ARREST WITHOUT WARRANT

### Art. 14.06. Must Take Offender Before Magistrate

(a) Except as otherwise provided by this article, in each case enumerated in this Code, the person making the arrest or the person having custody of the person arrested shall take the person arrested or have him taken without unnecessary delay, but not later than 48 hours after the person is arrested, before the magistrate who may have ordered the arrest, before some magistrate of the county where the arrest was made without an order, or, to provide more expeditiously to the person arrested the warnings described by Article 15.17 of this Code, before a magistrate in any other county of this state. The magistrate shall immediately perform the duties described in Article 15.17 of this Code.

(b) A peace officer who is charging a person, including a child, with committing an offense that is a Class C misdemeanor, other than an offense under Section 49.02, Penal Code, may, instead of taking the person before a magistrate, issue a citation to the person that contains written notice of the time and place the person must appear before a magistrate, the name and address of the person charged, the offense charged, and the following admonishment, in boldfaced or underlined type or in capital letters:

"If you are convicted of a misdemeanor offense involving violence where you are or were a spouse, intimate partner, parent, or guardian of the victim or are or were involved in another, similar relationship with the victim, it may be unlawful for you to possess or purchase a firearm, including a handgun or long gun, or ammunition, pursuant to federal law under 18 U.S.C. Section 922(g)(9) or Section 46.04(b), Texas Penal Code. If you have any questions whether these laws make it illegal for you to possess or purchase a firearm, you should consult an attorney."

(c) If the person resides in the county where the offense occurred, a peace officer who is charging a person with committing an offense that is a Class A

or B misdemeanor may, instead of taking the person before a magistrate, issue a citation to the person that contains written notice of the time and place the person must appear before a magistrate of this state as described by Subsection (a), the name and address of the person charged, and the offense charged.

(d) Subsection (c) applies only to a person charged with committing an offense under:

(1) Section 481.121, Health and Safety Code, if the offense is punishable under Subsection (b)(1) or (2) of that section;

(1-a) Section 481.1161, Health and Safety Code, if the offense is punishable under Subsection (b)(1) or (2) of that section;

(2) Section 28.03, Penal Code, if the offense is punishable under Subsection (b)(2) of that section;

(3) Section 28.08, Penal Code, if the offense is punishable under Subsection (b)(1) of that section;

(4) Section 31.03, Penal Code, if the offense is punishable under Subsection (e)(2)(A) of that section;

(5) Section 31.04, Penal Code, if the offense is punishable under Subsection (e)(2) of that section;

(6) Section 38.114, Penal Code, if the offense is punishable as a Class B misdemeanor; or

(7) Section 521.457, Transportation Code.

*Addition of (d)(1-a) effective Sept. 1, 2011 (SB 331, §9).*

#### 2011 Legislative Note

SB 331 amends subsection (d) to provide that subsection (c) applies to persons charged with an offense under Section 481.1161, Health and Safety Code, if the offense is punishable under Subsection (b)(1) or (2) of that section.

#### Commentary

The Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest without warrant. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). Generally, states must make such determinations within 48 hours of arrest. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

Without a showing of a causal connection between failing to take an accused before a magistrate and the accused's confession, failing to take the accused before a magistrate without unnecessary delay does not invalidate the confession. *Boyd v. State*, 811 S.W.2d 105, 124 (Tex. Crim. App. 1991). Failing to take an accused in front of a magistrate without delay does not invalidate a voluntary confession if the accused received his Miranda rights. *Id.* at 125.

The defendant has the burden to show that under Texas law, a delay in the arraignment process renders a confession acquired during the delay inadmissible as a matter of law. *Webb v. Beto*, 415 F.2d 433, 436 (5<sup>th</sup> Cir. 1969), cert. denied, 396 U.S. 1019 (1970).

A violation of this Article does not invalidate a search made incident to a lawful arrest since the purpose of the Article is to allow the magistrate to give the accused the warnings and discharge the duties required by Article 15.17, which is not a prerequisite to the search of the accused. *Corbin v. State*, 426 S.W.2d 238, 240 (Tex. Crim. App. 1968).

## CHAPTER FIFTEEN: ARREST UNDER WARRANT

### Art. 15.17. Duties of Arresting Officer and Magistrate

(a) In each case enumerated in this Code, the person making the arrest or the person having custody of the person arrested shall without unnecessary delay, but not later than 48 hours after the person is arrested, take the person arrested or have him taken before some magistrate of the county where the accused was arrested or, to provide more expeditiously to the person arrested the warnings described by this article, before a magistrate in any other county of this state. The arrested person may be taken before the magistrate in person or the image of the arrested person may be presented to the magistrate by means of an electronic broadcast system. The magistrate shall inform in clear language the person arrested, either in person or through the electronic broadcast system, of the accusation against him and of any affidavit filed therewith, of his right to retain counsel, of his right to remain silent, of his right to have an attorney present during any interview with peace officers or attorneys representing the state, of his right to terminate the interview at any time, and of his right to have an examining trial. The magistrate shall also inform the person arrested of the person's right to request the appointment of counsel if the

person cannot afford counsel. The magistrate shall inform the person arrested of the procedures for requesting appointment of counsel. If the person does not speak and understand the English language or is deaf, the magistrate shall inform the person in a manner consistent with Articles 38.30 and 38.31, as appropriate. The magistrate shall ensure that reasonable assistance in completing the necessary forms for requesting appointment of counsel is provided to the person at the same time. If the person arrested is indigent and requests appointment of counsel and if the magistrate is authorized under Article 26.04 to appoint counsel for indigent defendants in the county, the magistrate shall appoint counsel in accordance with Article 1.051. If the magistrate is not authorized to appoint counsel, the magistrate shall without unnecessary delay, but not later than 24 hours after the person arrested requests appointment of counsel, transmit, or cause to be transmitted to the court or to the courts' designee authorized under Article 26.04 to appoint counsel in the county, the forms requesting the appointment of counsel. The magistrate shall also inform the person arrested that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall allow the person arrested reasonable time and opportunity to consult counsel and shall, after determining whether the person is currently on bail for a separate criminal offense, admit the person arrested to bail if allowed by law. A recording of the communication between the arrested person and the magistrate shall be made. The recording shall be preserved until the earlier of the following dates: (1) the date on which the pretrial hearing ends; or (2) the 91st day after the date on which the recording is made if the person is charged with a misdemeanor or the 120th day after the date on which the recording is made if the person is charged with a felony. The counsel for the defendant may obtain a copy of the recording on payment of a reasonable amount to cover costs of reproduction. For purposes of this subsection, "electronic broadcast system" means a two-way electronic communication of image and sound between the arrested person and the magistrate and includes secure internet videoconferencing.

(b) After an accused charged with a misdemeanor punishable by fine only is taken before a magistrate under Subsection (a) and the magistrate has identified the accused with certainty, the magistrate may release the accused without bond and order the accused to appear at a later date for arraignment in the applicable justice court or municipal court. The order must state in writing the time, date, and place

of the arraignment, and the magistrate must sign the order. The accused shall receive a copy of the order on release. If an accused fails to appear as required by the order, the judge of the court in which the accused is required to appear shall issue a warrant for the arrest of the accused. If the accused is arrested and brought before the judge, the judge may admit the accused to bail, and in admitting the accused to bail, the judge should set as the amount of bail an amount double that generally set for the offense for which the accused was arrested. This subsection does not apply to an accused who has previously been convicted of a felony or a misdemeanor other than a misdemeanor punishable by fine only.

(c) When a deaf accused is taken before a magistrate under this article or Article 14.06 of this Code, an interpreter appointed by the magistrate qualified and sworn as provided in Article 38.31 of this Code shall interpret the warning required by those articles in a language that the accused can understand, including but not limited to sign language.

(d) If a magistrate determines that a person brought before the magistrate after an arrest authorized by Article 14.051 of this code was arrested unlawfully, the magistrate shall release the person from custody. If the magistrate determines that the arrest was lawful, the person arrested is considered a fugitive from justice for the purposes of Article 51.13 of this code, and the disposition of the person is controlled by that article.

(e) In each case in which a person arrested is taken before a magistrate as required by Subsection (a), a record shall be made of:

(1) the magistrate informing the person of the person's right to request appointment of counsel;

(2) the magistrate asking the person whether the person wants to request appointment of counsel; and

(3) whether the person requested appointment of counsel.

(f) A record required under Subsection (e) may consist of written forms, electronic recordings, or other documentation as authorized by procedures adopted in the county under Article 26.04(a).

(g) If a person charged with an offense punishable as a misdemeanor appears before a magistrate in compliance with a citation issued under Article 14.06(b) or (c), the magistrate shall perform the duties imposed by this article in the same manner as if the person had been arrested and brought before the magistrate by a peace officer. After the magistrate performs the duties imposed by this article, the magistrate except for good cause shown may release the person on personal bond. If a person who was issued a citation under Article 14.06(c) fails to appear as required by that citation, the magistrate before which the person is required to appear shall issue a warrant for the arrest of the accused.

Commentary

See generally, commentary under Art. 14.06 and Art. 1.051, *supra*.

Procedures normally required after arrest of accused persons and the preliminary proceedings which follow, such as the specific requirements of Art. 15.17, do not apply to persons charged with a community supervision violation. *Yates v. State*, 941 S.W.2d 357, 362 (Tex. App.—Waco 1997, writ ref'd).

When error is asserted and based on violation of a statute such as Art. 15.17, the harm analysis of Tex. R. App. P. 44.2(b) must be applied. *Hinds v. State*, 970 S.W.2d 33, 35 (Tex. App.—Dallas 1998, no pet.). Errors in criminal cases that do not affect substantial rights are to be disregarded on appeal. *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000). A substantial right is affected when the error had a substantial and injurious effect or influence in determining a jury's verdict. *Id.* (quoting *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997)).

Complying with Art. 15.17 will eliminate compliance issues with *Miranda* requirements. *Clark v. State*, 627 S.W.2d 693, 704 (Tex. Crim. App. 1982).

Officers are not required to bring an arrested person before a magistrate immediately after arrest, even if a magistrate is available. See *Jenkins v. State*, 912 S.W.2d 793, 807 (Tex. Crim. App. 1995). In *Jenkins*, there was no violation when the officers brought the arrested person before a magistrate sixteen hours after his arrest even though a magistrate was available. *Id.* Failure to bring an arrested person before a magistrate in a timely manner will not invalidate a confession unless there is proof of causal connection between the delay and

confession. *Cantu v. State*, 842 S.W.2d 667, 680 (Tex. Crim. App. 1992).

The Supreme Court has held that states may prevent police officers from requesting interviews with represented defendants but there is no constitutional requirement to do so. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2089 (2009).

In Texas, a defendant's Sixth Amendment right to counsel "attaches" or begins when he is brought before a magistrate as required by Art. 15.17. That does not necessarily mean that he should get an attorney at that time, but it means that he is entitled to one at any "critical stage" that occurs thereafter. *Rothgery v. Gillespie County*, 554 U.S. 191, 211–12 (2008). A defendant's initial appearance before a magistrate judge, where he learns the charge against him and his liberty is subject to restriction, marks the initiation of adversary judicial proceedings that trigger the Sixth Amendment right to counsel. *Id.* at 212.

Police may still interrogate defendants after the right to counsel attaches as long as the officers first read the defendants their *Miranda* rights and obtain a waiver of counsel as permitted under *Miranda*. *Montejo*, 129 S. Ct. 2079 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625, which forbade police to initiate interrogation of a criminal defendant once he had invoked his right to counsel at an arraignment or similar proceeding).

Once a defendant invokes the right to have counsel present during police questioning, no interrogation may take place until counsel is present. *Id.* at 2089–90; *Hughen v. State*, 297 S.W.3d 330, 335 (Tex. Crim. App. 2009) (noting that the Fifth Amendment bars police-initiated interrogation of defendants that have asserted their right to counsel unless counsel is present at the interrogation while the Sixth Amendment does not.)

**Art. 15.18. Arrest for Out-of-County Offense**

(a) A person arrested under a warrant issued in a county other than the one in which the person is arrested shall be taken before a magistrate of the county where the arrest takes place or, to provide more expeditiously to the arrested person the warnings described by Article 15.17, before a magistrate in any other county of this state, including the county where the warrant was issued. The magistrate shall:

(1) take bail, if allowed by law, and, if without jurisdiction, immediately transmit the bond taken to the court having jurisdiction of the offense; or

(2) in the case of a person arrested under warrant for an offense punishable by fine only, accept a written plea of guilty or nolo contendere, set a fine, determine costs, accept payment of the fine and costs, give credit for time served, determine indigency, or, on satisfaction of the judgment, discharge the defendant, as the case may indicate.

(b) Before the 11th business day after the date a magistrate accepts a written plea of guilty or nolo contendere in a case under Subsection (a)(2), the magistrate shall, if without jurisdiction, transmit to the court having jurisdiction of the offense:

- (1) the written plea;
- (2) any orders entered in the case; and
- (3) any fine or costs collected in the case.

(c) The arrested person may be taken before a magistrate by means of an electronic broadcast system as provided by and subject to the requirements of Article 15.17.

(d) This article does not apply to an arrest made pursuant to a capias pro fine issued under Chapter 43 or Article 45.045.

Commentary

When an individual arrested on an out of county warrant under Art. 15.18 is also arrested on a parole revocation warrant, the magistrate who places the arrested person in jail must immediately notify the sheriff of the county in which the offense is alleged to have been committed of the arrest on both warrants. The sheriff receiving the notice must take charge of the arrested person and have him brought before the proper court or magistrate. The proper magistrate is an officer of the county identified by CCP Art. 2.09 as a magistrate, and the proper court is the court over which the magistrate presides. The sheriff may take the arrested person before a magistrate of the county where the person is held, or, to provide the magistrate's warning more expeditiously, before a magistrate in any other county of the state. The sheriff is not required to take the arrested person to a magistrate in the county to which the person was paroled. A magistrate may perform a magistrate's duties under Chapter 15 for an alleged offender even though he

is not yet authorized to try the offense on the merits. *Op. Tex. Att'y Gen. GA-0605 (2008).*

## CHAPTER SEVENTEEN: BAIL

### Art. 17.032. Release on Personal Bond of Certain Mentally Ill Defendants

(a) In this article, "violent offense" means an offense under the following sections of the Penal Code:

- (1) Section 19.02 (murder);
- (2) Section 19.03 (capital murder);
- (3) Section 20.03 (kidnapping);
- (4) Section 20.04 (aggravated kidnapping);
- (5) Section 21.11 (indecency with a child);
- (6) Section 22.01(a)(1) (assault);
- (7) Section 22.011 (sexual assault);
- (8) Section 22.02 (aggravated assault);
- (9) Section 22.021 (aggravated sexual assault);
- (10) Section 22.04 (injury to a child, elderly individual, or disabled individual);
- (11) Section 29.03 (aggravated robbery); or
- (12) Section 21.02 (continuous sexual abuse of young child or children); or
- (13) Section 20A.03 (continuous trafficking of persons).

(b) A magistrate shall release a defendant on personal bond unless good cause is shown otherwise if the:

- (1) defendant is not charged with and has not been previously convicted of a violent offense;
- (2) defendant is examined by the local mental health or mental retardation authority or another mental health expert under Article 16.22 of this code;
- (3) applicable expert, in a written assessment submitted to the magistrate under Article 16.22:

(A) concludes that the defendant has a mental illness or is a person with mental retardation and is nonetheless competent to stand trial; and

(B) recommends mental health treatment for the defendant; and

(4) magistrate determines, in consultation with the local mental health or mental retardation authority, that appropriate community-based mental health or mental retardation services for the defendant are available through the Texas Department of Mental Health and Mental Retardation under Section 534.053, Health and Safety Code, or through another mental health or mental retardation service provider.

(c) The magistrate, unless good cause is shown for not requiring treatment, shall require as a condition of release on personal bond under this article that the defendant submit to outpatient or inpatient mental health or mental retardation treatment as recommended by the local mental health or mental retardation authority if the defendant's:

(1) mental illness or mental retardation is chronic in nature; or

(2) ability to function independently will continue to deteriorate if the defendant is not treated.

(d) In addition to a condition of release imposed under Subsection (c) of this article, the magistrate may require the defendant to comply with other conditions that are reasonably necessary to protect the community.

(e) In this article, a person is considered to have been convicted of an offense if:

(1) a sentence is imposed;

(2) the person is placed on community supervision or receives deferred adjudication; or

(3) the court defers final disposition of the case.

*Amendment to (a) effective Sept. 1, 2011 (HB 3000, §4).*

**2011 Legislative Note**

HB 3000 adds subsection (a)(13) to include "continuous trafficking of persons" in the list of "violent offenses" in Art. 17.032.

**Art. 17.033. Release on Bond of Certain Persons Arrested Without a Warrant**

(a) Except as provided by Subsection (c), a person who is arrested without a warrant and who is detained in jail must be released on bond, in an amount not to exceed \$5,000, not later than the 24th hour after the person's arrest if the person was arrested for a misdemeanor and a magistrate has not determined whether probable cause exists to believe that the person committed the offense. If the person is unable to obtain a surety for the bond or unable to deposit money in the amount of the bond, the person must be released on personal bond.

(a-1) Notwithstanding subsection (a) and except as provided by subsection (c), a person who, in a county with a population of three million or more, is arrested without a warrant and who is detained in jail must be released on bond, in an amount not to exceed \$5,000, not later than the 36th hour after the person's arrest if the person was arrested for a misdemeanor and a magistrate has not determined whether probable cause exists to believe that the person committed the offense.

(b) Except as provided by Subsection (c), a person who is arrested without a warrant and who is detained in jail must be released on bond, in an amount not to exceed \$10,000, not later than the 48th hour after the person's arrest if the person was arrested for a felony and a magistrate has not determined whether probable cause exists to believe that the person committed the offense. If the person is unable to obtain a surety for the bond or unable to deposit money in the amount of the bond, the person must be released on personal bond.

(c) On the filing of an application by the attorney representing the state, a magistrate may postpone the release of a person under Subsection (a), (a-1), or (b) for not more than 72 hours after the person's arrest. An application filed under this subsection must state the reason a magistrate has not determined whether probable cause exists to believe that the person committed the offense for which the person was arrested.

(d) The time limits imposed by Subsections (a), (a-1), and (b) do not apply to a person arrested without a warrant who is taken to a hospital, clinic, or other medical facility before being taken before a magistrate under Article 15.17. For a person described by this subsection, the time limits imposed by Subsections (a), (a-1), and (b) begin to run at the time, as documented in the records of the hospital,

clinic, or other medical facility, that a physician or other medical professional releases the person from the hospital, clinic, or other medical facility.

(e) Subsection (a-1) and this subsection expire on September 1, 2013.

*Amendments of (c) and (d) and additions of (a-1) and (e) effective Sept. 1, 2011 (HB 1173, §4). Section 3 of HB 1173 provides: "The change in law made by this Act in amending Article 17.033, Code of Criminal Procedure, applies only to a person arrested for an offense committed on or after the effective date of this Act. A person arrested for an offense committed before the effective date of this Act is governed by the law in effect on the date the offense was committed, and the former law is continued in effect for that purpose. For purposes of this section, an offense was committed before the effective date of this Act if any element of the offense occurred before that date."*

**2011 Legislative Note**

HB 1173 adds subsection (a-1) to allow counties with a population of three million or more (Harris County) to hold a person without a warrant for thirty-six hours, instead of twenty-four hours, before having to release the person on bond if the person was arrested for a misdemeanor and a magistrate has not determined whether probable cause exists. HB 1173 states that (a-1) expires on September 1, 2013.

**CHAPTER TWENTY-SIX: ARRAIGNMENT**

**Art. 26.01. Arraignment**

In all felony cases, after indictment, and all misdemeanor cases punishable by imprisonment, there shall be an arraignment.

**Art. 26.011. Waiver of Arraignment**

An attorney representing a defendant may present a waiver of arraignment, and the clerk of the court may not require the presence of the defendant as a condition of accepting the waiver.

**Art. 26.02. Purpose of Arraignment**

An arraignment takes place for the purpose of fixing his identity and hearing his plea

**Art. 26.03. Time of Arraignment**

No arraignment shall take place until the expiration of at least two entire days after the day on which a copy of the indictment was served on the defendant, unless the right to such copy or to such delay be waived, or unless the defendant is on bail.

**Art. 26.04. Procedures for Appointing Counsel**

(a) The judges of the county courts, statutory county courts, and district courts trying criminal cases in each county, by local rule, shall adopt and publish written countywide procedures for timely and fairly appointing counsel for an indigent defendant in the county arrested for, or charged with, or taking an appeal from a conviction of a misdemeanor punishable by confinement or a felony. The procedures must be consistent with this article and Articles 1.051, 15.17, 26.05, and 26.052. A court shall appoint an attorney from a public appointment list using a system of rotation, unless the court appoints an attorney under Subsection (f), (f-1), (h), or (i). The court shall appoint attorneys from among the next five names on the appointment list in the order in which the attorneys' names appear on the list, unless the court makes a finding of good cause on the record for appointing an attorney out of order. An attorney who is not appointed in the order in which the attorney's name appears on the list shall remain next in order on the list.

