2007 FAIR DEFENSE LAW

Prepared by the Task Force on Indigent Defense

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CODE OF CRIMINAL PROCEDURE

The Task Force on Indigent Defense gratefully acknowledges the assistance of Sam Veltri in preparing this publication.

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 of 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 ~~or an indigent defendant who has refused appointed counsel in order to retain private counsel~~ 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 ~~his~~ right to counsel for purposes of entering a guilty plea or proceeding to trial, the court shall advise the defendant ~~him~~ 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 ~~19~~___, by the (name of court) Court of my right to representation by counsel in the case ~~trial of the charge~~ 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 ~~the~~ 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).

Amendments to (e), (f), and (g) and addition of (f-1) and (f-2) effective Sept. 1, 2007 (HB 1178, §1). Section 3 of HB 1178 provides: "(a) The change in law made by this Act to Article 1.051(e), Code of Criminal Procedure, applies only to a proceeding at which an indigent defendant appears without counsel after having refused appointed counsel if the proceeding occurs on or after the effective date of this Act. A proceeding at which an indigent defendant appears without counsel after having refused appointed counsel that occurs before the effective date of this Act is covered by the law in effect at the time of the proceeding, and the former law is continued in effect for that purpose.

"(b) The change in law made by this Act to Article 1.051(f), Code of Criminal Procedure, applies only to a waiver of counsel or a communication with a defendant that occurs on or after the effective date of this Act. A waiver of counsel or a communication with a defendant that occurred before the effective date of this Act is covered by the law in effect at the time the waiver or communication occurred, and the former law is continued in effect for that purpose."

2007 Legislative Note

With the passage of H.B. 1178, the 80th Texas Legislature promulgated new procedures that judges and prosecutors must follow when obtaining waivers of the right to counsel from defendants charged with a felony or Class A or B misdemeanor. H.B. 1178 takes effect on September 1, 2007. Waivers obtained after September 1, 2007, will be presumed invalid if they are obtained in violation of the procedures specified in the bill.

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 and no waiver may be implied from a defendant's failure to request counsel. Failing either a relinquishment or an abandonment of the right, the judge may not conduct any adversary judicial proceedings with respect to formal criminal charges until the accused is represented by an attorney. *Oliver v. State*, 872 S.W.2d 713, 715 (Tex.Crim.App. 1994).

The primary goal of the ten-day preparation time afforded counsel by Art. 1.051(e) is to ensure the indigent defendant receives appointed counsel who is prepared for the proceeding. The ten-day preparation time is a mandatory provision that may be waived only with written consent or on the record in open court. If the defendant is represented by more than one attorney, Art. 1.051(e) is in compliance as long as at least one is afforded the 10 day period. However, an appointed attorney who replaces the originally appointed attorney must be afforded 10 days preparation time to comply with the statute. *Marin v. State*, 891 S.W.2d 267 (Tex.Crim.App. 1994); *Roney v. State*, 632 S.W.2d 598, 601 (Tex.Crim.App. 1982);

In contempt proceedings, defendant must be informed of his or her right to representation, and if found indigent, his or her right to appointment of counsel. A defendant has the right to representation by counsel during contempt proceeding, considering that proceeding may result in deprivation of liberty. *Ex parte Gonzales*, 945 S.W.2d 830, 836-837 (Tex.Crim.App. 1997).

The right to counsel guaranteed by the Sixth Amendment to the U.S. Constitution and Art. 1.051 does not attach prior to the initiation of adversarial judicial proceedings. *United States v. Gouveia*, 467 U.S. 180, 187 (1984); *Kirby v. Illinois*, 406 U.S. 682, 689 (1972); see also *Moore v. Illinois*, 434 U.S. 220, 228 (1977).

Caselaw in Texas is somewhat indeterminate on the question of what events may serve to initiate adversarial judicial proceedings for Sixth Amendment purposes. *Green v. State*, 872 S.W.2d 717, 720 (Tex.Crim.App. 1994). There is some authority that seems to support the proposition that adversarial judicial proceedings do not commence in a felony prosecution until the filing of an indictment. *DeBlanc v. State*, 799 S.W.2d 701, 706 (Tex.Crim.App. 1990). On the other hand, though it is clear that an arrest alone does not trigger adversarial judicial proceedings, with or without a warrant, nor does an Article 15.17 warning, a two judge panel opinion has held that the filing of a felony complaint does. *Dunn v. State*, 696 S.W.2d 561 (Tex.Crim.App. 1985); *Wyatt v. State*, 566 S.W.2d 597, 600 (Tex.Crim.App. 1978); *Barnhill v. State*, 657 S.W.2d 131, 132 (Tex.Crim.App. 1983). See also *Moore v. Illinois*, supra; *Brewer v. Williams*, 430 U.S. 387, 399 (1977); *Michigan v. Jackson*, 475 U.S. 625 (1986). With regard to misdemeanor charges, the right attaches when the state files a misdemeanor complaint. *State v. Frye*, 897 S.W.2d 324, 328 (Tex.Crim.App. 1995).

