

Texas Fair Defense Project

Final Report 80th Legislative Session

Delivery and Funding of Indigent Defense Services

The bills in this section amend the Fair Defense Act and/or directly impact the funding and delivery of indigent defense services.

HB 1178 (Escobar; SP: Ellis): HB 1178 clarifies procedures for obtaining waivers of the right to counsel. The bill requires judges to advise defendants of the right to counsel and give defendants a reasonable opportunity to request appointed counsel. The bill also prohibits prosecutors from initiating or encouraging waivers of the right to counsel, in a manner consistent with existing ethical rules. Waivers obtained in violation of the guidelines set forth in the bill are presumed invalid.

Status as of 6/17/07: Signed by the Governor; effective 9/1/07.

HB 1265 (Peña; SP: Seliger): HB 1265 makes minor changes relating to meeting requirements and definitions in the statute governing the operations of the Task Force on Indigent Defense. Specifically, the bill allows the Task Force to meet 4 times a year instead of quarterly and deletes the phrase “ad hoc” from the definition of an assigned counsel system. The bill also eliminates the scheduled 2007 sunset of the State Bar legal services fee, half of which is allocated to indigent defense (duplicating SB 168).

Status as of 6/17/07: Signed by the Governor; effective 9/1/07.

HB 1267 (Peña; SP: Seliger): HB 1267 adds a \$2 fee on each conviction for a criminal offense, which is expected to raise \$7.6 million annually for the delivery of indigent defense services. The bill also grants appointed defense counsel a right to appeal a judge’s failure to act on a request for payment within 60 days. Under prior law, appointed counsel could appeal a judge’s disapproval of a request for payment but not a judge’s failure to act on a request for payment. HB 1267 also provides that appointment of private counsel to indigent inmates in criminal cases involving alleged offenses committed while in the custody of TDCJ shall be governed by the Fair Defense Act. Counties shall pay appointed counsel for services provided to indigent inmates according the local indigent defense fee schedule, and the comptroller shall reimburse counties for the cost of inmate indigent defense within 60 days after receiving a request for reimbursement. Under prior law, indigent inmate appointments were not governed by the FDA and attorneys appointed in inmate cases were required to go through several state agencies in order to obtain compensation from a limited state fund maintained by the comptroller.

Status as of 6/17/07: Signed by the Governor; effective 9/1/07.

SB 168 (Ellis; SP: Flores): SB 168 eliminates the scheduled 2007 sunset of the State Bar legal services fee, half of which is allocated to indigent defense. The State Bar fee generates almost \$2 million annually for indigent defense. Revenue from the State Bar fee is earmarked for demonstration and pilot programs, and has been used to fund new local and regional public defender offices.

Status as of 6/17/07: Signed by the Governor; effective immediately.

Other Bills of Interest

The bills in this section do at least one of the following: (1) affect defendants' ability to avoid pre-trial incarceration in appropriate cases, thereby increasing defendants' ability to maintain employment and to retain private counsel or, if the defendant is later convicted, to pay restitution, court costs, and fees, or (2) extend procedural protections to defendants who are unable to pay court costs and fees or reimburse the county for the cost of providing appointed counsel.

HB 312 (Turner; SP: Whitmire): HB 312 requires the state to prove by a preponderance of the evidence that a probation defendant is able to pay but did not pay certain costs, including court costs, fees and/or the cost to reimburse the county for providing appointed counsel, before revoking probation in a case in which failure to pay is the only alleged probation violation. Prior law recognized indigency as an affirmative defense to nonpayment that had to be raised and proved by the defendant. Many defendants facing revocation on misdemeanor probation are not represented by counsel and were unaware of the existing affirmative defense and/or did not know how to raise it.

Status as of 6/17/07: Signed by the Governor; effective 9/1/07.

HB 2391 (Madden; SP: Seliger): HB 2391 authorizes peace officers to issue citations for certain Class B misdemeanors instead of taking alleged offenders before a magistrate, allowing alleged offenders to avoid pretrial incarceration for minor offenses. Magistrates are required to give statutory warnings, including warnings about the right to counsel, to defendants when they appear in compliance with a citation.

Status as of 6/17/07: Signed by the Governor; effective 9/1/07.

