TIDC
TEXAS INDIGENT DEFENSE COMMISSION

Fair Defense Laws 2021-2023

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TEXAS INDIGENT DEFENSE COMMISSION

PREFACE

In 2001, the 77th Texas Legislature passed the *Fair Defense Act* (SB 7), creating the blueprint for distribution of indigent defense funding from the State of Texas to local government through the creation of the Task Force on Indigent Defense, the first state body to administer statewide appropriations and policies. During the 82nd Legislative Session (2011), **Governor Perry** signed House Bill 1754 into law, establishing the Texas Indigent Defense Commission (Commission), the permanent organization that renamed and replaced the Task Force.

The Commission provides financial and technical support to counties to develop and maintain quality, cost-effective indigent defense systems that meet the needs of local communities and the requirements of the Constitution and state law. In addition to these duties, the Commission is pleased to update, provide commentary on, and publish the *Fair Defense Laws* after each legislative session.

The Commission gratefully acknowledges the assistance of **Kenna Titus** and **Zacharie Kump** in preparing this publication, as well as **Christopher Lough**, **Hayden Kursh, Rachel Gartman, Susan Stradley, Rebecca Yung, Cory Dalton,** and **Jaret Kanarek** for their work updating previous versions of the *Fair Defense Laws*.

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THE UNITED STATES CONSTITUTION

THE SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

COMMENTARY: The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." This fundamental right applies to the states through the Fourteenth Amendment. *See Gideon v. Wainwright*, 372 U.S. 335, 352 (1963). Per the Supreme Court's decision in *Gideon*, indigent defendants charged with a felony who cannot afford to retain an attorney have an absolute right to counsel appointed by the court. *Id.* at 342. On the same day that the Supreme Court decided *Gideon*, it also held that denying the assistance of counsel on appeal because a defendant could not afford to pay for an attorney constituted "discrimination against the indigent." *Douglas v. California*, 372 U.S. 353, 355 (1963).

The Supreme Court extended the right to counsel to include counsel in juvenile court proceedings in *In re Gault.* 387 U.S. 1 (1967). In *Argersinger v. Hamlin*, the Court also extended the right to counsel to include counsel for either felony or misdemeanor offenses if the defendant is facing jail time. 407 U.S. 25 (1972).

The Sixth Amendment's right to counsel was later interpreted to guarantee that a defendant receives effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Court created a test for evaluating ineffective counsel. To establish a successful claim of ineffective assistance of counsel, a defendant must show first that counsel's performance fell below an objective standard of reasonableness. *Id*. at 687. Second, a defendant must show that but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. *Davis v. State*, 278 S.W.3d 346, 352 (Tex. Crim. App. 2009) (citing and interpreting *Strickland*, 446 U.S. at 692). In addition to the *Strickland* requirements, a state prisoner must show that "the state court's decision is so obviously wrong that its error lies beyond any possibility for fair minded disagreement." *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020).

The prejudice prong of the Strickland test is presumed to have been met when an attorney fails to file a notice of appeal despite defendant's express wishes. This is true regardless of whether the defendant signed an appeal waiver for certain, but not all, possible appellate claims. *Garza v. Idaho,* 139 S. Ct. 738, 738 (2019). "[A] lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Id.* at 746.

More recently, the Supreme Court held that defendants have received ineffective counsel when they are not informed of the deportation consequence of a guilty plea. *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010). Further, in death penalty cases, an attorney's performance is deficient under *Strickland* when they fail to make an investigation into mitigation, present evidence that bolsters the State's case, and fail to investigate the State's aggravating evidence. *Andrus v. Texas*, 140 S. Ct. 1875, 1881-1882 (2020). The *Strickland* right to effective counsel has also been recognized where postconviction counsel is ineffective. *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

THE TEXAS CONSTITUTION

ARTICLE 1. BILL OF RIGHTS. TEXAS CONSTITUTION

Sec. 10. Rights of Accused in Criminal Prosecutions. In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both, shall be confronted by the witnesses against him and shall have compulsory process for obtaining witnesses in his favor, except that when the witness resides out of the State and the offense charged is a violation of any of the anti-trust laws of this State, the defendant and the State shall have the right to produce and have the evidence admitted by deposition, under such rules and laws as the Legislature may hereafter provide; and no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger.

CODE OF CRIMINAL PROCEDURE

CHAPTER 1. GENERAL PROVISIONS

Art. 1.05 Rights of Accused.

In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself. He shall have the right of being heard by himself, or counsel, or both; shall be confronted with the witnesses against him, and shall have compulsory process for obtaining witnesses in his favor. No person shall be held to answer for a felony unless on indictment of a grand jury.

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. Subject to Subsection (c-1), 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 in which the defendant is arrested shall appoint counsel as soon as possible, but not later than:

(1) 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, if the defendant is arrested in a county with a population less than 250,000; or

(2) 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, if the defendant is arrested in a county with a population of 250,000 or more.

(c-1) If an indigent defendant is arrested under a warrant issued in a county other than the county in which the arrest was made and the defendant is entitled to and requests appointed

counsel, a court or the courts' designee authorized under Article 26.04 to appoint counsel for indigent defendants in the county that issued the warrant shall appoint counsel within the periods prescribed by Subsection (c), regardless of whether the defendant is present within the county issuing the warrant and even if adversarial judicial proceedings have not yet been initiated against the defendant in the county issuing the warrant. However, if the defendant has not been transferred or released into the custody of the county issuing the warrant before the 11th day after the date of the arrest and if counsel has not otherwise been appointed for the defendant in the arresting county under this article, a court or the courts' designee authorized under Article 26.04 to appoint counsel for indigent defendants in the arresting county immediately shall appoint counsel to represent the defendant in any matter under Chapter 11 or 17, regardless of whether adversarial judicial proceedings have been initiated against the defendant in the arresting county. If counsel is appointed for the defendant in the arresting county as required by this subsection, the arresting county may seek from the county that issued the warrant reimbursement for the actual costs paid by the arresting county for the appointed counsel.

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

(1) an appeal to a court of appeals;

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

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

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

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

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

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

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

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

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

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

(f-2) In any adversary judicial proceeding that may result in punishment by confinement, the court may not direct or encourage the defendant to communicate with the attorney

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

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

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

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

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

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

(i) Subject to Subsection (c-1), with respect to a county with a population of less than 250,000, 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 in which the defendant is arrested 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). Subject to Subsection (c-1), 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), (c-1), or (i) if:

(1) the defendant is subsequently charged in the case with an offense different from the offense with which the defendant was initially charged; and

(2) good cause to appoint new counsel is stated on the record as required by Article 26.04(j)(2).

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

A defendant's right to counsel under Art. 1.051(c) and the Sixth Amendment to the U.S. Constitution must be affirmatively waived; waiver may not be implied from a defendant's failure to request counsel. *Oliver v. State*, 872 S.W.2d 713, 715 (Tex. Crim. App. 1994). If a defendant appears in court without counsel, the judge, as a preliminary matter before adversary judicial proceedings begin, must determine if the defendant is aware that he has a right to hire counsel and if he intends to do so. *Id.* at 716. If the defendant is indigent and cannot hire an attorney himself, the judge must appoint counsel to represent the defendant before conducting any adversarial judicial proceedings unless the defendant "knowingly and voluntarily relinquishes" his right to counsel. *Id.*

"The primary goal of art. 1.051(e) is to ensure the indigent defendant receives appointed counsel who is prepared for the proceeding." *Marin v. State*, 891 S.W.2d 267, 272 (Tex. Crim. App. 1994). When deciding if Art. 1.051(e) has been violated, courts focus on the actual preparation time, not the time between the formal appointment and the date of the proceeding. *Id.* at 270. Failure to satisfy Art. 1.051(e) may be raised on appeal without a previous objection. *Id.* at 268. If a defendant is re-indicted and the difference in indictments is negligible, counsel is not entitled to 10 additional days to prepare for the newer indictment. *Id.* at 271. If more than one attorney represents the defendant and at least one of the attorneys is given 10 days to prepare, then Art 1.051(e) is satisfied. *Id.* Similarly, if a defendant's sole appointed attorney is replaced by another one, the newly appointed attorney must be given 10 days to prepare for the proceeding. *Id.* at 272.

The right to counsel guaranteed by the Sixth Amendment and Art. 1.051 does not attach prior to the initiation of adversarial judicial proceedings. *United States v. Gouveia*, 467 U.S. 180, 188 (1984); *accord Forte v. State*, 707 S.W.2d 89, 91-92 (Tex. Crim. App. 1986). The Supreme Court has more recently clarified that a "criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings." *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 213 (2008) (holding that an Art. 15.17 hearing qualifies as an initiation of adversarial judicial proceedings and signals attachment of the right to counsel).

Even after the initiation of adversarial judicial proceedings, the right to counsel attaches only at the "critical stages" of adversary judicial proceedings. *Gilley v. State*, 418 S.W.3d 114, 120 (Tex. Crim. App. 2014); *Green v. State*, 872 S.W.2d 717, 720 (Tex. Crim. App. 1994). Critical stages are "proceedings between an individual and agents of the State—whether 'formal or informal, in court or out'—that amount to 'trial-like confrontations,' at which counsel would help the accused 'in coping with legal problems or . . . meeting his adversary.'" *Rothgery*, 554 U.S. at 212 n.16 (citations omitted).

Post-arraignment custodial interrogation is a critical stage. *Pecina v. State*, 361 S.W.3d 68, 78 (Tex. Crim. App. 2012). "When the police or other law-enforcement agents approach [a defendant] and give him his *Miranda* warnings," both the Fifth Amendment right to interrogation counsel and the Sixth Amendment right to counsel during a critical stage are either invoked or waived. *Id.*

A pretrial event or proceeding may be a critical stage if "the accused required aid in coping with legal problems or assistance in meeting his adversary." *Green*, 872 S.W.2d at 720-21 (citing *United States v. Ash*, 413 U.S. 300, 313 (1973)); *see also United States v. Wade*, 388

U.S. 218, 227 (1967) (holding that a pretrial event may be a critical stage when the presence of counsel is necessary to assure fairness and the effective assistance of counsel at trial). A pretrial procedure that would "impair defense on the merits if the accused is required to proceed without counsel" is considered to be a critical stage. *Gerstein v. Pugh*, 420 U.S. 103, 122 (1975). When any pretrial confrontation concerns the right of the accused to meaningfully cross-examine the prosecution's witnesses, it may be a critical stage if substantial prejudice to the accused's rights would result. *Green*, 872 S.W.2d at 720-21. Courts, then, must consider "whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." *Id.*

The Sixth Amendment requirement of "effective assistance of counsel at critical stages of a criminal proceeding" necessarily extends to pre- and post-trial critical stages. *Lafler v. Cooper*, 566 U.S. 156, 165 (2012). Accordingly, plea negotiations are considered critical stages of criminal proceedings for the purposes of the Sixth Amendment right to effective counsel. *Missouri v. Frye*, 566 U.S. 134, 145 (2012); *see also Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (finding the defendant received ineffective assistance of counsel when he was not informed of the deportation consequence of his guilty plea). The Sixth Amendment effective assistance requirement imposes a duty on defense counsel to "communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Frye*, 556 U.S. at 145.

The Supreme Court has held that probable cause determinations are not a critical stage due to their non-adversarial character and limited function. *Gerstein*, 420 U.S. at 122. However, the Court noted "state systems of criminal procedure vary widely . . . and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole." *Id.* at 123.

An examining trial in Texas is "arguably a critical stage" since it is adversarial in nature. *Green*, 872 S.W.2d at 721. On the specific facts of *Green*, the Court of Criminal Appeals held that the preliminary initial appearance at issue was not a critical stage because the defendant was neither required nor asked to plea, the probable cause determination was non-adversarial, an examining trial was not held during that time, and bail was not set. *Id.* at 721-22.

A post-indictment lineup where the accused is physically present is a critical stage of prosecution because the confrontation between the accused and victims and witnesses involves dangers and factors that "might seriously . . . derogate from a fair trial." *Wade*, 388 U.S. at 228. However, a post-indictment photographic display where the accused is not physically present is not a critical stage since the accused is not present and the setting is not adversarial. *Ash*, 413 U.S. at 317, 321.

The Government's scientific analysis of the accused's fingerprints, blood sample, clothing, hair, and other specimens is not a critical stage due to the wide availability of knowledge of these scientific techniques and technology. *Wade*, 388 U.S. at 227. Because the knowledge is sufficiently available, the accused has the opportunity to meaningfully confront the Government's case at trial. *Id.* at 228.

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

In *Gilley*, the pretrial child witness-competency examination at issue was not a critical stage of the appellant's trial requiring counsel's participation, even though the result of the determination could have an adverse consequence on the defendant. 418 S.W.3d at 120-21.

Trial courts have a duty to inform defendants of their right to representation of counsel in a contempt proceeding because contempt proceedings may result in the deprivation of a defendant's liberty. *Ex parte Gonzales*, 945 S.W.2d 830, 836 (Tex. Crim. App. 1997).

For the purposes of custodial interrogation, both the Fifth Amendment right to interrogation counsel and the Sixth Amendment right to counsel during a critical stage are either invoked or waived "when the police or other law-enforcement agents approach [a defendant] and give him his *Miranda* warnings." *Pecina v. State*, 361 S.W.3d 68, 78 (Tex. Crim. App. 2012).

A proceeding for revocation of probation or deferred sentencing is a critical stage because an uncounseled defendant might not be aware of options available to him and substantial rights could thus be affected. *Mempa v. Rhay*, 389 U.S. 128, 136 (1967). Further, a first appeal of right is a critical stage. *Cooks v. State*, 240 S.W.3d 906, 910 (Tex. Crim. App. 2007) (citing *Douglas v. California*, 372 U.S. 353, 357 (1963) ("[W]here the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.")). The period for filing a motion for new trial is also a critical stage because the steps involved might be unreasonable to require a defendant to complete without assistance. *Id.* (citing *Massingill v. State*, 8 S.W.3d 733, 736-37 (Tex. App-Austin 1999, pet. ref'd).

When appointing counsel, the court is under no obligation to search for an attorney that the defendant finds agreeable. *King v. State*, 29 S.W.3d 556, 566 (Tex. Crim. App. 2000). The right to counsel of choice does not extend to indigent defendants. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006).

Even though an indigent defendant is not entitled to counsel of choice, appointed counsel cannot be removed against the defendant's wishes once the attorney-client relationship has been established unless the record shows some "principled reason" for the removal. *In re Fletcher,* 584 S.W.3d 584, 588 (Tex. App. – Houston [1st Dist.] 2019).

However, indigent defendants do have the right to effective assistance of counsel. *Hernandez v. State*, 726 S.W.2d 53, 55 (Tex. Crim. App. 1986) (citing *Strickland*, 446 U.S. at 687-88 (1984)). The standard for reasonably effective assistance of counsel in Texas is "counsel reasonably likely to render and rendering reasonably effective assistance." *Butler v. State*, 716 S.W.2d 48, 54 (Tex. Crim. App. 1986) (citations omitted). If an indigent defendant seeks a change of appointed counsel, it is his burden to show that he is entitled to the change. *Malcom v. State*, 628 S.W.2d 790, 791 (Tex. Crim. App. 1982). In order to prevail on a motion to change appointed counsel, a defendant must demonstrate that "the totality of the representation" does not meet the standard for effectiveness. *Butler*, 716 S.W.2d at 54. Mere conflicts of personality or disagreements between client and counsel concerning matters such as trial strategy are "typically not valid grounds" for withdrawal of appointed counsel. *King*, 29 S.W.3d at 566; *Solis v. State*, 792 S.W.2d 95, 100 (Tex. Crim. App. 1990).

The right to counsel may not be manipulated in a way that obstructs the fair administration of justice or the orderly procedure of the court. *Webb v. State*, 533 S.W.2d 780, 784 (Tex. Crim. App. 1976). As such, "an accused may not wait until the day of trial to demand different counsel or to request that counsel be dismissed so that he may retain other counsel." *Id.* If the accused does request a change of counsel on the date of trial, the court (1) may appoint or allow the accused to retain new counsel; (2) must allow the accused to represent himself if the court denies the accused's request and the accused asserts his right to self-representation even after a proper admonishment from the court; or (3) may compel the accused who does not waive the right to counsel and does not assert his right to self-representation to proceed with his current attorney. *Burgess v. State*, 816 S.W.2d 424, 428-29 (Tex. Crim. App. 1991).

Trial courts may not force defendants to accept appointed counsel if they knowingly and intelligently waive the right to counsel and choose to defend themselves. *Faretta v. California*, 422 U.S. 806, 814-16 (1975); *see also Webb*, 533 S.W.2d at 783. However, the State may appoint "standby counsel" to be available to assist a defendant—even over the defendant's objection—in "overcoming routine procedural or evidentiary obstacles . . . such as

introducing evidence or objecting to testimony." *McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984).

To represent himself at trial, a defendant must "knowingly and intelligently" waive his right to counsel. *Faretta*, 422 U.S. at 835. This waiver does not have to be in writing, as construing Art. 1.051(g) to be mandatory would "operate to impose counsel on any defendant who refused to sign a written waiver" despite an otherwise valid invocation of *Faretta* rights. *Burgess*, 816 S.W.2d at 430. When a defendant asserts his right to self-representation, the trial court should determine that he fully understands the consequences of waiving his right to representation of counsel by warning and making the defendant aware of "the dangers and disadvantages of self-representation." *Faretta*, 422 U.S. at 835; *Burton v. State*, 634 S.W.2d 692, 694 (Tex. Crim. App. 1982). This determination requires that the trial court look not at whether the defendant can demonstrate "some skill or expertise," but rather, at the defendant's "background, age, experience, [and] education." *Id*. The trial court may also take a defendant's mental capacity into account by "asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so." *Indiana v. Edwards*, 554 U.S. 164, 177-78 (2008); *accord Chadwick v. State*, 309 S.W.3d 558, 561-562 (Tex. Crim. App. 2010).

Furthermore, the trial judge must inform defendants that "there are technical rules of evidence and procedure" and that the defendants "will not be granted any special consideration solely because [they] asserted [their] *pro se* rights." *Williams v. State*, 252 S.W.3d 353, 356 (Tex. Crim. App. 2008) (quoting *Johnson v. State*, 760 S.W.2d 277, 279 (Tex. Crim. App. 1988)).

It is important to note that the statutory language in 1.051(g) addresses only the waiver of the right to appointed counsel, however if the defendant will be self-represented, in a contested matter, the Court should give the admonishments listed in *Faretta v. California* and make the required findings.

If a defendant asserted his right to self-representation and was later appointed counsel, the record must adequately reflect that a defendant waived his right to self-representation after asserting it. *Funderburg v. State*, 717 S.W.2d 637, 642 (Tex. Crim. App. 1986). Proof of such waiver is not subject to as stringent a standard as proof of waiver of the right to counsel. *Id*. It is enough if the record sufficiently demonstrates that a defendant abandoned his initial request to represent himself. *Id*.; *see Brown v. Wainwright*, 665 F.2d 607, 611–12 (5th Cir. 1982). However, 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. *Funderburg*, 717 S.W.2d at 642.

A court is unlikely to invalidate the distinction under Art. 1.051(c) between indigent persons in more and less populous counties on equal protection grounds. Tex. Att'y Gen. Op. No. JC-0549 (2002). That distinction is subject only to rational basis review, 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." *Id.* Moreover, indigence standards "necessarily vary in different counties due to varying incomes and cost of living measures in the counties." *Id*.

Art. 1.053. PRESENT ABILITY TO PAY.
Except as otherwise specifically provided, in determining a defendant's ability to pay for any purpose, the court shall consider only the defendant's present ability to pay.

CHAPTER 11. HABEAS CORPUS

Art. 11.07. PROCEDURE AFTER CONVICTION WITHOUT DEATH PENALTY

Sec. 1. This article establishes the procedures for an application for writ of habeas corpus in which the applicant seeks relief from a felony judgment imposing a penalty other than death.

Sec. 2. After indictment found in any felony case, other than a case in which the death penalty is imposed, and before conviction, the writ must be made returnable in the county where the offense has been committed.

Sec. 3. (a) After final conviction in any felony case, the writ must be made returnable to the Court of Criminal Appeals of Texas at Austin, Texas.

(b) An application for writ of habeas corpus filed after final conviction in a felony case, other than a case in which the death penalty is imposed, must be filed with the clerk of the court in which the conviction being challenged was obtained, and the clerk shall assign the application to that court. When the application is received by that court, a writ of habeas corpus, returnable to the Court of Criminal Appeals, shall issue by operation of law. The clerk of that court shall make appropriate notation thereof, assign to the case a file number (ancillary to that of the conviction being challenged), and forward a copy of the application by certified mail, return receipt requested, by secure electronic mail, or by personal service to the attorney representing the state in that court, who shall answer the application not later than the 30th [~~15th~~] day after the date the copy of the application is received. Matters alleged in the application not admitted by the state are deemed denied.

(c) Within 20 days of the expiration of the time in which the state is allowed to answer, it shall be the duty of the convicting court to decide whether there are controverted, previously unresolved facts material to the legality of the applicant's confinement. Confinement means confinement for any offense or any collateral consequence resulting from the conviction that is the basis of the instant habeas corpus. If the convicting court decides that there are no such issues, the clerk shall immediately transmit to the Court of Criminal Appeals a copy of the application, any answers filed, and a certificate reciting the date upon which that finding was made. Failure of the court to act within the allowed 20 days shall constitute such a finding.

(d) If the convicting court decides that there are controverted, previously unresolved facts which are material to the legality of the applicant's confinement, it shall enter an order within 20 days of the expiration of the time allowed for the state to reply, designating the issues of fact to be resolved. To resolve those issues the court may order affidavits, depositions, interrogatories, additional forensic testing, and hearings, as well as using personal recollection. The state shall pay the cost of additional forensic testing ordered under this subsection, except that the applicant shall pay the cost of the testing if the applicant retains counsel for purposes of filing an application under this article. The convicting court may appoint an attorney or a magistrate to hold a hearing and make findings of fact. An attorney so appointed shall be compensated as provided in Article 26.05 of this code. It shall be the duty of the reporter who is designated to transcribe a hearing held pursuant to this article to prepare a transcript within 15 days of its conclusion. On completion of the transcript, the reporter shall immediately transmit the transcript to the clerk of the convicting court. After the convicting court makes findings of fact or approves the findings of the person designated to make them, the clerk of the convicting court shall immediately transmit to the Court of Criminal Appeals, under one cover, the application, any answers filed, any motions filed, transcripts of all depositions and hearings, any affidavits, and any other matters such as official records used by the court in resolving issues of fact.

(e) For the purposes of Subsection (d), "additional forensic testing" does not include forensic DNA testing as provided for in Chapter 64.

Sec. 4. (a) If a subsequent application for writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed

under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; or

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

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

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

Sec. 5. The Court of Criminal Appeals may deny relief upon the findings and conclusions of the hearing judge without docketing the cause, or may direct that the cause be docketed and heard as though originally presented to said court or as an appeal. Upon reviewing the record the court shall enter its judgment remanding the applicant to custody or ordering his release, as the law and facts may justify. The mandate of the court shall issue to the court issuing the writ, as in other criminal cases. After conviction the procedure outlined in this Act shall be exclusive and any other proceeding shall be void and of no force and effect in discharging the prisoner.

Sec. 6. Upon any hearing by a district judge by virtue of this Act, the attorney for applicant, and the state, shall be given at least seven full days' notice before such hearing is held.

Sec. 7. When the attorney for the state files an answer, motion, or other pleading relating to an application for a writ of habeas corpus or the court issues an order relating to an application for a writ of habeas corpus, the clerk of the court shall mail or deliver to the applicant a copy of the answer, motion, pleading, or order.