Even after the initiation of adversarial judicial proceedings the right to counsel attaches only at a "critical stage." *Forte v. State*, 707 S.W.2d 89, 92 (Tex.Crim.App. 1986); *Green v. State*, supra. In assessing whether a particular stage of the pre-trial proceedings is a "critical" one, the test utilized by the Supreme Court is to examine the event in order to

determine whether the accused required aid to deal with the legal problems or assistance in meeting his adversary. *United States v. Ash*, 413 U.S. 300, 309-313 (1973); *Green v. State*, supra. In *Green*, a preliminary initial appearance was held not to be a "critical stage" requiring representation by counsel because: (1) a plea was neither requested nor required; (2) the probable cause determination was non-adversarial; (3) an examining trial was neither held at, nor precluded by, the PIA; (4) bail was not set; and (5) nothing else happened at the PIA which required the aid of counsel to cope with any legal problems or assist in meeting the prosecutorial adversary. *Id.* at 721-22.

The right to counsel extends to the appellate process. *Webb v. State*, 533 S.W.2d 780, 783 (Tex.Crim.App. 1976). A trial court is not obligated to search for an attorney who meets with the approval of the accused. *Id.* at 784. Furthermore, the accused carries the burden of proving that he is entitled to a change of counsel. *Id*.

It is the defendant's decision whether to accept assistance of counsel or to conduct his own defense, and his choice must be honored when the benefits of the assistance of counsel are understood and voluntarily relinquished with an informed awareness of the dangers and disadvantages of self-representation, as evidenced by the record. *Faretta v. California*, 422 U.S. 806 (1975). Neither the defendant's technical legal training nor his ability to conduct an adequate defense are prerequisites for self-representation. *Burton v. State*, 634 S.W.2d 692, 694 (Tex.Crim.App. 1982); see also *Faretta v. California*, supra; *Renfro v. State*, 586 S.W.2d 496 (Tex.Crim.App. 1979); *Trevino v. State*, 555 S.W.2d 750 (Tex.Crim.App. 1977).

Where the defendant is adequately admonished as to dangers and disadvantages of self-representation, an assertion of the right to self-representation by defendant implies a valid waiver of right to appointed counsel. *Burgess v. State*, 816 S.W.2d 424, 427-28 (Tex.Crim.App. 1991).

It is unlikely that a court would invalidate Art. 1.051(c) on equal protection grounds because the distinction between indigents 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 indigency 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 indigency standard will necessarily vary in different counties due to varying incomes and cost of living measures in the counties. *Id*.

CHAPTER FOURTEEN: ARREST WITHOUT WARRANT

Art. 14.06. Must take offender before magistrate

(a) Except as otherwise provided by this article, ~~Subsection (b),~~ 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, and the offense charged.

(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;

(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.

Amendments to (a) and addition of (c) and (d) effective Sept. 1, 2007 (HB 2391, §1). Section 3 of HB 2391 provides: "The change in law made by this Act applies only to an offense committed on or after the effective date of this Act. An offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose. For purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date."

2007 Legislative Note

HB 2391 adds subsections (c) and (d) and makes a non-substantive, conforming change to subsection (a). In response to overcrowding in Texas jails, (c) was added to authorize peace officers to merely issue a citation to persons charged with certain Class A and B misdemeanors, provided that the person charged resides in the county in which the offense is committed and the citation contains written notice of the time and place to appear before a magistrate, the name and address of the person charged, and the offense charged. Subsection (d) lists the Class A and B misdemeanors to which this section applies, including possession of marijuana, criminal mischief, graffiti, theft, contraband in a correctional facility, and driving without a license. Under prior law, police officers were required to arrest persons who allegedly violated any Class A or Class B misdemeanor.

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 determination within 48 hours of arrest. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

An unreasonable delay in presenting an arrestee before a magistrate will not vitiate an otherwise voluntary confession if the arrestee was properly advised of his *Miranda* rights. *Boyd v. State*, 811 S.W.2d 105 (Tex.Crim.App. 1991). The burden is upon the defendant to show that under Texas law a delay in the arraignment process renders the confession acquired during the delay inadmissible as a matter of law. *Webb v. Beto*, 415 F.2d 433 (5th Cir. 1969), cert. denied, 396 U.S. 1019 (1970).

Failure to comply with provisions of Art. 14.06 will not vitiate a search made incident to a lawful arrest because the purpose of the statute is for the magistrate to give Art. 15.17 warnings to the accused which are not prerequisite to the search of the accused. *Corbin v. State*, 426 S.W.2d 238 (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) of this article 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 county court or statutory county 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.

Amendment adding (g) effective Sept. 1, 2007 (HB 2391, §2). See effective note following Art. 14.06.