(b) Procedures adopted under Subsection (a) shall:

- (1) authorize only the judges of the county courts, statutory county courts, and district courts trying criminal cases in the county, or the judges' designee, to appoint counsel for indigent defendants in the county;
- (2) apply to each appointment of counsel made by a judge or the judges' designee in the county;
- (3) ensure that each indigent defendant in the county who is charged with a misdemeanor punishable by confinement or with a felony and who appears in court without counsel has an opportunity to confer with appointed counsel before the commencement of judicial proceedings;
- (4) require appointments for defendants in capital cases in which the death penalty is sought to comply with any applicable requirements under Articles 11.071 and 26.052;
- (5) ensure that each attorney appointed from a public appointment list to represent an indigent defendant perform the attorney's duty owed to the defendant in accordance with the adopted procedures, the requirements of this code, and applicable rules of ethics; and

(6) ensure that appointments are allocated among qualified attorneys in a manner that is fair, neutral, and nondiscriminatory.

(c) Whenever a court or the courts' designee authorized under Subsection (b) to appoint counsel for indigent defendants in the county determines for purposes of a criminal proceeding that a defendant charged with or appealing a conviction of a felony or a misdemeanor punishable by confinement is indigent or that the interests of justice require representation of a defendant in the ~~a~~ criminal proceeding, the court or the courts' designee shall appoint one or more practicing attorneys to represent ~~defend~~ the defendant in accordance with this subsection and the procedures adopted under Subsection (a). If the court or the courts' designee determines that the defendant does not speak and understand the English language or that the defendant is deaf, the court or the courts' designee shall make an effort to appoint an attorney who is capable of communicating in a language understood by the defendant.

(d) A public appointment list from which an attorney is appointed as required by Subsection (a) shall contain the names of qualified attorneys, each of whom:

- (1) applies to be included on the list;
- (2) meets the objective qualifications specified by the judges under Subsection (e);
- (3) meets any applicable qualifications specified by the Texas Task Force on Indigent Defense Commission; and
- (4) is approved by a majority of the judges who established the appointment list under Subsection (e).

(e) In a county in which a court is required under Subsection (a) to appoint an attorney from a public appointment list:

- (1) the judges of the county courts and statutory county courts trying misdemeanor cases in the county, by formal action:

(A) shall:

- (i) establish a public appointment list of attorneys qualified to provide representation in the county in misdemeanor cases punishable by confinement; and
- (ii) specify the objective qualifications necessary for an attorney to be included on the list; and

(B) may establish, if determined by the judges to be appropriate, more than one appointment list graduated according to the degree of seriousness of the offense, and the attorneys' qualifications, and whether representation will be provided in trial court proceedings, appellate proceedings, or both; and

(2) the judges of the district courts trying felony cases in the county, by formal action:

(A) shall:

- (i) establish a public appointment list of attorneys qualified to provide representation in felony cases in the county; and
- (ii) specify the objective qualifications necessary for an attorney to be included on the list; and

(B) may establish, if determined by the judges to be appropriate, more than one appointment list graduated according to the degree of seriousness of the offense, and the attorneys' qualifications, and whether representation will be provided in trial court proceedings, appellate proceedings, or both.

(f) In a county in which a public defender's office is created or designated ~~defender is appointed~~ under Article 26.044, the court or the courts' designee may appoint that office ~~the public defender~~ to represent the defendant in accordance with guidelines established for the office~~public~~ defender.

(f-1) In a county in which a managed assigned counsel program is operated in accordance with Article 26.047, the managed assigned counsel program may appoint counsel to represent the defendant in accordance with the guidelines established for the program.

(g) A countywide alternative program for appointing counsel for indigent defendants in criminal cases is established by a formal action in which two-thirds of the judges of the courts designated under this

subsection vote to establish the alternative program. An alternative program for appointing counsel in misdemeanor and felony cases may be established in the manner provided by this subsection by the judges of the county courts, statutory county courts, and district courts trying criminal cases in the county. An alternative program for appointing counsel in misdemeanor cases may be established in the manner provided by this subsection by the judges of the county courts and statutory county courts trying criminal cases in the county. An alternative program for appointing counsel in felony cases may be established in the manner provided by this subsection by the judges of the district courts trying criminal cases in the county. In a county in which an alternative program is established:

(1) the alternative program may:

- (A) use a single method for appointing counsel or a combination of methods; and
- (B) use a multicounty appointment list using a system of rotation; and

(2) the procedures adopted under Subsection (a) must ensure that:

(A) attorneys appointed using the alternative program to represent defendants in misdemeanor cases punishable by confinement:

(i) meet specified objective qualifications for that representation, which may be graduated according to the degree of seriousness of the offense and whether representation will be provided in trial court proceedings, appellate proceedings, or both, for providing representation in misdemeanor cases punishable by confinement; and

(ii) are approved by a majority of the judges of the county courts and statutory county courts trying misdemeanor cases in the county;

(B) attorneys appointed using the alternative program to represent defendants in felony cases:

(i) meet specified objective qualifications for that representation, which may be graduated according to

the degree of seriousness of the offense and whether representation will be provided in trial court proceedings, appellate proceedings, or both, for providing representation in felony cases; and

(ii) are approved by a majority of the judges of the district courts trying felony cases in the county;

(C) appointments for defendants in capital cases in which the death penalty is sought comply with the requirements of Article 26.052; and

(D) appointments are reasonably and impartially allocated among qualified attorneys.

(h) In a county in which an alternative program for appointing counsel is established as provided by Subsection (g) and is approved by the presiding judge of the administrative judicial region, a court or the courts' designee may appoint an attorney to represent an indigent defendant by using the alternative program. In establishing an alternative program under Subsection (g), the judges of the courts establishing the program may not, without the approval of the commissioners court, obligate the county by contract or by the creation of new positions that cause an increase in expenditure of county funds.

(i) A court or the courts' designee required under Subsection (c) to appoint an attorney to represent a defendant accused or convicted of a felony may appoint an attorney from any county located in the court's administrative judicial region.

(j) An attorney appointed under this article shall:

(1) make every reasonable effort to contact the defendant not later than the end of the first working day after the date on which the attorney is appointed and to interview the defendant as soon as practicable after the attorney is appointed; and

(2) represent the defendant until charges are dismissed, the defendant is acquitted, appeals are exhausted, or the attorney is permitted or ordered relieved of his duties by the court to withdraw as counsel for the defendant or replaced by other counsel after a finding of good cause is entered on the record; and-

(3) with respect to a defendant not represented by other counsel, before withdrawing as counsel for the defendant after a trial or the entry of a plea of guilty:

(A) advise the defendant of the defendant's right to file a motion for new trial and a notice of appeal;

(B) if the defendant wishes to pursue either or both remedies described by Paragraph (A), assist the defendant in requesting the prompt appointment of replacement counsel; and

(C) if replacement counsel is not appointed promptly and the defendant wishes to pursue an appeal, file a timely notice of appeal.

(k) A court may replace an attorney who violates Subsection (j)(1) with other counsel. A majority of the judges of the county courts and statutory county courts or the district courts, as appropriate, trying criminal cases in the county may remove from consideration for appointment an attorney who intentionally or repeatedly violates Subsection (j)(1).

(l) Procedures adopted under Subsection (a) must include procedures and financial standards for determining whether a defendant is indigent. The procedures and standards shall apply to each defendant in the county equally, regardless of whether the defendant is in custody or has been released on bail.

(m) In determining whether a defendant is indigent, the court or the courts' designee may consider the defendant's income, source of income, assets, property owned, outstanding obligations, necessary expenses, the number and ages of dependents, and spousal income that is available to the defendant. The court or the courts' designee may not consider whether the defendant has posted or is capable of posting bail, except to the extent that it reflects the defendant's financial circumstances as measured by the considerations listed in this subsection.

(n) A defendant who requests a determination of indigency and appointment of counsel shall:

(1) complete under oath a questionnaire concerning his financial resources;

(2) respond under oath to an examination regarding his financial resources by the judge or

magistrate responsible for determining whether the defendant is indigent; or

(3) complete the questionnaire and respond to examination by the judge or magistrate.

(o) Before making a determination of whether a defendant is indigent, the court shall request the defendant to sign under oath a statement substantially in the following form: "On this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_, I have been advised by the (name of the court) Court of my right to representation by counsel in connection with the trial of the charge pending against me. I certify that I am without means to employ counsel of my own choosing and I hereby request the court to appoint counsel for me. (signature of the defendant)"

(p) A defendant who is determined by the court to be indigent is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant's financial circumstances occurs. If there is a material change in financial circumstances after a determination of indigency or non-indigency is made, the defendant, the defendant's counsel, or the attorney representing the state may move for reconsideration of the determination.

(q) A written or oral statement elicited under this article or evidence derived from the statement may not be used for any purpose, except to determine the defendant's indigency or to impeach the direct testimony of the defendant. This subsection does not prohibit prosecution of the defendant under Chapter 37, Penal Code.

(r) A court may not threaten to arrest or incarcerate a person solely because the person requests the assistance of counsel.

*Amendments to (a), (d), and (f) and addition of (f-1) effective Sept. 1, 2011 (HB 1754, §20).*

*Amendments to (a), (c), (e), (g), (i), (j), and (o) effective Sept. 1, 2011 (SB 1681, §4). Section 3 provides: "The change in law made by this Act applies only to a criminal proceeding that commences on or after the effective date of this Act. A criminal proceeding that commences before the effective date of this Act is governed by the law in effect when the proceeding commenced, and the former law is continued in effect for that purpose."*

#### 2011 Legislative Note

SB 1681 amends subsections (a), (c), (e), (g), (i), and (o) to require the courts to include the procedures for appointing counsel for indigent defendants appealing a conviction of felonies or

misdemeanors punishable by confinement in the local indigent defense plan when the trial counsel will be replaced by other counsel.

SB 1681 amends subsection (j) to require trial counsel to advise a defendant of his right to file a motion for new trial or appeal, and to help the defendant request appointment of replacement counsel if the defendant wishes to pursue either remedy, before being permitted by the court to withdraw representation.

HB 1754 amends subsection (a) to include subsection (f-1) in the list of options courts can appoint counsel for indigent defendants instead of using a public appointment list using a system of rotation.

HB 1754 makes non-substantive, conforming changes to subsections (d) and (f).

HB 1754 adds subsection (f-1) to allow managed assigned counsel, operating in accordance with Art. 26.047, to appoint counsel to represent the defendant in accordance with guidelines established for the program.

#### Commentary

See generally, commentary under Art. 1.051, *supra*.

The Sixth and Fourteenth Amendments guarantee that a defendant must be afforded the right to assistance of counsel before he can validly be convicted and punished by imprisonment in state or federal court. *Blankenship v. State*, 673 S.W.2d 578, 582 (Tex. Crim. App. 1984).

The Sixth Amendment guarantees both the right to counsel and the corresponding right to self-representation. *Faretta v. California*, 422 U.S. 806, 819 (1975). But see *Webb v. State*, 533 S.W.2d 780, 784 (Tex. Crim. App. 1976) (stating that while the accused has the right to prosecute his own appeal, the accused does not have a correlative right, exercisable on demand, to appear pro se before the Court of Criminal Appeals and present oral arguments). The record must adequately reflect that defendants waived their right to self-representation after asserting it, but proof of such waiver is not subject to as stringent a standard as proof of waiver of the right to counsel. *Funderburg v. State*, 717 S.W.2d 637, 642 (Tex. Crim. App. 1986). It is enough if the record sufficiently demonstrates that defendants abandon their initial request to represent themselves, although mere acquiescence to a trial court's unmistakable denial of their request to

represent themselves is not a waiver of a defendants' right to self-representation. *Id.* See also, *Brown v. Wainwright*, 665 F.2d 607, 611–12 (5<sup>th</sup> Cir. 1982).

There is no duty imposed on the trial court under Art. 26.04 to appoint counsel until the defendants show that they are indigent. *Gray v. Robinson*, 744 S.W.2d 604, 607 (Tex. Crim. App. 1988). In order to make its determination of indigence, the trial court is authorized to conduct an evidentiary hearing. *Id.*

Once established, the attorney-client relationship between an accused and his attorney should be protected by the courts without distinction as to whether the attorney is retained or appointed. *Stearnes v. Clinton*, 780 S.W.2d 216, 221–22 (Tex. Crim. App. 1989).

Once a court has appointed an attorney to represent an indigent defendant, the defendant has been afforded protections provided under Sixth and Fourteenth Amendments and Art. 26.04 regarding counsel. *Carroll v. State*, 176 S.W.3d 249, 255 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2004, pet. ref'd) (citing *Malcom v. State*, 628 S.W.2d 790, 791 (Tex. Crim. App. 1982)). If defendants are displeased with their appointed counsel, they have the burden of proof to show they are entitled to a change of counsel. *Malcom*, 628 S.W.2d at 791.

The trial court retains responsibility for relieving an *appointed attorney* of his duties. Similarly, the trial court retains the responsibility for *appointing* new counsel to represent an indigent appellant. *Bonner v. State*, 29 S.W.3d 360, 361 (Tex. App.—Waco 2000, pet. ref'd) (emphasis in original). But, when counsel files an *Anders* brief with an appellate court and the appellate court agrees that there are "no non-frivolous issues to be raised in an appeal," there is no constitutional right to counsel and the appellate court may grant counsel's request to withdraw from the case. *Meza v. State*, 206 S.W.3d 684, 688–89 (Tex. Crim. App. 2006).

Where counsel is not *replaced*, a magistrate does not err in permitting an attorney to *substitute* for counsel of record where the defendant agrees to the substitution and the attorney of record does not object. *Roberson v. State*, 879 S.W.2d 250, 252 (Tex. App.—Dallas 1994, pet. ref'd) (emphasis in original) (citing *Buntion v. Harmon*, *infra*).

A trial judge does not have the discretion to replace appointed trial counsel over counsel and defendant's objections without some principled reason apparent

from the face of the record. *Buntion v. Harmon*, 827 S.W.2d 945, 949 (Tex. Crim. App. 1992); See also *Stotts v. Wisser*, 894 S.W.2d 366, 368 (Tex. Crim. App. 1995).

Trial counsel, retained or appointed, has the duty to consult with and fully to advise clients concerning the meaning and effect of the judgment rendered by the court, their right to appeal from that judgment, and the necessity of giving notice of appeal and taking other steps to pursue an appeal. *Ex parte Axel*, 757 S.W.2d 369, 374 (Tex. Crim. App. 1998). Counsel should also discuss possible grounds for appeal and their merit, and delineate the advantages and disadvantages of appeal. *Id.* at 374.

When defendant's trial counsel does not withdraw from representation after sentencing and is not replaced by new counsel, a rebuttable presumption exists that trial counsel continued to effectively represent him during the time for filing a motion for new trial. See *Smith v. State*, 17 S.W.3d 660, 662 (Tex. Crim. App. 2000) (quoting *Oldham v. State*, 977 S.W.2d 354, 363 (Tex. Crim. App. 1998)).

In order for a defendant to be considered "indigent" and receive a free appellate record, the defendant must make a *prima facie* showing of indigence. *Tuck v. State*, 215 S.W.3d 411, 415 (Tex. Crim. App. 2007) (quoting *Whitehead v. State*, *infra*). The Court of Criminal Appeals implied that the two-step process should also be used to determine whether to appoint counsel for an appeal. See *Whitehead v. State*, 130 S.W.3d 866, 874 (Tex. Crim. App. 2004). While these inquiries generally involve the same factors, it is possible for a defendant to be indigent in one context but not the other, depending principally on the respective costs of each. *Whitehead*, 130 S.W.3d at 878; See also *Castillo v. State*, 595 S.W.2d 552 (Tex. Crim. App. 1980).

The trial court is not completely free to disbelieve the defendant's allegations concerning his own financial status when determining indigence, but the trial court may disbelieve an allegation if there is a reasonable, articulable basis for doing so, either because there is conflicting evidence or because the evidence submitted is in some manner suspect or determined by the court to be inadequate. *Whitehead*, 130 S.W.3d at 876. An inquiry into the reasonableness of the defendant's expenses is appropriate in order to determine whether a defendant can pay for an appellate record. *Tuck*, 215 S.W.3d at 416.

Submitting an "income and expense summary" and a "net worth statement," along with a signed affidavit

attesting to the truth of these documents, served the same purpose as answering a written questionnaire and thus sufficed to meet the requirements of Art. 26.04(n)(1). *Whitehead*, 130 S.W.3d. at 877.

An individual's negative net worth does not necessarily translate into indigence. *Id.* at 878. The real question is whether the defendant is capable of paying for legal counsel and for the appellate record. *Id.*

A person may not transfer his assets while awaiting trial, after alleging indigence, so that he may receive appointment of counsel, a free transcript, and free statement of facts. *Cardona v. Marshall*, 635 S.W.2d 741, 743 (Tex. Crim. App. 1982). A defendant, however, should not be denied appointment of counsel solely because other members of his family have assets and income. *Id.* at 743 (quoting *United States v. Rubinson*, 543 F.2d 951 (2<sup>nd</sup> Cir.), cert. denied).

#### **Art. 26.044. Public Defender's OfficeDefender**

(a) In this chapter:

(1) "Governmental entity" includes a county, a group of counties, a department branch ~~or~~ agency of a county, an administrative judicial region created by Section 74.042, Government Code, and any entity created under the Interlocal Cooperation Act as permitted by Chapter 791, Government Code.

(2) "Office of capital writs" means the office of capital writs established under Subchapter B, Chapter 78, Government Code.

(3) "Oversight board" means an oversight board established in accordance with Article 26.045.

(4) "Public defender's officedefender" means an entity that:

(A) is either:

(i) a governmental entity; or

(ii) a nonprofit corporation operating under a written agreement with a governmental entity, other than an individual judge or court; and:

(A) operating under a written agreement with a governmental entity, other than an individual judge or court;

(B) using public funds to provide legal representation and services to indigent defendants accused of a crime or juvenile offense, as those terms are defined by Section 79.001, Government Code; and

(C) providing legal representation and services to indigent defendants accused of a crime or juvenile offense, as those terms are defined by Section 71.001, Government Code.

(3) "Office of capital writs" means the office of capital writs established under Subchapter B, Chapter 78, Government Code.

(b) The commissioners court of any county, on written approval of a judge of a county court, statutory county court, or district court trying criminal cases or cases under Title 3, Family Code, in the county, may create a department of the county or by contract may designate a ~~appoint~~ a governmental entity or nonprofit corporation to serve as a public defender's office. The commissioners courts of two or more counties may enter into a written agreement to jointly ~~create~~ or ~~designate~~ ~~appoint~~ and jointly fund a regional public defender's office. In ~~creating~~ or ~~designating~~ ~~appointing~~ a public defender's office under this subsection, the commissioners court shall specify or the commissioners courts shall jointly specify, if ~~creating~~ or ~~designating~~ ~~appointing~~ a regional public defender's office:

(1) the duties of the public ~~defender's office~~;

(2) the types of cases to which the public ~~defender's office~~ may be appointed under Article 26.04(f) and the courts in which an attorney employed by the public ~~defender's office~~ may be required to appear;

(3) if the public ~~defender's office~~ is a nonprofit corporation, the term during which the contract designating the public ~~defender's office~~ is effective and how that contract may be renewed on expiration of the term whether the public ~~defender~~ is appointed to serve a term or serve at the pleasure of the commissioners court or the commissioners courts; and

(4) if ~~an oversight board is established under Article 26.045 for the public defender's office, the powers and duties that have been delegated to the oversight board~~ the public ~~defender~~ is appointed to serve a term, the term of appointment and the procedures for removing the public ~~defender~~.

(b-1) The applicable commissioners court or commissioners courts shall require a written plan from a governmental entity serving as a public defender's office.

(c) Before contracting with a nonprofit corporation to serve as ~~appointing~~ a public ~~defender's office~~ under Subsection (b), the commissioners court or commissioners courts shall solicit proposals for the public ~~defender's office~~.

(c-1) A written plan under Subsection (b-1) or a proposal must include:

(1) a budget for the public ~~defender's office~~, including salaries;

(2) a description of each personnel position, including the chief public ~~defender~~ position;

(3) the maximum allowable caseloads for each attorney employed by the ~~public ~~defender's office~~~~ proponent;

(4) provisions for personnel training;

(5) a description of anticipated overhead costs for the public ~~defender's office~~; and

(6) policies regarding the use of licensed investigators and expert witnesses by the ~~public ~~defender's office~~~~; and

(7) a policy to ensure that the chief public ~~defender~~ and other attorneys employed by the public ~~defender's office~~ do not provide representation to a defendant if doing so would create a conflict of interest that has not been waived by the client proponent.

(d) After considering each proposal for the public ~~defender's office~~ submitted by a governmental entity or nonprofit corporation under Subsection (c), the commissioners court or commissioners courts shall select a proposal that reasonably demonstrates that the ~~public ~~defender's office~~~~ proponent will provide adequate quality

representation for indigent defendants in the county or counties.

(e) The total cost of the proposal under Subsection (c) may not be the sole consideration in selecting a proposal.

(f) A To be eligible for appointment as a public defender's office must be directed by a chief public defender who:

- (1) is a member of the State Bar of Texas;
- (2) has practiced law for at least three years; and
- (3) has substantial experience in the practice of criminal law.

(g) A public defender's office~~defender~~ is entitled to receive funds for personnel costs and expenses incurred in operating as a public defender's office~~defender~~ in amounts fixed by the commissioners court and paid out of the appropriate county fund, or jointly fixed by the commissioners courts and proportionately paid out of each appropriate county fund if the public defender's office~~defender~~ serves more than one county.

(h) A public defender's office~~defender~~ may employ attorneys, licensed investigators, and other personnel necessary to perform the duties of the public defender's office~~defender~~ as specified by the commissioners court or commissioners courts under Subsection (b)(1).

(i) Except as authorized by this article, the chief public defender and other attorneys or an attorney employed by a public defender's office~~defender~~ may not:

- (1) engage in the private practice of criminal law; or
- (2) accept anything of value not authorized by this article for services rendered under this article.