HB 3060 (Peña; SP: Watson): HB 3060 requires law enforcement officers executing *capias pro fine* (warrants issued after judgment and sentence for unpaid fines and costs) to bring the defendant before the court no later than the next business day after arrest. The bill also clarifies that a defendant may not be imprisoned for failure to pay fines and costs unless the defendant (1) is not indigent and has failed to make a good faith effort to pay the fines and costs, or (2) is indigent, has failed to make a good faith effort to discharge the fines and costs through alternative methods (i.e., community service), and could have discharged the fines and costs through alternative methods without experiencing undue hardship. Prior law placed no limit on the length of time a defendant could be imprisoned on a *capias pro fine* before being brought to court for an indigency hearing, and authorized the detention of indigent defendants for nonpayment if they failed to make "sufficient bona fide efforts legally to acquire the resources to pay."

Status as of 6/17/07: Signed by the Governor; effective 9/1/07.

Bills That May Resurface Next Time

These bills died in the 80th Legislature, but may be re-filed in a future legislative session.

HB 541 (Martinez Fischer; SP: Hinojosa): HB 541 would have created an exception to the current rule that individuals arrested for an alleged parole violation are not eligible for pretrial release. The exception would have extended to individuals whose alleged parole violation is a technical violation or a misdemeanor-level new offense (not including assault, assault family violence, and intoxication offenses).

Status as of 6/17/07: Vetoed by the Governor.

HB 800 (Dutton): HB 800 would have allowed judges to grant expunctions to defendants who successfully completed deferred adjudication probation. Many unrepresented defendants who receive deferred adjudication are not informed that under current law the criminal charges against them cannot be expunged after they are dismissed upon successful completion of deferred adjudication, and that the charges will continue to have ongoing licensing, employment, housing, and immigration consequences. The ability to obtain an expunction would have mitigated these collateral consequences.

Status as of 6/17/07: Died on the House Calendar.

HB 1266 (Peña): HB 1266 would have modified statutory qualification requirements for attorneys appointed to represent defendants in capital cases, primarily by creating separate qualification requirements for appellate attorneys and eliminating current requirements that appellate attorneys have capital trial experience.

Status as of 6/17/07: Reported favorably from House Criminal Jurisprudence 5/2/07; not set on the House Calendar.

Companion: SB 528 (Seliger; SP: Peña) (passed the Senate 4/12/07; set on House Calendar 5/14/07; recommitted to House Criminal Jurisprudence 5/17/07, where it failed to receive an affirmative vote).

HB 2437 (Escobar): HB 2437 would have authorized counties and cities to establish pretrial victim-offender mediation programs for theft offenses. Defendants who participated in a mediation program and successfully completed the resulting mediation agreement would have had the charges against them dismissed.

Status as of 6/17/07: Reported favorably from House Criminal Jurisprudence 4/17/07; not set on the House Calendar.

HB 3305 (Peña): HB 3305 would have set mandatory eligibility guidelines for release on personal bond in a manner that would have significantly limited defendants' ability to obtain pretrial release on personal bond, which is typically the lowest cost bond available to poor defendants. HB 3305 also would have required judges to adopt a schedule of pre-approved bail amounts for misdemeanor offenses, and entitled defendants to release on the posting of the pre-approved bail amount unless a judge or magistrate entered an order modifying the bail amount in a specific case.

Status as of 6/17/07: Scheduled for hearing in House Criminal Jurisprudence 5/1/07, not heard in committee.

Companion: SB 1553 (Hinojosa) (heard in Senate Criminal Justice 4/24/2007, left pending in committee).

HB 3738 (Herrero): HB 3738 would have authorized any county, judicial district, or judge with jurisdiction overailable offenses to establish a personal bond office, and required personal bond offices to supervise all defendants released prior to trial. HB 3738 also would have increased the fee charged to defendants eligible for personal bond in counties that have drug court programs from 3 percent to 5 percent of the amount of bail fixed, and set aside 40 percent of the fee collected in drug court counties for administration of drug court programs.

Status as of 6/17/07: Referred to House Licensing and Administrative Procedures 3/22/07, not scheduled for hearing.