2007 Legislative Note

HB 2391 adds subsection (g) which requires a magistrate before whom a person is required to appear in compliance with a citation issued under Art. 14.06(b) or (c) to 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. Subsection (g) also authorizes a magistrate to release such a person on personal bond, except where good cause is shown otherwise. Finally, subsection (g) requires a magistrate before whom a person is required to appear in compliance with a citation issued under Art. 14.06(c) but fails to so appear to issue a warrant for that person's arrest.

Commentary

See generally, commentary under Art. 14.06, above.

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

When error is asserted 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, and errors that do not affect substantial rights disregarded. *Hinds v. State*, 970 S.W.3d 33, 35 (Tex.App.—Dallas 1998, no pet.). If the error has no substantial or injurious effect on the verdict, then it must be disregarded. *Morales v. State*, 32 S.W.3d 862 (Tex.Crim.App. 2000).

Taking an accused before a magistrate for his article 15.17 warnings does not constitute an "arraignment" for which right to assistance of counsel attaches. *Franks v. State*, 90 S.W.3d 771, 789 (Tex.App.—Fort Worth 2002, no pet.).

Where an accused expressly requests appointment of an attorney at Art. 15.17 warning hearing and adversarial proceedings have been initiated, a written waiver is insufficient to justify police-initiated interrogations. *Nehman v. State*, 721 S.W.2d 319 (Tex.Crim.App. 1986); *Michigan v. Jackson*, 475 U.S. 625 (1986); *Edwards v. Arizona*, 451 U.S. 477 (1981).

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.

Amendment adding (d) effective Sept. 1, 2007 (HB 3060, §1). Section 23 of HB 3060 provides: "The change in law made by this Act applies only to a fee imposed for the execution or processing of a warrant or capias issued for an offense committed on or after the effective date of this Act. A fee imposed for the execution or processing of a warrant or capias issued for an offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose. For purposes of this section, an offense

is committed before the effective date of this Act if any element of the offense occurs before that date."

2007 Legislative Note

HB 3060 adds subsection (d) which provides that this article does not apply to an arrest made pursuant to a capias pro fine issued under Chapter 43 (Execution of Judgment) or Art. 45.045 (Capias Pro Fine). A capias pro fine is a writ ordering the arrest of a criminal defendant who has failed to pay court-ordered fines, fees, etc.

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); ~~or~~

(11) Section 29.03 (aggravated robbery); or

(12) Section 21.02 (continuous sexual abuse of young child or children).

(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) examining expert, in a report 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 adding (a)(12) effective Sept. 1, 2007 (HB 8, §3.09). See effective note following Art. 14.06.

2007 Legislative Note

HB 8 adds subsection (a)(12) to include section 21.02 among the sections listed in the Penal Code under which an offense constitutes a "violent offense" per this article.

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.

(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) 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.

(c) The time limits imposed by Subsections (a) 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) 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.

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 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), (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 the requirements under Article 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 that a defendant charged with a felony or a misdemeanor punishable by confinement is indigent or that the interests of justice require representation of a defendant in a criminal proceeding, the court or the courts' designee shall appoint one or more practicing attorneys to 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 Task Force on Indigent Defense; 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

(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.

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

(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, which may be graduated according to the degree of seriousness of the offense, 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, which may be graduated according to the degree of seriousness of the offense, 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 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 relieved of his duties by the court or replaced by other counsel after a finding of good cause is entered on the record.

(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 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.

Commentary

See generally, commentary under Art. 1.051, above.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to assistance of counsel before he can validly be convicted and punished by imprisonment. *Blankenship v. State*, 673 S.W.2d 578 (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). The record must adequately reflect that a defendant waived his 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 record sufficiently demonstrates that defendant abandoned his initial request to represent himself, although mere acquiescence to a trial court's unmistakable denial of his request to represent himself is not a waiver of a defendant's right to self-representation. *Id*. See also, *Brown v. Wainwright*, 665 F.2d 607, 611-12 (5th Cir. 1982).

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

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, Code of Criminal Procedure, regarding counsel. A defendant has the burden of proof to show he is entitled to a change of counsel. *Carroll v. State*, 176 S.W.3d 249, 255 (Tex.App.—Houston [1st Dist.] 2004, pet. ref'd).

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).

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).

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).

Appointed counsel remains as defendant's counsel for all purposes until he is expressly permitted to withdraw or the appeal is finished. *Ward v. State*, 740 S.W.2d 794, 798 (Tex.Crim.App. 1987).

Trial counsel, retained or appointed, has the duty to consult with and fully to advise his client concerning the meaning and effect of the judgment rendered by the court, his right to appeal from that judgment, and the necessity of giving notice of appeal and taking other steps to pursue an appeal. Counsel should also discuss possible grounds for appeal and their merit, and delineate the advantages and disadvantages of appeal. *Axel v. State*, 757 S.W.2d 369, 374 (Tex. Cr. App. 1998). On appeal, a defendant has the burden to demonstrate from the record that he was unable to file a motion for new trial because he was not represented by counsel. *Burnett v. State*, 959 S.W.2d 652, 659 (Tex.App.—Houston [1st Dist.] 1997, pet. ref'd).