Effective Date: September 1, 2021

2021 Legislative Note: HB 3774 Section 8.01 amends Section 3(b), article 11.07, to require that the attorney representing the state answer the application for writ of habeas corpus application not later than the 30th day, rather than the 15th day, after the date the copy of the application is received.

COMMENTARY: The statutory language in Art. 11.07 indicates that the Legislature intended to permit "each applicant one full and fair opportunity" to pursue post-conviction claims, while also "prevent[ing] perpetual litigation of cases on habeas." *Ex parte Speckman*, 537 S.W.3d 49, 52 (Tex. Crim. App. 2017)

When a defendant has received ineffective assistance of counsel, the resulting conviction may be reversed following a writ of habeas corpus filed pursuant to Art. 11.07 if the conviction has caused adverse collateral consequences. *Ex parte Morse*, 591 S.W.2d 904, 905 (Tex. Crim. App. 1980). In *Ex parte Morse*, an indigent defendant entered a guilty plea before a lawyer was appointed to him. *Id*. This conviction resulted in adverse collateral consequences for the defendant in the form of parole consideration and prison job classification. *Id*. The court granted the defendant's writ of habeas corpus and found that "[m]ootness cannot prohibit a collateral attack if prior convictions that have been discharged may have serious collateral consequences to a criminal defendant." *Id*.

A writ of habeas corpus claiming ineffective assistance of appellate counsel challenges the conviction for purposes of Art. 11.07 Sec. 4. *Ex parte Santana,* 227 S.W.3d 700, 705 (Tex. Crim. App. 2007) ("An allegation of ineffective assistance of appellate counsel for failure to advance a point of error on direct appeal includes an underlying claim relating to the conviction that must be considered in analyzing deficient performance and prejudice."). Because of this, all subsequent writs are barred unless they meet one of the

two conditions set forth in Sec. 4(a)(1) and (2). *Id*. at 703.

While the writ of habeas corpus is "a writ of right" it may be waived if the waiver is "knowingly and intelligently" made. *Ex parte Reedy,* 282 S.W.3d 492, 494—496 (Tex. Crim. App. 2009). An applicant's waiver of habeas relief cannot be knowing and intelligent for claims such as "actual innocence based on newly available evidence, the suppression of material, exculpatory evidence by the State, and ineffective assistance of counsel." *Id.* at 498. These claims cannot usually be waived because "an applicant cannot be expected to have known about the existence of the facts that support such claims at the time of his waiver." *Id.*

Art. 11.071. PROCEDURE IN DEATH PENALTY CASE.

Sec. 1. APPLICATION TO DEATH PENALTY CASE.
Notwithstanding any other provision of this chapter, this article establishes the procedures for an application for a writ of habeas corpus in which the applicant seeks relief from a judgment imposing a penalty of death.

Sec. 2. REPRESENTATION BY COUNSEL.
(a) An applicant shall be represented by competent counsel unless the applicant has elected to proceed pro se and the convicting trial court finds, after a hearing on the record, that the applicant's election is intelligent and voluntary.

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

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

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

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

capital and forensic writs shall be compensated in accordance with Subchapter B, Chapter 78, Government Code.

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

(b) A convicting court seeking reimbursement for a county shall certify to the comptroller of public accounts the amount of compensation that the county is entitled to receive under this section. The comptroller of public accounts shall issue a warrant to the county in the amount certified by the convicting court, not to exceed $25,000.

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

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

Sec. 3. INVESTIGATION OF GROUNDS FOR APPLICATION.
(a) On appointment, counsel shall investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus.

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

(1) the claims of the application to be investigated;

(2) specific facts that suggest that a claim of possible merit may exist; and

(3) an itemized list of anticipated expenses for each claim.

(c) The court shall grant a request for expenses in whole or in part if the request for expenses is timely and reasonable. If the court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant.

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

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

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

Sec. 4. FILING OF APPLICATION.
(a) An application for a writ of habeas corpus, returnable to the court of criminal appeals, must be filed in the convicting court not later than the 180th day after the date the convicting court appoints counsel under Section 2 or not later than the 45th day after the date the state's original brief is filed on direct appeal with the court of criminal appeals, whichever date is later.

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

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

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

(1) a copy of the untimely application, with a statement of the convicting court that the application is untimely, or a statement of the convicting court that no application has been filed within the time periods required by Subsections (a) and (b); and

(2) any order the judge of the convicting court determines should be attached to an untimely application or statement under Subdivision (1).

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

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

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

(1) find that good cause has not been shown and dismiss the application;

(2) permit the counsel to continue representation of the applicant and establish a new filing date for the application, which may be not more than 180 days from the date the court permits the counsel to continue representation; or

(3) appoint new counsel to represent the applicant and establish a new filing date for the application, which may be not more than 270 days after the date the court appoints new counsel.

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

criminal appeals may enter an order denying counsel compensation under Section 2A.

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

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

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

Sec. 5. SUBSEQUENT APPLICATION.
(a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

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

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

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

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

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

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

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

(A) the application;

(B) the notation;

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

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

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

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

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

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

Sec. 6. ISSUANCE OF WRIT.
(a) If a timely application for a writ of habeas corpus is filed in the convicting court, a writ of habeas corpus, returnable to the court of criminal appeals, shall issue by operation of law.

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

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

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

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

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

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

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

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

(c) The clerk of the convicting court shall:

(1) make an appropriate notation that a writ of habeas corpus was issued;

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

(3) send a copy of the application by certified mail, return receipt requested, or by secure electronic mail to the attorney representing the state in that court.

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

Sec. 7. ANSWER TO APPLICATION.
(a) The state shall file an answer to the application for a writ of habeas corpus not later than the 120th day after the date the state receives notice of issuance of the writ. The state shall serve the answer on counsel for the applicant or, if the applicant is proceeding pro

se, on the applicant. The state may request from the convicting court an extension of time in which to answer the application by showing particularized justifying circumstances for the extension, but in no event may the court permit the state to file an answer later than the 180th day after the date the state receives notice of issuance of the writ.

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

Sec. 8. FINDINGS OF FACT WITHOUT EVIDENTIARY HEARING.
(a) Not later than the 20th day after the last date the state answers the application, the convicting court shall determine whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist and shall issue a written order of the determination.

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

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

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

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

(A) application;

(B) answer;

(C) orders entered by the convicting court;

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

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

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

(A) orders entered by the convicting court;

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

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

Sec. 9. HEARING.
(a) If the convicting court determines that controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist, the court shall enter an order, not later than the 20th day after the last date the state answers the application, designating the issues of fact to be resolved and the manner in which the issues shall be resolved. To resolve the issues, the court may require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection.

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

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

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

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

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

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

(A) the application;

(B) the answers and motions filed;

(C) the court reporter's transcript;

(D) the documentary exhibits introduced into evidence;

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

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

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

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

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

(A) orders entered by the convicting court;

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

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

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

Sec. 10. RULES OF EVIDENCE.
The Texas Rules of Criminal Evidence apply to a hearing held under this article.

Sec. 11. REVIEW BY COURT OF CRIMINAL APPEALS.
The court of criminal appeals shall expeditiously review all applications for a writ of habeas corpus submitted under this article. The court may set the cause for oral argument and may request further briefing of the issues by the applicant or the state. After reviewing the record, the court shall enter its judgment remanding the applicant to custody or ordering the applicant's release, as the law and facts may justify.

COMMENTARY: There is no federal or state constitutional right to counsel for writs of habeas corpus. *Ex parte Graves*, 70 S.W.3d 103, 110 (Tex. Crim. App. 2002) (citing *Coleman v. Thompson*, 501 U.S. 722, 752 (1991)). Accordingly, there is no constitutional right to have effective counsel for habeas proceedings; however, Article 11.071 provides a statutory right to "competent" counsel for a defendant's initial habeas proceedings. *Graves*, 70 S.W.3d at 113.

In Texas, the competency of counsel in habeas proceedings is determined by the counsel's qualifications, experience, and abilities at the initial appointment of counsel, as opposed to the final product of representation. *Id.* at 114.

"State and federal courts share concurrent habeas corpus jurisdiction to review the constitutional legitimacy of a conviction or death sentence obtained in state court." *Ex parte Moreno*, 245 S.W.3d 419, 428 (Tex. Crim. App. 2008). Federal courts may grant an applicant's claim previously adjudicated on the merits "only if [the Texas Court of Criminal Appeals] has misapplied clearly established federal law." *Ex parte Hood*, 304 S.W.3d 397,

406 (Tex. Crim. App. 2010); *see also* 28 U.S.C. § 2254(d) (allowing habeas to be granted if the state decision misapplied clearly established federal law or if the state decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding").

After filing an initial writ application, an applicant may not have his or her subsequent writ applications considered by state courts unless his or her application falls within one of the three statutory exceptions to the general prohibition against subsequent writs enumerated in Article 11.071, section 5(a). The first exception is a showing of new facts or law that were not available at the time of filing of any previous writ. *See Hood*, 304 S.W.3d at 406. The second exception is a claim of actual innocence coupled with a showing that, but for a Constitutional violation, no rational juror could have found the applicant guilty beyond a reasonable doubt (the "innocence gateway"). *Ex parte Reed*, 271 S.W.3d 698, 733 (Tex. Crim. App. 2008); *Ex Parte Brooks*, 219 S.W.3d 396, 398-400 (Tex. Crim. App. 2007) The third exception is a showing that, but for a Constitutional violation, no rational juror would have answered in the State's favor one or more of the special issues submitted in the applicant's trial ("innocence of the death penalty"). *Ex parte Blue*, 230 S.W.3d 151, 159-60 (Tex. Crim. App. 2007). In non-capital cases, even jurisdictional claims cannot be brought in a subsequent writ unless one of the statutory exceptions is met. *Ex parte Sledge*, 391 S.W.3d 104, 106 (Tex. Crim. App. 2013). While the Court of Criminal Appeals has not explicitly applied this interpretation to capital cases, the language of the non-capital statute (Art. 11.07 § 4(a)) is extremely similar to the language of Art. 11.071 § 5(a). *See id*.

To meet the first exception under a showing of new law, the applicant must allege facts minimally sufficient to bring him within the ambit of the new legal basis for relief. *Ex parte Staley*, 160 S.W.3d 56, 63 (Tex. Crim. App. 2005). A medical examiner's statements recanting his critical trial testimony due to advancements in medical research satisfied the requirements of Section 5(a) to bring a subsequent writ. *See Ex parte Henderson*, 246 S.W.3d 690, 692 (Tex. Crim. App. 2007).

Under the second exception ("innocence gateway"), the court evaluates the old and new evidence, regardless of whether it would be admitted under the rules of evidence at trial, to determine whether the applicant has met his threshold burden of prima facie innocence by a preponderance of evidence that no reasonable juror would have found the defendant guilty beyond a reasonable doubt. *Ex parte Reed*, 271 S.W.3d. at 733-34 (citing *House v. Bell*, 547 U.S. 518, 537-38 (2006)). If the innocence threshold is satisfied, the court then considers the otherwise barred constitutional claim on the merits to conclude how reasonable, properly instructed jurors would have decided in light of the supplemented record. *Id.* at 734 (citing *House*, 547 U.S. at 538). The Court of Criminal Appeals has adopted the Supreme Court's formulation of the burden a petitioner bears to meet this exception, which is to "show that the constitutional error 'probably' resulted in the conviction of one who was actually innocent." *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996) (quoting *Schlup v. Delo*, 513 U.S. 298, 322 (1995) (superseded by statute as applied to federal courts)).

The third exception, actual innocence of the death penalty, requires "clear and convincing evidence." *Blue*, 230 S.W.3d at 162-63. An intellectual disability claim in a subsequent writ that does not meet the first exception—newly available facts or law—may meet this third exception. *Id*. To do so, it must satisfy the higher Section 5(a)(3) "clear and convincing evidence" standard of proof. *Id*.

A state prisoner procedurally defaults on potential federal habeas claims if he or she defaults on such claims in state court "pursuant to an independent and adequate state procedural rule." *Aguilar v. Dretke*, 428 F.3d 526, 532-33 (5th Cir. 2005) (quoting *Coleman*, 501 U.S. at 750). Federal courts have consistently viewed the Section 5(a) abuse of writ provision as "adequate and independent" procedural grounds for procedural default purposes in federal courts. *Aguilar,* 428 F.3d at 533. Federal courts will not apply the procedural default "unless the last state court

to consider the claim 'clearly and expressly' relied on an independent and adequate state ground." *Emery v. Johnson*, 139 F.3d 191, 195 (5th Cir. 1997) (citing *Coleman*, 501 U.S. at 735). If the procedural default applies, federal habeas review of the claim is barred unless the applicant "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Aguilar,* 428 F.3d at 532-33 (quoting *Coleman*, 501 U.S. at 750). Note in *Trevino v. Thaler*, 569 U.S. 413, 417-418 (2013) the Supreme Court held "the structure and design" of Texas' appellate system makes it "virtually impossible" for an ineffective claim to be raised on direct appeal, and failure to do so cannot be the basis of a procedural default.

Executing individuals with intellectual disabilities violates the 8th Amendment of the Constitution. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). (The Supreme Court now uses the term "intellectual disability" in place of "mental retardation," but has defined them identically. *Hall v. Florida*, 572 U.S. 701, 704 (2014)). There is no national standard for enforcing this prohibition; states are left with "the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." *Atkins*, 536 U.S. at 317. Texas has no legislation guiding the process of determining intellectual disability in a death-penalty context or defining intellectual disability for the purposes of the *Atkins* exemption. *See Ex parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004) (noting the lack of relevant legislation); see *also Ex parte Sosa*, 364 S.W.3d 889, 891 (Tex. Crim. App. 2012) (defaulting to applying guidance from the American Association on Intellectual and Developmental Disabilities in the absence of legislation). Consequently, the Court of Criminal Appeals created its own guidelines for the determination of intellectual disability in *Briseno*, 135 S.W.3d at 6. However, the Supreme Court struck down the *Briseno* guidelines, holding them to be "lay perceptions" that "create an unacceptable risk that persons with [mental retardation] will be executed." *Moore v. Texas*, 137 S. Ct. 1039, 1051 (2017) (internal quotations omitted). Although the Supreme Court did not declare an alternative rule, it held that while states had "some flexibility," they did not have "unfettered discretion," and are further constrained by the standards in the medical community. *Id.* at 1053; see also Moore v. Texas, 139 S. Ct. 666, 203 L. Ed. 2d 1 (2019) (holding that the Texas Court of Criminal appeals erred in determining that the defendant did not have an intellectual disability). Following the Supreme Court's holding in *Moore*, the Fifth Circuit has abandoned the *Briseno* factors and instead applies the standard set forth in the most current version of the American Association of Intellectual and Development Disabilities manual. *Cathey v. Davis (In re Cathey)*, 857 F.3d 221, 238–39 (5th Cir. 2017).

Intellectual disability is a sentencing issue and may not be litigated pretrial. *Petetan v. State*, No. AP-77,038, 2017 Tex. Crim. App. LEXIS 286, at *127-29 (Tex. Crim. App. Mar. 8, 2017). In habeas proceedings where an applicant raises an *Atkins* claim that he has an intellectual disability and cannot be executed, the applicant bears the burden of proving by a preponderance of the evidence that he has an intellectual disability. *Briseno*, 135 S.W.3d at 12 (overruled on other grounds); *Neal v. State*, 256 S.W.3d 264, 273 (Tex. Crim. App. 2008) (holding that mental retardation is an affirmative defense).

Applicants that file late, after relying in good faith on a mistaken calculation of a deadline by a court, may still have their petitions considered. *Ex parte Ramos*, 977 S.W.2d 616, 617 (Tex. Crim. App. 1998). An application for an extension of a habeas deadline must be filed and ruled on before the original deadline. *Ex parte Reynoso*, 257 S.W.3d 715, 720 (Tex. Crim. App. 2008). If the original deadline falls on a weekend or holiday, the applicant may file the habeas writ on the next business day. *Id.* at 722.

Art. 11.074. COURT-APPOINTED REPRESENTATION REQUIRED IN CERTAIN CASES

(a) This article applies only to a felony or misdemeanor case in which the applicant seeks

relief on a writ of habeas corpus from a judgment of conviction that:

(1) imposes a penalty other than death; or

(2) orders community supervision.

(b) If at any time the state represents to the convicting court that an eligible indigent defendant under Article 1.051 who was sentenced or had a sentence suspended is not guilty, is guilty of only a lesser offense, or was convicted or sentenced under a law that has been found unconstitutional by the court of criminal appeals or the United States Supreme Court, the court shall appoint an attorney to represent the indigent defendant for purposes of filing an application for writ of habeas corpus, if an application has not been filed, or to otherwise represent the indigent defendant in a proceeding based on the application for the writ.

(c) An attorney appointed under this article shall be compensated as provided by Article 26.05.

CHAPTER 14. ARREST WITHOUT WARRANT

Art. 14.06. MUST TAKE OFFENDER BEFORE MAGISTRATE.

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

(b) A peace officer who is charging a person, including a child, with committing an offense that is a Class C misdemeanor, other than an offense under Section 49.02, Penal Code, may, instead of taking the person before a magistrate, issue a citation to the person that contains:

(1) written notice of the time and place the person must appear before a magistrate;

(2) the name and address of the person charged;

(3) the offense charged;

(4) information regarding the alternatives to the full payment of any fine or costs assessed against the person, if the person is convicted of the offense and is unable to pay that amount; and

(5) the following admonishment, in boldfaced or underlined type or in capital letters:

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

(c) If the person resides in the county where the offense occurred, a peace officer who is charging a person with committing an offense that is a Class A or B misdemeanor may, instead of taking the person before a magistrate, issue a citation to the person that contains written notice of the time and place the person must appear before a magistrate of this state as described by Subsection (a), the name and address of the person charged, and the offense charged.

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

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

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

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

(3) Section 28.08, Penal Code, if the offense is punishable under Subsection (b)(2) or (3) 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.

COMMENTARY: The Fourth Amendment requires a prompt "judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest [without warrant]." *Gerstein*, 420 U.S. at 114. Applying Gerstein, the Supreme Court has held that generally, there is no unreasonable delay when a jurisdiction makes such a determination within 48 hours of arrest. *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 55 (1991). However, a determination made within 48 hours may violate *Gerstein* if it was delayed unreasonably (e.g., a delay to gather more evidence to justify the arrest or a delay motivated by malice towards the arrestee). *Id.*

"Absent a showing of a causal connection between the failure to take an accused before a magistrate and the accused's confession," neglecting to take the accused before a magistrate without unnecessary delay does not invalidate a voluntary confession if the accused received his *Miranda* rights. *Boyd v. State*, 811 S.W.2d 105, 124-25 (Tex. Crim. App. 1991); *accord Webb v. Beto*, 415 F.2d 433, 436 (5th Cir. 1969) (holding that a delay in the arraignment process does not make a confession inadmissible unless there is a demonstrated causal connection between the delay and the confession).

Failure to comply with Art. 14.06 prior to a search incident to a lawful arrest does not invalidate the search. *Corbin v. State*, 426 S.W.2d 238, 240 (Tex. Crim. App. 1968).

CHAPTER 15. 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 a videoconference. The magistrate shall inform in clear language the person arrested, either in person or through a videoconference, 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. <u>If applicable, the magistrate shall inform the person that the person may file the affidavit described by Article 17.028(f).</u> If the person

arrested 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 and whether the bail decision is subject to Article 17.027, admit the person arrested to bail if allowed by law. A record of the communication between the arrested person and the magistrate shall be made. The record 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 record is made if the person is charged with a misdemeanor or the 120th day after the date on which the record is made if the person is charged with a felony. For purposes of this subsection, "videoconference" means a two-way electronic communication of image and sound between the arrested person and the magistrate and includes secure Internet videoconferencing.

(a-1) If a magistrate is provided written or electronic notice of credible information that may establish reasonable cause to believe that a person brought before the magistrate has a mental illness or is a person with an intellectual disability, the magistrate shall conduct the proceedings described by Article 16.22 or 17.032, as appropriate.

(b) After an accused charged with a misdemeanor punishable by fine only is taken before a magistrate under Subsection (a) and the magistrate has identified the accused with certainty, the magistrate may release the accused without bond and order the accused to appear at a later date for arraignment in the applicable justice court or municipal court. The order must state in writing the time, date, and place of the arraignment, and the magistrate must sign the order. The accused shall receive a copy of the order on release. If an accused fails to appear as required by the order, the judge of the court in which the accused is required to appear shall issue a warrant for the arrest of the accused. If the accused is arrested and brought before the judge, the judge may admit the accused to bail, and in admitting the accused to bail, the judge should set as the amount of bail an amount double that generally set for the offense for which the accused was arrested. This subsection does not apply to an accused who has previously been convicted of a felony or a misdemeanor other than a misdemeanor punishable by fine only.

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

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

(e) In each case in which a person arrested is taken before a magistrate as required by

Subsection (a) or Article 15.18(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 (a) or (e) may consist of written forms, electronic recordings, or other documentation as authorized by procedures adopted in the county under Article 26.04(a). The counsel for the defendant may obtain a copy of the record on payment of a reasonable amount to cover the costs of reproduction, or, if the defendant is indigent, the court shall provide a copy to the defendant without charging a cost for the copy.

(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.

Effective Date: January 1, 2022.

LEGISLATIVE NOTE: SB 6 (87(2)) amends Art. 15.17 to require a magistrate, if applicable, to inform the arrested person that he or she may file the affidavit described by Article 17.028(f), which allows a defendant who cannot pay bail file an affidavit saying so. It also requires the magistrate to admit the person arrested to bail if allowed by law after determining whether the bail decision is subject to Article 17.027, which limits the release on bail of a defendant who committed a felony while out on bail.

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

Under Art. 15.17(a), there is no "unnecessary delay" when officers do not immediately bring an arrestee before the first available magistrate. *See Jenkins v. State*, 912 S.W.2d 793, 807 (Tex. Crim. App. 1995). In *Jenkins*, there was no unnecessary delay when the officers first brought the arrested person before a magistrate approximately sixteen hours after his arrest even though a magistrate had been available at an earlier time. *Id.* Moreover, "failure to bring an arrested person before a magistrate in a timely manner will not invalidate a confession unless there is proof of causal connection between the delay and confession." *Cantu v. State*, 842 S.W.2d 667, 680 (Tex. Crim. App. 1992). Failing to bring a defendant before a magistrate while investigation continues to be conducted following the arrest also does not constitute unnecessary delay. *Gonzalez v. State*, 616 S.W.3d 585, 594 (Tex. Crim. App. 2020).

A defendant's Sixth Amendment right to counsel "attaches," i.e., begins, when he is brought before a magistrate, informed of the charges against him, and that his liberty is subject to restriction. *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 213 (2008). The accused is entitled to the presence of counsel at any critical stage that occurs thereafter. *Id.* at 212. Custodial interrogation is one such critical stage. *Pecina v. State*, 361 S.W.3d 68, 78 n. 40 (Tex. Crim. App. 2012).

The right to counsel during custodial interrogation is also protected by prophylactic measures stemming from the Fifth Amendment right against self-incrimination. *Montejo v. Louisiana*, 556 U.S. 778, 794–795 (2009). The Fifth Amendment right to

interrogation counsel is both narrower and broader than the Sixth Amendment right to trial counsel; it only applies to custodial interrogations, but it applies to all suspects in custodial interrogation, even those against whom formal proceedings have not commenced. *Id.* at 795. Otherwise, they are the same with respect to custodial interrogations. *Pecina*, 361 S.W.3d at 76–77 ("Once formal adversary proceedings begin, the Sixth Amendment right to counsel applies in exactly the same way as the Fifth Amendment right applies to custodial interrogation").