(j) A public defender's office~~defender~~ may not accept refuse an appointment under Article 26.04(f) if:

- (1) a conflict of interest exists that has not been waived by the client;
- (2) the public defender's office~~defender~~ has insufficient

resources to provide adequate representation for the defendant;

(3) the public defender's office~~defender~~ is incapable of providing representation for the defendant in accordance with the rules of professional conduct; or

(4) the public defender's office~~defender~~ shows other good cause for not accepting refusing the appointment.

(k) The judge may remove from a case a person public defender who violates a provision of Subsection (i) .

(l) A public defender's office~~defender~~ may investigate the financial condition of any person the public defender's office~~defender~~ is appointed to represent. The public defender's office~~defender~~ shall report the results of the investigation to the appointing judge. The judge may hold a hearing to determine if the person is indigent and entitled to representation under this article.

(m) If it is necessary that an attorney who is not employed by other than a public defender's office~~defender~~ be appointed, the attorney is entitled to the compensation provided by Article 26.05 of this code.

(n) An attorney employed by a public defender's office may be appointed with respect to an application for a writ of habeas corpus only if:

- (1) an attorney employed by the office of capital writs is not appointed in the case; and
- (2) the attorney employed by the public defender's office is on the list of competent counsel maintained under Section 78.056, Government Code.

*Amendments of (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), and (m) and addition of (b-1) and (c-1) effective Sept. 1, 2011 (HB 1754, §20).*

#### 2011 Legislative Note

HB 1754 amends (a) to include definitions for "office of capital writs" and "oversight board", redefine "governmental entity", and replace the definition of "public defender" with "public defender's office".

HB 1754 amends (b) to provide that a commissioners court of any county may create a department of the county or can, by contract, designate a nonprofit corporation to serve as a public defender's office, with the approval of a judge

of a county court, statutory county courts, or district court trying criminal cases or cases under Title 3, Family Code, in the county and provides requirements that the commissioners court must specify in creating a public defender's office.

HB 1754 adds (b-1) to require the commissioners court to require a written plan from a governmental entity serving as a public defender's office.

HB 1754 amends (c) to require a county to solicit proposals before entering into a contract with a nonprofit corporation to serve as public defender. The solicitation requirement no longer applies if a county chooses to create a county department to serve as the public defender's office.

HB 1754 adds (c-1) to provide requirements for a written plan for a county department under (b-1) or a proposal from a nonprofit corporation for a public defender's office under (c).

HB 1754 amends (f) to require that the chief public defender directing the public defender's office have certain qualifications.

HB 1754 amends (j) to prohibit a public defender's office from accepting an appointment under Art. 26.04(f) if a conflict of interest exists and it has not been waived by the client.

HB 1754 amends (m) to provide that if it is necessary to appoint an attorney not employed by a public attorney's office, the attorney is entitled to the compensation provided by Art. 26.05.

HB 1754 makes conforming and nonsubstantive changes to (b), (c), (c-1), (d), (e), (f), (g), (h), (i), (j) and (l) to distinguish between a public defender's office and an attorney in such an office.

#### Commentary

After the commissioners court has established a public defender's office pursuant to Art. 26.044, Code of Criminal Procedure, it remains obligated to pay attorneys appointed by trial courts to represent indigent defendants and must direct payment of the full amount of attorney fees ordered by a court under Art. 26.05 unless it can show that the trial court's award is so unreasonable as to amount to an abuse of discretion. *Op. Tex. Att'y Gen. LO-063 (1997)*.

#### Art. 26.045. PUBLIC DEFENDER OVERSIGHT BOARD.

(a) The commissioners court of a county or the commissioners courts of two or more counties may establish an oversight board for a public defender's office created or designated in accordance with this chapter.

(b) The commissioners court or courts that establish an oversight board under this article shall appoint members of the board. Members may include one or more of the following:

- (1) an attorney;
- (2) the judge of a trial court in this state;
- (3) a county commissioner;
- (4) a county judge;
- (5) a community representative; and
- (6) a former client or a family member of a former client of the public defender's office for which the oversight board was established under this article.

(c) The commissioners court or courts may delegate to the board any power or duty of the commissioners court to provide oversight of the office under Article 26.044, including:

- (1) recommending selection and removal of a chief public defender;
- (2) setting policy for the office; and
- (3) developing a budget proposal for the office.

(d) An oversight board established under this article may not gain access to privileged or confidential information.

*Addition of Art. 26.045 effective Sept. 1, 2011 (HB 1754 §20).*

#### 2011 Legislative Note

HB 1754 adds this article to create a public defender oversight board and set forth who may be a member of the board and what powers the board may have.

## Art. 26.047. Managed Assigned Counsel Program

(a) In this article:

- (1) "Governmental entity" has the meaning assigned by Article 26.044.
- (2) "Managed assigned counsel program" or "program" means a program operated with public funds:

(A) by a governmental entity, nonprofit corporation, or bar association under a written agreement with a governmental entity, other than an individual judge or court; and

(B) for the purpose of appointing counsel under Article 26.04 of this code or Section 51.10, Family Code.

(b) The commissioners court of any county, on written approval of a judge of the juvenile court of a county or a county court, statutory county court, or district court trying criminal cases in the county, may appoint a governmental entity, nonprofit corporation, or bar association to operate a managed assigned counsel program. The commissioners courts of two or more counties may enter into a written agreement to jointly appoint and fund a governmental entity, nonprofit corporation, or bar association to operate a managed assigned counsel program. In appointing an entity to operate a managed assigned counsel program under this subsection, the commissioners court shall specify or the commissioners courts shall jointly specify:

(1) the types of cases in which the program may appoint counsel under Article 26.04 of this code or Section 51.10, Family Code, and the courts in which the counsel appointed by the program may be required to appear; and

(2) the term of any agreement establishing a program and how the agreement may be terminated or renewed.

(c) The commissioners court or commissioners courts shall require a written plan of operation from an entity operating a program under this article. The plan of operation must include:

(1) a budget for the program, including salaries;

(2) a description of each personnel position, including the program's director;

(3) the maximum allowable caseload for each attorney appointed by the program;

(4) provisions for training personnel of the program and attorneys appointed under the program;

(5) a description of anticipated overhead costs for the program;

(6) a policy regarding licensed investigators and expert witnesses used by attorneys appointed under the program;

(7) a policy to ensure that appointments are reasonably and impartially allocated among qualified attorneys; and

(8) a policy to ensure that an attorney appointed under the program does not accept appointment in a case that involves a conflict of interest for the attorney that has not been waived by all affected clients.

(d) A program under this article must have a director. Unless the program uses a review committee appointed under Subsection (e), a program under this article must be directed by a person who:

(1) is a member of the State Bar of Texas;

(2) has practiced law for at least three years; and

(3) has substantial experience in the practice of criminal law.

(e) The governmental entity, nonprofit corporation, or bar association operating the program may appoint a review committee of three or more individuals to approve attorneys for inclusion on the program's public appointment list described by Subsection (f). Each member of the committee:

(1) must meet the requirements described by Subsection (d);

(2) may not be employed as a prosecutor; and

(3) may not be included on or apply for inclusion on the public appointment list described by Subsection (f).

(f) The program's public appointment list from which an attorney is appointed must contain the names of qualified attorneys, each of whom:

(1) applies to be included on the list;

(2) meets any applicable requirements specified by the procedure for appointing counsel adopted under Article 26.04(a) and the Texas Indigent Defense Commission; and

(3) is approved by the program director or review committee, as applicable.

(g) A court may replace an attorney appointed by the program for the same reasons and in the same manner described by Article 26.04(k).

(h) A managed assigned counsel program is entitled to receive funds for personnel costs and expenses incurred in amounts fixed by the commissioners court and paid out of the appropriate county fund, or jointly fixed by the commissioners courts and proportionately paid out of each appropriate county fund if the program serves more than one county.

(i) A managed assigned counsel program may employ personnel and enter into contracts necessary to perform the program's duties as specified by the commissioners court or commissioners courts under this article.

*Addition of Art. 26.047 effective Sept. 1, 2011 (HB 1754 §20).*

#### 2011 Legislative Note

HB 1754 adds this article to create a managed assigned counsel program and set forth who may authorize the program, who may participate in the program, and what powers the program may have.

#### **Art. 26.05. Compensation of Counsel Appointed to Defend**

(a) A counsel, other than an attorney with a public defender's office defender—or an attorney employed by the office of capital writs, appointed to represent a defendant in a criminal proceeding, including a habeas corpus hearing, shall be paid a reasonable attorney's fee for performing the following services, based on the time and labor required, the complexity

of the case, and the experience and ability of the appointed counsel:

(1) time spent in court making an appearance on behalf of the defendant as evidenced by a docket entry, time spent in trial, and time spent in a proceeding in which sworn oral testimony is elicited;

(2) reasonable and necessary time spent out of court on the case, supported by any documentation that the court requires;

(3) preparation of an appellate brief and preparation and presentation of oral argument to a court of appeals or the Court of Criminal Appeals; and

(4) preparation of a motion for rehearing.

(b) All payments made under this article shall be paid in accordance with a schedule of fees adopted by formal action of the judges of the county courts, statutory county courts, and district courts trying criminal cases in each county. On adoption of a schedule of fees as provided by this subsection, a copy of the schedule shall be sent to the commissioners court of the county.

(c) Each fee schedule adopted shall state reasonable fixed rates or minimum and maximum hourly rates, taking into consideration reasonable and necessary overhead costs and the availability of qualified attorneys willing to accept the stated rates, and shall provide a form for the appointed counsel to itemize the types of services performed. No payment shall be made under this article until the form for itemizing the services performed is submitted to the judge presiding over the proceedings or, if the county operates a managed assigned counsel program under Article 26.047, to the director of the program, and until the judge or director, as applicable, approves the payment. If the judge or director disapproves the requested amount of payment, the judge or director shall make written findings stating the amount of payment that the judge or director approves and each reason for approving an amount different from the requested amount. An attorney whose request for payment is disapproved or is not otherwise acted on by the 60th day after the date the request for payment is submitted may appeal the disapproval or failure to act by filing a motion with the presiding judge of the administrative judicial region. On the filing of a motion, the presiding judge of the administrative judicial region shall review the disapproval of

payment or failure to act and determine the appropriate amount of payment. In reviewing the disapproval or failure to act, the presiding judge of the administrative judicial region may conduct a hearing. Not later than the 45th day after the date an application for payment of a fee is submitted under this article, the commissioners court shall pay to the appointed counsel the amount that is approved by the presiding judge of the administrative judicial region and that is in accordance with the fee schedule for that county.

(d) A counsel in a non-capital case, other than an attorney with a public ~~defender's office~~<sup>defender</sup>, appointed to represent a defendant under this code shall be reimbursed for reasonable and necessary expenses, including expenses for investigation and for mental health and other experts. Expenses incurred with prior court approval shall be reimbursed in the same manner provided for capital cases by Articles 26.052(f) and (g), and expenses incurred without prior court approval shall be reimbursed in the manner provided for capital cases by Article 26.052(h).

(e) A majority of the judges of the county courts and statutory county courts or the district courts, as appropriate, trying criminal cases in the county may remove an attorney from consideration for appointment if, after a hearing, it is shown that the attorney submitted a claim for legal services not performed by the attorney.

(f) All payments made under this article shall be paid from the general fund of the county in which the prosecution was instituted or habeas corpus hearing held and may be included as costs of court.

(g) If the court determines that a defendant has financial resources that enable him to offset in part or in whole the costs of the legal services provided, including any expenses and costs, the court shall order the defendant to pay during the pendency of the charges or, if convicted, as court costs the amount that it finds the defendant is able to pay.

(h) Reimbursement of expenses incurred for purposes of investigation or expert testimony may be paid directly to a private investigator licensed under Chapter 1702, Occupations Code, or to an expert witness in the manner designated by appointed counsel and approved by the court.

(i) ~~The indigent defense representation fund is a separate account in the general revenue fund. The fund:~~

~~(1) consists of criminal fees collected under Section 133.107, Local Government Code; and~~

~~(2) may be used only for the purposes for which the fair defense account established under Section 71.058, Government Code, may be used, including compensating appointed counsel in accordance with this code.~~

*Amendment to (a), (c), and (d) effective Sept. 1, 2011 (HB 1754 §20).*

#### 2011 Legislative Note

HB 1754 makes a conforming change to subsections (a) and (d).

HB 1754 amends (c) to prohibit an attorney's fees from being paid under this article until the form for itemizing the services performed is submitted to the judge presiding over the proceedings or, if the county operates a managed assigned counsel program, to the director of the program, and until the judge or director approves the payment.

HB 1754 repealed subsection (i) to delete language related to the indigent representation fund, which was not ever formally created.

#### Commentary

Trial courts may order defendants to pay court-appointed attorney fees if they determine that a defendant has enough financial resources to pay for some or all the costs of an attorney's services. *Sauceda v. State*, 309 S.W.3d 767, 770 (Tex. App.—Amarillo 2010, pet. ref'd). A defendant's resources and ability to pay are critical elements in a trial courts determination of whether a defendant should be assessed attorney fees. *Mayer v. State*, 309 S.W.3d 552, 556 (Tex. Crim. App. 2010); See also *Sauceda*, 309 S.W.3d at 770. The Court of Criminal Appeals recently affirmed that an order to repay appointed attorney fees is invalid if it is entered without any "determination or finding by the trial court that appellant had any financial resources or was 'able to pay' the appointed attorney fees." *Mayer*, 309 S.W.3d at 553.

A complaint about the sufficiency of evidence of an appellant's financial resources and ability to pay are not waived by the appellant's failure to raise the complaint at trial. *Mayer*, 309 S.W.3d at 556. Cases with claims of insufficient evidence usually do not get remanded to allow for supplements to be added to the record. *Id.* at 557. The claims are measured by viewing the evidence in the record in the light most favorable to the verdict. *Id.*

The assessment of fees for an appointed attorney is not punitive. *Armstrong v. State*, 340 S.W.3d 759 (Tex. Crim. App. 2011). Court costs (including attorneys fees), as reflected in a certified bill of costs, need neither be orally pronounced nor incorporated by reference in the judgment to be effective. *Id.*

Appellants complaining of improper action under Art. 26.05 must show how they were harmed or injured by such action through evidence in the record. *Reed v. State*, 644 S.W.2d 479, 481 (Tex. Crim. App. 1983).

State funded attorney fees cannot be awarded for services rendered prior to the date counsel is formally appointed to represent an indigent. *Gray v. Robinson*, 744 S.W.2d 604, 607 (Tex. Crim. App. 1988).

Appointment of an expert witness under Art. 26.05 rests within sound discretion of trial court. *Quin v. State*, 608 S.W.2d 937, 938 (Tex. Crim. App. 1980). Absent a showing of harm, no abuse of that discretion will be found. *Id.*

It is not an inherent violation of due process for the State, pursuant to Art. 26.05(g), to take reasonable steps to collect on expenditures made on behalf of those who have the ability to off-set the State's expenses. *Curry v. Wilson*, 853 S.W.2d 40, 46 (Tex. Crim. App. 1993).

The trial court has discretion in determining the proper value of legal fees it orders a defendant to pay under Art. 26.05(g), but due process considerations require evidence in the record to provide a factual basis for the amount set. *Hester v. State*, 859 S.W.2d 95, 97 (Tex. App.—Dallas 1993, no pet.) (citing *Barker v. State*, 662 S.W.2d 640, 642 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1983, no pet.)). Trial court cannot postpone the determination of fees owed indefinitely to some time after the judgment becomes final. *Burke v. State*, 261 S.W.3d 438, 439 (Tex. App.—Austin 2008, no pet.).

An indigent's court-appointed attorney for a civil contempt proceeding may not be paid from the general fund of a county under the authority of Art. 26.04. *Op. Tex. Att'y Gen. JM-403* (1985).

Indigent defendants are not automatically entitled to assistance of court-appointed counsel to file a petition for discretionary review. *Peterson v. Jones*, 894 S.W.2d 370, 373 (Tex. Crim. App. 1995). There

is no statutory duty for district judges to authorize payment for attorney services performed in filing petitions for discretionary review. *Id.*

Defendants must be informed of their right to representation, and if found indigent, their right to appointment of counsel at a contempt proceeding for failure to pay court ordered attorney fees. *Ex parte Gonzales*, 945 S.W.2d 830 (Tex. Crim. App. 1997).

On September 7th, 2011, the attorney general issued Opinion No. GA-0884 related to the appointment of counsel in criminal cases for non-indigent defendants. The opinion concluded that although a court generally has no duty to appoint counsel to a non-indigent, a court may do so when the interests of justice require. The opinion also addressed appropriate amounts of attorney fee repayment orders when the county is served by a contract defender. The attorney general concluded a court may require a defendant, in an order of community supervision, to pay attorney fees according to the county's schedule of fees established under article 26.05, Code of Criminal Procedure, regardless of the amount of the county's contract with individual attorneys.

#### **Art. 26.051. Indigent Inmate Defense**

(a) In this article:

(1) "Board" means the Texas Board of Criminal Justice.

(2) "Correctional institutions division" means the correctional institutions division of the Texas Department of Criminal Justice.

(b) A court shall:

(1) notify the board if it determines that a defendant before the court is indigent and is an inmate charged with an offense committed while in the custody of the correctional institutions division or a correctional facility authorized by Section 495.001, Government Code; and  
(2) request that the board provide legal representation for the inmate.

(c) The board shall provide legal representation for inmates described by Subsection (d) of this section. The board may employ attorneys, support staff, and any other personnel required to provide legal representation for those inmates. All personnel employed under this article are directly responsible to the board in the performance of their duties. The

board shall pay all fees and costs associated with providing legal representation for those inmates.

(d) Repealed by Acts 1993, 73rd Leg., ch. 988, Sec. 7.02, eff. Sept. 1, 1993.

(e) The court shall appoint an attorney other than an attorney provided by the board if the court determines for any of the following reasons that a conflict of interest could arise from the use of an attorney provided by the board under Subsection (e) of this article:

(1) the case involves more than one inmate and the representation of more than one inmate could impair the attorney's effectiveness;

(2) the case is appealed and the court is satisfied that conflict of interest would prevent the presentation of a good faith allegation of ineffective assistance of counsel by a trial attorney provided by the board; or

(3) any conflict of interest exists under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas that precludes representation by an attorney appointed by the board.

(f) When the court appoints an attorney other than an attorney provided by the board:

(1) except as otherwise provided by this article, the inmate's legal defense is subject to Articles 1.051, 26.04, 26.05, and 26.052, as applicable; and

(2) the county in which a facility of the correctional institutions division or a correctional facility authorized by Section 495.001, Government Code, is located shall pay from its general fund the total costs of the aggregate amount allowed and awarded by the court for attorney compensation and expenses under Article 26.05 or 26.052, as applicable.

(g) The state shall reimburse a county for attorney compensation and expenses awarded under Subsection (h). A court seeking reimbursement for a county shall certify to the comptroller of public accounts the amount of compensation and expenses for which the county is entitled to be reimbursed under this article. Not later than the 60th day after the date the comptroller receives from the court the request for reimbursement, the comptroller

shall issue a warrant to the county in the amount certified by the court.

**Art. 26.052. Appointment of Counsel in Death Penalty Case; Reimbursement of Investigative Expenses**

(a) Notwithstanding any other provision of this chapter, this article establishes procedures in death penalty cases for appointment and payment of counsel to represent indigent defendants at trial and on direct appeal and to apply for writ of certiorari in the United States Supreme Court.

(b) If a county is served by a public defender's office, trial counsel and counsel for direct appeal or to apply for a writ of certiorari may be appointed as provided by the guidelines established by the public defender's office. In all other cases in which the death penalty is sought, counsel shall be appointed as provided by this article.

(c) A local selection committee is created in each administrative judicial region created under Section 74.042, Government Code. The administrative judge of the judicial region shall appoint the members of the committee. A committee shall have not less than four members, including:

(1) the administrative judge of the judicial region;

(2) at least one district judge;

(3) a representative from the local bar association; and

(4) at least one practitioner who is board certified by the State Bar of Texas in criminal law.

(d) (1) The committee shall adopt standards for the qualification of attorneys to be appointed to represent indigent defendants in capital cases in which the death penalty is sought.

(2) The standards must require that a trial attorney appointed as lead counsel to a capital case:

(A) be a member of the State Bar of Texas;

(B) exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases;

(C) 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, unless the local selection committee determines under subsection (n) that the conduct underlying the finding no longer accurately reflects the attorney's ability to provide effective representation;

(D) have at least five years of criminal law experience;

(E) have tried to a 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;

(F) have trial experience in:

(i) the use of and challenges to mental health or forensic expert witnesses; and

(ii) investigating and presenting mitigating evidence at the penalty phase of a death penalty trial; and

(G) have participated in continuing legal education courses or other training relating to criminal defense in death penalty cases.

(3) The standards must require that an attorney appointed as lead counsel in the direct appeal of a capital case:

(A) be a member of the State Bar of Texas;

(B) exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases;

(C) 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, unless the local selection committee determines under subsection (n) that the conduct underlying the finding no longer accurately reflects the attorney's ability to provide effective representation;

(D) have at least five years of criminal law experience;

(E) have authored a significant number of appellate briefs, including appellate briefs for homicide cases and other cases involving an offense punishable as a capital felony or a felony of the first degree or an offense described by Section 3g(a)(1), Article 42.12;

(F) have trial or appellate experience in:

(i) the use of and challenges to mental health or forensic expert witnesses; and

(ii) the use of mitigating evidence at the penalty phase of a death penalty trial; and

(G) have participated in continuing legal education courses or other training relating to criminal defense in appealing death penalty cases.