SB 159 (Wentworth; SP: Peña): SB 159 would have modified the public defender statute to allow counties to establish county departments to serve as public defender offices without first seeking competing bids from nonprofit corporations interested in operating the office under contract with the county. Counties choosing to establish a county department to serve as a public defender office would have been required to develop written plans containing the same information required under the mandatory competitive bid system that exists in current law, and

counties choosing to provide indigent defense services through a nonprofit public defender still would have been required to solicit bids from interested nonprofits.

Status as of 6/17/07: Passed the Senate 3/14/07; died on the House Calendar.

SB 306 (Harris; SP: Pierson): SB 306 would have allowed counties to delay appointment of second-chair counsel in capital cases until the earlier of the date the state provides written notice that it intends to seek the death penalty or the 90th day after the date on which the defendant is charged with a capital offense by indictment or complaint. SB 306 also would have ensured that trial of a death penalty case would not proceed before the 180th day after the appointment of second-chair counsel, allowed appointment of second-chair counsel to be avoided or voided, as applicable, if the state certifies that it will not seek the death penalty, and specifically authorized appointment of mitigation specialists in capital cases.

Status as of 6/17/07: Passed the Senate 4/2/07; died on the House Calendar.

SB 528 (Seliger; SP: Peña): SB 528 would have modified statutory qualification requirements for attorneys appointed to represent defendants in capital cases, primarily by creating separate qualification requirements for appellate attorneys and eliminating current requirements that appellate attorneys have capital trial experience.

Status as of 6/17/07: Passed the Senate 4/12/07; set on House Calendar 5/14/07; recommitted to House Criminal Jurisprudence 5/17/07, where it failed to receive an affirmative vote.

Companion: HB 1266 (Peña) (reported favorably from House Criminal Jurisprudence 5/2/07; not set on the House Calendar).

SB 643 (Carona): SB 643 would have required courts to order the state to produce discoverable materials, including police reports and other witness statements, in criminal cases not later than the 30th day after an indictment or information is filed. Current law does not require pretrial disclosure of police reports and other witness statements necessary to assess the strength of the state's charges and prepare an adequate defense.

Status as of 6/17/07: Reported favorably from Senate Criminal Justice 3/27/07; not again set on Senate Intent Calendar 4/24/07.

SB 1553 (Hinojosa): SB 1553 would have set mandatory eligibility guidelines for release on personal bond in a manner that would have significantly limited defendants' ability to obtain pretrial release on personal bond, which is typically the lowest cost bond available to poor defendants. SB 1553 also would have required judges to adopt a schedule of pre-approved bail amounts for misdemeanor offenses, and entitled defendants to release on the posting of the pre-approved bail amount unless a judge or magistrate entered an order modifying the bail amount in a specific case.

Status as of 6/17/07: Heard in Senate Criminal Justice 4/24/2007, left pending in committee.

Companion: HB 3305 (Peña) (scheduled for hearing in House Criminal Jurisprudence 5/1/07, not heard in committee).

SB 1655 (Ellis; SP: Hartnett): SB 1655 would have created a state-funded Office of Capital Writs to represent indigent defendants sentenced to death in state habeas corpus proceedings. A Capital Writs Committee, consisting of five members appointed by the President of the State Bar of Texas, would have recommended to the Court of Criminal Appeals the names of up to five qualified applicants for the position of Director of the Office of Capital Writs.

Status as of 6/17/07: Passed by the Senate 4/16/07; died on the House Calendar.

SB 647 (Ellis): SB 647 would have created a permanent fund for indigent defense consisting of 10 percent of any unencumbered positive balance of general revenue at the end of a biennium. Money in the permanent fund would have been appropriated to the Office of Court

Administration and distributed to counties according to a formula based on county population and compliance with state law and standards concerning indigent defense.

Status as of 6/17/07: Referred to Senate Finance 2/28/07, not heard in committee.

SB 777 (Harris): SB 777 would have authorized criminal law magistrates to review and adjust (upward or downward) bonds set by municipal court judges and justices of the peace. The bill would have applied only in those counties that have criminal law magistrates that serve the criminal district and county courts.

Status as of 6/17/07: Referred to Senate Criminal Justice 3/6/07, not heard in committee.