A defendant is "in custody" when there is a "formal arrest or restraint on freedom of movement to the degree associated with formal arrest." *New York v. Quarles*, 467 U.S. 649, 655 (1984). For example, a defendant placed in handcuffs and surrounded by four officers is in custody. *See id*. Relatedly, "interrogation" includes "express questioning or its functional equivalent." *Rhode Island v. Innis*, 446 U.S. 291, 300-301 (1980). It refers "not only to express questioning but to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the subject." *Id.* at 301.

At the onset of a custodial interrogation before questioning begins, police must advise the suspect of his rights via the *Miranda* warnings. *Pecina*, 361 S.W.3d at 75-76. Reading the suspect the warnings from Article 38.22 of the Texas Code of Criminal Procedure satisfies the *Miranda* requirements. *Clark v. State*, 627 S.W.2d 693, 704 (Tex. Crim. App. 1982). Only if the defendant voluntarily and intelligently waives his *Miranda* rights, including the right to have an attorney present during questioning, may his statement be introduced into evidence against him at trial. *Pecina*, 361 S.W.3d at 75. If a defendant asserts his right to counsel, the interrogation must stop. *Edwards v. Arizona*, 451 U.S. 477, 485 (1981). Police may not reinitiate questioning without counsel present—even if the defendant consults with counsel in the interim. *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990); *Hughen v. State*, 297 S.W.3d 330, 335 (Tex. Crim. App. 2009). "[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Edwards*, 451 U.S. at 484. The *Edwards* rule is "meant to prevent police from badgering defendants into changing their minds about their rights." *Montejo*, 556 U.S. at 789.

Invocations of the right to counsel during custodial interrogation must be unambiguous. *Davis v. United States*, 512 U.S. 452, 459 (1994). The defendant must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. *Id.* If the statement requesting an attorney does not meet the requisite level of clarity, the officers are not required to stop questioning the subject under *Edwards*. *Id.*; *see Moran v. Burbine*, 475 U.S. 412, 433, n.4 (1986) ("The interrogation must cease until an attorney is present *only* if the individual states that he wants an attorney.") (emphasis in original) (citations and internal quotation marks omitted).

A defendant's invocation of the right to counsel during magistration does not invoke his right to counsel during interrogation. *Pecina*, 361 S.W.3d at 78 (interpreting and applying *Montejo*, 556 U.S. at 796). In *Pecina*, the defendant failed to invoke either of his constitutional rights to counsel for custodial interrogation when he asked the judge for a lawyer and simultaneously agreed to speak to the police during his magistration hearing. *Id.* at 79. At the beginning of the interrogation, the defendant heard and waived his *Miranda* rights, and did not stop the interrogation, nor did he ask to speak with counsel. *Id.* at 80. By failing to tell the officers that he wished to speak to an attorney after he received his *Miranda* warning, the defendant waived both his Fifth and Sixth Amendment rights. *Id.* at 81.

See generally Art. 1.051 and 14.06 commentary.

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.

(a-1) If the arrested person is taken before a magistrate of a county other than the county that issued the warrant, the magistrate shall inform the person arrested of the procedures for requesting appointment of counsel and ensure that reasonable assistance in completing the necessary forms for requesting the appointment of counsel is provided to the person at the same time. If the person requests the appointment of counsel, the magistrate shall, without unnecessary delay but not later than 24 hours after the person requested the appointment of counsel, transmit, or cause to be transmitted, the necessary request forms to a court or the courts' designee authorized under Article 26.04 to appoint counsel in the county issuing the warrant.

(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.

Art. 15.19. NOTICE OF ARREST.

(a) If the arrested person fails or refuses to give bail, as provided in Article 15.18, the arrested person shall be committed to the jail of the county where the person was arrested. The magistrate committing the arrested person shall immediately provide notice to the sheriff of the county in which the offense is alleged to have been committed regarding:

(1) the arrest and commitment, which notice may be given by mail or other written means or by secure facsimile transmission or other secure electronic means; and

(2) whether the person was also arrested under a warrant issued under Section 508.251, Government Code.

(b) If a person is arrested and taken before a magistrate in a county other than the county in which the arrest is made and if the person is remanded to custody, the person may be confined in a jail in the county in which the magistrate serves for a period of not more than 72 hours after the arrest before being transferred to the county jail of the county in which the arrest occurred.

Art. 15.20. DUTY OF SHERIFF RECEIVING NOTICE.

(a) Subject to Subsection (b), the sheriff receiving the notice of arrest and commitment under Article 15.19 shall forthwith go or send for the arrested person and have the arrested person brought before the proper court or magistrate.

(b) A sheriff who receives notice under Article 15.19(a)(2) of a warrant issued under Section 508.251, Government Code, shall have the arrested person brought before the proper magistrate or court before the 11th day after the date the person is committed to the jail of the county in which the person was arrested.

Art. 15.21. RELEASE ON PERSONAL BOND IF NOT TIMELY DEMANDED.

If the proper office of the county where the offense is alleged to have been committed does not demand an arrested person described by Article 15.19 and take charge of the arrested person before the 11th day after the date the person is committed to the jail of the county in which the person is arrested, a magistrate in the county where the person was arrested shall:

(1) release the arrested person on personal bond without sureties or other security; and

(2) forward the personal bond to:

(A) the sheriff of the county where the offense is alleged to have been committed; or

(B) the court that issued the warrant of arrest.

CHAPTER 16. THE COMMITMENT OR DISCHARGE OF THE ACCUSED

Art. 16.22. EARLY IDENTIFICATION OF DEFENDANT SUSPECTED OF HAVING MENTAL ILLNESS OR INTELLECTUAL DISABILITY.

(a)

(1) Not later than 12 hours after the sheriff or municipal jailer having custody of a defendant for an offense punishable as a Class B misdemeanor or any higher category of offense receives credible information that may establish reasonable cause to believe that the defendant has a mental illness or is a person with an intellectual disability, the sheriff or municipal jailer shall provide written or electronic notice to the magistrate. The notice must include any information related to the sheriff's or municipal jailer's determination, such as information regarding the defendant's behavior immediately before, during, and after the defendant's arrest and, if applicable, the results of any previous assessment of the defendant. On a determination that there is reasonable cause to believe that the defendant has a mental illness or is a person with an intellectual disability, the magistrate, except as provided by Subdivision (2), shall order the service provider that contracts with the jail to provide mental health or intellectual and developmental disability services, the local mental health authority, the local intellectual and developmental disability authority, or another qualified mental health or intellectual and developmental disability expert to:

(A) interview the defendant if the defendant has not previously been interviewed by a qualified mental health or intellectual and developmental disability expert on or after the date the defendant was arrested for the offense for which the defendant is in custody and otherwise collect information regarding whether the defendant has a mental illness as defined by Section 571.003, Health and Safety Code, or is a person with an intellectual disability as defined by Section 591.003, Health and Safety Code, including, if applicable, information obtained from any previous assessment of the defendant and information regarding any previously recommended treatment or service; and

(B) provide to the magistrate a written report of an interview described by Paragraph (A) and the other information collected under that paragraph on the form approved by the Texas Correctional Office on Offenders with Medical or Mental Impairments under Section 614.0032(c), Health and Safety Code.

(2) The magistrate is not required to order the interview and collection of other information under Subdivision (1) if the defendant is no longer in custody or the defendant in the year preceding the defendant's applicable date of arrest has been determined to have a mental illness or to be a person with an intellectual disability by the service provider that contracts with the jail to provide mental health or intellectual and developmental disability services, the local mental health authority, the local intellectual and developmental disability authority, or another mental health or intellectual and developmental disability expert described by Subdivision (1). A court that elects to use the results of that previous determination may proceed under Subsection (c).

(3) If the defendant fails or refuses to submit to the interview and collection of other information regarding the defendant as required under Subdivision (1), the magistrate may order the defendant to submit to an examination in a jail, or in another place determined to be appropriate by the local mental health authority or local intellectual and developmental disability authority, for a reasonable period not to exceed 72 hours. If applicable, the county in which the committing court is located shall reimburse the local mental health authority or local intellectual and developmental disability authority for the mileage and per diem expenses of the personnel required to transport the defendant, calculated in accordance with the state travel regulations in effect at the time.

(a-1) If a magistrate orders a local mental health authority, a local intellectual and developmental disability authority, or another qualified mental health or intellectual and developmental disability expert to conduct an interview or collect information under Subsection (a)(1), the commissioners court for the county in which the magistrate is located shall reimburse the local mental health authority, local intellectual and developmental disability authority, or qualified mental health or intellectual and developmental disability expert for the cost of performing those duties in the amount provided by the fee schedule adopted under Subsection (a-2) or in the amount determined by the judge under Subsection (a-3), as applicable.

(a-2) The commissioners court for a county may adopt a fee schedule to pay for the costs to conduct an interview and collect information under Subsection (a)(1). In developing the fee schedule, the commissioners court shall consider the generally accepted reasonable cost in that county of performing the duties described by Subsection (a)(1). A fee schedule described by this subsection must be adopted in a public hearing and must be periodically reviewed by the commissioners court.

(a-3) If the cost of performing the duties described by Subsection (a)(1) exceeds the amount provided by the applicable fee schedule or if the commissioners court for the applicable county has not adopted a fee schedule, the authority or expert who performed the duties may request that the judge who has jurisdiction over the underlying offense determine the reasonable amount for which the authority or expert is entitled to be reimbursed under Subsection (a-1). The amount determined under this subsection may not be less than the amount provided by the fee schedule, if applicable. The judge shall determine the amount not later than the 45th day after the date the request is made. The judge is not required to hold a hearing before making a determination under this subsection.

(a-4) An interview under Subsection (a)(1) may be conducted in person in the jail, by telephone, or through a telemedicine medical service or telehealth service.

(b) Except as otherwise permitted by the magistrate for good cause shown, a written report of an interview described by Subsection (a)(1)(A) and the other information collected under that paragraph shall be provided to the magistrate:

(1) for a defendant held in custody, not later than 96 hours after the time an order was issued under Subsection (a); or

(2) for a defendant released from custody, not later than the 30th day after the date an order was issued under Subsection (a).

(b-1) The magistrate shall provide copies of the written report to:

(1) the defense counsel;

(2) ~~,~~ the attorney representing the state;

(3) ~~, and~~ the trial court;

(4) the sheriff or other person responsible for the defendant's medical records while the defendant is confined in county jail; and

(5) as applicable:

(A) any personal bond office established under Article 17.42 for the county in which the defendant is being confined; or

(B) the director of the office or department that is responsible for supervising the defendant while the defendant is released on bail and receiving mental health or intellectual and developmental disability services as a condition of bail.

(b-2) The written report must include a description of the procedures used in the interview and collection of other information under Subsection (a)(1)(A) and the applicable expert's observations and findings pertaining to:

(1) whether the defendant is a person who has a mental illness or is a person with an intellectual disability;

(2) whether there is clinical evidence to support a belief that the defendant may be incompetent to stand trial and should undergo a complete competency examination under Subchapter B, Chapter 46B; and

(3) any appropriate or recommended treatment or service.

(c) After the trial court receives the applicable expert's written report relating to the defendant under Subsection (b-1) or elects to use the results of a previous determination as described by Subsection (a)(2), the trial court may, as applicable:

(1) resume criminal proceedings against the defendant, including any appropriate proceedings related to the defendant's release on personal bond under Article 17.032 if the defendant is being held in custody;

(2) resume or initiate competency proceedings, if required, as provided by Chapter 46B;

(3) consider the written report during the punishment phase after a conviction of the offense for which the defendant was arrested, as part of a presentence investigation report, or in connection with the impositions of conditions following placement on community supervision, including deferred adjudication community supervision;

(4) refer the defendant to an appropriate specialty court established or operated under Subtitle K, Title 2, Government Code; or

(5) if the offense charged does not involve an act, attempt, or threat of serious bodily injury to another person, release the defendant on bail while charges against the defendant remain pending and enter an order transferring the defendant to the appropriate court for court-ordered outpatient mental health services under Chapter 574, Health and Safety Code.

(c-1) If an order is entered under Subsection (c)(5), an attorney representing the state shall file the application for court-ordered outpatient

services under Chapter 574, Health and Safety Code.

(c-2) On the motion of an attorney representing the state, if the court determines the defendant has complied with appropriate court-ordered outpatient treatment, the court may dismiss the charges pending against the defendant and discharge the defendant.

(c-3) On the motion of an attorney representing the state, if the court determines the defendant has failed to comply with appropriate court-ordered outpatient treatment, the court shall proceed under this chapter or with the trial of the offense.

(d) This article does not prevent the applicable court from, before, during, or after the interview and collection of other information regarding the defendant as described by this article:

(1) releasing a defendant who has a mental illness or is a person with an intellectual disability from custody on personal or surety bond, including imposing as a condition of release that the defendant submit to an examination or other assessment; or

(2) ordering an examination regarding the defendant's competency to stand trial.

(e) The Texas Judicial Council shall adopt rules to require the reporting of the number of written reports provided to a court under Subsection (a)(1)(B). The rules must require submission of the reports to the Office of Court Administration of the Texas Judicial System on a monthly basis.

(f) A written report submitted to a magistrate under Subsection (a)(1)(B) is confidential and not subject to disclosure under Chapter 552, Government Code, but may be used or disclosed as provided by this article.

Effective date: 09/01/21

2021 LEGISLATIVE NOTE: SB 49 amends 16.22 by amending Subsection (a)(2) and (b-1) and adding Subsections (b-1)(4), (b-1)(5), (b-1)(5)(A), (b-1)(5)(B), and (b-2). These amendments require a magistrate to submit a written report of any interview ordered for a defendant suspected of having a mental illness or an intellectual disability to a number of authorities responsible for the defendant's care.

Art. 16.23. DIVERSION OF PERSONS SUFFERING MENTAL HEALTH CRISIS OR SUBSTANCE ABUSE ISSUE.
(a) Each law enforcement agency shall make a good faith effort to divert a person suffering a mental health crisis or suffering from the effects of substance abuse to a proper treatment center in the agency's jurisdiction if:

(1) there is an available and appropriate treatment center in the agency's jurisdiction to which the agency may divert the person;

(2) it is reasonable to divert the person;

(3) the offense that the person is accused of is a misdemeanor, other than a misdemeanor involving violence; and

(4) the mental health crisis or substance abuse issue is suspected to be the reason the person committed the alleged offense.

(b) Subsection (a) does not apply to a person who is accused of an offense under Section 49.04, 49.045, 49.05, 49.06, 49.065, 49.07, or 49.08, Penal Code.

CHAPTER 17. BAIL

Art. 17.032. RELEASE ON PERSONAL BOND OF CERTAIN DEFENDANTS WITH MENTAL ILLNESS OR INTELLECTUAL DISABILITY.
(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), if the offense involved family violence as defined by Section 71.004, Family Code;

(7) Section 22.011 (sexual assault);

(8) Section 22.02 (aggravated assault);

(9) Section 22.021 (aggravated sexual assault);

(10) Section 22.04 (injury to a child, elderly individual, or disabled individual);

(11) Section 29.03 (aggravated robbery);

(12) Section 21.02 (continuous sexual abuse of young child or <u>disabled individual</u> ~~children~~); or

(13) Section 20A.03 (continuous trafficking of persons).

(b) Notwithstanding Article 17.03(b), or a bond schedule adopted or a standing order entered by a judge, a magistrate shall release a defendant on personal bond unless good cause is shown otherwise if:

(1) the defendant is not charged with and has not been previously convicted of a violent offense;

(2) the defendant is examined by the service provider that contracts with the jail to provide mental health or intellectual and developmental disability services, the local mental health authority, the local intellectual and developmental disability authority, or another qualified mental health or intellectual and developmental disability expert under Article 16.22;

(3) the applicable expert, in a written report submitted to the magistrate under Article 16.22:

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

(B) recommends mental health treatment or intellectual and developmental disability services for the defendant, as applicable;

(4) the magistrate determines, in consultation with the local mental health authority or local intellectual and developmental disability authority, that appropriate community-based mental health or intellectual and developmental disability services for the defendant are available in accordance with Section 534.053 or 534.103, Health and Safety Code, or through another mental health or intellectual and developmental disability services provider; and

(5) the magistrate finds, after considering all the circumstances, a pretrial risk assessment, if applicable, and any other credible information provided by the attorney representing the state or the defendant, that release on personal bond would reasonably ensure the defendant's appearance in court as required and the safety of the community and the victim of the alleged offense.

(c) The magistrate, unless good cause is shown for not requiring treatment or services, shall require as a condition of release on personal bond under this article that the defendant submit to outpatient or inpatient mental health treatment or intellectual and developmental disability services as recommended by the service provider that contracts with the jail to provide mental health or intellectual and developmental disability services, the local mental health authority, the local intellectual and developmental disability authority, or another qualified mental health or intellectual and developmental disability expert if the defendant's:

(1) mental illness or intellectual disability is chronic in nature; or

(2) ability to function independently will

continue to deteriorate if the defendant does not receive the recommended treatment or services.

Effective date: 09/01/21

2021 LEGISLATIVE NOTE: HB 375 makes conforming changes to 17.032(a).

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.

(d) 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.

Art. 17.09. DURATION; ORIGINAL AND SUBSEQUENT PROCEEDINGS; NEW BAIL.

Sec. 1. Where a defendant, in the course of a criminal action, gives bail before any court or person authorized by law to take same, for his personal appearance before a court or magistrate, to answer a charge against him, the said bond shall be valid and binding upon the defendant and his sureties, if any, thereon, for the defendant's personal appearance before the court or magistrate designated therein, as well as before any other court to which same may be transferred, and for any and all subsequent proceedings had relative to the charge, and each such bond shall be so conditioned except as hereinafter provided.

Sec. 2. When a defendant has once given bail for his appearance in answer to a criminal charge, he shall not be required to give another bond in the course of the same criminal action except as herein provided.

Sec. 3. Provided that whenever, during the course of the action, the judge or magistrate in whose court such action is pending finds that the bond is defective, excessive or insufficient in amount, or that the sureties, if any, are not acceptable, or for any other good and sufficient cause, such judge or magistrate may, either in term-time or in vacation, order the accused to be rearrested, and require the accused to give another bond in such amount as the judge or magistrate may deem proper. When such bond is so given and approved, the defendant shall be released from custody.

Sec. 4. Notwithstanding any other provision of this article, the judge or magistrate in whose court a criminal action is pending may not order the accused to be rearrested or require the accused to give another bond in a higher amount because the accused:

(1) withdraws a waiver of the right to counsel; or

(2) requests the assistance of counsel, appointed or retained.

COMMENTARY: The primary purpose of an appearance bond is securing the appearance of the defendant at his trial. *Ex parte Vance*, 608 S.W.2d 681, 683 (Tex. Crim. App. 1980). The accused's ability to make bail is not the only factor included in determining the amount of bail; the nature of the offenses will also have weight in the determination. *Id*. Although bail should be high enough to provide reasonable assurance that the undertaking will be complied with, it should not be used as an "instrument of oppression." *Id*.

The traditional right to freedom before conviction permits the unhampered preparation of a defense and serves to prevent the infliction of punishment prior to conviction. *Stack, et al. v. Boyle, United States Marshal*, 342 U.S. 1, 4 (1951); *Ex parte Anderer*, 61 S.W.3d 398, 405 (Tex. Crim. App. 2001). As the Supreme Court has explained, "[t]he time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness," all the while the defendant is "living under a cloud of anxiety, suspicion, and often hostility." *Barker v. Wingo*, 407 U.S. 514, 532-33 (1972). In addition, a pretrial detainee is "hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Id.* at 533.

No precise standard exists for determining "good and sufficient cause" to raise bail under article 17.09. *Miller v. State*, 855 S.W.2d 92, 93-94 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd). Each case must be reviewed on a fact-by-fact basis. *Id.* at 94. A trial court does not have to support a determination of "good and sufficient cause" with findings. *Ex parte Gomez*, Nos. PD-0724-20, PD-0725-20, 2021 Tex. Crim. App. LEXIS 567, at *10 (Crim. App. June 9, 2021) (stating that Article 17.09 "does not require a trial court to justify its ruling; it only requires that the trial court 'find' that the bond is insufficient in amount.).

Art. 17.151. RELEASE BECAUSE OF DELAY.

Sec. 1. A defendant who is detained in jail pending trial of an accusation against him must be released either on personal bond or by reducing the amount of bail required, if the state is not ready for trial of the criminal action for which he is being detained within:

(1) 90 days from the commencement of his detention if he is accused of a felony;

(2) 30 days from the commencement of his detention if he is accused of a misdemeanor punishable by a sentence of imprisonment in jail for more than 180 days;

(3) 15 days from the commencement of his detention if he is accused of a misdemeanor punishable by a sentence of imprisonment for 180 days or less; or

(4) five days from the commencement of his detention if he is accused of a misdemeanor punishable by a fine only.

Sec. 2. The provisions of this article do not apply to a defendant who is:

(1) serving a sentence of imprisonment for another offense while the defendant is serving that sentence;

(2) being detained pending trial of another accusation against the defendant as to which the applicable period has not yet elapsed;

(3) incompetent to stand trial, during the period of the defendant's incompetence; or

(4) being detained for a violation of the conditions of a previous release related to the safety of a victim of the alleged offense or to the safety of the community under this article.

CHAPTER 26. ARRAIGNMENT

Art. 26.01. ARRAIGNMENT. In all felony cases, after indictment, and all misdemeanorcases 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, charged with, or taking an appeal from a conviction of amisdemeanor punishable by confinement or a felony. The procedures must be consistent with this article and Articles 1.051, 15.17, 15.18, 26.05, and 26.052 and must provide for the priority appointment of a public defender's office as described by Subsection (f). A court shall appoint an attorney from a public appointment list using a system of rotation, unless the court appoints an attorney under Subsection (f), (f-1), (h), or (i). The court shall appoint attorneys from among the next five names on the appointment list in the order in which the attorneys' names appear on the list, unless the court makes a finding of good cause on the record for appointing an attorney out of order. An attorney who is not appointed in the order in which the attorney's name appears on the list shall remain next in order on the list.

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

(1) authorize only the judges of the county courts, statutory county courts, and district courts trying criminal cases in the county, or the judges' designee, to appoint counsel for indigent defendants in the county;

(2) apply to each appointment of counsel made by a judge or the judges' designee in the county;

(3) ensure that each indigent defendant in the county who is charged with a misdemeanor punishable by confinement or with a felony and who appears in court without counsel has an opportunity to confer with appointed counsel before the commencement of judicial proceedings;

(4) require appointments for defendants in capital cases in which the death penalty is sought to comply with any applicable requirements under Articles 11.071 and 26.052;

(5) ensure that each attorney appointed from a public appointment list to represent an indigent defendant perform the attorney's duty owed to the defendant in accordance with the adopted procedures, the requirements of this code, and applicable rules of ethics; and

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

(c) Whenever a court or the courts' designee authorized under Subsection (b) to appoint counsel for indigent defendants in the county determines for purposes of a criminal proceeding that a defendant charged with or appealing a conviction of a felony or a misdemeanor punishable by confinement is indigent or that the interests of justice require representation of a defendant in the proceeding, the court or the courts' designee shall appoint one or more practicing attorneys to represent the defendant in accordance with this subsection and the procedures adopted

under Subsection (a). If the court or the courts' designee determines that the defendant does not speak and understand the English language or that the defendant is deaf, the court or the courts' designee shall make an effort to appoint an attorney who is capable of communicating in a language understood by the defendant.