(4) The committee shall prominently post the standards in each district clerk's office in the region with a list of attorneys qualified for appointment.

(5) Not later than the second anniversary of the date an attorney is placed on the list of attorneys qualified for appointment in death penalty cases and each year following the second anniversary, the attorney must present proof to the committee that the attorney has successfully completed the minimum continuing legal education requirements of the State Bar of Texas, including a course or other form of training relating to criminal defense in death penalty cases or in appealing death penalty cases, as applicable. The committee shall remove the attorney's name from the list of qualified attorneys if the attorney fails to provide the committee with proof of completion of the continuing legal education requirements.

(e) The presiding judge of the district court in which a capital felony case is filed shall appoint two attorneys, at least one of whom must be qualified under this chapter, to represent an indigent defendant as soon as practicable after charges are filed, unless the state gives notice in writing that the state will not seek the death penalty.

(f) Appointed counsel may file with the trial court a pretrial ex parte confidential request for advance payment of expenses to investigate potential defenses. The request for expenses must state:

- (1) the type of investigation to be conducted;
- (2) specific facts that suggest the investigation will result in admissible evidence; and
- (3) an itemized list of anticipated expenses for each investigation.

(g) The court shall grant the request for advance payment of expenses in whole or in part if the request is reasonable. If the court denies in whole or in part the request for expenses, the court shall:

- (1) state the reasons for the denial in writing;
- (2) attach the denial to the confidential request; and
- (3) submit the request and denial as a sealed exhibit to the record.

(h) Counsel may incur expenses without prior approval of the court. On presentation of a claim for reimbursement, the court shall order reimbursement of counsel for the expenses, if the expenses are reasonably necessary and reasonably incurred.

(i) If the indigent defendant is convicted of a capital felony and sentenced to death, the defendant is entitled to be represented by competent counsel on appeal and to apply for a writ of certiorari to the United States Supreme Court.

(j) As soon as practicable after a death sentence is imposed in a capital felony case, the presiding judge of the convicting court shall appoint counsel to represent an indigent defendant on appeal and to apply for a writ of certiorari, if appropriate.

(k) The court may not appoint an attorney as counsel on appeal if the attorney represented the defendant at trial, unless:

- (1) the defendant and the attorney request the appointment on the record; and
- (2) the court finds good cause to make the appointment.

(l) An attorney appointed under this article to represent a defendant at trial or on direct appeal is compensated as provided by Article 26.05 from county funds. Advance payment of expenses anticipated or reimbursement of expenses incurred for purposes of investigation or expert testimony may be paid directly to a private investigator

licensed under the Private Investigators and Private Security Agencies Act (Article 4413(29bb), Vernon's Texas Civil Statutes) or to an expert witness in the manner designated by appointed counsel and approved by the court.

(m) The local selection committee shall annually review the list of attorneys posted under Subsection (d) to ensure that each listed attorney satisfies the requirements under this chapter.

(n) At the request of an attorney, the local selection committee shall make a determination under subsection (d)(2)(C) or (3)(C), as applicable, regarding an attorney's current ability to provide effective representation following a judicial finding that the attorney previously rendered ineffective assistance of counsel in a capital case.

*Amendment to (d) and addition of (n) effective Sept. 1, 2011 (SB 1308, §4). Section 2 of SB 1308 provides: "The change in law made by this Act applies to an attorney who, before, on, or after the effective date of this Act, has been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of a capital case." Section 3 of SB 1308 provides: "A local selection committee shall amend its standards as necessary to conform with the requirements of Subsection (n), Article 26.052, Code of Criminal Procedure, as added by this Act, not later than the 30th day after the effective date of this Act."*

#### 2011 Legislative Note

SB 1308 amends subsection (d) to provide attorneys that 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 may still be appointed to represent a defendant in trial of a capital case or the direct appeal of a capital case if they satisfy subsection (n) of this section.

SB 1308 adds subsection (n) to require a local selection committee, at the request of an attorney, to make a determination under subsection (d)(2)(C) or (3)(C), as applicable, regarding the attorney's current ability to provide effective representations following a judicial finding that the attorney previously rendered ineffective of counsel in a capital case.

#### Commentary

Failure to comply with Art. 26.052 is susceptible to harmless error analysis. *Kirk v. State*, 199 S.W.3d 467, 473 (Tex. App.—Fort Worth 2006, pet. ref'd). Failing to assign two attorneys qualified under Art. 26.052 was harmless error when the State represented to the court and the defendant's trial counsel that it would not seek the death penalty. *Id.*

It may be harmless error for a defendant to be represented by counsel not screened by an administrative judicial region according to Art. 26.052 if the attorney appointed is nonetheless qualified and capable. *Hughes v. State*, 24 S.W.3d 833 (Tex. Crim. App. 2000).

#### **Art. 26.056. Contribution from State in Certain Counties**

##### **Sec. 1.**

A county in which a state training school for delinquent children is located shall pay from its general fund the first \$250 of fees awarded for court-appointed counsel under Article 26.05 toward defending a child committed to the school from another county who is being prosecuted for a felony or misdemeanor in the county where the training school is located.

##### **Sec. 2.**

If the fees awarded for counsel compensation are in excess of \$250, the court shall certify the amount in excess of \$250 to the Comptroller of Public Accounts of the State of Texas. The Comptroller shall issue a warrant to the court-appointed counsel in the amount certified to the comptroller by the court.

#### **Art. 26.057. Cost of Employment of Counsel for Certain Minors**

If a juvenile has been transferred to a criminal court under Section 54.02, Family Code, and if a court appoints counsel for the juvenile under Article 26.04 of this code, the county that pays for the counsel has a cause of action against a parent or other person who is responsible for the support of the juvenile and is financially able to employ counsel for the juvenile but refuses to do so. The county may recover its cost of payment to the appointed counsel and may recover attorney's fees necessary to prosecute the cause of action against the parent or other person.

#### **Art. 26.06. Elected Officials Not to Be Appointed**

No court may appoint an elected county, district or state official to represent a person accused of crime, unless the official has notified the court of his availability for appointment. If an official has notified the court of his availability and is appointed as counsel, he may decline the appointment if he determines that it is in the best interest of his office

to do so. Nothing in this Code shall modify any statutory provision for legislative continuance.

#### **Commentary**

Neither Government Code Section 82.064 nor Art. 26.06 prohibit a justice of the peace who is an attorney from accepting an appointment to represent an indigent criminal defendant at the appellate level, and both implicitly recognize the justice's authority to do so. *Op. Tex. Att'y Gen. GA-0651* (2008).

#### **Art. 26.07. Name As Stated in Indictment**

When the defendant is arraigned, his name, as stated in the indictment, shall be distinctly called; and unless he suggest by himself or counsel that he is not indicted by his true name, it shall be taken that his name is truly set forth, and he shall not thereafter be allowed to deny the same by way of defense.

#### **Art. 26.08. If Defendant Suggests Different Name**

If the defendant, or his counsel for him, suggests that he bears some name different from that stated in the indictment, the same shall be noted upon the minutes of the court, the indictment corrected by inserting therein the name of the defendant as suggested by himself or his counsel for him, the style of the case changed so as to give his true name, and the cause proceed as if the true name had been first recited in the indictment.

#### **Art. 26.09. If Accused Refuses to Give His Real Name**

If the defendant alleges that he is not indicted by his true name, and refuses to say what his real name is, the cause shall proceed as if the name stated in the indictment were true; and the defendant shall not be allowed to contradict the same by way of defense.

#### **Art. 26.10. Where Name Is Unknown**

A defendant described as a person whose name is unknown may have the indictment so corrected as to give therein his true name.

#### **Art. 26.11. Indictment Read**

The name of the accused having been called, if no suggestion, such as is spoken of in the four preceding Articles, be made, or being made is disposed of as before directed, the indictment shall be read, and the defendant asked whether he is guilty or not, as therein charged.

### **Art. 26.12. Plea of Not Guilty Entered**

If the defendant answers that he is not guilty, such plea shall be entered upon the minutes of the court; if he refuses to answer, the plea of not guilty shall in like manner be entered.

### **Art. 26.13. Plea of Guilty**

(a) Prior to accepting a plea of guilty or a plea of nolo contendere, the court shall admonish the defendant of:

(1) the range of the punishment attached to the offense;

(2) the fact that the recommendation of the prosecuting attorney as to punishment is not binding on the court. Provided that the court shall inquire as to the existence of any plea bargaining agreements between the state and the defendant and, in the event that such an agreement exists, the court shall inform the defendant whether it will follow or reject such agreement in open court and before any finding on the plea. Should the court reject any such agreement, the defendant shall be permitted to withdraw his plea of guilty or nolo contendere;

(3) the fact that if the punishment assessed does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney, the trial court must give its permission to the defendant before he may prosecute an appeal on any matter in the case except for those matters raised by written motions filed prior to trial;

(4) the fact that if the defendant is not a citizen of the United States of America, a plea of guilty or nolo contendere for the offense charged may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law; and

(5) the fact that the defendant will be required to meet the registration requirements of Chapter 62, if the defendant is convicted of or placed on deferred adjudication for an offense for which a person is subject to registration under that chapter.

(b) No plea of guilty or plea of nolo contendere shall be accepted by the court unless it appears that the defendant is mentally competent and the plea is free and voluntary.

(c) In admonishing the defendant as herein provided, substantial compliance by the court is sufficient, unless the defendant affirmatively shows that he was not aware of the consequences of his plea and that he was misled or harmed by the admonishment of the court.

(d) The court may make the admonitions required by this article either orally or in writing. If the court makes the admonitions in writing, it must receive a statement signed by the defendant and the defendant's attorney that he understands the admonitions and is aware of the consequences of his plea. If the defendant is unable or refuses to sign the statement, the court shall make the admonitions orally.

(e) Before accepting a plea of guilty or a plea of nolo contendere, the court shall inquire as to whether a victim impact statement has been returned to the attorney representing the state and ask for a copy of the statement if one has been returned.

(f) The court must substantially comply with Subsection (e) of this article. The failure of the court to comply with Subsection (e) of this article is not grounds for the defendant to set aside the conviction, sentence, or plea.

(g) Before accepting a plea of guilty or a plea of nolo contendere and on the request of a victim of the offense, the court may assist the victim and the defendant in participating in a victim-offender mediation program.

(h) The court must substantially comply with Subsection (a)(5). The failure of the court to comply with Subsection (a)(5) is not a ground for the defendant to set aside the conviction, sentence, or plea.

(i) Notwithstanding this article, a court shall not order the state or any of its prosecuting attorneys to participate in mediation, dispute resolution, arbitration, or other similar procedures in relation to a criminal prosecution unless upon written consent of the state.

### **Art. 26.14. Jury on Plea of Guilty**

Where a defendant in a case of felony persists in pleading guilty or in entering a plea of nolo contendere, if the punishment is not absolutely fixed by law, a jury shall be impaneled to assess the punishment and evidence may be heard to enable

them to decide thereupon, unless the defendant in accordance with Articles 1.13 or 37.07 shall have waived his right to trial by jury.

#### **Art. 26.15. Correcting Name**

In any case, the same proceedings shall be had with respect to the name of the defendant and the correction of the indictment or information as provided with respect to the same in capital cases.

### **CHAPTER THIRTY-EIGHT: EVIDENCE IN CRIMINAL ACTIONS**

#### **Art. 38.30. Interpreter**

(a) When a motion for appointment of an interpreter is filed by any party or on motion of the court, in any criminal proceeding, it is determined that a person charged or a witness does not understand and speak the English language, an interpreter must be sworn to interpret for the person charged or the witness. Any person may be subpoenaed, attached or recognized in any criminal action or proceeding, to appear before the proper judge or court to act as interpreter therein, under the same rules and penalties as are provided for witnesses. In the event that the only available interpreter is not considered to possess adequate interpreting skills for the particular situation or the interpreter is not familiar with use of slang, the person charged or witness may be permitted by the court to nominate another person to act as intermediary between the person charged or witness and the appointed interpreter during the proceedings.

(a-1) A qualified telephone interpreter may be sworn to interpret for the person in the trial of a class C misdemeanor or a proceeding before a magistrate if an interpreter is not available to appear in person before the court or if the only available interpreter is not considered to possess adequate interpreting skills for the particular situation or is unfamiliar with the use of slang. In this subsection, "qualified telephone interpreter" means a telephone service that employs:

- (1) licensed court interpreters as defined by Section 57.001, Government Code; or
- (2) federally certified court interpreters.

(b) Except as provided by Subsection (c) of this article, interpreters appointed under the terms of this article will receive from the general fund of the county for their services a sum not to exceed \$100 a

day as follows: interpreters shall be paid not less than \$15 nor more than \$100 a day at the discretion of the judge presiding, and when travel of the interpreter is involved all the actual expenses of travel, lodging, and meals incurred by the interpreter pertaining to the case the interpreter is appointed to serve shall be paid at the same rate applicable to state employees.

(c) A county commissioners court may set a payment schedule and expend funds for the services of interpreters in excess of the daily amount of not less than \$15 or more than \$100 established by Subsection (b) of this article.

#### **Art. 38.31. Interpreters for Deaf Persons**

(a) If the court is notified by a party that the defendant is deaf and will be present at an arraignment, hearing, examining trial, or trial, or that a witness is deaf and will be called at a hearing, examining trial, or trial, the court shall appoint a qualified interpreter to interpret the proceedings in any language that the deaf person can understand, including but not limited to sign language. On the court's motion or the motion of a party, the court may order testimony of a deaf witness and the interpretation of that testimony by the interpreter visually, electronically recorded for use in verification of the transcription of the reporter's notes. The clerk of the court shall include that recording in the appellate record if requested by a party under Article 40.09 of this Code.

(b) Following the filing of an indictment, information, or complaint against a deaf defendant, the court on the motion of the defendant shall appoint a qualified interpreter to interpret in a language that the defendant can understand, including but not limited to sign language, communications concerning the case between the defendant and defense counsel. The interpreter may not disclose a communication between the defendant and defense counsel or a fact that came to the attention of the interpreter while interpreting those communications if defense counsel may not disclose that communication or fact.

(c) In all cases where the mental condition of a person is being considered and where such person may be committed to a mental institution, and where such person is deaf, all of the court proceedings pertaining to him shall be interpreted by a qualified interpreter appointed by the court.

(d) A proceeding for which an interpreter is required to be appointed under this Article may not commence until the appointed interpreter is in a position not exceeding ten feet from and in full view of the deaf person.

(e) The interpreter appointed under the terms of this Article shall be required to take an oath that he will make a true interpretation to the person accused or being examined, which person is deaf, of all the proceedings of his case in a language that he understands; and that he will repeat said deaf person's answer to questions to counsel, court, or jury, in the English language, in his best skill and judgment.

(f) Interpreters appointed under this Article are entitled to a reasonable fee determined by the court after considering the recommendations of the Texas Commission for the Deaf and Hard of Hearing. When travel of the interpreter is involved all the actual expenses of travel, lodging, and meals incurred by the interpreter pertaining to the case he is appointed to serve shall be paid at the same rate applicable to state employees.

(g) In this Code:

(1) "Deaf person" means a person who has a hearing impairment, regardless of whether the person also has a speech impairment, that inhibits the person's comprehension of the proceedings or communication with others.

(2) "Qualified interpreter" means an interpreter for the deaf who holds a current legal certificate issued by the National Registry of Interpreters for the Deaf or a current court interpreter certificate issued by the Board for Evaluation of Interpreters at the Department of Assistive or Rehabilitative Services.

## **CHAPTER FORTY-TWO: JUDGMENT AND SENTENCE**

### **Art. 42.12. Community Supervision.**

#### **Sec. 21. Violation of Community Supervision: Detention and Hearing**

(a) At any time during the period of community supervision the judge may issue a warrant for violation of any of the conditions of the community supervision and cause a defendant convicted under Section 43.02, Penal Code, or under Chapter 481, Health and Safety Code, or Sections 485.031

through 485.035, Health and Safety Code, or placed on deferred adjudication after being charged with one of those offenses, to be subject to the control measures of Section 81.083, Health and Safety Code, and to the court-ordered-management provisions of Subchapter G, Chapter 81, Health and Safety Code.

(b) At any time during the period of community supervision the judge may issue a warrant for violation of any of the conditions of the community supervision and cause the defendant to be arrested. Any supervision officer, police officer or other officer with power of arrest may arrest such defendant with or without a warrant upon the order of the judge to be noted on the docket of the court. Subject to Subsection (b-1), a—A defendant so arrested under this subsection may be detained in the county jail or other appropriate place of confinement until he can be taken before the judge for a determination regarding the alleged violation. The arresting officer shall immediately forthwith report the such arrest and detention to the such judge.

(b-1) Without any unnecessary delay, but not later than 48 hours after the person is arrested, the arresting officer or the person with custody of the arrested person shall take the arrested person before the judge who ordered the arrest for the alleged violation of a condition of community supervision or, if the judge is unavailable, before a magistrate of the county in which the person was arrested. The judge or magistrate shall perform all appropriate duties and may exercise all appropriate powers as provided by Article 15.17 with respect to an arrest for a new criminal offense, except that only the judge who ordered the arrest for the alleged violation may authorize the person's release on bail. The arrested person may be taken before the judge or magistrate under this subsection by means of an electronic broadcast system as provided by and subject to the requirements of Article 15.17.

(b-2) If the defendant has not been released on bail as permitted under Subsection (b-1), on motion by the defendant the judge who ordered the arrest for the alleged violation of a condition of community supervision shall cause the defendant to be brought before the judge for a hearing on the alleged violation within 20 days of filing of said motion, and after a hearing without a jury, may either continue, extend, modify, or revoke the community supervision. A judge may revoke the community supervision of a defendant who is imprisoned in a penal institution without a hearing if the defendant in writing before a court of record in the jurisdiction

where imprisoned waives his right to a hearing and to counsel, affirms that he has nothing to say as to why sentence should not be pronounced against him, and requests the judge to revoke community supervision and to pronounce sentence. In a felony case, the state may amend the motion to revoke community supervision any time up to seven days before the date of the revocation hearing, after which time the motion may not be amended except for good cause shown, and in no event may the state amend the motion after the commencement of taking evidence at the hearing. The judge may continue the hearing for good cause shown by either the defendant or the state.

(c) In a community supervision revocation hearing at which it is alleged only that the defendant violated the conditions of community supervision by failing to pay compensation paid to appointed counsel, community supervision fees, or court costs, the state must prove by a preponderance of the evidence that the defendant was able to pay and did not pay as ordered by the judge. The court may order a community supervision and corrections department to obtain information pertaining to the factors listed under Article 42.037(h) of this code and include that information in the report required under Section 9(a) of this article or a separate report, as the court directs.

(d) A defendant has a right to counsel at a hearing under this section. The court shall appoint counsel for an indigent defendant in accordance with the procedures adopted under Article 26.04.

(e) A court retains jurisdiction to hold a hearing under Subsection (b) and to revoke, continue, or modify community supervision, regardless of whether the period of community supervision imposed on the defendant has expired, if before the expiration the attorney representing the state files a motion to revoke, continue, or modify community supervision and a capias is issued for the arrest of the defendant.

*Amendment of (b) and (d) and additions of (b-1) and (b-2) effective Sept. 1, 2011 (SB 1681, §4). Section 3 of SB 1681 provides: "The change in law made by this Act applies only to a criminal proceeding that commences on or after the effective date of this Act. A criminal proceeding that commences before the effective date of this Act is governed by the law in effect when the proceeding commenced, and the former law is continued in effect for that purpose."*

#### 2011 Legislative Note

SB 1681 amends subsection (b) and adds (b-1) and (b-2) to authorize defendants arrested on motions to revoke probation to be brought before any

magistrate, rather than only the judge supervising the probation, to give required warnings, including about the right to counsel. The warnings before the judge or magistrate must be provided within 48 hours of arrest. The bill does not permit magistrates to release such persons on bail. SB 1681 provides that the arrested person may be taken before the judge or magistrate via an electronic broadcast system as provided and subject to the requirements of Art. 15.17.

SB 1681 amends subsection (d) to require the court to appoint counsel for an indigent defendant in accordance with procedures under Art. 26.04, the local indigent defense plan.

#### Commentary

If probationer at revocation hearing is indigent and has not waived the right to counsel, counsel must be appointed. *Mempa v. Rhay*, 389 U.S. 128, 137 (1967).

## FAMILY CODE

### CHAPTER FIFTY-ONE: GENERAL PROVISIONS

#### Sec. 51.10. Right to Assistance of Attorney; Compensation

(a) A child may be represented by an attorney at every stage of proceedings under this title, including:

- (1) the detention hearing required by Section 54.01 of this code;
- (2) the hearing to consider transfer to criminal court required by Section 54.02 of this code;
- (3) the adjudication hearing required by Section 54.03 of this code;
- (4) the disposition hearing required by Section 54.04 of this code;
- (5) the hearing to modify disposition required by Section 54.05 of this code;
- (6) hearings required by Chapter 55 of this code;
- (7) habeas corpus proceedings challenging the legality of detention resulting from action under this title; and
- (8) proceedings in a court of civil appeals or the Texas Supreme Court reviewing proceedings under this title.

(b) The child's right to representation by an attorney shall not be waived in:

- (1) a hearing to consider transfer to criminal court as required by Section 54.02 of this code;
- (2) an adjudication hearing as required by Section 54.03 of this code;
- (3) a disposition hearing as required by Section 54.04 of this code;
- (4) a hearing prior to commitment to the Texas Youth Commission as a modified disposition in accordance with Section 54.05(f) of this code; or
- (5) hearings required by Chapter 55 of this code.