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 time for filing a motion for new trial. *Smith v. State*, 17 S.W.3d 660, 662 (Tex.Crim.App. 2000). Where defendant has been deprived of meaningful appeal because of ineffective assistance of counsel, defendant is entitled to relief. *Evitts v. Lucey*, 469 U.S. 387, 397 (1985).

A trial court has no authority to *sua sponte* remove appointed counsel, over defendant's and counsel's objections, absent some principled reason apparent from the face of the record. *Buntion v. Harmon*, 827 S.W.2d 945, 949 (Tex.Crim.App. 1992).

We have articulated a two-step process for determining whether a defendant is indigent for the purpose of obtaining a free record on appeal: (1) the defendant must make a *prima facie* showing of indigence, and (2) when the *prima facie* showing is made, the burden shifts to the State to show that the defendant is not in fact indigent. *Snoke v. State*, 780 S.W.2d 210, 213 (Tex.Crim.App. 1989). The Court of Criminal Appeals implied that the two-step process should also be used to determine whether to appoint counsel for appeal. *Id.*, at 210; *see also 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 v. State*, supra at 878; *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 indigency, 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 v. State*, supra at 875.

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 v. State*, supra.

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

A person may not transfer his assets while awaiting trial, after alleging indigency, so that he may make 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; *United States v. Rubinson*, 543 F.2d 951 (2nd Cir.), cert. denied, *Chester v. United States*, 429 U.S. 850 (1976).

Art. 26.044. Public Defender

(a) In this chapter:

(1) "Governmental entity" includes a county, a group of counties, a 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) "Public defender" means a governmental entity or nonprofit corporation:

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

(B) using public funds; 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.

(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 in the county, may appoint a governmental entity or nonprofit corporation to serve as a public defender. The commissioners courts of two or more counties may enter into a written agreement to jointly appoint and fund a regional public defender . In appointing a public defender under this subsection, the commissioners court shall specify or the commissioners courts shall jointly specify, if appointing a regional public defender:

(1) the duties of the public defender;

(2) the types of cases to which the public defender may be appointed under Article 26.04(f) and the courts in which the public defender may be required to appear;

(3) 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 the public defender is appointed to serve a term, the term of appointment and the procedures for removing the public defender.

(c) Before appointing a public defender under Subsection (b), the commissioners court or commissioners courts shall solicit proposals for the public defender. A proposal must include:

(1) a budget for the public defender, 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 proponent;

(4) provisions for personnel training;

(5) a description of anticipated overhead costs for the public defender; and

(6) policies regarding the use of licensed investigators and expert witnesses by the proponent.

(d) After considering each proposal for the public defender submitted by a governmental entity or nonprofit corporation, the commissioners court or commissioners courts shall select a proposal that reasonably demonstrates that the proponent will provide adequate quality representation for indigent defendants in the county or counties.

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

(f) To be eligible for appointment as a public defender, the governmental entity or nonprofit corporation 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 is entitled to receive funds for personnel costs and expenses incurred in operating as a public 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 serves more than one county.

(h) A public defender may employ attorneys, licensed investigators, and other personnel necessary to perform the duties of the public 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 or an attorney employed by a public 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 may refuse an appointment under Article 26.04(f) if:

(1) a conflict of interest exists;

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

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

(4) the public defender shows other good cause for refusing the appointment.

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

(l) A public defender may investigate the financial condition of any person the public defender is appointed to represent. The 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 other than a public defender be appointed, the attorney is entitled to the compensation provided by Article 26.05 of this code.

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. 26.05. Compensation of counsel appointed to defend

(a) A counsel, other than an attorney with a public defender, 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 and the judge approves the payment. If the judge disapproves the requested amount of payment, the judge shall make written findings stating the amount of payment that the judge 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, 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 (c) and addition of (i) effective Sept. 1, 2007 (HB 1267, §1). Section 8 of HB 1267 provides: "The change in law made by this Act to Article 26.05(c), Code of Criminal Procedure, applies only to a request for payment submitted under Article 26.05(c) on or after the effective date of this Act."

2007 Legislative Note

HB 1267 amends subsection (c) to grant indigent defense attorneys whose request for payment had not been answered after 60 days a right of appeal to the presiding judge of the administrative judicial region. Under prior law, indigent defense attorneys were authorized to appeal a disapproval of a request for payment, but situations where a judge had failed to act on a request for payment were not addressed. Subsection (i) was added to explain the Indigent Defense Representation Fund created by HB 1267 with the addition of Secs. 133.107(a) and (b) of the Local Government Code and to provide that it consists of criminal fees and may be used only for the purposes for which the Fair Defense Account may be used.