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

(1) applies to be included on the list;

(2) meets the objective qualifications specified by the judges under Subsection (e);

(3) meets any applicable qualifications specified by the Texas Indigent Defense Commission; and

(4) is approved by a majority of the judges who established the appointment list under Subsection (e).

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

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

(A) shall:

(i) establish a public appointment list of attorneys qualified to provide representation in the county in misdemeanor cases punishable by confinement; and

(ii) specify the objective qualifications necessary for an attorney to be included on the list; and

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

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

(A) shall:

(i) establish a public appointment list of attorneys qualified to provide representation in felony cases in the county; and

(ii) specify the objective qualifications necessary for an attorney to be included on the list; and

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

(f) In a county with a public defender's office, the court or the courts' designee shall give priority in appointing that office to represent the defendant in the criminal proceeding, including a proceeding in a capital murder case. However, the court is not required to appoint the public defender's office if:

(1) the court makes a finding of good cause for appointing other counsel, provided that in a capital murder case, the court makes a finding of good cause on the record for appointing that counsel;

(2) the appointment would be contrary to the office's written plan under Article 26.044;

(3) the office is prohibited from accepting the appointment under Article 26.044(j); or

(4) a managed assigned counsel program also exists in the county and an attorney will be appointed under that program.

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

(g) A countywide alternative program for appointing counsel for indigent defendants in criminal cases is established by a formal action in which two-thirds of the judges of the courts designated under this subsection vote to establish the alternative program. An alternative program for appointing counsel in misdemeanor and felony cases may be established in the manner provided by this subsection by the judges of the county courts, statutory county courts, and district courts trying criminal cases in the county. An alternative program for appointing counsel in misdemeanor cases may be established in the manner provided by this subsection by the judges of the county courts and statutory county courts trying criminal cases in the county. An alternative program for appointing counsel in felony cases may be established in the manner provided by this subsection by the judges of the district courts trying criminal cases in the county. In a county in which an alternative program is established:

(1) the alternative program may:

(A) use a single method for appointing counsel or a combination of methods; and

(B) use a multicounty appointment list using a system of rotation; and

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

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

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

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

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

(i) meet specified objective qualifications for that representation, which may be graduated according to the degree of seriousness of the offense and whether representation will be provided in trial court proceedings, appellate proceedings, or both; 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) Subject to Subsection (f), 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) Subject to Subsection (f), a court or the courts' designee required under Subsection (c) to appoint an attorney to represent a defendant accused or convicted of a felony may appoint an attorney from any county located in the court's administrative judicial region.

(j) An attorney appointed under this article shall:

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

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

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

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

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

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

(4) not later than October 15 of each year and on a form prescribed by the Texas Indigent Defense Commission, submit to the county information, for the preceding fiscal year, that describes the percentage of the attorney's practice time that was dedicated to work based on appointments accepted in the county under this article and Title 3, Family Code.

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

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

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

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

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

(2) respond under oath to an examination regarding his financial resources by the judge or magistrate responsible for determining whether the defendant is indigent; or

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

(o) Before making a determination of whether a defendant is indigent, the court shall request

the defendant to sign under oath a statement substantially in the following form:

> "On this _____ day of _____, 20 ___, I have been advised by the (name of the court) Court of my right to representation by counsel in connection with the 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 nonindigency 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: The trial court does not have a duty under Art. 26.04 to appoint counsel until a defendant proves his indigence. *Gray v. Robinson*, 744 S.W.2d 604, 607 (Tex. Crim. App. 1988). In order to make its determination of indigence, the trial court is authorized to conduct an evidentiary hearing. *Id*.

Whether a person is indigent depends on the context. He is indigent in the appointment-of-counsel context if he is without the means to employ counsel of his own choosing, and indigent in the appellate-record context if he cannot pay or give security for the appellate record. *Whitehead v. State*, 130 S.W.3d 866, 878 (Tex. Crim. App. 2004). While the same factors are generally considered for both of these inquiries, it is possible for a defendant to be indigent in one context but not the other. *Id.* For example, the defendant in *Castillo v. State* managed to retain counsel but could not afford a transcription of the court reporter's notes for appeal. 595 S.W.2d 552, 554 (Tex. Crim. App. 1980).

The question of indigence for appeal purposes is to be determined at the time of the appeal and not at the time of trial. *Cardona v. Marshall*, 635 S.W.2d 741, 742 (Tex. Crim. App. 1982).

There are no standards to guide trial judges in determining the indigence of a defendant; each case must be decided on its own facts. *Id.*

A defendant can establish a prima facie showing of indigence on nothing more than his own testimony. *Tuck v. State*, 215 S.W.3d 411, 417 (Tex. Crim. App. 2007). The trial court has less discretion to disbelieve the defendant's evidence of indigence than it has to disbelieve a defendant's sworn statements in other contexts. *Compare Whitehead*, 130 S.W.3d at 875 ("[T]he trial court does not have the nearly unfettered discretion seen in other contexts to simply disbelieve the defendant's evidence of indigence . . . [A] trial court should accept the defendant's evidence absent some reason in the record for not doing so."), *with Ross v. State*, 32 S.W.3d 853, 857 (Tex. Crim. App. 2000) (upholding the grant of a motion to suppress on grounds that the trial court could have simply disbelieved the State witness's testimony). When determining indigence, judges should accept defendants' financial allegations made under oath unless there is "reason to believe they are untrue or incomplete." *Whitehead*, 130 S.W.3d at 876. If such a reason presents itself, judges may require defendants to verify their claim with supporting documents or disbelieve their claim if there is a reasonable, articulable basis for doing so. *Id*.

An inquiry into the reasonableness of the defendant's expenses, in light of the totality of his financial situation, is appropriate in order to determine whether a defendant can pay or

give security for an appellate record. *Tuck*, 215 S.W.3d at 416. However, the fact that a defendant's income is less than his expenses does not necessarily mean that his expenses are unreasonable. *Id.*

Similarly, "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*, 130 S.W.3d at 878.

After alleging indigence, a person may not transfer his assets while awaiting trial in order to receive appointment of counsel, a free transcript, and free statement of facts. *Cardona v. Marshall*, 635 S.W.2d 741, 743 (Tex. Crim. App. 1982). A defendant, however, "should not be denied appointment of counsel solely because other members of his family have assets and income." *Id.* at 743 (quoting *United States v. Rubinson*, 543 F.2d 951, 964 (2nd Cir. 1976)).

Submitting an income and expense summary and a net worth statement, along with a signed affidavit attesting to the truth of these documents, serves the same purpose as answering the questionnaire required by Art. 26.04(n)(1). *Whitehead*, 130 S.W.3d. at 877.

A trial judge is under no duty to find an attorney agreeable to the defendant. *King v. State*, 29 S.W.3d 556, 566 (Tex. Crim. App. 2000). The right to counsel of choice does not extend to indigent defendants. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006).

Once established, the attorney-client relationship between an accused and his attorney should be protected by the courts regardless of whether the attorney is retained or appointed. *Stearnes v. Clinton*, 780 S.W.2d 216, 221–22 (Tex. Crim. App. 1989). When an attorney-client relationship is established, the trial judge may not arbitrarily remove the attorney over the objections of both the defendant and his counsel. *Id.* at 221. There must be some principled reason, apparent from the record, to justify a trial judge's *sua sponte* interference with the attorney-client relationship. *Id.* The same goes for replacing appointed trial counsel for appeal. *Buntion v. Harmon*, 827 S.W.2d 945, 949 (Tex. Crim. App. 1992).

The defendant's constitutional right to counsel terminates if counsel files an *Anders* brief with a motion to withdraw and the appellate court agrees that there are no non-frivolous issues to be raised in an appeal. *Meza v. State*, 206 S.W.3d 684, 688 (Tex. Crim. App. 2006). The appellate court should grant the motion to withdraw. *Id.* If the appellate court finds there are plausible grounds for appeal, "the appellate court *still* grants the motion to withdraw, but remands the cause to the trial court for appointment of new appellate counsel." *Kelly v. State*, 436 S.W.3d 313, 318 n. 16 (Tex. Crim. App. 2013) (emphasis in original).

See generally Art. 1.051 commentary.

Art. 26.044. PUBLIC DEFENDER'S OFFICE. (a) In this chapter:

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

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

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

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

(A) is either:

(i) a governmental entity; or

(ii) a nonprofit corporation operating under a written agreement with a governmental

entity, other than an individual judge or court; and

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

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

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

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

(3) if the public defender's office is a nonprofit corporation, the term during which the contract designating the public defender's office is effective and how that contract may be renewed on expiration of the term; and

(4) if an oversight board is established under Article 26.045 for the public defender's office, the powers and duties that have been delegated to the oversight board.

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

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

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

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

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

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

(4) provisions for personnel training;

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

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

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

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

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

(f) A public defender's office must be directed by a chief public defender who:

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

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

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

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

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

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

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

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

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

(1) a conflict of interest exists that has not been waived by the client;

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

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

(4) the acceptance of the appointment would violate the maximum allowable caseloads established at the public defender's office; or

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

(j-1) On refusing an appointment under Subsection (j), a chief public defender shall file with the court a written statement that identifies any reason for refusing the appointment. The court shall determine whether the chief public defender has demonstrated adequate good cause for refusing the appointment and shall include the statement with the papers in the case.

(j-2) A chief public defender may not be terminated, removed, or sanctioned for refusing in good faith to accept an appointment under Subsection (j).

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

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

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

(n) An attorney employed by a public defender's office may be appointed with respect to an application for a writ of habeas corpus filed under Article 11.071 only if:

(1) an attorney employed by the office of capital writs is not appointed in the case; and

(2) the attorney employed by the public defender's office is on the list of competent counsel maintained under Section 78.056, Government Code.

COMMENTARY: "[A]fter the commissioners court has established a public defender's office [pursuant to Art. 26.044], 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." Tex. Att'y Gen. LO-97-063 (1997).

Art. 26.045. PUBLIC DEFENDER OVERSIGHT BOARD.

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

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

(1) an attorney;

(2) the judge of a trial court in this state;

(3) a county commissioner;

(4) a county judge;

(5) a community representative; and

(6) a former client or a family member of a former client of the public defender's office for which the oversight board was established under this article.

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

(1) recommending selection and removal of a chief public defender;

(2) setting policy for the office; and

(3) developing a budget proposal for the office.

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

Art. 26.047. MANAGED ASSIGNED COUNSEL PROGRAM.

(a) In this article:

(1) "Governmental entity" has the meaning assigned by Article 26.044.

(2) "Managed assigned counsel program" or "program" means a program operated with public funds:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) applies to be included on the list;

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

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

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

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

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

Art. 26.05. COMPENSATION OF COUNSEL APPOINTED TO DEFEND.

(a) A counsel, other than an attorney with a public defender's office or an attorney

employed by the office of capital and forensic writs, appointed to represent a defendant in a criminal proceeding, including a habeas corpus hearing, shall be paid a reasonable attorney's fee for performing the following services, based on the time and labor required, the complexity of the case, and the experience and ability of the appointed counsel:

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

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

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

(4) preparation of a motion for rehearing.

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

(c) Each fee schedule adopted shall state reasonable fixed rates or minimum and maximum hourly rates, taking into consideration reasonable and necessary overhead costs and the availability of qualified attorneys willing to accept the stated rates, and shall provide a form for the appointed counsel to itemize the types of services performed. No payment shall be made under this article until the form for itemizing the services performed is submitted to the judge presiding over the proceedings or, if the county operates a managed assigned counsel program under Article 26.047, to the director of the program, and until the judge or director, as applicable, approves the payment. If the judge or director disapproves the requested amount of payment, the judge or director shall make written findings stating the amount of payment that the judge or director approves and each reason for approving an amount different from the requested amount. An attorney whose request for payment is disapproved or is not otherwise acted on by the 60th day after the date the request for payment is submitted may appeal the disapproval or failure to act by filing a motion with the presiding judge of the administrative judicial region. On the filing of a motion, the presiding judge of the administrative judicial region shall review the disapproval of payment or failure to act and determine the appropriate amount of payment. In reviewing the disapproval or failure to act, the presiding judge of the administrative judicial region may conduct a hearing. Not later than the 45th day after the date an application for payment of a fee is submitted under this article, the commissioners court shall pay to the appointed counsel the amount that is approved by the presiding judge of the administrative judicial region and that is in accordance with the fee schedule for that county.

(d) A counsel in a non-capital case, other than an attorney with a public defender's office, 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 reimbursement fees.

(g) If the judge determines that a defendant has financial resources that enable the defendant to offset in part or in whole the costs of the legal services provided to the defendant in accordance with Article 1.051(c) or (d), including any expenses and costs, the judge shall order the defendant to pay during the pendency of the charges or, if convicted, as a reimbursement fee the amount that the judge finds the defendant is able to pay. The defendant may not be ordered to pay an amount that exceeds:

(1) the actual costs, including any expenses and costs, paid by the county for the legal services provided by an appointed attorney; or

(2) if the defendant was represented by a public defender's office, the actual amount, including any expenses and costs, that would have otherwise been paid to an appointed attorney had the county not had a public defender's office.

(g-1)

(1) This subsection applies only to a defendant who at time of sentencing to confinement or placement on community supervision, including deferred adjudication community supervision, did not have the financial resources to pay the maximum amount described by Subsection (g)(1) or (2), as applicable, for legal services provided to the defendant.

(2) At any time during a defendant's sentence of confinement or period of community supervision, the judge, after providing written notice to the defendant and an opportunity for the defendant to present information relevant to the defendant's ability to pay, may order a defendant to whom this subsection applies to pay any unpaid portion of the amount described by Subsection (g)(1) or (2), as applicable, if the judge determines that the defendant has the financial resources to pay the additional portion.

(3) The judge may amend an order entered under Subdivision (2) if, subsequent to the judge's determination under that subdivision, the judge determines that the defendant is indigent or demonstrates an inability to pay the amount ordered.

(4) In making a determination under this subsection, the judge may only consider the information a court or courts' designee is authorized to consider in making an indigency determination under Article 26.04(m).

(5) Notwithstanding any other law, the judge may not revoke or extend the defendant's period of community supervision solely to collect the amount the defendant has been ordered to pay under this subsection.

(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.

COMMENTARY: "The state of Texas has a significant interest in assuring that persons with the financial resources to pay for their own representation do not take a free ride at the expense of its taxpayers." *Curry v. Wilson*, 853 S.W.2d 40, 46 (Tex. Crim. App. 1993). "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." *Id.*

A defendant's resources and ability to pay are critical elements in a trial court's determination of whether a defendant should be obligated to pay attorney fees. *Mayer v. State*, 309 S.W.3d 552, 556 (Tex. Crim. App. 2010).

An order to repay appointed attorney fees is invalid if it is entered without any "determination or finding by the trial court that appellant had any financial resources or

was 'able to pay' the appointed attorney fees." *Id.* at 553 (Tex. Crim. App. 2010)(citing *Mayer v. State*, 274 S.W.3d 898, 901 (Tex. App.—Amarillo 2008). The courts of appeals frequently modify criminal judgments to delete attorney fee repayment orders entered without a finding, or without evidence sufficient to support a finding, that the defendant is able to pay. *See, e.g., Phelps v. State*, 532 S.W.3d 437, 440 (Tex. App.—Texarkana 2017, pet. dism'd); *Kirkland v. State*, 488 S.W.3d 379 (Tex. App.—Beaumont 2016, no pet.); *West v. State*, 474 S.W.3d 785 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *Jones v. State*, 428 S.W.3d 163 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *Stinecipher v. State*, 438 S.W.3d 155 (Tex. App.—Tyler 2014, no pet.); *Smith v. State*, 421 S.W.3d 161 (Tex. App.—San Antonio 2013, no pet.); *Wolfe v. State*, 377 S.W.3d. 141 (Tex. App.—Amarillo 2012, no pet.).

Article 26.05(g) requires a present determination of financial resources and does not allow speculation about possible future resources. *Cates v. State*, 402 S.W.3d 250, 252 (Tex. Crim. App. 2013).

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

Defendants who are ordered to repay attorney fees as an obligation of a judgment imposing probation without an ability-to-pay finding must bring their claim in a direct appeal (and *not* on appeal from a judgment revoking probation) or risk forfeiture. *Wiley v. State*, 410 S.W.3d 313, 318 (Tex. Crim. App. 2013). The claim is forfeited if the defendant was aware of his obligation to pay the fees but did not bring the claim in a direct appeal. *Riles v. State*, 452 S.W.3d 333, 337 (Tex. Crim. App. 2015). However, when attorney fees are *only* conditions of community supervision—not independent obligations or court costs—payment of the fees upon revocation of probation has been overturned. *Summers v. State*, 555 S.W.3d 844, 854 (Tex. App..— Waco 2018, no. pet.).

The assessment of fees for an appointed attorney is not punitive; it does not "alter the punishment to which the defendant is subject." *Armstrong v. State*, 340 S.W.3d 759, 767 (Tex. Crim. App. 2011). Court costs (including attorney fees), as reflected in a certified bill of costs, need neither be orally pronounced nor incorporated by reference in the judgment to be effective. *Id.* at 766.

The trial court's determination of a reasonable attorney's fee for appointed counsel is limited by the fixed or minimum and maximum hourly rates adopted by formal action of the judges within a county. *In re State ex rel. Wice v. Fifth Judicial Dist. Court of Appeals*, 581 S.W.3d 189, 192 (Tex. Crim. App. 2018).

The trial court has the discretion to determine the proper value of the legal fees it orders a defendant to pay under Art. 26.05(g); however, the legal fees must be commensurate with the circumstances—like the time, labor, and experience of counsel—in the case. *In re Perkins*, 512 S.W.3d 424, 432 (Tex. App.—Corpus Christi 2016, pet. denied).

At a contempt proceeding for failure to pay court-ordered attorney fees, "a defendant must be informed of his right to representation, and if found indigent, his right to appointment of counsel." *Ex Parte Gonzales*, 945 S.W.2d 830, 837 (Tex. Crim. App. 1997). An indigent person'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. 26.05. Tex. Att'y Gen. Op. No. JM-403 (1985).

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

Indigent defendants are "not automatically entitled to assistance of court-appointed

counsel to file a petition for discretionary review." *Peterson v. Jones*, 894 S.W.2d 370, 373 (Tex. Crim. App. 1995). There is no statutory duty for district judges to authorize payment for attorney services performed in filing petitions for discretionary review. *Id.*

"A court may require a defendant, in an order of community supervision, to pay attorney fees according to the county's schedule of fees established under article 26.05, regardless of the county commissioners court's contract with individual attorneys." Tex. Att'y Gen. Op. No. GA-0884 (2011).

The trial court retains the discretion to appoint an expert witness under Art. 26.05. *Quin v. State*, 608 S.W.2d 937, 938 (Tex. Crim. App. 1980). "Absent a showing of harm, no abuse of that discretion in the refusal to appoint an expert witness will be found." *Id.*

Article 26.05(c) requires that counsel for indigent defendants provide an itemized list of services performed to assess a "reasonable attorney's fee." However, counsel may not disclose privileged information when submitting itemized bills. Morrison v. State, 575 S.W.3d 1, 26 (Tex. App. – Texarkana 2019, no pet.) (Holding that defense counsel rendered ineffective assistance of counsel because "there was no strategic reason why . . . defense counsel would ever disclose the detailed confidential communications included in his billing records.")

Art. 26.051. INDIGENT INMATE DEFENSE.
(a) In this article:

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

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

(b)-(c) Repealed by Acts 2007, 80th Leg., ch. 1014 (H.B. 1267), § 7, eff. Sept. 1, 2007.

(d) A court shall:

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

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

(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, § 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.

(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.

Art. 26.052. APPOINTMENT OF COUNSEL IN DEATH PENALTY CASE; REIMBURSEMENT OF INVESTIGATIVE EXPENSES.

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

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

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

(1) the administrative judge of the judicial region;

(2) at least one district judge;

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

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

(d)

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

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

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

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

(C) have not been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any capital case, unless the local selection committee determines under subsection (n) that the conduct underlying the finding no longer accurately reflects the attorney's ability to provide effective representation;

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

(E) have tried to a verdict as lead defense counsel a significant number of felony cases, including homicide trials and other trials for offenses punishable

as second or first degree felonies or capital felonies;

(F) have trial experience in:

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

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

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

(3) The standards must require that an attorney appointed as lead 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, unless the local selection committee determines under subsection (n) that the conduct underlying the finding no longer accurately reflects the attorney's ability to provide effective representation;

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

(E) have authored a significant number of appellate briefs, including appellate briefs for homicide cases and other cases involving an offense punishable as a capital felony or a felony of the first degree or an offense described by Article 42A.054(a);

(F) have trial or appellate experience in:

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

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

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

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

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

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

(f) Appointed counsel may file with the trial court a pretrial ex parte confidential request for advance payment of expenses to investigate

potential defenses. The request for expenses must state:

(1) the type of investigation to be conducted;

(2) specific facts that suggest the investigation will result in admissible evidence; and

(3) an itemized list of anticipated expenses for each investigation.

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

(1) state the reasons for the denial in writing;

(2) attach the denial to the confidential request; and

(3) submit the request and denial as a sealed exhibit to the record.

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

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

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

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

(1) the defendant and the attorney request the appointment on the record; and

(2) the court finds good cause to make the appointment.

(l) An attorney appointed under this article to represent a defendant at trial or on direct appeal is compensated as provided by Article 26.05 from county funds. Advance payment of expenses anticipated or reimbursement of expenses incurred for purposes of investigation or expert testimony may be paid directly to a private investigator licensed under the Private Investigators and Private Security Agencies Act (Article 4413(29bb), Vernon's Texas Civil Statutes) or to an expert witness in the manner designated by appointed counsel and approved by the court.

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

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

COMMENTARY: The due process guarantee of fundamental fairness requires the state to provide an indigent defendant with expert assistance if such assistance is "likely to be a significant factor at trial." *Ex parte Jimenez*, 364 S.W.3d 866, 876 (Tex. Crim. App. 2012) (quoting *Ake v. Okla.*, 470 U.S. 68, 74 (1985)). "Because psychiatric evidence is at once esoteric and uncertain, the indigent accused needs a psychiatrist . . . to provide technical assistance to the accused, to help evaluate the strength of his defense, to offer his own expert diagnosis at trial if it is favorable to that defense, and to identify the weaknesses in the State's case, if any, by testifying himself and/or preparing counsel to cross-examine opposing experts." *De Freece v. State*, 848 S.W. 2d 150, 159 n.7 (Tex. Crim. App. 1993). A neutral

expert or "court's expert" is insufficient to meet this burden because, *inter alia*, a neutral expert is not subject to the attorney-client privilege. *See id.* at 159, n. 8.

The right to expert assistance has its limits: an indigent defendant is not guaranteed the same quality and quantity of assistance that non-indigent defendants may purchase. *Jimenez*, 364 S.W.3d at 876-77. Neither is he entitled to select an expert based on his own personal preference or one who will agree with his defense theory. *Id* at 877. "But if the defendant makes a sufficient threshold showing of the need for expert assistance on a particular issue, the defendant is entitled to access to at least one expert" to assist the defendant's counsel in presenting his defense in the best possible light. *Id*.

In order to receive expert assistance, an indigent defendant must provide concrete reasons for requiring the appointment of a particular expert rather than simply stating that an appointment would be advantageous. *Id*. at 877-78 (citing *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985)). A trial judge does not err in denying funds for an appointed expert when defense neglects to provide the name of the requested expert and the particulars required by 26.052(f). *Id.* at 878.