(c) If the child was not represented by an attorney at the detention hearing required by Section 54.01 of this code and a determination was made to detain the child, the child shall immediately be entitled to representation by an attorney. The court shall order the retention of an attorney according to Subsection (d) or appoint an attorney according to Subsection (f).

(d) The court shall order a child's parent or other person responsible for support of the child to employ an attorney to represent the child, if:

- (1) the child is not represented by an attorney;
- (2) after giving the appropriate parties an opportunity to be heard, the court determines that the parent or other person responsible for support of the child is financially able to employ an attorney to represent the child; and
- (3) the child's right to representation by an attorney:
  - (A) has not been waived under Section 51.09 of this code; or
  - (B) may not be waived under Subsection (b) of this section.

(e) The court may enforce orders under Subsection (d) by proceedings under Section 54.07 or by appointing counsel and ordering the parent or other person responsible for support of the child to pay a reasonable attorney's fee set by the court. The order may be enforced under Section 54.07.

(f) The court shall appoint an attorney to represent the interest of a child entitled to representation by an attorney, if:

- (1) the child is not represented by an attorney;
- (2) the court determines that the child's parent or other person responsible for support of the child is financially unable to employ an attorney to represent the child; and
- (3) the child's right to representation by an attorney:
  - (A) has not been waived under Section 51.09 of this code; or
  - (B) may not be waived under Subsection (b) of this section.

(g) The juvenile court may appoint an attorney in any case in which it deems representation necessary to protect the interests of the child.

(h) Any attorney representing a child in proceedings under this title is entitled to 10 days to prepare for any adjudication or transfer hearing under this title.

(i) Except as provided in Subsection (d) of this section, an attorney appointed under this section to represent the interests of a child shall be paid from the general fund of the county in which the proceedings were instituted according to the schedule in Article 26.05 of the Texas Code of Criminal Procedure, 1965. For this purpose, a bona fide appeal to a court of civil appeals or proceedings on the merits in the Texas Supreme Court are considered the equivalent of a bona fide appeal to the Texas Court of Criminal Appeals.

(j) The juvenile board of a county may make available to the public the list of attorneys eligible for appointment to represent children in proceedings under this title as provided in the plan adopted under Section 51.102. The list of attorneys must indicate the level of case for which each attorney is eligible for appointment under Section 51.102(b)(2).

(k) Subject to Chapter 61, the juvenile court may order the parent or other person responsible for support of the child to reimburse the county for payments the county made to counsel appointed to represent the child under Subsection (f) or (g). The court may:

- (1) order payment for each attorney who has represented the child at any hearing, including a detention hearing, discretionary transfer hearing, adjudication hearing, disposition hearing, or modification of disposition hearing;
- (2) include amounts paid to or on behalf of the attorney by the county for preparation time and investigative and expert witness costs; and
- (3) require full or partial reimbursement to the county.

(l) The court may not order payments under Subsection (k) that exceed the financial ability of the parent or other person responsible for support of the child to meet the payment schedule ordered by the court.

**Commentary**

Juvenile proceedings are quasi-criminal in nature even though they are classified as civil proceedings. *In re D.A.S.*, 973 S.W.2d 296, 298 (Tex. 1998) (citing *In re Gault*, 387 U.S. 1, 30 (1967)). *Miranda* warning requirements apply to juveniles as well as adults. *In re Gault*, 387 U.S. 1 (1967).

The *Anders* procedure set forth by the Supreme Court extends to juvenile appeals. *In re D.A.S.*, 973 S.W.2d at 298.

Appointment of counsel is provided for juveniles at hearings in which the issue of the child's delinquent conduct is tried, at disposition hearings if the child is found to have engaged in delinquent conduct, at dispositions involving sentencing of a child to commitment in the Texas Youth Commission with a possible transfer to the Texas Department of Criminal Justice, and at release or transfer hearings. *In re Hall*, 286 S.W.3d 925, 929-30 (Tex. 2009). There is no right to appointed counsel for post-adjudication habeas corpus proceedings. *Id.* at 930.

**Sec. 51.101. Appointment of Attorney and Continuation of Representation**

(a) If an attorney is appointed at the initial detention hearing and the child is detained, the attorney shall continue to represent the child until the case is terminated, the family retains an attorney, or a new attorney is appointed by the juvenile court. Release of the child from detention does not terminate the attorney's representation.

(b) If there is an initial detention hearing without an attorney and the child is detained, the attorney appointed under Section 51.10(c) shall continue to

represent the child until the case is terminated, the family retains an attorney, or a new attorney is appointed by the juvenile court. Release of the child from detention does not terminate the attorney's representation.

(c) The juvenile court shall determine, on the filing of a petition, whether the child's family is indigent if: (1) the child is released by intake; (2) the child is released at the initial detention hearing; or (3) the case was referred to the court without the child in custody.

(d) A juvenile court that makes a finding of indigence under Subsection (c) shall appoint an attorney to represent the child on or before the fifth working day after the date the petition for adjudication or discretionary transfer hearing was served on the child. An attorney appointed under this subsection shall continue to represent the child until the case is terminated, the family retains an attorney, or a new attorney is appointed by the juvenile court. (e) The juvenile court shall determine whether the child's family is indigent if a motion or petition is filed under Section 54.05 seeking to modify disposition by committing the child to the Texas Youth Commission or placing the child in a secure correctional facility. A court that makes a finding of indigence shall appoint an attorney to represent the child on or before the fifth working day after the date the petition or motion has been filed. An attorney appointed under this subsection shall continue to represent the child until the court rules on the motion or petition, the family retains an attorney, or a new attorney is appointed.

**Sec. 51.102. Appointment of Counsel Plan**

(a) The juvenile board in each county shall adopt a plan that:

(1) specifies the qualifications necessary for an attorney to be included on an appointment list from which attorneys are appointed to represent children in proceedings under this title; and

(2) establishes the procedures for:

(A) including attorneys on the appointment list and removing attorneys from the list; and

(B) appointing attorneys from the appointment list to individual cases.

(b) A plan adopted under Subsection (a) must:

(1) to the extent practicable, comply with the requirements of Article 26.04, Code of Criminal Procedure, except that:

(A) the income and assets of the child's parent or other person responsible for the child's support must be used in determining whether the child is indigent; and

(B) any alternative plan for appointing counsel is established by the juvenile board in the county; and

(2) recognize the differences in qualifications and experience necessary for appointments to cases in which:

(A) the allegation is:

(i) conduct indicating a need for supervision or delinquent conduct, and commitment to the Texas Youth Commission is not an authorized disposition; or

(ii) delinquent conduct, and commitment to the Texas Youth Commission without a determinate sentence is an authorized disposition; or

(B) determinate sentence proceedings have been initiated or proceedings for discretionary transfer to criminal court have been initiated.

## GOVERNMENT CODE

### CHAPTER SEVENTY-ONE: GENERAL PROVISIONS

#### Sec. 71.001. Definitions

In this chapter:

(1) "Assigned counsel program" means a system under which private attorneys, acting as independent contractors and compensated with public funds, are individually appointed to provide legal representation and services to a particular indigent defendant accused of a crime or juvenile offense.

(2) (1) "Chair" means chair of the council.

(3) "Contract defender program" means a system under which private attorneys, acting as independent contractors and compensated with public funds, are engaged to provide legal representation and services to a group of unspecified indigent defendants who appear before a particular court or group of courts.

(4) (2) "Council" means the Texas Judicial Council.

(5) "Crime" means:

(A) a misdemeanor punishable by confinement; or

(B) a felony.

(3) (6) "Defendant" means a person accused of a crime or a juvenile offense, as those terms are defined by Section 79.001.

(7) "Indigent defense support services" means criminal defense services that:

(A) are provided by licensed investigators, experts, or other similar specialists, including forensic experts and mental health experts; and

(B) are reasonable and necessary for appointed counsel to provide adequate representation to indigent defendants.

(8) "Juvenile offense" means conduct committed by a person while younger than 17 years of age that constitutes:

(A) a misdemeanor punishable by confinement; or

(B) a felony.

(4) (9) "Public defender's office" has the meaning assigned by Article 26.044(a), Code of Criminal Procedure.

*Amendments to Section 71.001, Government Code, effective Sept. 1, 2011 (HB 1754, §20).*

#### 2011 Legislative Note

HB 1754 amends this section by defining "public defender's office" rather than "public defender", redefining "defendant", deleting definitions of other terms, which are moved to new Sec. 79.001.

**Sec. 71.0351. Indigent Defense Information**

2011 Legislative Note

Sec. 71.0351 replaced by Sec. 79.036 effective Sept. 1, 2011 (HB 1754, §20).

**Sec. 71.051. Establishment of Task Force; Composition**

2011 Legislative Note

Sec. 71.051 replaced by Sec. 79.002 and Sec. 79.011 effective Sept. 1, 2011 (HB 1754, §20).

**Sec. 71.052. Ex Officio Members**

2011 Legislative Note

Sec. 71.052 replaced by Sec. 79.013 effective Sept. 1, 2011 (HB 1754, §20).

**Sec. 71.053. Appointments**

2011 Legislative Note

Sec. 71.053 replaced by Sec. 79.014 effective Sept. 1, 2011 (HB 1754, §20).

**Sec. 71.054. Vacancies**

2011 Legislative Note

Sec. 71.054 replaced by Sec. 79.017 effective Sept. 1, 2011 (HB 1754, §20).

**Sec. 71.055. Meetings; Quorum; Voting**

2011 Legislative Note

Sec. 71.055 replaced by Sec. 79.018 effective Sept. 1, 2011 (HB 1754, §20).

**Sec. 71.056. Compensation**

2011 Legislative Note

Sec. 71.056 replaced by Sec. 79.019 effective Sept. 1, 2011 (HB 1754, §20).

**Sec. 71.057. Budget**

2011 Legislative Note

Sec. 71.057 replaced by Sec. 79.033 effective Sept. 1, 2011 (HB 1754, §20).

**Sec. 71.058. Fair Defense Account**

2011 Legislative Note

Sec. 71.058 replaced by Sec. 79.031 effective Sept. 1, 2011 (HB 1754, §20).

**Sec. 71.059. Acceptance of gifts, grants, and other funds; State Grants Team**

2011 Legislative Note

Sec. 71.059 replaced by Sec. 79.032 effective Sept. 1, 2011 (HB 1754, §20).

**Sec. 71.060. Policies and Standards**

2011 Legislative Note

Sec. 71.060 replaced by Sec. 79.034 effective Sept. 1, 2011 (HB 1754, §20).

**Sec. 71.061. County reporting plan; Task Force reports**

2011 Legislative Note

Sec. 71.061 replaced by Sec. 79.035 effective Sept. 1, 2011 (HB 1754, §20).

**Sec. 71.062. Technical support; Grants**

2011 Legislative Note

Sec. 71.062 replaced by Sec. 79.037 effective Sept. 1, 2011 (HB 1754, §20).

**Sec. 71.063. Immunity from liability**

2011 Legislative Note

Sec. 71.063 replaced by Sec. 79.020 effective Sept. 1, 2011 (HB 1754, §20).

**CHAPTER SEVENTY-EIGHT: CAPITAL WRITS COMMITTEE AND OFFICE OF CAPITAL WRITS**

**Subchapter A. Capital Writs Committee**

**Sec. 78.001. Definitions.**

In this subchapter:

(1) "Committee" means the capital writs committee established under this subchapter.

(2) "Office of capital writs" means the office of capital writs established under Subchapter B.

**Sec. 78.002. Establishment of Committee; Duties**

(a) The capital writs committee is established.

(b) The committee shall recommend to the court of criminal appeals as provided by Section 78.004 a director for the office of capital writs when a vacancy exists for the position of director.

**Sec. 78.003. Appointment and Composition of Committee**

(a) The committee is composed of the following five members who are appointed by the president of the State Bar of Texas, with ratification by the executive committee of the State Bar of Texas:

(1) three attorneys who are members of the State Bar of Texas and who are not employed as prosecutors or law enforcement officials, all of whom must have criminal defense experience with death penalty proceedings in this state; and

(2) two state district judges, one of whom serves as presiding judge of an administrative judicial region.

(b) The committee shall elect one member of the committee to serve as the presiding officer of the committee.

(c) The committee members serve at the pleasure of the president of the State Bar of Texas, and the committee meets at the call of the presiding officer of the committee.

**Sec. 78.004. Recommendation and Appointment of Director of Office of Capital Writs**

(a) The committee shall submit to the court of criminal appeals, in order of the committee's preference, a list of the names of not more than five persons the committee recommends that the court consider in appointing the director of the office of capital writs when a vacancy exists for the position of director. If the committee finds that three or more persons under the committee's consideration are qualified to serve as the director of the office of capital writs, the committee must include at least three names in the list submitted under this subsection.

(b) Each person recommended to the court of criminal appeals by the committee under Subsection (a):

(1) must exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases, as described by the Guidelines and Standards for Texas Capital Counsel, as published by the State Bar of Texas; and

(2) may not have been found by a state or federal court to have rendered ineffective assistance of counsel during the trial or appeal of a death penalty case.

(c) When a vacancy for the position exists, the court of criminal appeals shall appoint from the list of persons submitted to the court under Subsection (a) the director of the office of capital writs.

[Sections 78.005-78.050 reserved for expansion]

**Subchapter B. Office of Capital Writs**

**Sec. 78.051. Definitions.**

In this subchapter:

(1) "Committee" means the capital writs committee established under Subchapter A.

(2) "Office" means the office of capital writs established under this subchapter.

**Sec. 78.052. Establishment; Funding.**

(a) The office of capital writs is established and operates under the direction and supervision of the director of the office.

(b) The office shall receive funds for personnel costs and expenses:

(1) as specified in the General Appropriations Act; and

(2) from the fair defense account under Section 79.031-71.058, in an amount sufficient to cover personnel costs and expenses not covered by appropriations described by Subdivision (1).

*Amendment to (b)(2) effective Sept. 1, 2011 (HB 1754, §20).*

**2011 Legislative Note**

HB 1754 makes a conforming change to subsection (b).

**Sec. 78.053. Director; Staff.**

(a) The court of criminal appeals shall appoint a director to direct and supervise the operation of the office. The director serves a four-year term and continues to serve until a successor has been appointed and qualified. The court of criminal appeals may remove the director only for good cause. The director may be reappointed for a second or subsequent term.

(b) The director shall employ attorneys and employ or retain licensed investigators and other personnel necessary to perform the duties of the office. To be

employed by the director, an attorney may not have been found by a state or federal court to have rendered ineffective assistance of counsel during the trial or appeal of a death penalty case.

(c) The director and any attorney employed by the office may not:

(1) engage in the private practice of criminal law; or

(2) accept anything of value not authorized by law for services rendered under this subchapter.

#### **Sec. 78.054. Powers and Duties**

(a) The office may not accept an appointment under Article 11.071, Code of Criminal Procedure, if:

(1) a conflict of interest exists;

(2) the office has insufficient resources to provide adequate representation for the defendant;

(3) the office is incapable of providing representation for the defendant in accordance with the rules of professional conduct; or

(4) other good cause is shown for not accepting the appointment.

(b) The office may not represent a defendant in a federal habeas review. The office may not represent a defendant in an action or proceeding in state court other than an action or proceeding that:

(1) is conducted under Article 11.071, Code of Criminal Procedure;

(2) is collateral to the preparation of an application under Article 11.071, Code of Criminal Procedure; or

(3) concerns any other post-conviction matter in a death penalty case other than a direct appeal, including an action or proceeding under Article 46.05 or Chapter 64, Code of Criminal Procedure.

(c) Notwithstanding Article 26.04(p), Code of Criminal Procedure, the office may independently investigate the financial condition of any person the office is appointed to represent. The office shall report the results of the investigation to the appointing judge. The judge may hold a hearing to

determine if the person is indigent and entitled to representation under this section.

#### **Sec. 78.055. Compensation of Other Appointed Attorneys.**

If it is necessary that an attorney other than an attorney employed by the office be appointed, that attorney shall be compensated as provided by Articles 11.071 and 26.05, Code of Criminal Procedure.

#### **Sec. 78.056. Appointment List**

(a) The presiding judges of the administrative judicial regions shall maintain a statewide list of competent counsel available for appointment under Section 2(f), Article 11.071, Code of Criminal Procedure, if the office does not accept or is prohibited from accepting an appointment under Section 78.054. Each attorney on the list:

(1) must exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases; and

(2) may not have been found by a state or federal court to have rendered ineffective assistance of counsel during the trial or appeal of a death penalty case.

(b) The Office of Court Administration of the Texas Judicial System and the Texas Indigent Defense Commission shall provide administrative support necessary under this section.

*Amendments to (a), (d), and (f) and addition of (f-1) effective Sept. 1, 2011 (HB 1754, §20).*

#### **2011 Legislative Note**

HB 1754 makes a conforming change to subsection (b).

#### **Preface to Chapter 79, Government Code:**

HB 1754 changes the name of the Task Force on Indigent Defense to the Texas Indigent Defense Commission. The powers and duties of the new Commission are largely the same as those of the prior Task Force. The legislative note following each section below lists the corresponding section from the repealed provisions in Chapter 71. The Commission, like the Task Force, remains a permanent standing committee of the Texas Judicial Council and administratively attached to the Office of Court Administration (OCA). OCA will provide administrative support services to help the

Commission carry out its legislative responsibilities. The Commission will now be responsible for preparing, approving, and submitting its Legislative Appropriations Request and maintaining a budget structure separate from that of OCA.

## **CHAPTER SEVENTY-NINE: TEXAS INDIGENT DEFENSE COMMISSION**

### **Subchapter A. General Provisions**

#### **Sec. 79.001. DEFINITIONS.**

(1) "Assigned counsel program" means a system under which private attorneys, acting as independent contractors and compensated with public funds, are individually appointed to provide legal representation and services to a particular indigent defendant accused of a crime or juvenile offense.

(2) "Board" means the governing board of the Texas Indigent Defense Commission.

(3) "Commission" means the permanent standing committee of the council known as the Texas Indigent Defense Commission.

(4) "Contract defender program" means a system under which private attorneys, acting as independent contractors and compensated with public funds, are engaged to provide legal representation and services to a group of unspecified indigent defendants who appear before a particular court or group of courts.

(5) "Council" means the Texas Judicial Council.

(6) "Crime" means:

(A) a misdemeanor punishable by confinement; or

(B) a felony.

(7) "Defendant" means a person accused of a crime or a juvenile offense.

(8) "Executive director" means the executive director of the Texas Indigent Defense Commission.

(9) "Indigent defense support services" means criminal defense services that:

(A) are provided by licensed investigators, experts, or other similar specialists, including forensic experts and mental health experts; and

(B) are reasonable and necessary for appointed counsel to provide adequate representation to indigent defendants.

(10) "Juvenile offense" means conduct committed by a person while younger than 17 years of age that constitutes:

(A) a misdemeanor punishable by confinement; or

(B) a felony.

(11) "Managed assigned counsel program" has the meaning assigned by Article 26.047, Code of Criminal Procedure.

(12) "Office of capital writs" means the office of capital writs established under Subchapter B, Chapter 78.

(13) "Public defender's office" has the meaning assigned by Article 26.044(a), Code of Criminal Procedure.

*Addition of this Section effective Sept. 1, 2011 (HB 1754, §20).*

#### **2011 Legislative Note**

HB 1754 adds this section to provide definitions for Chapter Seventy-Nine, Government Code.

#### **Sec. 79.002. ESTABLISHMENT OF COMMISSION.**

(a) The Texas Indigent Defense Commission is established as a permanent standing committee of the council.

(b) The commission operates under the direction and supervision of a governing board.

[Sections 79.003-79.010 reserved for expansion]

*Addition of this Section effective Sept. 1, 2011 (HB 1754, §20).*

#### **2011 Legislative Note**

HB 1754 adds this section to replace Sec. 71.051.

## **SUBCHAPTER B. ADMINISTRATIVE PROVISIONS**

### **Sec. 79.011. ESTABLISHMENT OF BOARD: COMPOSITION.**

(a) The commission is governed by a board consisting of eight ex officio members and five appointive members.

(b) Except as provided by Section 79.033(b), the board shall exercise the powers and perform the duties under this chapter independently of the council.

*Addition of this Section effective Sept. 1, 2011 (HB 1754, §20).*

2011 Legislative Note

HB 1754 adds this section to replace Sec. 71.051

### **Sec. 79.012. EXECUTIVE DIRECTOR.**

(a) The executive director is appointed by the board.

(b) The executive director:

(1) must be a licensed attorney;

(2) must demonstrate an interest in the standards for and provision of criminal defense services to indigent individuals;

(3) may not engage in the private practice of law; and

(4) may not accept money, property, or any other thing of value not authorized by law for services rendered under this chapter.

*Addition of this Section effective Sept. 1, 2011 (HB 1754, §20).*

### **Sec. 79.013. EX OFFICIO MEMBERS.**

The ex officio members of the board are:

(1) the following six members of the council:

(A) the chief justice of the supreme court;

(B) the presiding judge of the court of criminal appeals;

(C) one of the members of the senate serving on the council who is designated by the lieutenant governor;

(D) the member of the house of representatives appointed by the speaker of the house;

(E) one of the courts of appeals justices serving on the council who is designated by the governor; and

(F) one of the county court or statutory county court judges serving on the council who is designated by the governor or, if a county court or statutory county court judge is not serving on the council, one of the statutory probate court judges serving on the council who is designated by the governor;

(2) one other member of the senate appointed by the lieutenant governor; and

(3) the chair of the House Criminal Jurisprudence Committee.