Commentary

An order entered by the court under authority of Art. 26.05 is presumed to be reasonable and must be allowed unless the Commissioners Court can show that the order is so unreasonable, arbitrary, or capricious as to amount to an abuse of discretion. *Gray County v. Warner & Finney*, 727 S.W.2d 633, 636 (Tex.App.—Amarillo 1987, no writ).

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. Absent a showing of harm, no abuse of that discretion will be found. *Quin v. State, 608 S.W.2d 937, 938 (Tex. Crim. App. 1980)*. In order to obtain prior approval of the trial court for reasonable expenses connected with expert testimony, a defendant must demonstrate to the trial court a specific need for the testimony. *Ventura v. State*, 801 S.W.2d 225, 227 (Tex.App.—San Antonio 1990, no pet.).

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 [14th Dist.] 1983, 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).

Counsel appointed to represent indigent defendant was not entitled to compensation for expenses in filing petition for discretionary review which was not "appeal" for which indigent was entitled to court appointed counsel. *Peterson v. Jones*, 894 S.W.2d 370, 373 (Tex.Crim.App. 1995).

Art. 26.051. Indigent inmate defense

(a) In this article:

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

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

~~(b) This article applies only to the appointment of attorneys for indigent inmate defendants made on or after August 1, 1990.~~

~~(c) A county in which a facility of the institutional division or a correctional facility authorized by Section 495.001, Government Code, is located shall, except as provided by Subsection (f) of this article, pay from its general fund the total costs of the aggregate sum allowed and awarded by the court for~~

~~attorney's fees under Article 26.05 of this code for an attorney appointed by the court, other than an attorney provided by the board in Subsection (e) of this article, to defend an indigent inmate~~.

(d) A court shall:

(1) ~~may~~ 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 ~~institutional~~ division or a correctional facility authorized by Section 495.001, Government Code; and

(2) request that the board provide legal representation for the inmate.

(e) 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.

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

(g) 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.

(h) 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 ~~the county shall pay from its general fund the first $250.00 of the aggregate sum allowed and awarded by the court for the attorney fees under Article 26.05 of this code. If the fees awarded for a court-appointed attorney in a case described by this subsection exceed $250.00, the court shall certify the amount in excess of $250.00 to the board. On request of the board, the comptroller shall issue a warrant to the court-appointed attorney in the amount certified to the board by the court.~~

(i) 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.

Amendments to (a)(2), (d), and (h), addition of (i), and repeal of (b) and (c) effective Sept. 1, 2007 (HB 1267, §§2, 3, and 7). Section 9 of HB 1267 provides: "The change in law made by this Act to Article 26.051, Code of Criminal Procedure, applies to compensation and expenses owed on or after the effective date of this Act to an attorney appointed under Article 26.051, Code of Criminal Procedure, regardless of whether the attorney was appointed before, on, or after the effective date of this Act."

2007 Legislative Note

HB 1267 amends subsection (a)(2) to define "correctional institutions division" to mean the correctional institutions division of the Texas Department of Criminal Justice (TDCJ). Subsections (b) and (c) are repealed.

HB 1267 amends subsection (d) to require a court to notify the Texas Board of Criminal Justice (board) when a defendant before the court is an indigent inmate and request that the board provide legal representation for the inmate. Sub-section (e) requires the board to bear the cost of providing legal representation for indigent inmate defendants, absent an exception under subsection (g). Under prior law, courts were authorized but not required to make said notification and request.

HB 1267 amends subsection (h) to list the other articles in the code of criminal procedure to which an

inmate's legal defense is subject when the court appoints an attorney other than an attorney provided by the board.

HB 1267 further amends subsection (h) and adds subsection (i) to streamline the process whereby amounts awarded by the court for attorney compensation are paid when the court appoints an attorney for indigent inmate defense other than an attorney provided by the board. To subject indigent inmate defense claims to the same safeguards enacted by the Fair Defense Act as other indigent defense claims, counties are required to pay fees and expenses awarded by the court upfront, and the state must reimburse the county within 60 days. Under prior law, payments to attorneys in indigent inmate defense cases could take many months due to a multi-layered approval process.

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 or an attorney appointed as lead appellate 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

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

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

(4) 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 the defense of death penalty cases. 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.

~~**Art. 26.055. Contribution from state for defense of indigent inmates**~~

~~**Sec. 1.**~~

~~(a) This article applies only to an attorney appointed under Article 26.05 of this code to defend an indigent inmate before August 1, 1990.~~

~~(b) A county in which a facility of the institutional division of the Texas Department of Criminal Justice, or a correctional facility authorized by Section 494.001, Government Code, is located shall pay from its general fund only the first $250 of the aggregate sum allowed and awarded by the court for attorneys' fees under Article 26.05 toward defending an inmate committed to that facility who is being prosecuted for an offense committed in that county while in the custody of the department if the inmate was originally committed for an offense committed in another county.~~