A failure to comply with Art. 26.052's procedures is susceptible to a harmless error analysis pursuant to Tex. R. App. Pro 44.2(b). *Hughes v. State*, 24 S.W.3d 833, 837 (Tex. Crim. App.), (upholding capital murder conviction where district clerk's office failed to post list of capital-murder-qualified attorneys but the attorneys appointed were qualified). "Failure to adhere to statutory procedures serving to protect a constitutional provision is a violation of the statute, not a violation of the constitutional provision itself." *Id.* at n. 2.

Art. 26.056. CONTRIBUTION FROM STATE IN CERTAIN COUNTIES.

Sec. 1.
A county in which a state training school for delinquent children is located shall pay from its general fund the first $250 of fees awarded for court-appointed counsel under Article 26.05 toward defending a child committed to the school from another county who is being prosecuted for a felony or misdemeanor in the county where the training school is located.

Sec. 2.
If the fees awarded for counsel compensation are in excess of $250, the court shall certify the amount in excess of $250 to the Comptroller of Public Accounts of the State of Texas. The Comptroller shall issue a warrant to the court-appointed counsel in the amount certified to the comptroller by the court.

Art. 26.057. COST OF EMPLOYMENT OF COUNSEL FOR CERTAIN MINORS.
If a juvenile has been transferred to a criminal court under Section 54.02, Family Code, and if a court appoints counsel for the juvenile under Article 26.04 of this code, the county that pays for the counsel has a cause of action against a parent or other person who is responsible for the support of the juvenile and is financially able to employ counsel for the juvenile but refuses to do so. The county may recover its cost of payment to the appointed counsel and may recover attorney's fees necessary to prosecute the cause of action against the parent or other person.

Art. 26.06. ELECTED OFFICIALS NOT TO BE APPOINTED.
No court may appoint an elected county, district or state official to represent a person accused of crime, unless the official has notified the court of his availability for appointment. If an official has notified the court of his availability and is appointed as counsel, he may decline the appointment if he determines that it is in the best interest of his office to do so. Nothing in this Code shall modify any statutory provision for legislative continuance.

COMMENTARY: A justice of the peace is implicitly authorized by Sec. 82.064, Government Code, and Art. 26.06, Code of Criminal Procedure, to accept an appointment to represent an indigent criminal defendant at the appellate level. Tex. Att'y Gen. Op. No. GA-0651 (2008).

CHAPTER 32. DISMISSING PROSECUTIONS

Art. 32.01. DEFENDANT IN CUSTODY AND NO INDICTMENT PRESENTED.

(a) When a defendant has been detained in custody or held to bail for the defendant's appearance to answer any criminal accusation, the prosecution, unless otherwise ordered by the court, for good cause shown, supported by affidavit, shall be dismissed and the bail discharged, if indictment or information be not presented against the defendant on or before the last day of the next term of the court which is held after the defendant's commitment or admission to bail or on or before the 180th day after the date of commitment or admission to bail, whichever date is later.

(b) A surety may file a motion under Subsection (a) for the purpose of discharging the defendant's bail only.

CHAPTER 38. 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 any criminal proceeding before a judge or magistrate if an interpreter is not available to appear in person at the proceeding or if the only available interpreter is not considered to possess adequate interpreting skills for the particular situation or is unfamiliar with the use of slang. In this subsection, "qualified telephone interpreter" means a telephone service that employs:

(1) licensed court interpreters as defined by Section 157.001, 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 and Rehabilitative Services.

CHAPTER 42. JUDGMENT AND SENTENCE

Art. 42.15. FINES AND COSTS. (a) When the defendant is fined, the judgment shall be that the defendant pay the amount of the fine and all costs to the state.

(a-1) Notwithstanding any other provision of this article, during or immediately after imposing a sentence in a case in which the defendant entered a plea in open court as provided by Article 27.13, 27.14(a), or 27.16(a), a court shall inquire on the record whether the defendant has sufficient resources or income to immediately pay all or part of the fine and costs. If the court determines that the defendant does not have sufficient resources or income to immediately pay all or part of the fine and costs, the court shall determine whether the fine and costs should be:

(1) subject to Subsection (c), required to be paid at some later date or in a specified portion at designated intervals;

(2) discharged by performing community service under, as applicable, Article 43.09(f), Article 45.049, Article 45.0492, as added by Chapter 227 (H.B. 350), Acts of the 82nd Legislature, Regular Session,

2011, or Article 45.0492, as added by Chapter 777 (H.B. 1964), Acts of the 82nd Legislature, Regular Session, 2011;

(3) waived in full or in part under Article 43.091 or 45.0491; or

(4) satisfied through any combination of methods under Subdivisions (1)-(3).

(b) Subject to Subsections (c) and (d) and Article 43.091, when imposing a fine and costs, a court may direct a defendant:

(1) to pay the entire fine and costs when sentence is pronounced;

(2) to pay the entire fine and costs at some later date; or

(3) to pay a specified portion of the fine and costs at designated intervals.

(c) When imposing a fine and costs in a misdemeanor case, if the court determines that the defendant is unable to immediately pay the fine and costs, the court shall allow the defendant to pay the fine and costs in specified portions at designated intervals.

(d) A judge may allow a defendant who is a child, as defined by Article 45.058(h), to elect at the time of conviction, as defined by Section 133.101, Local Government Code, to discharge the fine and costs by:

(1) performing community service or receiving tutoring under Article 45.0492, as added by Chapter 227 (H.B. 350), Acts of the 82nd Legislature, Regular Session, 2011; or

(2) paying the fine and costs in a manner described by Subsection (b).

(e) The election under Subsection (d) must be made in writing, signed by the defendant, and, if present, signed by the defendant's parent, guardian, or managing conservator. The court shall maintain the written election as a record of the court and provide a copy to the defendant.

(f) The requirement under Article 45.0492(a), as added by Chapter 227 (H.B. 350), Acts of the 82nd Legislature, Regular Session, 2011, that an offense occur in a building or on the grounds of the primary or secondary school at which the defendant was enrolled at the time of the offense does not apply to the performance of community service or the receipt of tutoring to discharge a fine or costs under Subsection (d)(1).

Effective date: 09/01/21

2021 LEGISLATIVE NOTE: SB 1373 amends 42.15(a-1) to require judges to inquire on the record about a defendant's ability to pay. The goal of this change is to close a loophole which allowed courts of appeal to assume an inquiry into a defendant's ability to pay occurred when it may not have.

CHAPTER 42A. COMMUNITY SUPERVISION

SUBCHAPTER G. DISCRETIONARY CONDITIONS GENERALLY

Art. 42A.301. BASIC DISCRETIONARY CONDITIONS.
(a) The judge of the court having jurisdiction of the case shall determine the conditions of community supervision after considering the results of a risk and needs assessment conducted with respect to the defendant. The assessment must be conducted using an instrument that is validated for the purpose of assessing the risks and needs of a defendant placed on community supervision. The judge may impose any reasonable condition that is not duplicative of another condition and that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant. In determining the conditions, the judge shall consider the extent to which the conditions impact the defendant's:

(1) work, education, and community service schedule or obligations; and

(2) ability to meet financial obligations.

(b) Conditions of community supervision may include conditions requiring the defendant to:

(1) commit no offense against the laws of this state or of any other state or of the United States;

(2) avoid injurious or vicious habits;

(3) ~~avoid persons or places of disreputable or harmful character, including any person, other than a family member of the defendant, who is an active member of a criminal street gang;~~

~~(4)~~ report to the supervision officer as directed by the judge or supervision officer and obey all rules and regulations of the community supervision and corrections department;

(4)~~(5)~~ permit the supervision officer to visit the defendant at the defendant's home or elsewhere;

(5)(~~6~~) work faithfully at suitable employment to the extent possible;

(6)~~(7)~~ remain within a specified place;

(7)~~(8)~~ pay in one or more amounts:

(A) the defendant's fine, if one is assessed; and

(B) all court costs, regardless of whether a fine is assessed;

(8)~~(9)~~ support the defendant's dependents;

(9)~~(10)~~ participate, for a period specified by the judge, in any community-based program, including a community service project under Article 42A.304;

(10)~~(11)~~ if the judge determines that the defendant has financial resources that enable the defendant to offset in part or in whole the costs of the legal services provided to the defendant in accordance with Article 1.051(c) or (d), including any expenses and costs, reimburse the county in which the prosecution was instituted for the costs of the legal services in an amount that the judge finds the defendant is able to pay, except that the defendant may not be ordered to pay an amount that exceeds:

(A) the actual costs, including any expenses and costs, paid by the county for the legal services provided by an appointed attorney; or

(B) if the defendant was represented by a public defender's office, the actual amount, including any expenses and costs, that would have otherwise been paid to an appointed attorney had the county not had a public defender's office;

(11)~~(12)~~ if under custodial supervision in a community corrections facility:

(A) remain under that supervision;

(B) obey all rules and regulations of the facility; and

(C) pay a percentage of the defendant's income to the facility for room and board;

(12)~~(13)~~ submit to testing for alcohol or controlled substances;

(13)~~(14)~~ attend counseling sessions for substance abusers or participate in substance abuse treatment services in a program or facility approved or licensed by the Department of State Health Services;

(14)~~(15)~~ with the consent of the victim of a misdemeanor offense or of any offense under Title 7, Penal Code, participate in victim-defendant mediation;

(15)~~(16)~~ submit to electronic monitoring;

(16)~~(17)~~ reimburse the compensation to victims of crime fund for any amounts paid from that fund to or on behalf of a victim, as defined by Article 56B.003, of the offense or if no reimbursement is required, make one payment to the compensation to victims of crime fund in an amount not to

exceed $50 if the offense is a misdemeanor or not to exceed $100 if the offense is a felony;

(17)~~(18)~~ reimburse a law enforcement agency for the analysis, storage, or disposal of raw materials, controlled substances, chemical precursors, drug paraphernalia, or other materials seized in connection with the offense;

(18)~~(19)~~ reimburse all or part of the reasonable and necessary costs incurred by the victim for psychological counseling made necessary by the offense or for counseling and education relating to acquired immune deficiency syndrome or human immunodeficiency virus made necessary by the offense;

(19)~~(20)~~ pay a fine in an amount not to exceed $50 to a crime stoppers organization, as defined by Section 414.001, Government Code, and as certified by the Texas Crime Stoppers Council;

(20)~~(21)~~ submit a DNA sample to the Department of Public Safety under Subchapter G, Chapter 411, Government Code, for the purpose of creating a DNA record of the defendant; and

(21)~~(22)~~ in any manner required by the judge, provide in the county in which the offense was committed public notice of the offense for which the defendant was placed on community supervision.

(c) Before the judge may require as a condition of community supervision that the defendant receive treatment in a state-funded substance abuse treatment program, including an inpatient or outpatient program, a substance abuse felony program under Article 42A.303, or a program provided to the defendant while confined in a community corrections facility as defined by Article 42A.601, the judge must consider the results of an evaluation conducted to determine the appropriate type and level of treatment necessary to address the defendant's alcohol or drug dependency.

Effective date: 09/01/21

2021 LEGISLATIVE NOTE: HB 385 deletes text from 42A.301(b) authorizing conditions of community supervision to include conditions requiring the defendant to avoid persons or places of disreputable or harmful character, including any person, other than a family member of the defendant, who is an active member of a criminal street gang. These amendments aim to allow more people to stay in the probation system as an alternative to incarceration, in part by removing arbitrary conditions of probation.

SUBCHAPTER N. PAYMENTS: FEES

Art. 42A.651. PAYMENT AS CONDITION OF COMMUNITY SUPERVISION.

(a) A judge may not order a defendant to make a payment as a term or condition of community supervision, except for:

(1) the payment of fines, court costs, or restitution to the victim;

(2) reimbursement of a county as described by Article 42A.301(b)(11); or

(3) a payment ordered as a condition that relates personally to the rehabilitation of the defendant or that is otherwise expressly authorized by law.

(b) A defendant's obligation to pay a fine or court cost as ordered by a judge is independent of any requirement to pay the fine or court cost as a condition of the defendant's community supervision. A defendant remains obligated to pay any unpaid fine or court cost after the expiration of the defendant's period of community supervision.

(c) A judge may not impose a condition of community supervision requiring a defendant to reimburse a county for the costs of legal services as described by Article 42A.301(b)(11) if the defendant has already satisfied that obligation under Article 26.05(g).

Art. 42A.652. MONTHLY REIMBURSEMENT FEE.

(a) Except as otherwise provided by this article, a judge who grants community supervision to a defendant shall set a reimbursement fee of not less than $25 and not more than $60 to be paid each month during the period of community supervision by the defendant to:

(1) the court of original jurisdiction; or

(2) the court accepting jurisdiction of the defendant's case, if jurisdiction is transferred under Article 42A.151.

(b) The judge may make payment of the monthly reimbursement fee a condition of granting or continuing the community supervision. The judge may waive or reduce the fee or suspend a monthly payment of the reimbursement fee if the judge determines that payment of the fee would cause the defendant a significant financial hardship.

(c) A court accepting jurisdiction of a defendant's case under Article 42A.151 shall enter an order directing the defendant to pay the monthly reimbursement fee to that court instead of to the court of original jurisdiction. To the extent of any conflict between an order issued under this subsection and an order issued by a court of original jurisdiction, the order entered under this subsection prevails.

(d) A judge who receives a defendant for supervision as authorized by Section 510.017, Government Code, may require the defendant to pay the reimbursement fee authorized by this article.

(e) A judge may not require a defendant to pay the reimbursement fee under this article for any month after the period of community supervision has been terminated by the judge under Article 42A.701.

(f) A judge shall deposit any reimbursement fee received under this article in the special fund of the county treasury, to be used for the same purposes for which state aid may be used under Chapter 76, Government Code.

Art. 42A.655. ABILITY TO PAY.

(a) The court shall consider the defendant's ability to pay before ordering the defendant to make any payments under this chapter.

(b) Notwithstanding any other law and subject to Subsection (c), the court shall consider whether the defendant has sufficient resources or income to make any payments under this chapter, excluding restitution but including any fee, fine, reimbursement cost, court cost, rehabilitation cost, program cost, service cost, counseling cost, ignition interlock cost, assessment cost, testing cost, education cost, treatment cost, payment required under Article 42A.652, or any other payment or cost authorized or required under this chapter. The court shall consider under this subsection whether a defendant has sufficient resources or income:

(1) before or immediately after placing the defendant on community supervision, including deferred adjudication community supervision; and

(2) during the period of community supervision, before or immediately after the court orders or requires the defendant to make any payments under this chapter.

(c) Subsection (b) does not apply to consideration of a defendant 's ability to pay restitution.

(d) Notwithstanding any other law, if a defendant is ordered to make a payment included under Subsection (b), the court shall reconsider whether the defendant has sufficient resources or income to make the payment at any hearing held under Article 42A.751(d).

(e) A defendant who is ordered to make a payment included under Subsection (b) may, at any time during the defendant 's period of community supervision, including deferred adjudication community supervision, but not more than once in any six-month period unless the defendant shows a substantial and compelling reason for making an additional request during that period, file a written statement with the clerk of the court

requesting reconsideration of the defendant 's ability to make the payment and requesting that the payment be satisfied by an alternative method provided under Subsection (f). On receipt of the statement, the court shall consider whether the defendant 's financial status or required payments have changed in such a way that the defendant 's ability to make a payment previously ordered by the court is substantially hindered. If after conducting a review under this subsection the court finds that the defendant 's ability to make a payment previously ordered by the court is substantially hindered, the court shall determine whether all or a portion of the payment should be satisfied by an alternative method provided under Subsection (f). The court shall notify the defendant and the attorney representing the state of the court 's decision regarding whether to allow all or a portion of the payment to be satisfied by an alternative method.

(f) Notwithstanding any other law, if the court determines under this article at any time during a defendant 's period of community supervision, including deferred adjudication community supervision, that the defendant does not have sufficient resources or income to make a payment included under Subsection (b), the court shall determine whether all or a portion of the payment should be:

(1) required to be paid at a later date or in a specified portion at designated intervals;

(2) waived completely or partially under Article 43.091 or 45.0491;

(3) discharged by performing community service under Article 42A.304 or 45.049, as applicable; or

(4) satisfied through any combination of methods under Subdivisions (1)-(3).

(g) In making a determination under Subsection (f), a court may waive completely or partially a payment required under Article 42A.652 only if, after waiving all other applicable payments included under Subsection (b), the court determines that the defendant does not have sufficient resources or income to make the payment.

(h) The Office of Court Administration of the Texas Judicial System shall adopt a standardized form that a defendant may use to make a request under Subsection (e) for the reconsideration of the defendant 's ability to pay. The form must include:

(1) detailed and clear instructions for how to fill out the form and submit a request to the court; and
(2) the following statement at the top of the form, in bold type and in any language in which the form is produced: "If at any time while you are on community supervision your ability to pay any fine, fee, program cost, or other payment ordered by the court, other than restitution, changes and you cannot afford to pay, you have the right to request that the court review your payments and consider changing or waiving your payments. You can use this form to make a request for a change in your payments. You cannot use this form to request a change in restitution payments."

(i) A supervision officer or the court shall promptly provide a defendant a copy of the form adopted under Subsection (h) on the defendant 's request for the form.

(j) This subsection applies only to a defendant whose payments are wholly or partly waived under this article. At any time during the defendant 's period of community supervision, including deferred adjudication community supervision, the court, on the court 's own motion or by motion of the attorney representing the state, may reconsider the waiver of the payment. After providing written notice to the defendant and an opportunity for the defendant to present information relevant to the defendant 's ability to pay, the court may order the defendant to pay all or part of the waived amount of the payment only if the court determines that the defendant has sufficient resources or income to pay the amount.

Effective date: 09/01/21

2021 LEGISLATIVE NOTE: HB 385 amends 42A.655 by adding Subsections (b)-(j). These additions provide guidance to judges in conducting ability to pay determinations. Under the amendments the courts shall conduct ability to pay inquiries when ordering defendants to make payments during community supervision. If it is determined a defendant is unable to pay, the court may postpone due dates for payments, waive part or all of payments, or allow community service in lieu of payment. Further, a form will be created that a defendant may use to request the court reassess their ability to pay at any time during community supervision.

SUBCHAPTER P. REVOCATION AND OTHER SANCTIONS

Art. 42A.751. VIOLATION OF CONDITIONS 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 or 43.021, Penal Code, Chapter 481, Health and Safety Code, or Sections 485.031 through 485.035, Health and Safety Code, or placed on deferred adjudication community supervision after being charged with one of those offenses, to be subject to:

(1) the control measures of Section 81.083, Health and Safety Code; and

(2) 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 condition of community supervision and cause the defendant to be arrested. Any supervision officer, police officer or other officer with the power of arrest may arrest the defendant with or without a warrant on the order of the judge to be noted on the docket of the court. Subject to Subsection (c), a defendant arrested under this subsection may be detained in the county jail or other appropriate place of confinement until the defendant can be taken before the judge for a determination regarding the alleged violation. The arresting officer shall immediately report the arrest and detention to the judge.

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

(d) If the defendant has not been released on bail as permitted under Subsection (c), on motion by the defendant the judge who ordered the arrest for the alleged violation of a condition of community supervision shall cause the defendant to be brought before the judge for a hearing on the alleged violation within 20 days of the date the motion is filed. After a hearing without a jury, the judge may continue, extend, modify, or revoke the community supervision.

(e) A judge may revoke without a hearing the community supervision of a defendant who is imprisoned in a penal institution if the defendant in writing before a court of record or a notary public in the jurisdiction where the defendant is imprisoned:

(1) waives the defendant's right to a hearing and to counsel;

(2) affirms that the defendant has nothing to say as to why sentence should not be pronounced against the defendant; and

(3) requests the judge to revoke community supervision and to pronounce sentence.

(f) In a felony case, the state may amend the motion to revoke community supervision any time before the seventh day before the date of the revocation hearing, after which time the motion may not be amended except for good cause shown. The state may not amend the motion after the commencement of taking evidence at the revocation hearing.

(g) The judge may continue the revocation hearing for good cause shown by either the defendant or the state.

(h) The court may not revoke the community supervision of a defendant if, at the revocation hearing, the court finds that the only evidence supporting the alleged violation of a condition of community supervision is the uncorroborated results of a polygraph examination.

(i) In a revocation hearing at which it is alleged only that the defendant violated the conditions of community supervision by failing to pay community supervision fees or court costs or by failing to pay the costs of legal services as described by Article 42A.301(b)(11), the state must prove by a preponderance of the evidence that the defendant was able to pay and did not pay as ordered by the judge.

(j) The court may order a community supervision and corrections department to obtain information pertaining to the factors listed under Article 42.037(h) and include that information in the presentence report required under Article 42A.252 or a separate report, as the court directs.

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

(l) A court retains jurisdiction to hold a hearing under Subsection (d) 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 of the supervision period:

(1) the attorney representing the state files a motion to revoke, continue, or modify community supervision; and

(2) a capias is issued for the arrest of the defendant.

Effective date: 09/01/21

2021 LEGISLATIVE NOTE: HB 1540 amends 17.45(a) by including convictions under 43.021, Penal Code, for solicitation of prostitution.

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

CHAPTER 43. EXECUTION OF JUDGMENT

Art. 43.035. RECONSIDERATION OF FINE OR COSTS.

(a) If the defendant notifies the court that the defendant has difficulty paying the fine and costs in compliance with the judgment, the court shall hold a hearing to determine whether that portion of the judgment imposes an undue hardship on the defendant.

(b) For purposes of Subsection (a), a defendant may notify the court by:

(1) voluntarily appearing and informing the court or the clerk of the court in the manner established by the court for that purpose;

(2) filing a motion with the court;

(3) mailing a letter to the court; or

(4) any other method established by the court for that purpose.

(c) If the court determines at the hearing under Subsection (a) that the portion of the judgment regarding the fine and costs imposes an undue hardship on the defendant, the court shall consider whether the fine and costs should be satisfied through one or more methods listed under Article 42.15(a-1).

(d) The court may decline to hold a hearing under Subsection (a) if the court:

(1) previously held a hearing under that subsection with respect to the case and is able to determine without holding a hearing that the portion of the judgment regarding the fine and costs does not impose an undue hardship on the defendant; or

(2) is able to determine without holding a hearing that:

(A) the applicable portion of the judgment imposes an undue hardship on the defendant; and

(B) the fine and costs should be satisfied through one or more methods listed under Article 42.15(a-1).

(e) The court retains jurisdiction for the purpose of making a determination under this article.

Art. 43.091. WAIVER OF PAYMENT OF FINES AND COSTS FOR CERTAIN DEFENDANTS AND FOR CHILDREN.

(a) A court may waive payment of all or part of a fine imposed on a defendant if the court determines that:

(1) the defendant is indigent or does not have sufficient resources or income to pay all or part of the fine or was, at the time the offense was committed, a child as defined by Article 45.058(h); and

(2) each alternative method of discharging the fine under Article 43.09 or 42.15 would impose an undue hardship on the defendant.

(b) A determination of undue hardship made under Subsection (a)(2) is in the court's discretion. In making that determination, the court may consider, as applicable, the defendant's:

(1) significant physical or mental impairment or disability;

(2) pregnancy and childbirth;

(3) substantial family commitments or responsibilities, including child or dependent care;

(4) work responsibilities and hours;

(5) transportation limitations;

(6) homelessness or housing insecurity; and

(7) any other factor the court determines relevant.

(c) A court may waive payment of all or part of the costs imposed on a defendant if the court determines that the defendant:

(1) is indigent or does not have sufficient resources or income to pay all or part of the costs; or

(2) was, at the time the offense was committed, a child as defined by Article 45.058(h).