*Addition of this Section effective Sept. 1, 2011 (HB 1754, §20).*

2011 Legislative Note

HB 1754 adds this section to replace Sec. 71.052

### **Sec. 79.014. APPOINTMENTS.**

(a) The governor shall appoint with the advice and consent of the senate five members of the board as follows:

(1) one member who is a district judge serving as a presiding judge of an administrative judicial region;

(2) one member who is a judge of a constitutional county court or who is a county commissioner;

(3) one member who is a practicing criminal defense attorney;

(4) one member who is a chief public defender in this state or the chief public defender's designee, who must be an attorney employed by the public defender's office; and

(5) one member who is a judge of a constitutional county court or who is a county commissioner of a county with a population of 250,000 or more.

(b) The board members serve staggered terms of two years, with two members' terms expiring February 1 of each odd-numbered year and three members' terms expiring February 1 of each even-numbered year.

(c) In making appointments to the board, the governor shall attempt to reflect the geographic and demographic diversity of the state.

(d) A person may not be appointed to the board if the person is required to register as a lobbyist under Chapter 305 because of the person's activities for compensation on behalf of a profession related to the operation of the commission or the council.

*Addition of this Section effective Sept. 1, 2011 (HB 1754, §20).*

2011 Legislative Note

HB 1754 adds this section to replace Sec. 71.054

#### **Sec. 79.015. PRESIDING OFFICER.**

The board shall select a chair from among its members.

*Addition of this Section effective Sept. 1, 2011 (HB 1754, §20).*

#### **Sec. 79.016. DISCLOSURE REQUIRED.**

(a) A board member who is a chief public defender or who is an attorney employed by a public defender's office in a county that applies for funds under Section 79.037 shall disclose that fact before a vote by the board regarding an award of funds to that county and may not participate in such a vote.

(b) A board member's disclosure under Subsection (a) must be entered into the minutes of the board meeting at which the disclosure is made or reported, as applicable.

(c) The commission may not award funds under Section 79.037 to a county served by a chief public defender or other attorney who fails to make a disclosure to the board as required by Subsection (a).

*Addition of this Section effective Sept. 1, 2011 (HB 1754, §20).*

#### **Sec. 79.017. VACANCIES.**

A vacancy on the board must be filled for the unexpired term in the same manner as the original appointment.

*Addition of this Section effective Sept. 1, 2011 (HB 1754, §20).*

2011 Legislative Note

HB 1754 adds this section to replace Sec. 71.054

#### **Sec. 79.018. MEETINGS; QUORUM; VOTING.**

(a) The board shall meet at least four times each year and at such other times as it considers necessary or convenient to perform its duties.

(b) Six members of the board constitute a quorum for purposes of transacting the business of the board. The board may act only on the concurrence of five board members or a majority of the board members present, whichever number is greater. The board may adopt policies and standards under Section 79.034 only on the concurrence of seven board members.

(c) Except as provided by Section 79.016, a board member is entitled to vote on any matter before the board, except as otherwise provided by rules adopted by the board.

*Addition of this Section effective Sept. 1, 2011 (HB 1754, §20).*

2011 Legislative Note

HB 1754 adds this section to replace Sec. 71.055

#### **Sec. 79.019. COMPENSATION.**

A board member may not receive compensation for services on the board but is entitled to be reimbursed for actual and necessary expenses incurred in discharging board duties. The expenses are paid from funds appropriated to the board.

*Addition of this Section effective Sept. 1, 2011 (HB 1754, §20).*

2011 Legislative Note

HB 1754 adds this section to replace Sec. 71.056

#### **Sec. 79.020. IMMUNITY FROM LIABILITY.**

A member of the board performing duties on behalf of the board is not liable for damages arising from an act or omission within the scope of those duties.

*Addition of this Section effective Sept. 1, 2011 (HB 1754, §20).*

2011 Legislative Note

HB 1754 adds this section to replace Sec. 71.063

#### **Sec. 79.021. RULES.**

The board shall adopt rules as necessary to implement this chapter.

[Sections 79.022-79.030 reserved for expansion]

*Addition of this Section effective Sept. 1, 2011 (HB 1754, §20).*

## **SUBCHAPTER C. GENERAL POWERS AND DUTIES OF COMMISSION**

### **Sec. 79.031. FAIR DEFENSE ACCOUNT.**

The fair defense account is an account in the general revenue fund that may be appropriated only to:

- (1) the commission for the purpose of implementing this chapter; and
- (2) the office of capital writs for the purpose of implementing Subchapter B, Chapter 78.

*Addition of this Section effective Sept. 1, 2011 (HB 1754, §20).*

2011 Legislative Note

HB 1754 adds this section to replace Sec. 71.058

### **Sec. 79.032. ACCEPTANCE OF GIFTS, GRANTS, AND OTHER FUNDS; STATE GRANTS TEAM.**

(a) The commission may accept gifts, grants, and other funds from any public or private source to pay expenses incurred in performing its duties under this chapter.

(b) The State Grants Team of the Governor's Office of Budget, Planning, and Policy may assist the commission in identifying grants and other resources available for use by the commission in performing its duties under this chapter.

*Addition of this Section effective Sept. 1, 2011 (HB 1754, §20).*

2011 Legislative Note

HB 1754 adds this section to replace Sec. 71.059

### **Sec. 79.033. ADMINISTRATIVE ATTACHMENT; SUPPORT; BUDGET.**

(a) The commission is administratively attached to the Office of Court Administration of the Texas Judicial System.

(b) The office of court administration shall provide administrative support services, including human resources, budgetary, accounting, purchasing, payroll, information technology, and legal support services, to the commission as necessary to carry out the purposes of this chapter.

(c) The commission, in accordance with the rules and procedures of the Legislative Budget Board, shall prepare, approve, and submit a legislative appropriations request that is separate from the legislative appropriations request for the Office of Court Administration of the Texas Judicial System and is used to develop the commission's budget structure. The commission shall maintain the legislative appropriations request and budget structure separately from those of the office of court administration.

*Addition of this Section effective Sept. 1, 2011 (HB 1754, §20).*

2011 Legislative Note

HB 1754 adds this section to replace Sec. 71.057

### **Sec. 79.034. POLICIES AND STANDARDS.**

(a) The commission shall develop policies and standards for providing legal representation and other defense services to indigent defendants at trial, on appeal, and in post conviction proceedings. The policies and standards may include:

(1) performance standards for counsel appointed to represent indigent defendants;

(2) qualification standards under which attorneys may qualify for appointment to represent indigent defendants, including:

(A) qualifications commensurate with the seriousness of the nature of the proceeding;

(B) qualifications appropriate for representation of mentally ill defendants and noncitizen defendants;

(C) successful completion of relevant continuing legal education programs approved by the council; and

(D) testing and certification standards;

(3) standards for ensuring appropriate appointed caseloads for counsel appointed to represent indigent defendants;

(4) standards for determining whether a person accused of a crime or juvenile offense is indigent;

(5) policies and standards governing the organization and operation of an assigned counsel program;

(6) policies and standards governing the organization and operation of a public defender's office consistent with recognized national policies and standards;

(7) standards for providing indigent defense services under a contract defender program consistent with recognized national policies and standards;

(8) standards governing the reasonable compensation of counsel appointed to represent indigent defendants;

(9) standards governing the availability and reasonable compensation of providers of indigent defense support services for counsel appointed to represent indigent defendants;

(10) standards governing the operation of a legal clinic or program that provides legal services to indigent defendants and is sponsored by a law school approved by the supreme court;

(11) policies and standards governing the appointment of attorneys to represent children in proceedings under Title 3, Family Code;

(12) policies and standards governing the organization and operation of a managed assigned counsel program consistent with nationally recognized policies and standards; and

(13) other policies and standards for providing indigent defense services as determined by the commission to be appropriate.

(b) The commission shall submit its proposed policies and standards developed under Subsection (a) to the board for adoption. The board shall adopt the proposed policies and standards as appropriate.

(c) Any qualification standards adopted by the board under Subsection (b) that relate to the appointment of counsel in a death penalty case must be consistent with the standards specified under

Article 26.052(d), Code of Criminal Procedure. An attorney who is identified by the commission as not satisfying performance or qualification standards adopted by the board under Subsection (b) may not accept an appointment in a capital case.

*Addition of this Section effective Sept. 1, 2011 (HB 1754, §20).*

2011 Legislative Note

HB 1754 adds this section to replace Sec. 71.060

**Sec. 79.035. COUNTY REPORTING PLAN: COMMISSION REPORTS.**

(a) The commission shall develop a plan that establishes statewide requirements for counties relating to reporting indigent defense information. The plan must include provisions designed to reduce redundant reporting by counties and provisions that take into consideration the costs to counties of implementing the plan statewide. The commission shall use the information reported by a county to monitor the effectiveness of the county's indigent defense policies, standards, and procedures and to ensure compliance by the county with the requirements of state law relating to indigent defense. The commission may revise the plan as necessary to improve monitoring of indigent defense policies, standards, and procedures in this state.

(b) The commission shall annually submit to the governor, lieutenant governor, speaker of the house of representatives, and council and shall publish in written and electronic form a report:

(1) containing any information submitted to the commission by a county under Section 79.036; and

(2) regarding:

(A) the quality of legal representation provided by counsel appointed to represent indigent defendants;

(B) current indigent defense practices in the state as compared to state and national standards;

(C) efforts made by the commission to improve indigent defense practices in the state;

(D) recommendations made by the commission for improving indigent defense practices in the state; and

(E) the findings of a report submitted to the commission under Section 79.039.

(c) The commission shall annually submit to the Legislative Budget Board and council and shall publish in written and electronic form a detailed report of all expenditures made under this subchapter, including distributions under Section 79.037.

(d) The commission may issue other reports relating to indigent defense as determined to be appropriate by the commission.

*Addition of this Section effective Sept. 1, 2011 (HB 1754, §20).*

2011 Legislative Note  
HB 1754 adds this section to replace Sec. 71.061

#### **Sec. 79.036. INDIGENT DEFENSE INFORMATION.**

(a) In each county, not later than November 1 of each odd-numbered year and in the form and manner prescribed by the commission, the following information shall be prepared and provided to the commission:

(1) a copy of all formal and informal rules and forms that describe the procedures used in the county to provide indigent defendants with counsel in accordance with the Code of Criminal Procedure, including the schedule of fees required under Article 26.05 of that code;

(2) any revisions to rules or forms previously submitted under this section; or

(3) verification that rules and forms previously submitted under this section still remain in effect.

(b) Except as provided by Subsection (c):

(1) the local administrative district judge in each county, or the person designated by the judge, shall perform the action required by Subsection (a) with respect to all rules and forms adopted by the judges of the district courts trying felony cases in the county; and

(2) the local administrative statutory county court judge in each county, or the person designated by the judge, shall perform the action required by Subsection (a) with respect to all rules and forms adopted by the judges of the county courts and statutory county courts trying misdemeanor cases in the county.

(c) If the judges of two or more levels of courts described by Subsection (b) adopt the same formal and informal rules and forms, the local administrative judge serving the courts having jurisdiction over offenses with the highest classification of punishment, or the person designated by the judge, shall perform the action required by Subsection (a).

(d) The chair of the juvenile board in each county, or the person designated by the chair, shall perform the action required by Subsection (a) with respect to all rules and forms adopted by the juvenile board.

(e) In each county, the county auditor, or the person designated by the commissioners court if the county does not have a county auditor, shall prepare and send to the commission in the form and manner prescribed by the commission and on a monthly, quarterly, or annual basis, with respect to legal services provided in the county to indigent defendants during each fiscal year, information showing the total amount expended by the county to provide indigent defense services and an analysis of the amount expended by the county:

(1) in each district, county, statutory county, and appellate court;

(2) in cases for which a private attorney is appointed for an indigent defendant;

(3) in cases for which a public defender is appointed for an indigent defendant;

(4) in cases for which counsel is appointed for an indigent juvenile under Section 51.10(f), Family Code; and

(5) for investigation expenses, expert witness expenses, or other litigation expenses.

(f) As a duty of office, each district and county clerk shall cooperate with the county auditor or the person designated by the commissioners court and the commissioners court in retrieving information

required to be sent to the commission under this section.

*Addition of this Section effective Sept. 1, 2011 (HB 1754, §20).*

2011 Legislative Note

HB 1754 adds this section to replace Sec. 71.0351

**Sec. 79.037. TECHNICAL SUPPORT; GRANTS.**

(a) The commission shall:

(1) provide technical support to:

(A) assist counties in improving their indigent defense systems; and

(B) promote compliance by counties with the requirements of state law relating to indigent defense;

(2) to assist counties in providing indigent defense services in the county, distribute in the form of grants any funds appropriated for the purposes of this section; and

(3) monitor each county that receives a grant and enforce compliance by the county with the conditions of the grant, including enforcement by:

(A) withdrawing grant funds; or

(B) requiring reimbursement of grant funds by the county.

(b) The commission shall distribute funds as required by Subsection (a)(2) based on a county's compliance with standards adopted by the board and the county's demonstrated commitment to compliance with the requirements of state law relating to indigent defense.

(c) The board shall adopt policies to ensure that funds under Subsection (a)(2) are allocated and distributed to counties in a fair manner.

(d) A county may not reduce the amount of funds provided for indigent defense services in the county because of funds provided by the commission under this section.

*Addition of this Section effective Sept. 1, 2011 (HB 1754, §20).*

2011 Legislative Note

HB 1754 adds this section to replace Sec. 71.062

**Sec. 79.039. EXONERATION REPORT.**

(a) Each legal clinic or program in this state that is operated by a law school and that receives financial support from the commission shall submit to the commission an annual report regarding criminal cases:

(1) in which the clinic or program has provided legal services to an indigent defendant during the preceding calendar year; and

(2) in which:

(A) based on a finding of actual innocence, the court of criminal appeals overturns a conviction; or

(B) the governor issues a pardon based on actual innocence.

(b) The report required under Subsection (a) must:

(1) identify each likely cause of a wrongful conviction listed in the report; and

(2) recommend to the judiciary and the legislature best practices, policies, and statutory changes to address or mitigate those likely causes with respect to future criminal cases.

*Addition of this Section effective Sept. 1, 2011 (HB 1754, §20).*

2011 Legislative Note

HB 1754 adds this section to require a university innocence project that receives financial assistance from the Commission to submit a report on the causes of a wrongful conviction when a project's client is exonerated.

## LOCAL GOVERNMENT CODE

### CHAPTER ONE HUNDRED THIRTY-THREE: CRIMINAL AND CIVIL FEES PAYABLE TO THE COMPTROLLER

#### Sec. 133.102. Consolidated Fees on Conviction

(a) A person convicted of an offense shall pay as a court cost, in addition to all other costs:

- (1) \$133 on conviction of a felony;
- (2) \$83 on conviction of a Class A or Class B misdemeanor; or
- (3) \$40 on conviction of a nonjailable misdemeanor offense, including a criminal violation of a municipal ordinance, other than a conviction of an offense relating to a pedestrian or the parking of a motor vehicle.

(b) The court costs under Subsection (a) shall be collected and remitted to the comptroller in the manner provided by Subchapter B.

(c) The money collected under this section as court costs imposed on offenses committed on or after January 1, 2004, shall be allocated according to the percentages provided in Subsection (e).

(d) The money collected as court costs imposed on offenses committed before January 1, 2004, shall be distributed using historical data so that each account or fund receives the same amount of money the account or fund would have received if the court costs for the accounts and funds had been collected and reported separately.

(e) The comptroller shall allocate the court costs received under this section to the following accounts and funds so that each receives to the extent practicable, utilizing historical data as applicable, the same amount of money the account or fund would have received if the court costs for the accounts and funds had been collected and reported separately, except that the account or fund may not receive less than the following percentages:

- (1) abused children's counseling 0.0088 percent;
- (2) crime stoppers assistance 0.2581 percent;
- (3) breath alcohol testing 0.5507 percent;

(4) Bill Blackwood Law Enforcement Management Institute 2.1683 percent;

(5) law enforcement officers standards and education 5.0034 percent;

(6) comprehensive rehabilitation 9.8218 5.3218 percent;

(7) operator's and chauffeur's license 11.1426 percent;

(8) criminal justice planning 12.5537 percent;

(9) an account in the state treasury to be used only for the establishment and operation of the Center for the Study and Prevention of Juvenile Crime and Delinquency at Prairie View A&M University 1.2090 percent;

(10) compensation to victims of crime fund 37.6338 percent;

(11) ~~emergency radio infrastructure fugitive apprehension account~~ 5.5904 12.0904 percent;

(12) judicial and court personnel training fund 4.8362 percent;

(13) an account in the state treasury to be used for the establishment and operation of the Correctional Management Institute of Texas and Criminal Justice Center Account 1.2090 percent; and

(14) fair defense account 8.01436 0.0143 percent.

(f) Of each dollar credited to the law enforcement officers standards and education account under Subsection (e)(5):

(1) 33.3 cents may be used only to pay administrative expenses; and

(2) the remainder may be used only to pay expenses related to continuing education for persons licensed under Chapter 1701, Occupations Code.

*Amendments to (e)(6), (e)(11), and (e)(14) effective September 1, 2011 (HB 442, §3).*

#### 2011 Legislative Note

HB 442 amends subsection (e) to add the emergency radio infrastructure account to the list of accounts that receive a percentage of court costs

authorized in this section. The section also increases the minimum percentage of court costs allocated to the Fair Defense Account from 6.0143% to 8.0143%.

#### **Sec. 133.107. Fee for Support of Indigent Defense Representation**

(a) A person convicted of any offense, other than an offense relating to a pedestrian or the parking of a motor vehicle, shall pay as a court cost, in addition to other costs, a fee of \$2 to be used to fund indigent defense representation through the fair defense account established under Section 79.03171.058, Government Code.

(b) The treasurer shall remit a fee collected under this section to the comptroller in the manner provided by Subchapter B. The comptroller shall credit the remitted fees to the credit of the fair defense account established under Section 71.058, Government Code.

*Amendments to (a), (d), and (f) and addition of (f-1) effective Sept. 1, 2011 (HB 1754, §20).*

HB 1754 makes a conforming change to subsection (a).

*Note: References to the Task Force on Indigent Defense should be read as to the Texas Indigent Defense Commission and statutory references to repealed sections should be read as to its replacement section from the 2011 Legislative Notes and the chart beginning on page 67.*

### **TEXAS ADMINISTRATIVE CODE**

#### **TITLE 1. ADMINISTRATION**

#### **PART 8. JUDICIAL COUNCIL**

#### **CHAPTER 173. INDIGENT DEFENSE GRANTS**

##### **Subchapter A. General Funding Program Provisions**

###### **Sec. 173.101. Applicability**

(a) The Texas Legislature authorized the Task Force on Indigent Defense (Task Force) to direct the Comptroller to distribute Fair Defense Account funds, including grants, to counties to provide indigent defense services. It further authorized the Task Force to monitor grants and enforce compliance by counties with grant terms.

Subchapters A - D of this chapter apply to all indigent defense grants and other funds awarded to counties by the Task Force. Subchapter A of this chapter covers the general provisions for funding. Subchapter B of this chapter addresses funding types, eligibility, and general provisions of grant funding. Subchapter C of this chapter sets out the rules related to administering grants. Subchapter D of this chapter specifies rules regarding fiscal and program monitoring and audits.

(b) Only counties in Texas are eligible to receive grants or other funds from the Task Force.

(c) The Task Force may distribute funds in accordance with its policies and based on official submissions and reports provided by the counties. These funds must be used to improve indigent defense systems in the county and are subject to all applicable conditions contained in this chapter.

#### **Sec. 173.102. Definitions**

The following words and terms, when used in this chapter, will have the following meanings, unless otherwise indicated:

(1) "Applicant" is a county that has submitted a grant application, grant renewal documentation, or other request for funding from the Task Force.

(2) "Application" is any formal request for funding submitted by a county to the Task Force.

(3) "Crime" means

(A) a misdemeanor punishable by confinement; or

(B) a felony.

(4) "Defendant" means a person accused of a crime or a juvenile offense.

(5) "Direct Disbursement" means funds available for reimbursement of indigent defense expenses to counties that do not apply for the formula grant.

(6) "Discretionary Grant" means funding approved for a specific program designed to improve the quality of indigent defense services.

(7) "Equalization Disbursement" means funding allocated to counties through a formula based

on the percentage of reimbursement counties receive for increased indigent defense expenses or other criteria approved by the Task Force.

(8) "Extraordinary Disbursement" means funding to reimburse a county for actual extraordinary expenses for providing indigent defense services in a case or series of cases.

(9) "Fair Defense Account" is an account in the general revenue fund that may be appropriated only to the Task Force on Indigent Defense for the purpose of implementing the Texas Fair Defense Act.

(10) "Formula Grant" means funding allocated to counties through a formula based upon population figures or other criteria approved by the Task Force.

(11) "Grant" is a funding award made by the Task Force to a Texas county in the form of a formula grant or discretionary grant.

(12) "Grantee" means a county that is the recipient of a grant or other funds from the Task Force.

(13) "Juvenile offense" means conduct committed by a person while younger than 17 years of age that constitutes:

(A) a misdemeanor punishable by confinement; or

(B) a felony.

(14) "Other funds" means funding awarded by the Task Force to a county other than a grant and includes but is not limited to:

(A) Direct Disbursements;

(B) Extraordinary Disbursements;

(C) Equalization Disbursements;

(D) Targeted Specific funding; and

(E) Technical Support.