~~**Sec. 2.**~~

~~If the fees awarded for court-appointed counsel in a case covered by Section 1 of this article exceed $250, the court shall certify the amount in excess of $250 to the Texas Board of Criminal Justice. On request of the board, the comptroller shall issue a warrant to the court-appointed counsel in the amount certified to the board by the court.~~

~~**Sec. 3.**~~

~~(a) In the defense of a prosecution of an offense committed while the actor was an inmate in the custody of the institutional division of the Texas Department of Criminal Justice, the state shall reimburse a counsel appointed to defend the actor for expenses incurred by the counsel, in an amount that the court determines to be reasonable, for payment of:~~

~~(1) salaries and expenses of foreign language interpreters and interpreters for deaf persons whose services are necessary to the defense;~~

~~(2) consultation fees of experts whose assistance is directly related to the defense;~~

~~(3) travel expenses for witnesses;~~

~~(4) compensation of witnesses;~~

~~(5) the cost of preparation of a statement of facts and a transcript of the trial for purposes of appeal; and~~

~~(6) food, lodging, and travel expenses incurred by the defense counsel and staff during travel essential to the defense, calculated on the same basis as expenses incurred by the prosecutor's staff related to essential travel are calculated.~~

~~(b) The trial court shall certify the amount of reimbursement for expenses under this section to the Texas Board of Criminal Justice. On request of the board, the comptroller shall issue a warrant in that amount to the defense counsel or, if the board determines that the amount certified by the trial court is unreasonable, in an amount that the board determines to be reasonable.~~

~~(c) Notwithstanding anything to the contrary contained in this Act, the reimbursement for expenses submitted by the defense counsel shall not exceed the amount the county would pay for the same activity or service, if that activity or service was not reimbursed by the state. The trial judge shall certify compliance with this paragraph on request by the Texas Board of Criminal Justice.~~

Repeal of Art. 26.055 effective Sept. 1, 2007 (HB 1267, §7).

2007 Legislative Note

HB 1267 repeals Art. 26.055 in conjunction with the amendments to Art. 26.051 (*above*) designed to streamline the payment process for court appointed attorneys and make this article applicable to all appointments of attorneys for indigent inmate defendants regardless of date of appointment.

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.

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; and

(6) the fact that it is unlawful for the defendant to possess or transfer a firearm or ammunition if the defendant is convicted of a misdemeanor involving family violence, as defined by Section 71.004, Family Code.

(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.

Amendment adding (a)(6) effective Sept. 1, 2007 (SB 1470, §1).

2007 Legislative Note

SB 1470 amends Article 26.13(a) by adding (a)(6) requiring the court, prior to accepting a plea of guilty or a plea of nolo contendere, to admonish the defendant that it is unlawful for the defendant to possess or transfer a firearm or ammunition if the defendant is convicted of a misdemeanor involving family violence, as defined by Section 71.004, Family Code.

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 of 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.

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. A defendant so arrested may be detained in the county jail or other appropriate place of confinement until he can be taken before the judge. Such officer shall forthwith report such arrest and detention to such judge. If the defendant has not been released on bail, on motion by the defendant the judge shall cause the defendant to be brought before the judge for a hearing 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, ~~restitution, or reparations,~~ the state must prove by a preponderance of the evidence that ~~inability of~~ the defendant was able to pay and did not pay as ordered by the judge ~~is an affirmative defense to revocation, which the defendant must prove by a preponderance of evidence~~. 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.

(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 to (c) effective Sept. 1, 2007 (HB 312, §1). Section 2 of HB 312 provides: "The change in law made by this Act applies only to a community supervision revocation hearing held on or after the effective date of this Act.

2007 Legislative Note

HB 312 amends subsection (c) to require that state to prove by a preponderance of the evidence that a defendant was able to but did not pay community supervision fees or court costs ordered. Previous law required the defendant to raise inability to pay as an affirmative defense. The amendment also allows the probation department to obtain financial information related to his ability to pay.

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 (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
Miranda warning requirements apply to juveniles as well as adults. *In re Gault*, 387 U.S. 1 (1967).

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 ~~Ad hoc 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) "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) "Council" means the Texas Judicial Council.

(5) "Crime" means:

(A) a misdemeanor punishable by confinement; or

(B) a felony.

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

(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.

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

Amendment to (1) effective Sept. 1, 2007 (HB 1265, §1).

2007 Legislative Note
HB 1265 amends Section 71.001(1) by changing the defined term from "ad hoc assigned counsel program" to simply "assigned counsel program." The definition provided in the statute is for assigned counsel programs generally, while "ad hoc" appointment system is specific type of assigned counsel program that denotes a random system of attorney appointment. Therefore, the amendment removes the improper use of the term "ad hoc".

Sec. 71.0351. 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 Task Force on Indigent Defense, the following information shall be prepared and provided to the Office of Court Administration of the Texas Judicial System:

(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 to the Office of Court Administration under this section; or

(3) verification that rules and forms previously submitted to the Office of Court Administration 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 count; 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 Office of Court Administration of the Texas Judicial System in the form and manner prescribed by the Task Force on Indigent Defense 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 Office of Court Administration of the Texas Judicial System under this section and under a reporting plan developed by the Task Force on Indigent Defense under Section 71.061(a).