(d) This subsection applies only to a defendant placed on community supervision, including deferred adjudication community supervision, whose fine or costs are wholly or partly waived under this article. At any time during the defendant's period of community supervision, the court, on the court's own motion or by motion of the attorney representing the state, may reconsider the waiver of the fine or costs. After providing written notice to the defendant and an opportunity for the defendant to present information relevant to the defendant's ability to pay, the court may order the defendant to pay all or part of the waived amount of the fine or costs only if the court

determines that the defendant has sufficient resources or income to pay that amount.

CHAPTER 64. MOTION FOR FORENSIC DNA TESTING

Art. 64.01. Motion

(a) In this section, "biological material":

(1) means an item that is in possession of the state and that contains blood, semen, hair, saliva, skin tissues or cells, fingernail scrapings, bone, bodily fluids, or other identifiable biological evidence that may be suitable for forensic DNA testing; and

(2) includes the contents of a sexual assault evidence collection kit

(a-1) A convicted person may submit to the convicting court a motion for forensic DNA testing of evidence that has a reasonable likelihood of containing biological material. The motion must be accompanied by an affidavit, sworn to by the convicted person, containing statements of fat in support of the motion.

(b) The motion may request forensic DNA testing only of evidence described iby Subsection (a-1) that was secured in relation ot the offense that is the basis of the challenged conviction and was in the possession of the state during the trial of the offense, but:

(1) was not previously subjected to DNA testing; or

(2) although previously subjected to DNA testing:

(A) can be subjected to testing with new testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous tests; or

(B) was tested:

(i) at a laboratory that ceased conducting DNA testing after an audit by the Texas Forensic Science Commission revealed the laboratory engaged in faulty testing practices; and

(ii) during the period identified in the audit as involving faulty testing practices.

(c) A convicted person is entitled to counsel during a proceeding under this chapter. The convicting court shall appoint counsel for the convicted person if the person informs the court that the person wishes to submit a motion under this chapter, the court finds reasonable grounds for a motion to be filed, and the court determines that the person is indigent. Counsel must be appointed under this subsection not later than the 45th day after the date the court finds reasonable grounds or the date the court determines that the person is indigent, whichever is later. Compensation of counsel is provided in the same manner as is required by:

(1) Article 11.071 for the representation of a petitioner convicted of a capital felony; and

(2) Chapter 26 for the representation in a habeas corpus hearing of an indigent defendant convicted of a felony other than a capital felony.

COMMENTARY: "Although there is a statutory right to counsel during a proceeding under Chapter 64 of the code of criminal procedure, there is no federal or state constitutional right to counsel under Chapter 64." *Uvalle v. State*, Nos. 05-04-00508-CR, 05-04-00509-CR, 05-04-00510-CR, 2005 Tex. App. LEXIS 2324, 9 (Tex. App. – Dallas Mar. 29, 2005). Because there is no constitutional right to counsel in a Chapter 64 proceeding, there is not constitutional right to effective assistance of counsel." *Id. See also In re Wiley,* No. 03-03-00327-CR, 2004 Tex. App. LEXIS 810, 1 (Tex. App. – Austin Jan. 28, 2004).

An indigent applicant has "a limited right to appointed counsel." *Ex parte Gutierrez,* 337 S.W.3d 883, 889 (Tex. Crim. App. 2011). Before September 1, 2003 under Article 64.01(c), appointment of counsel for an indigent person was mandatory. However, after Article 64.01(c)

was amended effective September 1, 2003, "an indigent person seeking DNA testing is entitled to appointed counsel only if the trial court finds reasonable grounds for a testing motion to be filed." *In re Turner*, No. 03-11-00177-CV, 2011 Tex. App. LEXIS 2658, 1 (Tex. App. – Austin Apr. 8, 2011).

The amended statute requires "only a showing of "reasonable grounds" for a motion to be filed, not the establishment of a "prima facie" case. *Lewis v. State*, 191 S.W.3d 225, 227 (Tex. App. – San Antonio Dec. 28, 2005). Under the facts in *Lewis*, the applicant's request for counsel was denied because he failed to show that the evidence in question "still exists]" and that "identity was or is an issue in the case". *Id.* at 228.

Art. 64 does not define "reasonable grounds." However, courts have found that reasonable grounds for testing are not present "if no biological evidence exists or if it has been destroyed, or if identity was not or is not an issue." 337 S.W.3d at 891. Additionally, the DNA test must "affirmatively cast doubt upon the validity of the inmate's conviction." *Id.* at 892. So, if a favorable result for the applicant would not change the outcome of the trial, "there are no reasonable grounds to appoint an attorney." *Id.* Conversely, reasonable grounds are present "when the facts stated in the request for counsel or otherwise known to the convicting court reasonably suggest that a "valid" or "viable" argument for testing can be made. *Id.* at 891.

"[A]n indigent inmate need not prove his entitlement to testing as a precondition for obtaining appointed counsel to assist him in filing a testing motion . . . reasonable grounds for a testing motion are present when the facts stated in the request for counsel or otherwise known to the trial court reasonably suggest that a plausible argument for testing can be made." *In re Franklin,* No. 03-07-00563-CR, 2008 Tex. App. LEXIS 4545, 7 (Tex. App. – Austin June 19, 2008).

Because Art. 64.01(c) does not differentiate between trial and appellate stages, "an indigent convicted person is entitled to appointed counsel to prosecute an appeal under chapter 64." *Watson v. State,* Nos. 07-06-0415-CR, 2006 Tex. App. LEXIS 10002, 2 (Tex. App. – Amarillo Nov. 16, 2006).

"The alleged invalidity of the warrant or the failure to allow counsel to be present during the original testing are not grounds for seeking retesting of biological material under Chapter 64. *Dukes v. State*, No. 04-12-00404-CR, 2013 Tex. Appl. LEXIS 5002, 6 (Tex. App. – San Antonio Apr. 24, 2013).

Failure by counsel to seek DNA testing during trial does not guarantee that a request for DNA testing will be granted under Rule 64. Failure to seek DNA testing during trial can be evidence of ineffective assistance of counsel. This is because trial counsel could decline to seek testing "as a matter of reasonable trial strategy" and so post-rial testing is not "required by the interests of justice." *Skinner v. State,* 293 S.W.3d 196, 202 (Tex. Crim. App. 2009)

A court's decision to deny appointed counsel under Art. 64 is not an "appealable order" because "a motion for appointed counsel is a preliminary matter that precedes the initiation of Chapter 64 proceedings." *Gutierrez v. State,* 307 S.W.3d 318, 323 (Tex. Crim. App. 2010). To appeal a decision denying counsel, an applicant must "file a motion for DNA testing and, if and when the motion is denied, appeal any alleged error made by the trial judge in refusing to appoint counsel." *Id.*

Art. 64.011. Guardians and Other Representatives

(a) In this chapter, "guardian of a convicted person" means a person who is the legal guardian of the convicted person, whether the legal relationship between the guardian and convicted person exists because of the age of the convicted person or because of the physical or mental incompetency of the convicted person.

(b) A guardian of a convicted person may submit motions for the convicted person under this chapter and is entitled to counsel otherwise provided to a convicted person under this chapter.

Art. 64.02. Notice to State; Response

(a) On receipt of the motion, the convicting court shall:

(1) provide the attorney representing the state with a copy of the motion; and

(2) require the attorney representing the state to take on of the following actions in response to the motion not later than the 60th day after the date the motion is served on the attorney representing the state:

(A) deliver the evidence to the court, along with a description of the condition of the evidence; or

(B) explain in writing to the court why the state cannot deliver the evidence to the court.

(b) The convicting court may proceed under Article 64.03 after the response period described by Subsection (a)(2) has expired, regardless of whether the attorney representing the state submitted a response under that subsection.

Art. 64.03. Requirements; Testing

(a) A convicting court may order forensic DNA testing under this chapter only if:

(1) the court finds that:

(A) the evidence:

(i) still exists and is in a condition making DNA testing possible; and

(ii) has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect;

(B) there is a reasonable likelihood that the evidence contains biological material suitable for DNA testing; and

(C) identity was or is an issue in the case; and

(2) the convicted person establishes by a preponderance of the evidence that:

(A) the person would not have been convicted if exculpatory results had been obtained through DNA testing; and

(B) the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice.

(b) A convicted person who pleaded guilty or nolo contendere or, whether before or after conviction, made a confession or similar admission in the case may submit a motion under this chapter, and the convicting court is prohibited from finding that identity was not an issue in the case solely on the basis of that plea, confession, or admission, as applicable.

(b-1) Notwithstanding Subsection (c), a convicting court shall order that the requested DNA testing be done with respect to evidence described by Article 64.01(b)(2)(B) if the court finds in the affirmative the issues listed in Subsection (a)(1), regardless of whether the convicted person meets the requirements of Subsection (a)(2). The court may order the test to be conducted by any laboratory that the court may order to conduct a test under Subsection (c).

(c) If the convicting court finds in the affirmative the issues listed in Subsection (a)(1) and the convicted person meets the requirements of Subsection (a)(2), the court shall order that the requested forensic DNA testing be conducted. The court may order the test to be conducted by:

(1) the Department of Public Safety;

(2) a laboratory operating under a contract with the department; or

(3) on the request of the convicted person, another laboratory if that laboratory is accredited under Article 38.01.

(d) If the convicting court orders that the forensic DNA testing be conducted by a laboratory other than a Department of Public Safety laboratory or a laboratory under contract with the department, the State of Texas is not liable for the cost of testing under this subsection unless good cause for payment of that cost has been shown. A political subdivision of the state is not liable for the cost of testing under this subsection, regardless of whether good cause for payment of that cost has been shown. If the court orders that the testing be conducted by a laboratory described by this subsection, the court shall include in the order requirements that:

(1) the DNA testing be conducted in a timely and efficient manner under reasonable conditions designed to protect the integrity of the evidence and the testing process;

(2) the DNA testing employ a scientific method sufficiently reliable and relevant to be admissible under Rule 702, Texas Rules of Evidence; and

(3) on completion of the DNA testing, the results of the testing and all data related to the testing required for an evaluation of the test results be immediately filed with the court and copies of the results and data be served on the convicted person and the attorney representing the state.

(e) The convicting court, not later than the 30th day after the conclusion of a proceeding under this chapter, shall forward the results to the Department of Public Safety.

COMMENTARY: Because there is no state or federal constitutional right to counsel in habeas cases, for an applicant to succeed in obtaining counsel for a Chapter 64 request, the applicant must show that "identity was or is an issue in the case and that a reasonable probability exists that he would not have been convicted if he were permitted to conduct DNA testing." *Gowans v. State,* No.01-19-00901-CR, 2020 Tex. App. LEXIS 9976, 11 (Tex. app. – Houston 1st District Dec. 17, 2020).

Art. 64.035. Unidentified DNA Profiles

If an analyzed sample meets the applicable requirements of state or federal submission policies, on completion of the testing under Article 64.03, the convicting court shall order an unidentified DNA profile to be compared with the DNA profiles in:

(1) the DNA database established by the Federal Bureau of Investigation; and

(2) the DNA database maintained by the Department of Public Safety under Subchapter G, Chapter 411, Government Code.

Art. 64.04. Finding

After examining the results of testing under Article 64.03 and any comparison of a DNA profile under Article 64.035, the convicting court shall hold a hearing and make a finding as to whether, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted.

Art. 64.05. Appeals

An appeal under this chapter is to a court of appeals in the same manner as an appeal of any other criminal matter, except that if the convicted person was convicted in a capital case and was sentenced to death, the appeal is a direct appeal to the court of criminal appeals.

CHAPTER 103. COLLECTION AND RECORDKEEPING

Art. 103.001. COSTS PAYABLE.
(a) In a justice or municipal court, a cost is not payable by the person charged with the cost until a written bill is:

(1) produced or is ready to be produced, containing the items of cost; and

(2) signed by the officer who charged the cost or the officer who is entitled to receive payment for the cost.

(b) In a court other than a justice or municipal court, a cost is not payable by the person charged with the cost until a written bill containing the items of cost is:

(1) produced;

(2) signed by the officer who charged the cost or the officer who is entitled to receive payment for the cost; and

(3) provided to the person charged with the cost.

Art. 103.002. CERTAIN COSTS BARRED.
An officer may not impose a cost for a service not performed or for a service for which a cost is not expressly provided by law.

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;

(2) an adjudication hearing as required by Section 54.03;

(3) a disposition hearing as required by Section 54.04;

(4) a hearing prior to commitment to the Texas Juvenile Justice Department as a modified disposition in accordance with Section 54.05(f); or

(5) hearings required by Chapter 55.

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

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

(1) the child is not represented by an attorney;

(2) after giving the appropriate parties an opportunity to be heard, the court determines that the parent or other person responsible for support of the child is financially able to employ an attorney to represent the child; and

(3) the child's right to representation by an attorney:

(A) has not been waived under Section 51.09 of this code; or

(B) may not be waived under Subsection (b) of this section.

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

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

(1) the child is not represented by an attorney;

(2) the court determines that the child's parent or other person responsible for support of the child is financially unable to employ an attorney to represent the child; and

(3) the child's right to representation by an attorney:

(A) has not been waived under Section 51.09 of this code; or

(B) may not be waived under Subsection (b) of this section.

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

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

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

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

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

(1) order payment for each attorney who has represented the child at any hearing, including a detention hearing, discretionary transfer hearing, adjudication hearing, disposition hearing, or modification of disposition hearing;

(2) include amounts paid to or on behalf of the attorney by the county for preparation time and investigative and expert witness costs; and

(3) require full or partial reimbursement to the county.

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

COMMENTARY: Juvenile proceedings are quasi-criminal in nature even though they are classified as civil proceedings. *In re D.A.S.*, 973 S.W.2d 296, 298 (Tex. 1998) (citing *In re* Gault, 387 U.S. 1, 30 (1967)). Like criminal defendants, juveniles have a constitutional right to counsel during the delinquency determination. *Id.* Further, the right to effective assistance of counsel extends to juveniles and efficacy of assistance is analyzed

under the standard set out in *Strickland*. *Matthews v. Lumpkin*, No. 3:19-CV-0192, 2020 U.S. Dist. LEXIS 198208, *48-49 (S.D. Tex. 2020) (citing *Kent v. United States*, 383 U.S. 541, 561-62 (1966)). *Miranda* warning requirements apply to juveniles as well. *In re Gault*, 387 U.S. at 55.

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

Sec. 51.101. APPOINTMENT OF ATTORNEY AND CONTINUATION OF REPRESENTATION.
(a) If an attorney is appointed under Section 54.01(b-1) or (d) to represent a child 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 Juvenile Justice Department 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 Juvenile Justice Department is not an authorized disposition; or

(ii) delinquent conduct, and commitment to the department 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.

CHAPTER FIFTY-FOUR: JUDICIAL PROCEEDINGS

Sec. 54.01. DETENTION HEARING.
(a) Except as provided by Subsection (p), if the child is not released under Section 53.02, a detention hearing without a jury shall be held promptly, but not later than the second working day after the child is taken into custody; provided, however, that when a child is detained on a Friday or Saturday, then such detention hearing shall be held on the first working day after the child is taken into custody.

(b) Reasonable notice of the detention hearing, either oral or written, shall be given, stating the time, place, and purpose of the hearing. Notice shall be given to the child and, if they can be found, to his parents, guardian, or custodian. Prior to the commencement of the hearing, the court shall inform the parties of the child's right to counsel and to appointed counsel if they are indigent and of the child's right to remain silent with respect to any allegations of delinquent conduct, conduct indicating a need for supervision, or conduct that violates an order of probation imposed by a juvenile court.

(b-1) Unless the court finds that the appointment of counsel is not feasible due to exigent circumstances, the court shall appoint counsel within a reasonable time before the first detention hearing is held to represent the child at that hearing.

(c) At the detention hearing, the court may consider written reports from probation officers, professional court employees, guardians ad litem appointed under Section 51.11(d), or professional consultants in addition to the testimony of witnesses. Prior to the detention hearing, the court shall provide the attorney for the child with access to all written matter to be considered by the court in making the detention decision. The court may order counsel not to reveal items to the child or the child's ~~his~~ parent, guardian, or guardian ad litem if such disclosure would materially harm the treatment and rehabilitation of the child or would substantially decrease the likelihood of receiving information from the same or similar sources in the future.

(d) A detention hearing may be held without the presence of the child's parents if the court has been unable to locate them. If no parent or guardian is present, the court shall appoint counsel or a guardian ad litem for the child, subject to the requirements of Subsection (b-1).

(e) At the conclusion of the hearing, the court shall order the child released from detention unless it finds that:

(1) he is likely to abscond or be removed from the jurisdiction of the court;

(2) suitable supervision, care, or protection for him is not being provided by a parent, guardian, custodian, or other person;

(3) he has no parent, guardian, custodian, or other person able to return him to the court when required;

(4) he may be dangerous to himself or may threaten the safety of the public if released; or

(5) he has previously been found to be a delinquent child or has previously been

convicted of a penal offense punishable by a term in jail or prison and is likely to commit an offense if released.

(f) Unless otherwise agreed in the memorandum of understanding under Section 37.011, Education Code, a release may be conditioned on requirements reasonably necessary to insure the child's appearance at later proceedings, but the conditions of the release must be in writing and a copy furnished to the child. In a county with a population greater than 125,000, if a child being released under this section is expelled under Section 37.007, Education Code, the release shall be conditioned on the child's attending a juvenile justice alternative education program pending a deferred prosecution or formal court disposition of the child's case.

(g) No statement made by the child at the detention hearing shall be admissible against the child at any other hearing.

(h) A detention order extends to the conclusion of the disposition hearing, if there is one, but in no event for more than 10 working days. Further detention orders may be made following subsequent detention hearings. The initial detention hearing may not be waived but subsequent detention hearings may be waived in accordance with the requirements of Section 51.09. Each subsequent detention order shall extend for no more than 10 working days, except that in a county that does not have a certified juvenile detention facility, as described by Section 51.12(a)(3), each subsequent detention order shall extend for no more than 15 working days.

(i) A child in custody may be detained for as long as 10 days without the hearing described in Subsection (a) of this section if:

(1) a written request for shelter in detention facilities pending arrangement of transportation to his place of residence in another state or country or another county of this state is voluntarily executed by the child not later than the next working day after he was taken into custody;

(2) the request for shelter contains:

(A) a statement by the child that he voluntarily agrees to submit himself to custody and detention for a period of not longer than 10 days without a detention hearing;

(B) an allegation by the person detaining the child that the child has left his place of residence in another state or country or another county of this state, that he is in need of shelter, and that an effort is being made to arrange transportation to his place of residence; and

(C) a statement by the person detaining the child that he has advised the child of his right to demand a detention hearing under Subsection (a) of this section; and

(3) the request is signed by the juvenile court judge to evidence his knowledge of the fact that the child is being held in detention.

(j) The request for shelter may be revoked by the child at any time, and on such revocation, if further detention is necessary, a detention hearing shall be held not later than the next working day in accordance with Subsections (a) through (g) of this section.

(k) Notwithstanding anything in this title to the contrary, the child may sign a request for shelter without the concurrence of an adult specified in Section 51.09 of this code.

(l) The juvenile board may appoint a referee to conduct the detention hearing. The referee shall be an attorney licensed to practice law in this state. Such payment or additional payment as may be warranted for referee services shall be provided from county funds. Before commencing the detention hearing, the referee shall inform the parties who have appeared that they are entitled to have the hearing before the juvenile court judge or a substitute judge authorized by Section 51.04(f). If a party objects to the referee conducting the detention hearing, an authorized judge shall conduct the hearing within 24 hours. At the

conclusion of the hearing, the referee shall transmit written findings and recommendations to the juvenile court judge or substitute judge. The juvenile court judge or substitute judge shall adopt, modify, or reject the referee's recommendations not later than the next working day after the day that the judge receives the recommendations. Failure to act within that time results in release of the child by operation of law. A recommendation that the child be released operates to secure the child's immediate release, subject to the power of the juvenile court judge or substitute judge to reject or modify that recommendation. The effect of an order detaining a child shall be computed from the time of the hearing before the referee.

(m) The detention hearing required in this section may be held in the county of the designated place of detention where the child is being held even though the designated place of detention is outside the county of residence of the child or the county in which the alleged delinquent conduct, conduct indicating a need for supervision, or probation violation occurred.

(n) An attorney appointed by the court under Section 51.10(c) because a determination was made under this section to detain a child who was not represented by an attorney may request on behalf of the child and is entitled to a de novo detention hearing under this section. The attorney must make the request not later than the 10th working day after the date the attorney is appointed. The hearing must take place not later than the second working day after the date the attorney filed a formal request with the court for a hearing.

(o) The court or referee shall find whether there is probable cause to believe that a child taken into custody without an arrest warrant or a directive to apprehend has engaged in delinquent conduct, conduct indicating a need for supervision, or conduct that violates an order of probation imposed by a juvenile court. The court or referee must make the finding within 48 hours, including weekends and holidays, of the time the child was taken into custody. The court or referee may make the finding on any reasonably reliable information without regard to admissibility of that information under the Texas Rules of Evidence. A finding of probable cause is required to detain a child after the 48th hour after the time the child was taken into custody. If a court or referee finds probable cause, additional findings of probable cause are not required in the same cause to authorize further detention.

(p) If a child is detained in a county jail or other facility as provided by Section 51.12(l) and the child is not released under Section 53.02(f), a detention hearing without a jury shall be held promptly, but not later than the 24th hour, excluding weekends and holidays, after the time the child is taken into custody.

(q) If a child has not been released under Section 53.02 or this section and a petition has not been filed under Section 53.04 or 54.05 concerning the child, the court shall order the child released from detention not later than:

(1) the 30th working day after the date the initial detention hearing is held, if the child is alleged to have engaged in conduct constituting a capital felony, an aggravated controlled substance felony, or a felony of the first degree; or

(2) the 15th working day after the date the initial detention hearing is held, if the child is alleged to have engaged in conduct constituting an offense other than an offense listed in Subdivision (1) or conduct that violates an order of probation imposed by a juvenile court.

(q-1) The juvenile board may impose an earlier deadline than the specified deadlines for filing petitions under Subsection (q) and may specify the consequences of not filing a petition by the deadline the juvenile board has established. The juvenile board may authorize but not require the juvenile court to release a respondent from detention for failure of the prosecutor to file a petition by the juvenile board's deadline.

(r) On the conditional release of a child from detention by judicial order under Subsection (f), the court, referee, or detention magistrate may order that the child's parent, guardian, or

custodian present in court at the detention hearing engage in acts or omissions specified by the court, referee, or detention magistrate that will assist the child in complying with the conditions of release. The order must be in writing and a copy furnished to the parent, guardian, or custodian. An order entered under this subsection may be enforced as provided by Chapter 61.

Effective date: 09/01/21

2021 LEGISLATIVE NOTE: SB 2049 amends 54.01(c) to authorize a juvenile court to consider written reports from guardians ad litem at certain hearings. This aims to support youth in the foster care system who have engagement with the juvenile justice system.

COMMENTARY: "[D]etention orders under section 54.01 of the Family Code are interlocutory in nature and are not appealable." *In re J.C.L.*, No. 10-11-00407-CV, 2011 Tex. App. LEXIS 8756, *4 (Tex. App.—Waco, Oct. 28, 2011) (mem. op.). "A juvenile, just as any other person, may challenge a restraint upon his or her liberty by filing an application for writ of habeas corpus in the proper court." *M.B. v. State*, 905 S.W.2d 344, 346 (Tex. App.—El Paso, 1995, no pet.) (mem. op.).