(15) "Special condition" means a requirement placed on a county by the Task Force that must be satisfied as condition of funding.

(16) "Targeted Specific Funds" means funding awarded to counties by the Task Force for a specific program designed to promote and assist counties' compliance with the requirements of state law relating to indigent defense.

(17) "Technical Support" means funding awarded to counties to improve the quality of indigent defense services, raise the knowledge base about indigent defense, and establish processes that can be generalized to similar situations in other counties.

(18) "Task Force on Indigent Defense" (Task Force) is the governmental entity established and governed by §71.051 of the Texas Government Code.

(19) "UGMS" means the Uniform Grant Management Standards promulgated by the Governor's Office of Budget and Planning at §§5.141 - 5.151 and §5.167 of this title.

**Sec. 173.103. Process for Submitting Applications for Grants and Other Funds**

(a) The Task Force shall provide notice of availability of grants and other funds on the Internet, and will publish on its website the related methods and policies.

(b) Grant applications. The Task Force will provide written notice to each county judge of any Requests for Applications (RFA) for indigent defense grants. Applicants applying pursuant to an RFA must submit their applications according to the requirements provided in the RFA. The RFA will provide the following:

(1) information regarding deadlines for the submission of applications;

(2) the maximum and minimum amounts of funding available for a grant, if applicable;

(3) the starting and ending dates for grants;

(4) information regarding how applicants may access applications;

(5) information regarding where applicants must submit applications;

(6) submission and program requirements; and

<p>(7) the priorities for funding as established by the Task Force.</p> <p>(c) Applications for other funds. The Task Force also may consider applications for other funds that have not been submitted pursuant to an RFA. Applicants must submit such applications in accordance with the Task Force-provided guidelines for other funds, and will be selected in accordance with §173.104 of this chapter (relating to Grant Resolutions).</p>	<p>has satisfied the requirements of a special condition imposed by the Task Force. The Task Force may reject the application and deny the grant for failure to satisfy the requirements.</p> <p>(e) Except as provided by law, all funding decisions made by the Task Force or its designees are final and are not subject to appeal.</p>
<p><b>Sec. 173.104. Grant Resolutions</b></p>	
<p>(a) Each grant application must include a resolution from the county commissioners' court that contains the following:</p>	
<p>(1) authorization for the submission of the application to the Task Force;</p> <p>(2) provision giving the authorized official the power to apply for, accept, decline, modify, or cancel the grant; and</p> <p>(3) written assurance that, in the event of loss or misuse of Fair Defense Account funds, the governing body will return all funds as required by the Task Force.</p>	
<p>(b) The Task Force may require a resolution from counties receiving other funds.</p>	
<p><b>Sec. 173.105. Selection Process</b></p>	
<p>(a) The Task Force or its designees will review all applications and shall award from the Fair Defense Account formula grants, discretionary grants, or other funds.</p>	
<p>(b) Upon reviewing an application, staff may require an applicant to submit, within a specified time, additional information to complete the review or to clarify or justify the application. Neither a request for additional information nor the issuance of a preliminary review report means that the Task Force will fund an application.</p>	
<p>(c) The Task Force will inform applicants in writing or by electronic means of decisions to grant or deny applications for funding.</p>	
<p>(d) If the Task Force determines that an applicant has failed to submit the necessary information or has failed to comply with any Task Force rule or other relevant statute, rule, or requirement, the Task Force may hold a grantee's funds until the grantee</p>	
<p>55</p>	

and Contract Management Act of 1981, Chapter 783, Texas Government Code. See §§5.141 - 5.151 and §5.167 of this title.

(2) The Task Force forms, including the statement of grant award, grant adjustment notice, grantee's progress report, financial expenditure report, and property inventory report.

#### **Sec. 173.109. Use of the Internet**

The Task Force may require submission of applications for grants or other funds, progress reports, financial reports, and other information via the Internet. Completion and submission of a progress report or financial report via the Internet meets the relevant requirements contained within this chapter for submitting reports in writing. If an application for a grant or other funds is submitted via the Internet, the Task Force will not consider it complete until the grantee provides an Internet Submission Form that is signed by the applicant's authorized official and that meets all relevant deadlines for applications. This form certifies that the information submitted via the Internet is true and correct and that, if funding is awarded, the grantee will abide by all relevant rules, policies, and procedures. The Director of the Task Force may grant a county a waiver of Internet submission requirements for good cause shown.

### **Subchapter B. Eligibility and Funding Requirements**

#### **Sec. 173.201. Eligibility**

(a) The Task Force may provide funds, including grants from the Fair Defense Account, to counties that have complied with standards developed by the Task Force and that have demonstrated commitment to compliance with the requirements of state law relating to indigent defense.

(b) A county may not reduce the amount of funds expended for indigent defense services in the county because of funds provided by the Task Force. Because discretionary grants and targeted specific funds are awarded to enable a county to establish a new system or program for providing indigent defense services, such grants may or may not enter into a calculation of whether the county has or will reduce its funding because of Task Force funding. Other types of funding, including formula grants, direct disbursements, equalization disbursements, extraordinary disbursements, or technical support,

shall be considered in determining compliance with this requirement.

#### **Sec. 173.202. Use of Funds**

Grants provided under this chapter may be used by counties for:

- (1) Attorney fees for indigent defendants accused of crimes or juvenile offenses;
- (2) Expenses for licensed investigators, experts, forensic specialists, or mental health experts related to the criminal defense of indigent defendants;
- (3) Other direct litigation costs related to the criminal defense of indigent defendants; and
- (4) Other approved expenses allowed by the RFA or necessary for the operation of a funded program.

#### **Sec. 173.203. Expenditure Categories**

(a) Allowable expenditure categories and any necessary definitions will be provided to the applicant as part of the application process.

(b) Expenditures may be allocated to the grant in accordance with the Uniform Grant Management Standards.

#### **Sec. 173.204. Program Income**

(a) Rules governing the use of program income are included in the provisions of the Uniform Grant Management Standards adopted by reference in §173.108 of this chapter (relating to Adoptions by Reference).

(b) Grantees must use program income to supplement program costs or reduce program costs. Program income may only be used for allowable program costs.

#### **Sec. 173.205. Equipment**

(a) Decisions by the Task Force or its designees regarding requests to purchase equipment using Task Force funds will be made based on the availability of funds, whether the grantee has demonstrated that the requested equipment is necessary and essential to the successful operation of the funded program, and whether the equipment is reasonable in cost.

(b) For counties that receive a multi-year grant, the Task Force will only fund equipment and other one-time costs during the first year unless permission is granted in writing. Otherwise, equipment and other one-time costs will not factor in to the overall project costs after the first year of the grant.

(c) The Task Force requires each grantee to maintain an inventory report of all equipment purchased with Task Force funds. This report must comport with the final financial expenditure report. At least once each year during the award period, each grantee must complete a physical inventory of all property purchased with Task Force funds and the grantee must reconcile the results with the purchased property records. For single-year awards, the inventory and reconciliation must be made at the end of the award period and submitted with the final report.

(d) Equipment purchased with Task Force funds must be labeled and handled in accordance with the grantee's property management policies and procedures.

(e) Unless otherwise provided, equipment purchased is the property of the grantee after the end of the award period or termination of the operation of the funded program, whichever occurs last.

## **Subchapter C. Administering Grants**

### **Sec. 173.301. Grant Officials**

(a) Each grant must have the following designated to serve as grant officials:

(1) Program director. This person must be the officer or employee responsible for program operation and who will serve as the point-of-contact regarding the program's day-to-day operations.

(2) Financial officer. This person must be the county auditor or county treasurer if the county does not have a county auditor.

(3) Authorized official. This person must be authorized to apply for, accept, decline, modify, or cancel the grant for the applicant county. A county judge or a designee authorized by the governing body in its resolution may serve as the authorized official.

(b) The Task Force may require a county to designate a program director for other funded programs.

(c) The program director and the authorized official may be the same person. The financial officer may not serve as the program director or the authorized official.

### **Sec. 173.302. Obligating Funds**

The grantee may not obligate grant funds before the beginning or after the end of the grant period.

### **Sec. 173.303. Retention of Records**

(a) Grantees must maintain all financial records, supporting documents, statistical records, and all other records pertinent to the award for at least three years following the closure of the most recent audit report or submission of the final expenditure report. Records retention is required for the purposes of state examination and audit. Grantees may retain records in an electronic format. All records are subject to audit or monitoring during the entire retention period.

(b) Grantees must retain records for equipment, non-expendable personal property, and real property for a period of three years from the date of the item's disposition, replacement, or transfer.

(c) If any litigation, claim, or audit is started before the expiration of the three-year records retention period, the grantee must retain the records under review until the resolution of all litigation, claims, or audit findings.

### **Sec. 173.304. Expenditure Reports**

(a) Recipients of grants and other funds may be required to submit expenditure reports to the Task Force in addition to the annual expenditure report required for all counties under Texas Government Code §71.0351(e).

(b) The Task Force will provide the appropriate forms and instructions for the reports along with deadlines for their submission. The financial officer shall be responsible for submitting the expenditure reports. The Task Force may place a financial hold on a grantee's future funds if the grantee fails to submit timely expenditure reports or submits incomplete financial reports.

(c) Grantees must ensure that actual expenditures are adequately documented. Documentation may include, but is not limited to, ledgers, purchase orders, travel records, time sheets or other payroll documentation, invoices, contracts, mileage records, telephone bills and other documentation that verifies the expenditure amount and appropriateness to the funded program.

#### **Sec. 173.305. Provision of Funds**

(a) After a grant has been accepted and if there are no outstanding special conditions or other deficiencies, the Task Force may forward funds to the grantee. Funds will be disbursed to the grantee no more often than quarterly unless specific permission is granted in writing from the Director.

(b) Disbursement of funds is always subject to the availability of funds.

(c) Discretionary grant funds will be paid only after the expenditure report has been submitted. Funds must be expended, not obligated, before being included in the funding expenditure report.

#### **Sec. 173.306. Discretionary Grant Adjustments**

(a) The authorized official must sign all requests for grant adjustments.

(b) Budget Adjustments. Grant adjustments consisting of reallocations of funds among or within budget categories in excess of \$10,000 or ten percent of the original grant award, whichever is less, are considered budget adjustments, and are allowable only with prior approval of the Director of the Task Force.

(c) Non-Budget Grant Adjustments. The following rules apply to non-budget grant adjustments:

(1) Requests to revise the scope, target, or focus of the project, or alter project activities require advance written approval from the Task Force or its designees, as determined by the Director of the Task Force.

(2) The grantee will notify the Task Force or its designees in writing of any change in the designated program director, financial officer, or authorized official within ten days following the change.

#### **Sec. 173.307. Remedies for Noncompliance**

If a grantee fails to comply with any term or condition of a grant or other funds, the Task Force may take one or more of the following actions:

- (1) disallow all or part of the cost of the activity or action that is not in compliance and seek a return of the cost;
- (2) impose administrative sanctions, other than fines, on the grantee;
- (3) temporarily withhold all payments pending correction of the deficiency by the grantee;
- (4) withhold future grants or other funds from the program or grantee; or
- (5) terminate the grant or other funds in whole or in part.

#### **Sec. 173.308. Term of Grant or Other Funds**

(a) The term of a grant or other funds shall be specified in the award statement or other funding document.

(b) If a grantee wishes to terminate a grant or other funds in whole or in part before the end of the award period, the grantee must notify the Task Force in writing. The Task Force or its designee will make arrangements with the grantee for the early termination of the award.

(c) The Task Force may terminate any grant or other funds, in whole or in part, when:

- (1) a grantee fails to comply with any term or condition of the grant or other funds or the grantee has failed to comply with any applicable rule;
- (2) the grantee and the Director of the Task Force agree to do so;
- (3) indigent defense funds are no longer available; or
- (4) conditions exist that make it unlikely that grant or program objectives will be accomplished.

(d) A grantee may submit a written request for an extension of the funding period in extraordinary circumstances. The Task Force must receive

requests for funding extensions at least 30 days prior to the end of the funding period.

### **Sec. 173.309. Violations of Laws**

If the grantee has a reasonable belief that a criminal violation may have occurred in connection with Fair Defense Account funds, including the misappropriation of funds, fraud, theft, embezzlement, forgery, or any other serious irregularities indicating noncompliance with the requirements of a grant or other funds, the grantee must immediately notify the Task Force in writing of the suspected violation or irregularity. The grantee may also notify the local prosecutor's office of any possible criminal violations. Grantees whose programs or personnel become involved in any litigation arising from the grant or award of other funds, whether civil or criminal, must immediately notify the Task Force and forward a copy of any demand notices, lawsuits, or indictments to the Task Force.

### **Sec. 173.310. Progress Reports for Discretionary Grants and Other Funds**

Each grantee must submit reports regarding performance and progress towards goals and objectives in accordance with the instructions provided by the Task Force or its designee. To remain eligible for funding, the grantee must be able to show the scope of services provided and the impact and quality of those services.

## **Subchapter D. Fiscal Monitoring and Audits**

### **Sec. 173.401. Fiscal Monitoring**

(a) The Task Force or its designees will monitor the activities of grantees as necessary to ensure that Task Force grant funds are used for authorized purposes in compliance with laws, regulations, and the provisions of grant agreements.

(b) The monitoring program may consist of formal audits, monitoring reviews, and technical assistance. The Task Force or its designees may implement monitoring through on-site review at the grantee location or through a desk review based on grantee reports. In addition, the Task Force or its designees may require grantees to submit relevant information to the Task Force to support any monitoring review. The Task Force may contract with an outside provider to conduct the monitoring.

(c) Grantees must make available to the Task Force or its designees all requested records relevant to a monitoring review. The Task Force or its designees may make unannounced monitoring visits at any time. Failure to provide adequate documentation upon request may result in disallowed costs or other remedies for noncompliance as detailed under §173.307 of this chapter (relating to Remedies for Noncompliance).

(d) After a monitoring review, the grantee will be notified in writing of any noncompliance identified by the Task Force or its designees in the form of a draft report.

(e) The grantee will respond to the draft report and the deficiencies, if any, and submit a plan of corrective action, if necessary, within a time frame specified by the Task Force or its designees.

(f) The corrective action plan will include the:

(1) titles of the persons responsible for implementing the corrective action plan;

(2) corrective action to be taken; and

(3) anticipated completion date.

(g) If the grantee believes corrective action is not required for a noted deficiency, the response will include an explanation, specific reasons, and supporting documentation.

(h) The Task Force or its designees will approve the corrective action plan and may require modifications prior to approval. The grantee's replies and the approved corrective action plan, if any, will become part of the final report.

(i) The grantee will correct deficiencies identified in the final report within the time frame specified in the corrective action plan.

### **Sec. 173.402. Audits Not Performed by the Task Force on Indigent Defense**

(a) Grantees must submit to the Task Force copies of the results of any single audit conducted in accordance with the State Single Audit Circular issued under the Uniform Grant Management Standards. Grantees must ensure that single audit results, including the grantee's response and corrective action plan, if applicable, are submitted to the Task Force within 30 days after grantee receipt

of the audit results or nine months after the end of the audit period, whichever is earlier.

(b) All other audits performed by auditors independent of the Task Force must be maintained at the grantee's administrative offices pursuant to §173.303 of this chapter (relating to Retention of Records) and be made available upon request by the Task Force or its representatives. Grantees must notify the Task Force of any audit results that may adversely impact the Task Force grant funds.

(c) Nothing in this section should be construed so as to require a special or program-specific audit of a grantee's Indigent Defense grant program.

## **CHAPTER 174. INDIGENT DEFENSE POLICIES AND STANDARDS**

### **Subchapter A. Minimum Continuing Legal Education Requirements**

#### **Sec. 174.1. Appointment in Criminal Cases**

An Attorney who meets the requirements of this rule may be appointed to represent an indigent person arrested for or charged with a crime, if the attorney is otherwise eligible under the procedures developed under Article 26.04, Code of Criminal Procedure. Crime has the meaning assigned by §173.2(2). An attorney may be appointed under this rule only if an attorney:

(1) Completes a minimum of six hours of continuing legal education pertaining to criminal law during each 12-month reporting period. The judges of criminal courts of the county shall set the 12-month reporting period applicable to the jurisdiction. Continuing legal education may include activities accredited under Section 4, Article XII, State Bar Rules, self-study, teaching at an accredited continuing legal education activity, attendance at a law school class or legal research-based writing. The judges may require attorneys to complete more than the minimum number of hours of continuing legal education in criminal law in the procedures developed under Article 26.04, Code of Criminal Procedure; or

(2) Is currently certified in criminal law by the Texas Board of Legal Specialization.

#### **Sec. 174.2. Appointment in Juvenile Cases**

An attorney who meets the requirements of this rule may be appointed to represent an indigent juvenile

detained for or accused of engaging in delinquent conduct or conduct indicating a need for supervision, if the attorney is otherwise eligible under the plan developed under Section 51.101, Family Code. An attorney may be appointed under this rule only if an attorney:

(1) Completes a minimum of six hours of continuing legal education pertaining to juvenile law during each 12-month reporting period. The juvenile board shall set the 12-month reporting period applicable to the jurisdiction. Continuing legal education may include activities accredited under Section 4, Article XII, State Bar Rules, self-study, teaching at an accredited continuing legal education activity, attendance at a law school class or legal research-based writing. A juvenile board may require an attorney to complete more than the minimum number of hours of continuing legal education in juvenile law in the plan developed under Section 51.101, Family Code; or

(2) Is currently certified in juvenile law by the Texas Board of Legal Specialization.

#### **Sec. 174.3. Reporting Period**

(a) Continuing legal education activity completed within a one-year period immediately preceding an attorney's initial reporting period may be used to meet the educational requirement for the initial year.

(b) Continuing legal education activity completed during any reporting period in excess of the minimum six-hour requirement for such period may be applied to the following period's requirement. The carryover provision applies to one year only.

#### **Sec. 174.4. Emergency Appointment**

If no attorney who meets the continuing legal education or board certification requirements contained in this subchapter is available by the time an attorney must be appointed in the case, another attorney may be appointed. The person making an appointment under this section shall give priority to an attorney with experience in criminal or juvenile law, respectively.

## **Subchapter B. Contract Defender Program Requirements**

### **Division 1. Definitions**

#### **Sec. 174.10. Subchapter Definitions**

The following words and terms when used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise.

(1) **Appointing Authority.** The appointing authority is the:

(A) Judge or judges who have authority to establish an indigent defense plan and approve attorneys to represent indigent defendants in criminal cases under Article 26.04, Code of Criminal Procedure; and/or

(B) Juvenile board that has authority to establish an indigent defense plan and approve attorneys to represent indigent respondents in juvenile cases under §51.102, Family Code.

(2) **Contract Defender Program.** Contract defender program means a system under which private attorneys, acting as independent contractors and compensated with public funds, are engaged to provide legal representation and services to a group of unspecified indigent defendants who appear before a particular court or group of courts.

(3) **Contracting Authority.** The contracting authority is the county or counties that have the authority to conclude a contract and to obligate funds for the provision of indigent defense services.

(4) **Contractor.** The contractor is an attorney, law firm, professional association, lawyer's association, law school, bar association, non-profit organization or other entity that can be bound by contract.

(5) **Itemized Fee Voucher.** An itemized fee voucher is any instrument, such as an invoice, that details services provided by a contractor providing indigent defense services. The itemized fee voucher may be in paper or electronic form. It shall include at a minimum all the information necessary for the county auditor or other designated official to complete the expenditure report required to be submitted to

the Office of Court Administration by §71.0351, Government Code.

### **Division 2. Application of Standards and Contracting Procedures**

#### **Sec. 174.11. Application of Subchapter**

This subchapter applies to all contract defender programs. This subchapter does not apply to public defender programs established and governed by Chapter 26, Code of Criminal Procedure.

#### **Sec. 174.12. Application Process**

The appointing authority shall solicit and select contractors in accordance with the procedure governing alternative appointment programs contained in Article 26.04, Code of Criminal Procedure.

(1) **Notification.** The notification of the opportunity to apply (NOA) to be a contractor shall be distributed in a manner that reasonably covers all practicing members of the bar within the county or other region designated by the appointing authority. The notification shall inform attorneys of all requirements for submitting applications.

(2) **Opportunity to Respond.** All potential contractors shall have the same opportunity to respond to the NOA and be considered for the award of a contract.

(3) **Application.** All applications must be submitted in writing and shall be maintained by the appointing authority or contracting authority in accordance with the Texas State Library and Archives Commission Retention Schedule for Local Records-Local Schedule GR.

#### **Sec. 174.13. Application Review Process**

Following the review of all applications the appointing authority shall by a majority vote select contractor(s), specify the types of cases each contractor is qualified to handle, and authorize the contracting authority to enter into a contract. The attorneys associated with the selected contractor(s) must meet the attorney qualification requirements contained in the indigent defense procedures adopted pursuant to Article 26.04, Code of Criminal Procedure. If the contract does not exclude capital cases in which the death penalty is sought, the attorneys associated with the selected contractor(s)

must also meet the attorney qualifications set by the regional selection committee and be approved by the regional selection committee to represent clients in capital cases. The appointing authority shall consider at least the following factors when evaluating applications:

- (1) Experience and qualifications of the applicant;
- (2) Applicant's past performance in representing defendants in criminal cases;
- (3) Applicant's disciplinary history with the state bar;
- (4) Applicant's ability to comply with the terms of the contract; and
- (5) Cost of the services under the contract.