Sec. 71.051. Establishment of Task Force; Composition

The Task Force on Indigent Defense is established as a standing committee of the council and is composed of eight ex officio members and five appointive members.

Sec. 71.052. Ex Officio Members

The ex officio members 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 to serve on the Task Force on Indigent Defense;

(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 to serve on the Task Force on Indigent Defense; and

(F) one of the county court or statutory county court judges serving on the council who is designated by the governor to serve on the Task Force on Indigent Defense 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 to serve on the task force;

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

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

Sec. 71.053. Appointments

(a) The governor shall appoint with the advice and consent of the senate five members of the Task Force on Indigent Defense 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 public defender or who is employed by a public defender; 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 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 Task Force on Indigent Defense, the governor shall attempt to reflect the geographic and demographic diversity of the state.

(d) A person may not be appointed to the Task Force on Indigent Defense 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 task force or the council.

Sec. 71.054. Vacancies
A vacancy on the Task Force on Indigent Defense must be filled for the unexpired term in the same manner as the original appointment. An appointment to fill a vacancy shall be made not later than the 90th day after the date the vacancy occurs.

(a) The Task Force on Indigent Defense shall meet at least quarterly and at such other times as it deems necessary or convenient to perform its duties.

(b) Six members of the Task Force on Indigent Defense constitute a quorum for purposes of transacting task force business. The task force may act only on the concurrence of five task force members or a majority of the task force members present, whichever number is greater. The task force may develop policies and standards under Section 71.060 only on the concurrence of seven task force members.

(c) A Task Force on Indigent Defense member is entitled to vote on any matter before the task force, except as otherwise provided by rules adopted by the task force and ratified by the council.

Sec. 71.055. Meetings; Quorum; Voting

(a) The Task Force on Indigent Defense shall meet at least four times each year ~~quarterly~~ and at such other times as it deems necessary or convenient to perform its duties.

(b) Six members of the Task Force on Indigent Defense constitute a quorum for purposes of transacting task force business. The task force may act only on the concurrence of five task force members or a majority of the task force members present, whichever number is greater. The task force may develop policies and standards under Section 71.060 only on the concurrence of seven task force members.

(c) A Task Force on Indigent Defense member is entitled to vote on any matter before the task force, except as otherwise provided by rules adopted by the task force and ratified by the council.

Amendment to (a) effective Sept. 1, 2007 (HB 1265, §2).

2007 Legislative Note
HB 1265 amends subsection (a) to allow the task force to meet at least four times a year instead of quarterly. Under prior law, the schedule of issuing grants and adopting policies and standards sometimes required the task force to compress meeting dates where two meetings fall in one quarter. This change allows the task force to set meetings at appropriate times for the greatest efficiency.

Sec. 71.056. Compensation
A Task Force on Indigent Defense member may not receive compensation for services on the task force but is entitled to be reimbursed for actual and necessary expenses incurred in discharging the member's duties as a task force member. The expenses are paid from funds appropriated to the task force.

Sec. 71.057. Budget

(a) The Task Force on Indigent Defense budget shall be a part of the budget for the council. In preparing a budget and presenting the budget to the legislature, the task force shall consult with the executive director of the Office of Court Administration of the Texas Judicial System.

(b) The Task Force on Indigent Defense budget may include funds for personnel who are employees

of the council but who are assigned to assist the task force in performing its duties.

(c) The executive director of the Office of Court Administration of the Texas Judicial System may not reduce or modify the Task Force on Indigent Defense budget or use funds appropriated to the task force without the approval of the task force.

Sec. 71.058. Fair Defense Account

The 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 this subchapter.

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

(a) The Task Force on Indigent Defense may accept gifts, grants, and other funds from any public or private source to pay expenses incurred in performing its duties under this subchapter.

(b) The State Grants Team of the Governor's Office of Budget, Planning, and Policy may assist the Task Force on Indigent Defense in identifying grants and other resources available for use by the task force in performing its duties under this subchapter.

Sec. 71.060. Policies and Standards

(a) The Task Force on Indigent Defense 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 non-citizen 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 ~~ad hoc~~ assigned counsel program;

(6) policies and standards governing the organization and operation of a public defender 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; and

(12) other policies and standards for providing indigent defense services as determined by the task force to be appropriate.

(b) The Task Force on Indigent Defense shall submit policies and standards developed under Subsection (a) to the council for ratification

(c) Any qualification standards adopted by the Task Force on Indigent Defense under Subsection (a) 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 task force as not satisfying performance or qualification standards adopted by the task force under Subsection (a) may not accept an appointment in a capital case.

Amendment to (a) effective Sept. 1, 2007 (HB 1265, §3).