GOVERNMENT CODE

CHAPTER 41. GENERAL PROVISIONS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 41.258. ASSISTANT PROSECUTOR SUPPLEMENT FUND AND FAIR DEFENSE ACCOUNT.

(a) The assistant prosecutor supplement fund is created in the state treasury.

(b) A court, judge, magistrate, peace officer, or other officer taking a bail bond for an offense other than a misdemeanor punishable by fine only under Chapter 17, Code of Criminal Procedure, shall require the payment of a $15 reimbursement fee by each surety posting the bail bond, provided the fee does not exceed $30 for all bail bonds posted at that time for an individual and the fee is not required on the posting of a personal or cash bond.

(c) An officer collecting a reimbursement fee under this section shall deposit the fee in the county treasury in accordance with Article 103.004, Code of Criminal Procedure.

(d) An officer who collects a reimbursement fee due under this section shall:

(1) keep separate records of the funds collected; and

(2) file the reports required by Article 103.005, Code of Criminal Procedure.

(e) The custodian of the county treasury shall:

(1) keep records of the amount of funds on deposit that are collected under this section; and

(2) send to the comptroller not later than the last day of the month following each calendar quarter the funds collected under this section during the preceding quarter.

(f) A surety paying a reimbursement fee under Subsection (b) may apply for and is entitled to a refund of the fee not later than the 181st day after the date the state declines to prosecute an individual or the grand jury declines to indict an individual.

(g) A county may retain 10 percent of the funds collected under this section and may also retain all interest accrued on the funds if the custodian of the treasury:

(1) keeps records of the amount of funds on deposit; and

(2) remits the funds to the comptroller as prescribed by Subsection (e).

(h) Funds collected are subject to audit by the comptroller, and funds expended are subject to audit by the state auditor.

(i) The comptroller shall deposit two-thirds of the funds received under this section in the assistant prosecutor supplement fund and one-third of the funds received under this section to the fair defense account. A county may not reduce the amount of funds provided for indigent defense services in the county because of funds provided under this subsection.

(j) The comptroller shall pay supplements from the assistant prosecutor supplement fund as provided by this subchapter. At the end of each fiscal year, any unexpended balance in the fund in excess of $1.5 million may be transferred to the general revenue fund.

CHAPTER 71. TEXAS JUDICIAL COUNCIL

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 71.001. DEFINITIONS.
In this chapter:

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

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

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

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

SUBCHAPTER C. POWERS AND DUTIES

Sec. 71.0355. PLAN AND REPORT ON COURT-ORDERED REPRESENTATION.

(a) The council shall develop a statewide plan requiring counties and courts in this state to report information on court-ordered representation for appointments made in suits affecting the parent-child relationship under Part 1, Subchapter B, Chapter 107, Family Code. In developing the plan, the council must consider the costs to counties of implementing the plan and design the plan to reduce redundant reporting.

(b) Not later than November 1 of each odd-numbered year and in the form and manner prescribed in the plan, each local administrative district judge for a court subject to the plan, or the person designated by the judge, shall prepare and provide to the
council:

(1) a copy of all formal and informal rules and forms the court uses to appoint representation in suits affecting the parent-child relationship under Part 1, Subchapter B, Chapter 107, Family Code;

(2) any fee schedule the court uses for court-ordered representation; and

(3) information on whether the court is complying with Chapter 37, including the lists and the rotation system required by that chapter.

(c) Each county auditor, or other individual designated by the commissioners court of a county, shall prepare and send to the council, in the form and manner prescribed in the plan, information on the money spent by the county during the preceding state fiscal year to provide court-ordered representation in suits affecting the parent-child relationship under Part 1, Subchapter B, Chapter 107, Family Code. The information must include:

(1) the total amount of money spent by the county to provide court-ordered representation services; and

(2) of the money spent under Subdivision (1), the amount of money spent:

(A) for appointments in each district court, county court, statutory county court, and appellate court in the county;

(B) for appointments of private attorneys for respondents, including parents, children, and alleged fathers, who are indigent;

(C) for appointments of public counsel for respondents, including parents, children, and alleged fathers, who are indigent; and

(D) for investigation, expert witness, or other litigation expenses.

(d) Each local administrative district judge for a court subject to the plan, or the person designated by the judge, and each county auditor, or other individual designated by the commissioners court of a county, shall provide to the council the information required under the plan and this section.

(e) The council annually shall:

(1) compile in a report the information submitted to the council under the plan and this section;

(2) submit the report compiled under Subdivision (1) to the governor, lieutenant governor, and speaker of the house of representatives; and

(3) electronically publish the report compiled under Subdivision (1).

CHAPTER 78. CAPITAL AND FORENSIC WRITS COMMITTEE AND OFFICE OF CAPITAL AND FORENSIC WRITS

SUBCHAPTER A. CAPITAL AND FORENSIC WRITS COMMITTEE

Sec. 78.001. DEFINITIONS.
In this subchapter:

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

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

Sec. 78.002. ESTABLISHMENT OF COMMITTEE; DUTIES.

(a) The capital and forensic writs committee is established.

(b) The committee shall provide oversight and strategic guidance to the office of capital and forensic writs, including:

(1) recommending ~~recommend~~ to the court of criminal appeals as provided by Section 78.004 a director for the office of capital and forensic writs when a vacancy exists for the position of director~~.~~;

(2) setting policy for the office of capital and forensic writs; and

(3) developing a budget proposal for the office of capital and forensic writs.

(c) The committee may not access privileged or confidential information.

Effective date: 09/01/21

2021 LEGISLATIVE NOTE: SB 280 amends 71.002 Subsection (b) and adds Subsection (c). The change requires the capital and forensic writs committee to provide oversight and strategic guidance to the office of capital and forensic writs and prohibits the committee from accessing privileged or confidential information.

Sec. 78.003. APPOINTMENT AND COMPOSITION OF COMMITTEE.
(a) The committee is composed of the following five members who are appointed as follows: ~~by the president of the State Bar of Texas, with ratification by the executive committee of the State Bar of Texas~~:

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

(2) two attorneys who are appointed by the president of the State Bar of Texas, with

ratification by the executive committee of the State Bar of Texas ~~two state district judges, one of whom serves as presiding judge of an administrative judicial region~~.

(a-1) Each member of the committee must be a licensed attorney and must have significant experience in capital defense or indigent criminal defense policy or practice. A member of the committee may not be a prosecutor, a law enforcement official, a judge of a court that presides over criminal offenses, or an employee of the office of capital and forensic writs.

(a-2) Members of the committee serve four-year terms and may be reappointed.

(a-3) If a vacancy occurs, the appropriate appointing authority shall appoint a person to serve for the remainder of the unexpired term in the same manner as the original appointment.

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

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

Effective date: 09/01/21

2021 LEGISLATIVE NOTE: SB 280 amends 78.003 Subsections (a) and (c) and adds Subsections (a-1), (a-2), and (a-3). It amends current law relating to the composition of the capital and forensic writs committee.

Sec. 78.004. RECOMMENDATION AND APPOINTMENT OF DIRECTOR OF OFFICE OF CAPITAL AND FORENSIC WRITS.
(a) The committee shall submit to the court of criminal appeals, in order of the committee's preference, a list of the names of not more than five persons the committee recommends that the court consider in appointing the director of the office of capital and forensic writs when a vacancy exists for the position of director. If the committee finds that three or more persons under the committee's consideration are qualified to serve as the director of the office of capital and forensic writs, the committee must include at least three names in the list submitted under this subsection.

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

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

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

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

[Sections 78.005-78.050 reserved for expansion]

SUBCHAPTER B. OFFICE OF CAPITAL AND FORENSIC WRITS

Sec. 78.051. DEFINITIONS.
In this subchapter:

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

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

Sec. 78.052. ESTABLISHMENT; FUNDING.
(a) The office of capital and forensic writs is established and operates under the direction and supervision of the director of the office.

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

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

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

Sec. 78.053. DIRECTOR; STAFF.
(a) The court of criminal appeals shall appoint a director to direct and supervise the operation of the office. The director serves a four-year term and continues to serve until a successor has been appointed and qualified. The court of criminal appeals may remove the director only for good cause. The director may be reappointed for a second or subsequent term.

(b) The director shall employ attorneys and employ or retain licensed investigators, experts, and other personnel necessary to perform the duties of the office. To be employed by the director, an attorney may not have been found by a state or federal court to have rendered ineffective assistance of counsel during the trial or appeal of a criminal case.

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

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

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

Sec. 78.054. POWERS AND DUTIES.
(a) The office may not accept an appointment under Article 11.071, Code of Criminal Procedure, if:

(1) a conflict of interest exists;

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

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

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

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

(1) is conducted under Article 11.071 or 11.073, Code of Criminal Procedure;

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

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

(4) is conducted under Article 11.073, Code of Criminal Procedure, or is collateral to the preparation of an application under Article 11.073, Code of Criminal Procedure, if the case was referred in writing to the office by the Texas Forensic Science Commission under Section 4(h), Article 38.01, Code of Criminal Procedure.

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

(d) The office may consult with law school clinics with applicable knowledge and experience and with other experts as necessary to investigate the facts of a particular case.

Sec. 78.055. COMPENSATION OF OTHER APPOINTED ATTORNEYS.
If it is necessary that an attorney other than an attorney employed by the office be appointed, that attorney shall be compensated as provided

by Articles 11.071 and 26.05, Code of Criminal Procedure.

Sec. 78.056. APPOINTMENT LIST.
(a) The presiding judges of the administrative judicial regions shall maintain a statewide list of competent counsel available for appointment under Section 2(f), Article 11.071, Code of Criminal Procedure, if the office does not accept or is prohibited from accepting an appointment under Section 78.054. Each attorney on the list:

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

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

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

CHAPTER 79. TEXAS INDIGENT DEFENSE COMMISSION

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 79.001. DEFINITIONS.
(1) "Assigned counsel program" means a system under which private attorneys, acting as independent contractors and compensated with public funds, are individually appointed to provide legal representation and services to a particular indigent defendant accused of a crime or juvenile offense.

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

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

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

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

(6) "Crime" means:

(A) a misdemeanor punishable by confinement; or

(B) a felony.

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

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

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

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

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

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

(A) a misdemeanor punishable by confinement; or

(B) a felony.

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

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

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

Sec. 79.002. ESTABLISHMENT OF COMMISSION.
(a) The Texas Indigent Defense Commission is established as a permanent standing committee of the council.

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

[Sections 79.003-79.010 reserved for expansion]

SUBCHAPTER B. ADMINISTRATIVE PROVISIONS

Sec. 79.011. ESTABLISHMENT OF BOARD; COMPOSITION.
(a) The commission is governed by a board consisting of eight ex officio members and five appointive members.

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

Sec. 79.012. EXECUTIVE DIRECTOR.
(a) The executive director is appointed by the board.

(b) The executive director:

(1) must be a licensed attorney;

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

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

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

Sec. 79.013. EX OFFICIO MEMBERS.
The ex officio members of the board are:

(1) the following six members of the council:

(A) the chief justice of the supreme court;

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

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

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

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

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

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

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

Sec. 79.014. APPOINTMENTS.
(a) The governor shall appoint with the advice and consent of the senate five members of the board as follows:

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

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

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

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

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

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

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

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

Sec. 79.015. PRESIDING OFFICER.
The board shall select a chair from among its members.

Sec. 79.016. DISCLOSURE REQUIRED.
(a) A board member who is a chief public defender for or an attorney employed by an entity that applies for funds under Section 79.037 shall disclose that fact before a vote by the board regarding an award of funds to that entity and may not participate in that vote.

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

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

Sec. 79.017. VACANCIES.
A vacancy on the board must be filled for the unexpired term in the same manner as the original appointment.

Sec. 79.018. MEETINGS; QUORUM; VOTING.
(a) The board shall meet at least four times each year and at such other times as it considers necessary or convenient to perform its duties.

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

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

Sec. 79.019. COMPENSATION.
A board member may not receive compensation for services on the board but is entitled to be reimbursed for actual and necessary expenses incurred in discharging board duties. The expenses are paid from funds appropriated to the board.

Sec. 79.020. IMMUNITY FROM LIABILITY.
A member of the board performing duties on behalf of the board is not liable for damages arising from an act or omission within the scope of those duties.

Sec. 79.021. RULES.
The board shall adopt rules as necessary to implement this chapter.

[Sections 79.022-79.030 reserved for expansion]

SUBCHAPTER C. GENERAL POWERS AND DUTIES OF COMMISSION

Sec. 79.031. FAIR DEFENSE ACCOUNT.
The fair defense account is an account in the general revenue fund that may be appropriated only to:

(1) the commission for the purpose of implementing this chapter; and

(2) the office of capital and forensic writs for the purpose of implementing Subchapter B, Chapter 78.

Sec. 79.032. ACCEPTANCE OF GIFTS, GRANTS, AND OTHER FUNDS; STATE GRANTS TEAM.
(a) The commission may accept gifts, grants, and other funds from any public or private source to pay expenses incurred in performing its duties under this chapter.

(b) The State Grants Team of the Governor's Office of Budget, Planning, and Policy may assist the commission in identifying grants and other resources available for use by the commission in performing its duties under this chapter.

Sec. 79.033. ADMINISTRATIVE ATTACHMENT; SUPPORT; BUDGET.
(a) The commission is administratively attached to the Office of Court Administration of the Texas Judicial System.

(b) The office of court administration shall provide administrative support services, including human resources, budgetary, accounting, purchasing, payroll, information technology, and legal support services, to the commission as necessary to carry out the purposes of this chapter.

(c) The commission, in accordance with the rules and procedures of the Legislative Budget Board, shall prepare, approve, and submit a legislative appropriations request that is separate from the legislative appropriations request for the Office of Court Administration of the Texas Judicial System and is used to develop the commission's budget structure. The commission shall maintain the legislative appropriations request and budget structure separately from those of the office of court administration.

Sec. 79.034. POLICIES AND STANDARDS.
(a) The commission shall develop policies and standards for providing legal representation and other defense services to indigent defendants at trial, on appeal, and in post conviction proceedings. The policies and standards may include:

(1) performance standards for counsel appointed to represent indigent defendants;

(2) qualification standards under which attorneys may qualify for appointment to represent indigent defendants, including:

(A) qualifications commensurate with the seriousness of the nature of the proceeding;
(B) qualifications appropriate for representation of mentally ill defendants and noncitizen defendants;

(C) successful completion of relevant continuing legal education programs approved by the council; and

(D) testing and certification standards;

(3) standards for ensuring appropriate appointed caseloads for counsel appointed to represent indigent defendants;

(4) standards for determining whether a person accused of a crime or juvenile offense is indigent;

(5) policies and standards governing the organization and operation of an assigned counsel program;

(6) policies and standards governing the organization and operation of a public defender's office consistent with recognized national policies and standards;

(7) standards for providing indigent defense services under a contract defender program consistent with recognized national policies and standards;

(8) standards governing the reasonable compensation of counsel appointed to represent indigent defendants;

(9) standards governing the availability and reasonable compensation of providers of indigent defense support services for counsel appointed to represent indigent defendants;

(10) standards governing the operation of a legal clinic or program that provides legal services to indigent defendants and is sponsored by a law school approved by the supreme court;

(11) policies and standards governing the appointment of attorneys to represent children in proceedings under Title 3, Family Code;

(12) policies and standards governing the organization and operation of a managed assigned counsel program consistent with nationally recognized policies and standards; and

(13) other policies and standards for providing indigent defense services as determined by the commission to be appropriate.

(b) The commission shall submit its proposed policies and standards developed under Subsection (a) to the board for adoption. The board shall adopt the proposed policies and standards as appropriate.

(c) Any qualification standards adopted by the board under Subsection (b) that relate to the appointment of counsel in a death penalty case must be consistent with the standards specified under Article 26.052(d), Code of Criminal Procedure. An attorney who is identified by the commission as not satisfying performance or qualification standards adopted by the board under Subsection (b) may not accept an appointment in a capital case.

Sec. 79.035. COUNTY REPORTING PLAN; COMMISSION REPORTS.

(a) The commission shall develop a plan that establishes statewide requirements for counties relating to reporting indigent defense information. The plan must include provisions designed to reduce redundant reporting by counties and provisions that take into consideration the costs to counties of implementing the plan statewide. The commission shall use the information reported by a county to monitor the effectiveness of the county's indigent defense policies, standards, and procedures and to ensure compliance by the county with the requirements of state law relating to indigent defense. The commission may revise the plan as necessary to improve monitoring of indigent defense policies, standards, and procedures in this state.

(b) The commission shall annually submit to the governor, lieutenant governor, speaker of the house of representatives, and council and shall publish in written and electronic form a report:

(1) containing any information submitted to the commission by a county under Section 79.036; and

(2) regarding:

(A) the quality of legal representation provided by counsel appointed to represent indigent defendants;

(B) current indigent defense practices in the state as compared to state and national standards;

(C) efforts made by the commission to improve indigent defense practices in the state;

(D) recommendations made by the commission for improving indigent defense practices in the state; and

(E) the findings of a report submitted to the commission under Section 79.039.

(c) The commission shall annually submit to the Legislative Budget Board and council and shall publish in written and electronic form a detailed report of all expenditures made under this subchapter, including distributions under Section 79.037.

(d) The commission may issue other reports relating to indigent defense as determined to be appropriate by the commission.

Sec. 79.036. INDIGENT DEFENSE INFORMATION.

(a) Not later than November 1 of each odd-numbered year and in the form and manner prescribed by the commission, each county shall prepare and provide to the commission:

(1) a copy of all formal and informal rules and forms that describe the procedures used in the county to provide indigent defendants with counsel in accordance with the Code of Criminal Procedure, including the schedule of fees required under Article 26.05 of that code;

(2) any plan or proposal submitted to the commissioners court under Article 26.044, Code of Criminal Procedure;

(3) any plan of operation submitted to the commissioners court under Article 26.047, Code of Criminal Procedure;

(4) any contract for indigent defense services required under rules adopted by the commission relating to a contract defender program;

(5) any revisions to rules, forms, plans, proposals, or contracts previously submitted under this section; or

(6) verification that rules, forms, plans, proposals, or contracts previously submitted under this section still remain in effect.

(a-1) Not later than November 1 of each year and in the form and manner prescribed by the commission, each county shall prepare and provide to the commission information that describes for the preceding fiscal year the number of appointments under Article 26.04, Code of Criminal Procedure, and Title 3, Family Code, made to each attorney accepting appointments in the county, and information provided to the county by those attorneys under Article 26.04(j) (4), Code of Criminal Procedure.

(b) Except as provided by Subsection (c):

(1) the local administrative district judge in each county, or the person designated by the judge, shall perform the action required by Subsection (a) with respect to all rules and forms adopted by the judges of the district courts trying felony cases in the county; and

(2) the local administrative statutory county court judge in each county, or the person designated by the judge, shall perform the action required by Subsection (a) with respect to all rules and forms adopted by the judges of the county courts and statutory county courts trying misdemeanor cases in the county.

(c) If the judges of two or more levels of courts described by Subsection (b) adopt the same formal and informal rules and forms, the local administrative judge serving the courts having jurisdiction over offenses with the highest classification of punishment, or the person designated by the judge, shall perform the action required by Subsection (a).

(d) The chair of the juvenile board in each county, or the person designated by the chair, shall perform the action required by Subsection (a) with respect to all rules and forms adopted by the juvenile board.

(e) In each county, the county auditor, or the person designated by the commissioners court if the county does not have a county auditor, shall prepare and send to the commission in the form and manner prescribed by the commission and on a monthly, quarterly, or annual basis, with respect to legal services provided in the county to indigent defendants during each fiscal year, information showing the total amount expended by the county to provide indigent defense services and an analysis of the amount expended by the county:

(1) in each district, county, statutory county, and appellate court;

(2) in cases for which a private attorney is appointed for an indigent defendant;

(3) in cases for which a public defender is appointed for an indigent defendant;

(4) in cases for which counsel is appointed for an indigent juvenile under Section 51.10(f), Family Code; and

(5) for investigation expenses, expert witness expenses, or other litigation expenses.

(f) As a duty of office, each district and county clerk shall cooperate with the county auditor or the person designated by the commissioners court and the commissioners court in retrieving information required to be sent to the commission under this section.

Sec. 79.037. TECHNICAL SUPPORT; GRANTS. (a) The commission shall:

(1) provide technical support to:

(A) assist counties in improving their systems for providing indigent defense services, including indigent defense support services ~~systems~~; and

(B) promote compliance by counties with the requirements of state law relating to indigent defense;

(2) to assist a county in providing or improving the provision of indigent defense services in the county, distribute in the form of grants any funds appropriated for the purposes of this section to one or more of the following entities:

(A) the county;

(B) a law school's legal clinic or program that provides indigent defense services in the county; ~~and~~

(C) a regional public defender that meets the requirements of Subsection (e) and provides indigent defense services in the county; ~~and~~

(D) an entity described by Section 791.013 that provides to a county administrative services under an interlocal contract entered into for the purpose of providing or improving the provision of indigent defense services in the county; and

(E) A nonprofit corporation that provides indigent defense services or indigent defense support services in the county; and

(3) monitor each entity that receives a grant under Subdivision (2) and enforce compliance with the conditions of the grant, including enforcement by:

(A) withdrawing grant funds; or

(B) requiring reimbursement of grant funds by the entity.

(b) The commission shall determine for each county the entity or entities that are eligible to receive funds for the provision of or improvement in the provision of indigent defense services under Subsection (a)(2). The determination must be made based on the entity's:

(1) compliance with standards adopted by the board; and

(2) demonstrated commitment to compliance with the requirements of state law relating to indigent defense.

(c) The board shall adopt policies to ensure that funds under Subsection (a)(2) are allocated and distributed in a fair manner.

(d) A county may not reduce the amount of funds provided for indigent defense services in the county because of funds provided by the commission under this section.

~~Subsection (e) as amended by SB 1353:~~

~~(e) The commission may award a grant to an entity described by Section 791.013 that provides to a county administrate services under an interlocal contract entered into for the purpose of providing or improving the provision of indigent defense services in the county. The commission shall monitor each entity that receives a grant under this~~

~~subsection and enforce compliance with the conditions of the grant in the same manner as if the grant were awarded directly to a county under subsection (a)(2).~~

~~Subsection (e) as amended by SB 1057:~~

(e) The commission may distribute funds under Subsection (a) (2) to a regional public defender's office formed under Article 26.044, Code of Criminal Procedure, if:

(1) the regional public defender's office serves two or more counties;

(2) each county that enters an agreement to create or designate and to jointly fund the regional public defender's office satisfies the commission that the county will timely provide funds to the office for the duration of the grant for at least half of the office's operational costs;

(3) each participating county by local rule adopts and submits the commission guidelines under Article 26.04(f), Code of Criminal Procedure, detailing the types of cases to be assigned to the office; and

(4) each participating county and the regional public defender's office agree in writing to a method that the commission that determines to be appropriate under Subsection (f) to pay all costs associated with the defense of cases assigned to the office that remain pending in the county after the termination of the agreement or the county's participation in the agreement.

(f) The commission shall select, by rule or under a contract with a regional public defender's office, a method for the payment of costs under Subsection (e) (4), which may include any combination of the following:

(1) allowing an office to establish and maintain a reserve of funds sufficient to cover anticipated costs, in an amount determined appropriate by the commission;

(2) guaranteeing all or part of the cost to be paid; or

(3) establishing a schedule of fees for the payment of costs in the manner provided by Article 26.05, Code of Criminal Procedure.

(g) Any change to a schedule of fees established under Subsection (f) (3) must first be approved by the commission.

(h) A regional public defender's office shall collect each participating county's portion of the operational costs as that portion is provided by the county to the office.