#### **Sec. 174.14. Awarding the Contract**

In accordance with Article 26.04(h), Code of Criminal Procedure, the contracting authority may approve the recommended contractor(s) and enter into a contract for services. The contracting authority shall enter into a contract only if it complies with these standards and all applicable law governing professional services contracts entered into by counties. A contract shall not be awarded solely on the basis of cost.

#### **Division 3. Required Elements of a Contract for Indigent Defense Services (Each Component Below Shall Be Included in a Contract for Indigent Defense Services and Shall Serve as the Basis for the NOA)**

##### **Sec. 174.15. Parties**

Identify the appointing authority, contracting authority, and contractor.

##### **Sec. 174.16. Term of Contract**

The contract shall specify the term of the contract, including any provision for extensions, and a provision for terminating the contract by either party.

##### **Sec. 174.17. Scope of Contract**

The contract shall specify the categories of cases in which the contractor is to provide services.

##### **Sec. 174.18. Minimum Attorney Qualifications**

The contract shall specify minimum qualifications for attorneys covered by the contract and require such attorneys to maintain the qualifications during the term of the contract. The qualifications shall equal or exceed the qualifications provided in the indigent defense procedures adopted pursuant to Article 26.04, Code of Criminal Procedure. If the contract does not exclude capital cases in which the death penalty is sought, the qualifications shall equal or exceed the minimum attorney qualifications set by the regional selection committee and the attorneys covered by the contract shall be required to be on the list of attorneys approved by the regional selection committee to represent clients in capital cases. If a contract covers services provided by more than one attorney, qualifications may be graduated according to the seriousness of offense and each attorney shall be required to meet and maintain only those qualifications established for the offense level(s) for which the attorney is approved to provide defense services.

##### **Sec. 174.19. Duration of Representation**

The contract shall specify that the contractor has the responsibility to complete all cases once representation is commenced during the term of the contract, unless an attorney covered by the contract is relieved or replaced in accordance with Article 26.04(j)(2), Code of Criminal Procedure.

##### **Sec. 174.20. Substitution of Attorneys**

The contract shall identify the attorney(s) who will perform legal representation in each category of case covered by the contract and prohibit the substitution of other attorneys without prior approval by a majority of the appointing authority. Nothing in the contract shall prohibit an attorney covered by the contract from being relieved or replaced in accordance with Article 26.04(j)(2) of the Code of Criminal Procedure.

##### **Sec. 174.21. Caseload Limitations**

The contract shall set the maximum number of cases or workload each attorney may be required to handle pursuant to the contract.

##### **Sec. 174.22. Standards of Representation**

The contract shall require that the contractor provide zealous legal representation to all clients in a professional, skilled manner consistent with all

applicable laws and the Texas Disciplinary Rules of Professional Conduct.

#### **Sec. 174.23. Conflicts of Interest**

The contract shall state a policy to assure that the contractor and its attorneys do not provide representation to defendants when doing so would involve a conflict of interest.

#### **Sec. 174.24. Investigators and Experts**

The contract shall specify how investigation services and experts that are necessary to provide competent representation will be made available in a manner consistent with Article 26.05(d), Code of Criminal Procedure.

#### **Sec. 174.25. Compensation and Payment Processes**

The contract shall set the amount of compensation to be paid to the contractor and the designated method and timing of payment. The contract shall state that the contractor shall be required to submit an itemized fee voucher. The voucher must be approved by a member of the appointing authority prior to being forwarded to the county financial officer for approval and payment. The contract shall also specify how a contractor is to be compensated for cases assigned but not disposed within the term of the contract as provided in §174.19 of this subchapter.

### **Subchapter C. Policy Monitoring Requirements**

#### **Division 1. Definitions**

#### **Sec. 174.26. Subchapter Definitions**

The following words and terms when used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise.

- (1) Director--The director of the Task Force.
- (2) Program Director--The local officer or employee designated under §173.301 of this title.
- (3) Period of review--The 12 months preceding the date of the monitoring visit.
- (4) Policies and Standards Committee--A committee of the Task Force charged with

developing policies and standards related to improving indigent defense services.

(5) Policy Monitor--The employee of the Task Force who monitors the effectiveness of a county's indigent defense policies, standards, and procedures.

(6) Risk Assessment--A tool to rank each county's potential risk of not being in compliance with indigent defense laws.

(7) Task Force--Task Force means the Task Force on Indigent Defense.

#### **Division 2. Policy Monitoring Process and Benchmarks**

#### **Sec. 174.27. Risk Assessment**

A risk assessment of each county shall be conducted by the policy monitor each fiscal year as the primary means of determining which counties will be selected for on-site policy monitoring. On-site monitoring visits to counties shall then be apportioned by administrative judicial region, county size, risk assessment scores, past visits and other documented factors. The risk assessment shall use a variety of factors related to the provision of indigent defense services, including but not limited to the following:

- (1) Whether a county reported investigation and expert witness expenses;
- (2) Whether a county reported reimbursements for attorney fees;
- (3) Amount of per capita indigent defense expenses;
- (4) Felony, misdemeanor, and juvenile attorney appointment rates;
- (5) Population of a county;
- (6) Whether complaints about a county have been received by the Task Force;
- (7) Whether a county received an equalization award;
- (8) Whether a county reported appeals cases; and

(9) Whether a county completed a voluntary self-assessment.

### **Sec. 174.28. On-Site Monitoring Process**

(a) Purpose. The process promotes local compliance with the requirements of the Fair Defense Act and Task Force rules and provides technical assistance to improve processes where needed.

(b) Monitoring Process. The policy monitor examines the local indigent defense plans and local procedures and processes to determine if the jurisdiction meets the statutory requirements and rules adopted by the Task Force. The policy monitor also attempts to randomly select samples of actual cases from the period of review by using a 15% confidence interval for a population at a 95% confidence level.

(c) Core Requirements. On-site policy monitoring focuses on the six core requirements of the Fair Defense Act and related rules. This rule establishes the process for evaluating policy compliance with a requirement and sets benchmarks for determining whether a county is in substantial policy compliance with the requirement.

#### **(1) Prompt and Accurate Magistration.**

(A) The policy monitor shall review the local indigent defense plans and determine if they require:

- (i) Magistration within 48 hours of arrest;
- (ii) That the right to counsel be communicated to the arrestee, the arrestee be provided an opportunity to request counsel, and both be recorded; and
- (iii) Transmittal of the request for appointed counsel to the appointing authority within 24 hours of request.

(B) The policy monitor shall check for documentation indicating that the magistrate or county has:

- (i) Informed and explained to an arrestee the rights listed in Article 15.17(a), Code of Criminal Procedure, including the right to counsel;

(ii) Maintained a process to magistrate arrestees within 48 hours of arrest;

(iii) Maintained a process for magistrates not authorized to appoint counsel to transmit requests for counsel to the appointing authority within 24 hours of the request; and

(iv) Maintained magistrate processing records required by Article 15.17(a), (e), and (f), Code of Criminal Procedure, and records documenting the time of arrest, time of magistration, whether the person requested counsel, and time for transferring requests for counsel to the appointing authority.

(C) A county is presumed to be in substantial compliance with the prompt magistration requirement if magistration in at least 98% of the policy monitor's sample is conducted within 48 hours of arrest.

(2) Indigence Determination. The policy monitor shall review the local indigent defense plans and determine if they:

(A) Specify procedures and standards for determining whether a defendant is indigent;

(B) Apply the procedures and standards to each defendant in the county equally, regardless of whether the defendant is in custody or has been released on bail; and

(C) In the case of juveniles, specify that the income and assets of the parent or other person responsible for the juvenile shall be considered in determining the indigence of the child.

(3) Minimum Attorney Qualifications. The policy monitor shall review the local indigent defense plans and documentation to determine if they:

(A) Specify objective qualifications that attorneys must meet to be eligible for appointment, including the continuing legal education (CLE) requirements set out in §§174.1 - 174.4 of this title and annually track attorney CLE hours;

(B) Require each attorney applying to be on an appointment list be approved by a

majority of the judges who try criminal cases at the felony or misdemeanor offense level, respectively, or by a majority vote of the juvenile board in juvenile cases; and

(C) In the case of juveniles, recognize the differences in qualifications and experience necessary for appointments for different offense levels as required by Texas Family Code §51.102(b)(2).

(4) Prompt Appointment of Counsel.

(A) The policy monitor shall review the local indigent defense plans and determine if they require:

(i) Counsel to be appointed for indigent defendants within one working day of receipt of the request for counsel in counties with a population of 250,000 or more, or three working days in other counties;

(ii) For juveniles not represented at the initial detention hearing, either immediate appointment of counsel or an order requiring the person having custody over the child to retain counsel if the person with custody is not found to be indigent;

(iii) For juveniles, that counsel to be appointed within five working days of the service on the child of the petition if the child's custodian is found indigent.

(B) The policy monitor shall check for documentation indicating that:

(i) Counsel was appointed for arrestees within one working day of receipt of the request for counsel in counties with a population of 250,000 or more, or three working days in other counties; and

(ii) Counsel was appointed within one day of the detention hearing for in-custody juveniles and within five working days of service of the petition on the juvenile for out-of-custody juveniles.

(C) A county is presumed to be in substantial compliance with the prompt appointment of counsel requirement if, in each level of proceedings (felony,

misdemeanor, and juvenile cases), at least 90% of indigence determinations in the policy monitor's sample are timely

(5) Attorney Selection Process.

(A) The policy monitor shall review the local indigent defense plans and determine if they:

(i) Include an attorney selection method; and

(ii) Specify who is authorized to make appointments, what appointment lists are used, and a description of when an attorney on the list may be skipped, if applicable.

(B) The policy monitor shall check for documentation indicating:

(i) In the case of a contract defender program, that all requirements of §§174.10 - 174.25 of this title are met;

(ii) That attorney selection process actually used matches what is stated in the indigent defense plans; and

(iii) The number of appointments in the policy monitor's sample per attorney at each level (felony, misdemeanor, juvenile, and appeals) during the period of review, the percentage share of appointments represented by the top 10% of attorneys accepting appointments.

(C) A county is presumed to be in substantial compliance with the fair, neutral, and non-discriminatory attorney appointment system requirement if, in each level of proceedings (felony, misdemeanor, and juvenile cases), the percentage of appointments received by the top 10% of recipient attorneys does not exceed three times their respective share. If the county can track attorney list changes, the monitor will only examine the distribution of cases for attorneys that were on the appointment list for the entire year. The top 10% of recipient attorneys is the whole attorney portion of the appointment list that is closest to 10% of the total list.

(6) Payment Process.

(A) The policy monitor shall review the local indigent defense plans and determine if they include:

- (i) An attorney fee schedule;
- (ii) Procedures for paying attorneys, experts, and investigators in accordance with the fee schedule; and
- (iii) Procedures to reimburse expert and investigative expenses incurred without prior court approval when the expenses are reasonable and necessary.

(B) The policy monitor shall check for documentation indicating that the county has established a process for collecting and reporting itemized indigent defense expense and case information.

(d) Report.

(1) Report Issuance. The policy monitor shall issue a report to the program director within 30 days of the on-site monitoring visit to a county, unless a documented exception is provided by the director, with an alternative deadline provided, not later than 90 days from the on-site monitoring visit. The report shall contain each finding of noncompliance.

(2) County Response. Within 60 days of the date the report is issued by the policy monitor, the program director shall respond in writing to each finding of noncompliance, and shall describe the proposed corrective action to be taken by the county. The county may request the director to grant an extension of up to 60 days.

(3) Follow-up Visits. The policy monitor shall conduct an additional on-site visit to counties where the report included significant noncompliance findings. The follow-up visit shall occur within 12 months following receipt of a county's response to the report. The policy monitor shall review a county's implementation of corrective actions and shall report to the county and Task Force any remaining issues not corrected. Within 30 days of the date the follow-up report is issued by the policy monitor, the program director shall respond in writing to each finding of noncompliance, and shall describe the proposed corrective action to be taken by the county. The county may request the director to grant an extension of up to 30 days.

(4) Failure to Respond to Report. If a county fails to respond to a monitoring report or follow-up report within the required time, then a certified letter will be sent to the program director, financial officer, county judge, local administrative district court judge, local administrative statutory county court judge, and chair of the juvenile board notifying them that all further payments will be withheld if no response to the report is received by the Task Force within 10 days of receipt of the letter. If funds are withheld under this section, then the funds will not be reinstated until the Task Force or the Policies and Standards Committee approves the release of the funds.

(5) Noncompliance. If a county fails to correct any noncompliance findings, the Task Force may impose a remedy under §173.307 of this title.

*Amendment of (d)(3) and additions of (c)(1)(C), (c)(4)(C), (c)(5)(C), and (d)(4) effective June 30, 2010 (35 TEXREG 5519).*

## Appendix – Changes After 2011 Legislative Session

### Changes listed by Statute CODE OF CRIMINAL PROCEDURE

Statute	Topic	Changes	Replaced by:
Art. 1.051	Right to Representation by Counsel	None	
Art. 11.071	Procedure in Death Penalty Case	Amended by HB 1646	
Art. 14.06	Must Take Offender Before Magistrate	Amended by SB 331	
Art. 15.17	Duties of Arresting Officer and Magistrate	None	
Art. 15.18	Arrest for Out-of-County Offense	None	
Art. 17.032	Release on Personal Bond of Certain Mentally Ill Defendants	Amended by HB 3000	
Art. 17.033	Release on Bond of Certain Persons Arrested without a Warrant	Amended by HB 1173	
Art. 26.01	Arraignment	None	
Art. 26.011	Waiver of Arraignment	None	
Art. 26.02	Purpose of Arraignment	None	
Art. 26.03	Time of Arraignment	None	
Art. 26.04	Procedures for Appointing Counsel	Amended by HB 1754 & SB 1681	
Art. 26.044	Public Defender in County with Four County Courts and Four District Courts	Amended by HB 1754	
Art. 26.045	Public Defender Oversight Board	Added by HB 1754	
Art. 26.047	Managed Assigned Counsel Program	Added by HB 1754	
Art. 26.05	Compensation of Counsel Appointed to Defend	Amended by HB 1754	
Art. 26.051	Indigent Inmate Defense	None	
Art. 26.052	Appointment of Counsel in Death Penalty Case; Reimbursement of Investigative Expenses	Amended by SB 1308	
Art. 26.056	Contribution from State in Certain Counties	None	
Art. 26.057	Cost of Employment of Counsel for Certain Minors	None	
Art. 26.06	Elected Officials not to be Appointed	None	
Art. 26.07	Name as Stated in Indictment	None	
Art. 26.08	If Defendant Suggests Different Name	None	
Art. 26.09	If Accused Refuses to Give his Real Name	None	
Art. 26.10	Where Name is Unknown	None	
Art. 26.11	Indictment Read	None	

Art. 26.12	Plea of Not Guilty Entered	None	
Art. 26.13	Plea of Guilty	None	
Art. 26.14	Jury on Plea of Guilty	None	
Art. 26.15	Correcting Name	None	
Art. 38.30	Interpreter	None	
Art. 38.31	Interpreters for Deaf Persons	None	
Art. 42.12	Community Supervision	Amended by SB 1681	

## FAMILY CODE

Statute	Topic	Changes	Replaced by:
Sec. 51.10	Right to Assistance of Attorney; Compensation	None	
Sec. 51.101	Appointment of Attorney and Continuation of Representation	None	
Sec. 51.102	Appointment of Counsel Plan	None	

## GOVERNMENT CODE

Statute	Topic	Changes	Replaced by:
Sec. 71.001	Definitions	Amended by HB 1754	
Sec. 71.0351	Indigent Defense Information	Repealed by HB 1754	§79.036
Sec. 71.051	Establishment of Task Force; Composition	Repealed by HB 1754	§79.002 and §79.011
Sec. 71.052	Ex Officio Members	Repealed by HB 1754	§79.013
Sec. 71.053	Appointments	Repealed by HB 1754	§79.014
Sec. 71.054	Vacancies	Repealed by HB 1754	§79.017
Sec. 71.055	Meetings; Quorum; Voting	Repealed by HB 1754	§79.018
Sec. 71.056	Compensation	Repealed by HB 1754	§79.019
Sec. 71.057	Budget	Repealed by HB 1754	§79.033
Sec. 71.058	Fair Defense Account	Repealed by HB 1754	§79.031
Sec. 71.059	Acceptance of Gifts, Grants, and Other Funds; State Grants Team	Repealed by HB 1754	§79.032
Sec. 71.060	Policies and Standards	Repealed by HB 1754	§79.034
Sec. 71.061	County Reporting Plan; Task Force Reports	Repealed by HB 1754	§79.035
Sec. 71.062	Technical Support; Grants	Repealed by HB 1754	§79.037
Sec. 71.063	Immunity from Liability	Repealed by HB 1754	§79.020
Sec. 78.001	Definitions	None	None
Sec. 78.002	Establishment of Committee; Duties	None	None
Sec. 78.003	Appointment and Composition of Committee	None	None
Sec. 78.004	Recommendation and Appointment of Director of Office of Capital Writs	None	None
Sec. 78.052	Definitions	None	None
Sec. 78.052	Establishment; Funding	Amended by HB 1754	None
Sec. 78.053	Director; Staff	None	None
Sec. 78.054	Powers and Duties	None	None
Sec. 78.055	Compensation of Other Appointed Attorneys	None	None
Sec. 78.056	Appointment List	Amended by HB 1754	None
Sec. 79.001	Definitions	Created by HB 1754	None
Sec. 79.002	Establishment of Commission		None

Sec. 79.011	Establishment of Board; Composition		None
Sec. 79.012	Executive Director		None
Sec. 79.013	Ex Officio Members		None
Sec. 79.014	Appointments		None
Sec. 79.015	Presiding Officer		None
Sec. 79.016	Disclosure Required		None
Sec. 79.017	Vacancies		None
Sec. 79.018	Meetings; Quorum; Voting		None
Sec. 79.019	Compensation		None
Sec. 79.020	Immunity from Liability		None
Sec. 79.021	Rules		None
Sec. 79.031	Fair Defense Account		None
Sec. 79.032	Acceptance of Gifts, Grants, and Other Funds; State Grants Team		None
Sec. 79.033	Administrative Attachment; Support; Budget		None
Sec. 79.034	Policies and Standards		None
Sec. 79.035	County Reporting Plan; Commission Reports		None
Sec. 79.036	Indigent Defense Information		None
Sec. 79.037	Technical Support; Grants		None
Sec. 79.039	Exoneration Report		None

#### **LOCAL GOVERNMENT CODE**

<b>Statute</b>	<b>Topic</b>	<b>Changes</b>	<b>Replaced by:</b>
Sec. 133.102	Consolidated Fees on Conviction	Amended by HB 442	
Sec. 133.107	Fee for Support of Indigent Defense Representation	Amended by HB 1754	

#### **TEXAS ADMINISTRATIVE CODE**

<b>Statute</b>	<b>Topic</b>	<b>Changes</b>	<b>Replaced by:</b>
Sec. 173.101	Applicability	None	
Sec. 173.102	Definitions	None	
Sec. 173.103	Process for Submitting Applications for Grants and Other Funds	None	
Sec. 173.104	Grant Resolutions	None	
Sec. 173.105	Selection Process	None	
Sec. 173.106	Grant Funding Decisions	None	
Sec. 173.107	Grant Acceptance	None	
Sec. 173.108	Adoptions by Reference	None	
Sec. 173.109	Use of the Internet	None	
Sec. 173.201	Eligibility	None	
Sec. 173.202	Use of Funds	None	
Sec. 173.203	Expenditure Categories	None	
Sec. 173.204	Program Income	None	
Sec. 173.205	Equipment	None	
Sec. 173.301	Grant Officials	None	
Sec. 173.302	Obligating Funds	None	
Sec. 173.303	Retention of Records	None	

Sec. 173.304	Expenditure Reports	None	
Sec. 173.305	Provision of Funds	None	
Sec. 173.306	Discretionary Grant Adjustments	None	
Sec. 173.307	Remedies for Noncompliance	None	
Sec. 173.308	Term of Grant or Other Funds	None	
Sec. 173.309	Violations of Laws	None	
Sec. 173.310	Progress Reports for Discretionary Grants and Other Funds	None	
Sec. 173.401	Fiscal Monitoring	None	
Sec. 173.402	Audits Not Performed by the Task Force on Indigent Defense	None	
Sec. 174.1	Appointment in Criminal Cases	None	
Sec. 174.2	Appointment in Juvenile Cases	None	
Sec. 174.3	Reporting Period	None	
Sec. 174.4	Emergency Appointment	None	
Sec. 174.10	Subchapter Definitions	None	
Sec. 174.11	Application of Subchapter	None	
Sec. 174.12	Application Process	None	
Sec. 174.13	Application Review Process	None	
Sec. 174.14	Awarding the Contract	None	
Sec. 174.15	Parties	None	
Sec. 174.16	Term of Contract	None	
Sec. 174.17	Scope of Contract	None	
Sec. 174.18	Minimum Attorney Qualifications	None	
Sec. 174.19	Duration of Representation	None	
Sec. 174.20	Substitution of Attorneys	None	
Sec. 174.21	Caseload Limitations	None	
Sec. 174.22	Standards of Representation	None	
Sec. 174.23	Conflicts of Interest	None	
Sec. 174.24	Investigators and Experts	None	
Sec. 174.25	Compensation and Payment Processes	None	
Sec. 174.26	Subchapter Definitions	None	
Sec. 174.27	Risk Assessment	None	
Sec. 174.28	On-Site Monitoring Process	Amended by 35 TEXREG 5519	