2007 Legislative Note
HB 1265 amends Sec. 71.060(a)(5) to conform to a change of definition in Sec. 71.001(1).

Sec. 71.061. County reporting plan; Task Force reports

(a) The Task Force on Indigent Defense 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 task force 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 task force may revise the plan as necessary to improve monitoring of indigent defense policies, standards, and procedures in this state.

(b) The Task Force on Indigent Defense 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 the information submitted under Section 71.0351
(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 task force to improve indigent defense practices in the state; and

(D) recommendations made by the task force for improving indigent defense practices in the state.

(c) The Task Force on Indigent Defense 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 71.062.

(d) The Task Force on Indigent Defense may issue other reports relating to indigent defense as determined to be appropriate by the task force.

Sec. 71.062. Technical support; Grants

(a) The Task Force on Indigent Defense 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) direct the comptroller to distribute funds, including grants, to counties to provide indigent defense services in the county; and

(3) monitor each county that receives a grant and enforce compliance by the county with the conditions of the grant, including enforcement by directing the comptroller to:

(A) withdraw grant funds; or

(B) require reimbursement of grant funds by the county.

(b) The Task Force on Indigent Defense shall direct the comptroller to distribute funds as required by Subsection (a)(2) based on a county's compliance with standards developed by the task force and the county's demonstrated commitment to compliance with the requirements of state law relating to indigent defense.

(c) The Task Force on Indigent Defense shall develop 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 Task Force on Indigent Defense under this section.

Sec. 71.063. Immunity from liability

The Task Force on Indigent Defense or a member of the task force performing duties on behalf of the task force is not liable for damages arising from an act or omission within the scope of the duties of the task force.

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 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) fugitive apprehension account 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 6.0143 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.

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 71.058, 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.

Amendment adding Section 133.107(a) and (b) effective Sept. 1, 2007 (HB 1267, §6). Section 10 of HB 1267 provides: "The imposition of a cost of court under Section 133.107, Local Government Code, as added by this Act, applies only to an offense committed on or after the effective date of this Act." See effective note following Art. 14.06.

2007 Legislative Note

HB 1267 adds Sec. 133.107(a) and (b) to create a new General Revenue-Dedicated Account for Indigent Defense Representation. The account may only be appropriated to the Task Force on Indigent Defense or for compensating appointed counsel. The new account is funded with a $2 court cost on criminal convictions, other than pedestrian or parking offenses.

Appendix – Changes After 2007 Legislative Session

Changes listed by Statute

CODE OF CRIMINAL PROCEDURE

Statute	Topic	Changes
Art. 1.051	Right to Representation by Counsel	Amended by HB 1178
Art. 14.06	Must Take Offender Before Magistrate	Amended by HB 2391
Art. 15.17	Duties of Arresting Officer and Magistrate	Amended by HB 2391
Art. 15.18	Arrest for Out-of-County Offense	Amended by HB 3060
Art. 17.032	Release on Personal Bond of Certain Mentally Ill Defendants	Amended by HB 8
Art. 17.033	Release on Bond of Certain Persons Arrested without a Warrant	None
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	None
Art. 26.044	Public Defender in County with Four County Courts and Four District Courts	None
Art. 26.05	Compensation of Counsel Appointed to Defend	Amended by HB 1267
Art. 26.051	Indigent Inmate Defense	Amended by HB 1267
Art. 26.052	Appointment of Counsel in Death Penalty Case; Reimbursement of Investigative Expenses	None
Art. 26.055	Contribution from State for Defense of Indigent Inmates	None
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	Amended by SB 1470
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

FAMILY CODE

Statute	Topic	Changes
Sec. 51.10	Right to Assistance of Attorney;	None

	Compensation	
Sec. 51.101	Appointment of Attorney and Continuation of Representation	None
Sec. 51.102	Appointment of Counsel Plan	None

GOVERNMENT CODE

Statute	Topic	Changes
Sec. 71.001	Definitions	Amended by HB 1265
Sec. 71.0351	Indigent Defense Information	None
Sec. 71.051	Establishment of Task Force; Composition	None
Sec. 71.052	Ex Officio Members	None
Sec. 71.053	Appointments	None
Sec. 71.054	Vacancies	None
Sec. 71.055	Meetings; Quorum; Voting	Amended by HB 1265
Sec. 71.056	Compensation	None
Sec. 71.057	Budget	None
Sec. 71.058	Fair Defense Account	None
Sec. 71.059	Acceptance of Gifts, Grants, and Other Funds; State Grants Team	None
Sec. 71.060	Policies and Standards	Amended by HB 1265
Sec. 71.061	County Reporting Plan; Task Force Reports	None
Sec. 71.062	Technical Support; Grants	None
Sec. 71.063	Immunity from Liability	None

LOCAL GOVERNMENT CODE

Statute	Topic	Changes
Sec. 133.102	Consolidated Fees on Conviction	None
Sec. 133.107	Fee for Support of Indigent Defense Representation	Added by HB 1267