Effective date: 09/01/21

2021 LEGISLATIVE NOTE: HB 295 amends 79.037(a) to authorize the Texas Indigent Defense Commission to provide grants to nonprofit corporations to provide indigent defense and indigent defense support services.

Sec. 79.039. EXONERATION REPORTS.
(a) Each legal clinic or program in this state that is operated by a law school and that receives financial support from the commission shall submit to the commission an annual report regarding criminal cases:

(1) in which the clinic or program has provided legal services to an indigent defendant during the preceding calendar year; and

(2) in which:

(A) based on a finding of actual innocence, the court of criminal appeals overturns a conviction; or

(B) the governor issues a pardon based on actual innocence.

(b) The report required under Subsection (a) must:

(1) identify each likely cause of a wrongful conviction listed in the report; and

(2) recommend to the judiciary and the legislature best practices, policies, and

statutory changes to address or mitigate those likely causes with respect to future criminal cases.

Sec. 79.040. INDIGENT DEFENSE INFORMATION SYSTEM

(a) By entering into an interlocal contract with one or more counties under Chapter 791, the commission may participate and assist counties in the creation, implementation, operation, and maintenance of a computerized system to be used to assist those counties in the provision and administration of indigent defense services and to be used to collect data from those counties regarding representation of indigent defendants in this state.

(b) The commission may use appropriated funds to pay costs incurred under an interlocal contract described by Subsection (a), including license fees, implementation costs, maintenance and operations costs, administrative costs, and any other costs specified in the interlocal contract.

(c) The commission may provide training services to counties on the use and operation of a system created, implemented, operated, or maintained by one or more counties under Subsection (a).

(d) Subchapter L, Chapter 2054, does not apply to an indigent defense information system created under this section.

Sec. 79.042. SUCCESSION PLAN FOR CERTAIN PUBLIC DEFENDERS' OFFICES.

(a) In this section, "governmental entity" has the meaning assigned by Article 26.044, Code of Criminal Procedure.

(b) As a condition of a grant awarded by the commission to a regional public defender's office that primarily handles capital cases, the commission may establish for the public defender's office a succession plan to take effect only if the commissioners court of the county in which the central administrative office of the public defender's office is located ceases for any reason to be a party to the agreement creating or designating the public defender's office.

(c) A succession plan established under Subsection (b) may:

(1) authorize the commission to designate a governmental entity to administer the regional public defender's office;

(2) require the governmental entity designated under Subdivision (1) to establish an oversight board for the regional public defender's office under Article 26.045, Code of Criminal Procedure; and

(3) require the regional public defender's office to comply with any rules adopted by the commission for the administration of the public defender's office.

CHAPTER 81. STATE BAR

SUBCHAPTER C. MEMBERSHIP

Sec. 81.054. MEMBERSHIP FEES AND ADDITIONAL FEES.

(a) The supreme court shall set membership fees and other fees for members of the state bar during the court's annual budget process under Section 81.022. The fees, except as provided by Subsection (j) and those set for associate members, must be set in accordance with this section and Section 81.022.

(b) An emeritus member is not required to pay a membership fee for the year in which the member reaches the age of 70 or any year following that year.

(c) Fees shall be paid to the clerk of the supreme court. The clerk shall retain the fees, other than fees collected under Subsection (j), until distributed to the state bar for expenditure under the direction of the supreme court to administer this chapter. The clerk shall retain the fees collected under Subsection (j) until distribution is approved by an order of the supreme court. In ordering that distribution, the supreme court shall order that the fees collected under Subsection (j) be remitted to the comptroller at least as frequently as quarterly. The comptroller shall credit 50 percent of the remitted fees to the credit of the judicial fund for programs approved by the supreme court that provide basic civil legal services to the indigent and shall credit the remaining 50 percent of the remitted fees to the fair defense account in the general revenue fund which is established under Section 79.031, to be used, subject to all requirements of Section 79.037, for demonstration or pilot projects that develop and promote best practices for the efficient delivery of quality representation to indigent defendants in criminal cases at trial, on appeal, and in postconviction proceedings.

(d) Fees collected under Subsection (j) may be used only to provide basic civil legal services to the indigent and legal representation and other defense services to indigent defendants in criminal cases as provided by Subsection (c). Other fees collected under this chapter may be used only for administering the public purposes provided by this chapter.

(e) The state bar by rule may adopt a system under which membership fees are due on various dates during the year. For the year in which a due date is changed, the annual fee shall be prorated on a monthly basis so that the member pays only that portion of the fee that is allocable to the number of months remaining before the new expiration date. An increase in fees applies only to fees that are payable on or after the effective date of the increase.

(f) A person who is otherwise eligible to renew the person's membership may renew the membership by paying the required membership fees to the state bar on or before the due date.

(g) A person whose membership has been expired for 90 days or less may renew the membership by paying to the state bar membership fees equal to 1-1/2 times the normally required membership fees.

(h) A person whose membership has been expired for more than 90 days but less than one year may renew the membership by paying to the state bar membership fees equal to two times the normally required membership fees.

(i) Not later than the 30th day before the date a person's membership is scheduled to expire, the state bar shall send written notice of the impending expiration to the person at the person's last known address according to the records of the state bar.

(j) The supreme court shall set an additional legal services fee in an amount of $65 to be paid annually by each active member of the state bar except as provided by Subsection (k). Section 81.024 does not apply to a fee set under this subsection.

(k) The legal services fee shall not be assessed on any Texas attorney who:

(1) is 70 years of age or older;

(2) has assumed inactive status under the rules governing the State Bar of Texas;

(3) is a sitting judge;

(4) is an employee of the state or federal government;

(5) is employed by a city, county, or district attorney's office and who does not have a private practice that accounts for more than 50 percent of the attorney's time;

(6) is employed by a 501(c)(3) nonprofit corporation and is prohibited from the outside practice of law;

(7) is exempt from MCLE requirements because of nonpracticing status; or

(8) resides out of state and does not practice law in Texas.

(l) In this section, "indigent" has the meaning assigned by Section 51.941.

~~CHAPTER 103. ADDITIONAL COURT FEES AND COSTS~~

~~SUBCHAPTER B. MISCELLANEOUS FEES AND COSTS~~

~~SEC. 103.027. MISCELLANEOUS FEES AND COSTS: GOVERNMENT CODE~~

~~(a) Fees and costs shall be paid or collected under the Government Code as follows:~~

~~(1) filing a certified copy of a judicial finding of fact and conclusion of law if charged by the secretary of state (Sec. 51.905, Government Code) . . . $15~~

Effective date: 01/01/22

2021 LEGISLATIVE NOTE: SB 41 repeals Chapter 103, Government Code as part of court cost consolidation.

LOCAL GOVERNMENT CODE

CHAPTER 133. 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) $185 on conviction of a felony;

(2) $147 on conviction of a Class A or Class B misdemeanor; or

(3) $62 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, 2020, 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. The money collected as court costs imposed on offenses committed on or after January 1, 2004, but before January 1, 2020, shall be allocated according to the percentages provided in Subsection (e), as that subsection existed and was applied on December 31, 2019.

(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) crime stoppers assistance account 0.2427 percent;

(2) breath alcohol testing account 0.3900 percent;

(3) Bill Blackwood Law Enforcement Management Institute account 1.4741 percent;

(4) Texas Commission on Law Enforcement account 3.4418 percent;

(5) law enforcement and custodial officer supplement retirement trust fund 7.2674 percent;

(6) criminal justice planning account 8.5748 percent;

(7) 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 0.8540 percent;

(8) compensation to victims of crime account 24.6704 percent;

(9) emergency radio infrastructure account 3.6913 percent;

(10) judicial and court personnel training account 3.3224 percent;

(11) 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 0.8522 percent;

(12) fair defense account 17.8857 percent.

(13) judicial fund 12.2667 percent;

(14) DNA testing account 0.1394 percent;

(15) specialty court account 1.0377 percent;

(16) statewide electronic filing system account 0.5485 percent;

(17) jury service fund 6.4090 percent;

(18) truancy prevention and diversion account 2.5956 percent; and

(19) transportation administrative fee account 4.3363 percent.

(f) Of each dollar credited to the Texas Commission on Law Enforcement:

(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.

COMMENTARY: Under section 133.102(e)(12), a portion of consolidated court costs collected under 133.102 are allocated to the fair defense account. The allocation of these funds to the fair defense account is a constitutionally valid use of funds because it is expended "for a legitimate criminal justice purpose: the protection of an indigent defendant's right to counsel." *Townsend v. State*, No. 13-18-00049-CR, 2019 Tex. App. LEXIS 10071, at *18 (Tex. App.—Corpus Christi Nov. 21, 2019) (Holding that the allocation of funds to the fair defense account was constitutional under 133.107. 133.107 has since been repealed but 133.102(e)(12) serves the same functional purpose.); *see also Johnson v. State*, 573 S.W.3d 328, 338 (Tex. App.—Houston [14th Dist.] 2019).

Sec. 133.122. ALLOCATION OF FEES TO JURY SERVICE FUND.

(a) The jury service fund is created in the state treasury. The fund consists of money allocated to the fund under Section 133.102(e). Money in the fund may be appropriated only to provide juror reimbursements to counties.

(b) If, at any time, the unexpended balance of the jury service fund exceeds $10 million, the

comptroller shall transfer the amount in excess of $10 million to the fair defense account.

TAX CODE

TITLE 1. PROPERTY TAX CODE

SUBTITLE D. APPRAISAL AND ASSESSMENT

CHAPTER 26. ASSESSMENT

Sec. 26.0442. Tax Rate Adjustment for County Indigent Defense Compensation Expenditures.

(a) In this section, "indigent defense compensation expenditures" for a tax year means the difference between:

(1) the amount paid by a county in the period beginning on July 1 of the tax year preceding the tax year for which the tax is adopted and ending on June 30 of the tax year for which the tax is adopted to:

(A) provide appointed counsel for indigent individuals in criminal or civil proceedings in accordance with the schedule of fees adopted under Article 26.05, Code of Criminal Procedure; and

(B) fund the operations of a public defender's office under Article 26.044, Code of Criminal Procedure; and

(2) [~~, in the period beginning on July 1 of the tax year preceding the tax year for which the tax is adopted and ending on June 30 of the tax year for which the tax is adopted, less~~] the amount of any state grants received by the county during that period for the same purpose.

(b) If a county's indigent defense compensation expenditures exceed the amount of those expenditures for the preceding tax year, the no-new-revenue maintenance and operations rate for the county is increased by the lesser of the rates computed according to the following formulas:

(Current Tax Year's Indigent Defense Compensation Expenditures--Preceding Tax Year's Indigent Defense Compensation Expenditures) / (Current Total Value--New Property Value)

or

(Preceding Tax Year's Indigent Defense Compensation Expenditures x 0.05) / (Current Total Value--New Property Value)

(c) The county shall include a notice of the increase in the no-new-revenue maintenance and operations rate provided by this section, including a description and the amount of indigent defense compensation expenditures, in the information published under Section 26.04(e) and, as applicable, in the notice prescribed by Section 26.06 or 26.061.

Effective Date: 09/01/21

Legislative Note: HB 295 amends Section 26.0442(a), Tax Code, to redefine "indigent defense compensation expenditures" for purposes of Section 26.0442 to exclude funds allocated to public defender's offices.

Provides that Section 26.0442 (Tax Rate Adjustment for County Indigent Defense Compensation Expenditures), Tax Code, as amended by this Act, applies to the calculation of the no-new-revenue maintenance and operations rate for a county only for a tax year beginning on or after January 1, 2022.

TEXAS ADMINISTRATIVE CODE

TITLE 1. ADMINISTRATION

PART 8. JUDICIAL COUNCIL

CHAPTER 173. INDIGENT DEFENSE GRANTS

SUBCHAPTER A. GENERAL FUNDING PROGRAM PROVISIONS

Sec. 173.101. APPLICABILITY.

(a) The Texas Legislature authorized the Texas Indigent Defense Commission (Commission) to direct the Comptroller to distribute Fair Defense Account funds and other appropriated funds, including grants, to counties and other eligible entities enumerated in section 79.037, Government Code, to provide indigent defense services. It further authorized the Commission to monitor grants and enforce compliance with grant terms. Subchapters A - D of this chapter apply to all indigent defense grants and other funds awarded to counties by the Commission. Subchapter A of this chapter covers the general provisions for funding. Subchapter B of this chapter addresses funding types, eligibility, and general provisions of grant funding. Subchapter C of this chapter sets out the rules related to administering grants. Subchapter D of this chapter specifies rules regarding fiscal and program monitoring and audits.

(b) Only counties in Texas and other eligible entities enumerated in section 79.037, Government Code, are eligible to receive grants or other funds from the Commission.

(c) The Commission may distribute grants in accordance with its policies and based on official submissions and reports provided by grantees. These funds must be used to support or improve indigent defense systems in the county and are subject to all applicable conditions contained in this chapter.

Effective date: 10/17/17, 42 TexReg 5669

Sec. 173.102. DEFINITIONS.

The following words and terms, when used in this chapter, will have the following meanings, unless otherwise indicated:

(1) "Applicant" is a county or other eligible entity that has submitted a grant application, grant renewal documentation, or other request for funding from the Commission.

(2) "Application" is any formal request for funding submitted to the Commission.

(3) “Compliance Assistance Grants” means discretionary funding awarded to counties by the Commission for a specific program designed to promote and assist counties’ compliance with the requirements of state law relating to indigent defense.

(4) "Crime" means

(A) a misdemeanor punishable by confinement; or

(B) a felony.

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

(6) "Discretionary Grant" means discretionary funding awarded on a competitive basis to implement new programs or processes in Texas counties designed to improve the quality of indigent defense services.

(7) "Extraordinary Disbursement Grant" means discretionary funding to reimburse a county for actual extraordinary expenses for providing indigent defense services in a case or series of cases causing a financial hardship for the county.

(8) "Fair Defense Account" is an account in the general revenue fund that may be appropriated to the Commission for the purpose of implementing the Texas Fair Defense Act.

(9) "Fiscal Monitor" is an employee of the Commission who monitors counties’ fiscal processes to ensure that grant funds are spent appropriately in accordance with the Texas Fair Defense Act.

(10) "Formula Grant" means funding awarded to counties through a formula approved by the Commission.

(11) "Grant" is a funding award made by the Commission to a Texas county or other eligible entity.

(12) "Grantee" means a county or other eligible entity that is the recipient of a grant or other funds from the Commission.

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

(A) a misdemeanor punishable by confinement; or

(B) a felony.

(14) "Special condition" means a requirement placed on a grant recipient by the Commission that must be satisfied as condition of funding.

(15) "Sustainability Grant" means discretionary funding awarded to assist counties in maintaining regional public defender programs.

(16) "Technical Support Grants" means discretionary-based funding awarded for special projects to improve the quality of indigent defense services, raise the knowledge base about indigent defense, and establish processes that can be generalized to similar situations in other counties.

(17) "Texas Indigent Defense Commission" (Commission) is the governmental entity established and governed by §79.002 of the Texas Government Code.

(18) "UGMS" means the Uniform Grant Management Standards promulgated by the Office of the Comptroller.

Effective date: 10/17/17, 42 TexReg 5669

Sec. 173.103. PROCESS FOR SUBMITTING APPLICATIONS FOR GRANTS AND OTHER FUNDS.
(a) The Commission shall publish notice of availability of grants and related policies on its website.

(b) Grant applications. The Commission will provide notice to each county judge of the availability of indigent defense grants. Applicants applying pursuant to a Request for Applications (RFA) must submit their applications according to the requirements provided in the RFA. The RFA will provide the following:

(1) information regarding deadlines for the submission of applications;

(2) the maximum and minimum amounts of funding available for a grant, if applicable;

(3) the starting and ending dates for grants;

(4) information regarding how applicants may access applications;

(5) information regarding where and how applicants must submit applications;

(6) submission and program requirements; and

(7) the priorities for funding as established by the Commission.

Effective date: 10/17/17, 42 TexReg 5669

Sec. 173.104. GRANT RESOLUTIONS.
Each grant application from a county must include a resolution from the county commissioners' court that contains the following:

(1) authorization for the submission of the application to the Commission;

(2) provision giving the authorized official the power to apply for, accept, decline, modify, or cancel the grant; and

(3) written assurance that, in the event of loss or misuse of grant funds, the governing body will return all funds as required by the Commission.

Effective date: 10/17/17, 42 TexReg 5669

Sec. 173.105. SELECTION PROCESS.
(a) The Commission or its designees will review all applications and shall award from the Fair

Defense Account formula grants and discretionary grants.

(b) Upon reviewing an application, staff may require an applicant to submit, within a specified time, additional information to complete the review or to clarify or justify the application. Neither a request for additional information nor the issuance of a preliminary review report means that the Commission will fund an application.

(c) The Commission will inform applicants in writing or by electronic means of decisions to grant or deny applications for funding.

(d) If the Commission determines that an applicant has failed to submit the necessary information or has failed to comply with any Commission rule or other relevant statute, rule, or requirement, the Commission may hold a grantee's funds until the grantee has satisfied the requirements of a special condition imposed by the Commission. The Commission may reject the application and deny the grant for failure to satisfy the requirements.

Effective date: 10/17/17, 42 TexReg 5669

Sec. 173.106. GRANT FUNDING DECISIONS.
(a) The Commission or its designees will make decisions on applications for funding through the use of objective tools and comparative analysis. The Commission or its designees will first determine whether the grantee is eligible for funds in accordance with §173.101 of this chapter (relating to Applicability) and §173.201 of this chapter (relating to Eligibility).

(b) All funding decisions rest completely within the discretionary authority of the Commission or its designees. The receipt of an application for funding does not obligate the Commission to award funding, and the Commission may make grant awards that partially fund budget items in grant applications.

(c) Making a grant award based on an application does not obligate the Commission to give any subsequent application priority consideration.

(d) Commission decisions regarding funding are subject to the availability of funds.

Effective date: 10/17/17, 42 TexReg 5669

Sec. 173.107. GRANT ACCEPTANCE.
Each applicant must accept or reject a grant award within 30 days of the date upon which the Commission issues a Statement of Grant Award. The executive director of the Commission or his designee may alter this deadline upon request from the applicant. The authorized official designated under §173.301 of this chapter (relating to Grant Officials) must formally accept the grant in writing before the grantee may receive any grant funds.

Effective date: 10/17/17, 42 TexReg 5669

Sec. 173.108. ADOPTIONS BY REFERENCE.
(a) Grantees must comply with all applicable state statutes, rules, regulations, and guidelines.

(b) The Commission adopts by reference the rules, documents, and forms listed below that relate to the administration of grants.

(1) Uniform Grant Management Standards (UGMS) adopted pursuant to the Uniform Grant and Contract Management Act, Chapter 783, Texas Government Code.

(2) The Commission forms, including the statement of grant award, grant adjustment notice, grantee's progress report, financial expenditure report, and property inventory report.

Effective date: 10/17/17, 42 TexReg 5669

Sec. 173.109. USE OF THE INTERNET.
The Commission may require submission of applications for grants or other funds, progress reports, financial reports, and other information via the internet. Completion and submission of a progress report or financial report via the internet meets the relevant requirements contained within this chapter for submitting reports in writing.

Effective date: 10/17/17, 42 TexReg 5669

SUBCHAPTER B. ELIGIBILITY AND FUNDING REQUIREMENTS.

Sec. 173.201. ELIGIBILITY.
(a) The Commission may award grants to counties and other eligible entities enumerated in section 79.037, Government Code, that have complied with standards developed by the Commission and that have demonstrated commitment to compliance with the requirements of state law relating to indigent defense. Grants to non-county eligible entities will only be awarded for the purpose of supporting or improving indigent defense services in Texas counties.

(b) A county may not reduce the amount of funds expended for indigent defense services in the county because of funds provided by the Commission.

Effective date: 10/17/17, 42 TexReg 5669

Sec. 173.202. USE OF FUNDS.
Grants provided under this chapter may be used by counties for:

(1) Attorney fees for indigent defendants accused of crimes or juvenile offenses;

(2) Expenses for licensed investigators, experts, forensic specialists, or mental health experts working for the defense under derivative attorney-client privilege to assist in the criminal defense of indigent defendants;

(3) Other direct litigation costs related to the criminal defense of indigent defendants; and

(4) Other approved expenses allowed by the Request for Applications necessary for the operation of a funded program.

Effective date: 10/17/17, 42 TexReg 5669

Sec. 173.203. EXPENDITURE CATEGORIES.
(a) Allowable expenditure categories and any necessary definitions will be provided to the applicant as part of the application process.

(b) Expenditures may be allocated to the grant in accordance with the Uniform Grant Management Standards.

Effective date: 10/17/17, 42 TexReg 5669

Sec. 173. 204. PROGRAM INCOME.
(a) Rules governing the use of program income are included in the provisions of the Uniform Grant Management Standards adopted by reference in §173.108 of this chapter (relating to Adoptions by Reference).

(b) Grantees must use program income to supplement program costs or reduce program costs. Program income may only be used for allowable program costs.

Effective date: 10/17/17, 42 TexReg 5669

Sec. 173.205. EQUIPMENT.
(a) Decisions by the Commission or its designees regarding requests to purchase equipment using Commission funds will be made based on the availability of funds, whether the grantee has demonstrated that the requested equipment is necessary and essential to the successful operation of the funded program, and whether the equipment is reasonable in cost.

(b) For counties that receive a multi-year grant, the Commission will only fund equipment and other one-time start-up costs during the first year unless permission is granted in writing. Otherwise, equipment and other one-time costs will not factor in to the overall project costs after the first year of the grant.

(c) The Commission requires each grantee to maintain an inventory report of all equipment purchased with Commission funds. This report must comport with the final financial expenditure report. At least once each year during the award period, each grantee must complete a physical inventory of all property purchased with Commission funds and the grantee must reconcile the results with the purchased property records. For single-year awards, the inventory and reconciliation must be made at the end of the award period and submitted with the final report.

(d) Equipment purchased with Commission funds must be labeled and handled in accordance with the grantee's property management policies and procedures.

(e) Unless otherwise provided, equipment purchased is the property of the grantee after the end of the award period or termination of the operation of the funded program, whichever occurs last.

Effective date: 10/17/17, 42 TexReg 5669

SUBCHAPTER C. ADMINISTERING GRANTS

Sec. 173.301. GRANT OFFICIALS.
(a) Each grant must have the following designated to serve as grant officials:

(1) Financial officer. For grants to counties, this person must be the county auditor or county treasurer if the county does not have a county auditor. For grants to other eligible entities, the financial officer will be designated by the applicant.

(2) Authorized official. This person must be authorized to apply for, accept, decline, modify, or cancel the grant for the applicant. A county judge or a designee authorized by the governing body in its resolution may serve as the authorized official. For grants to non-county eligible entities, the authorized official will be designated by the applicant.

(b) The Commission may require a county to designate a program director. This person must be the officer or employee responsible for program operation and who will serve as the point-of-contact regarding the program's day-to-day operations.

(c) The program director and the authorized official may be the same person. The financial officer may not serve as the program director or the authorized official.

Effective date: 10/17/17, 42 TexReg 5669

Sec. 173.302. OBLIGATING FUNDS.
The grantee may not obligate grant funds before the beginning or after the end of the grant period.

Effective date: 10/17/17, 42 TexReg 5669

Sec. 173.303. RETENTION OF RECORDS.
(a) Grantees must maintain all financial records, supporting documents, statistical records, and all other records pertinent to the award for at least three years following the closure of the most recent audit report or submission of the final expenditure report. Records retention is required for the purposes of state examination and audit. Grantees may retain records in an electronic format. All records are subject to audit or monitoring during the entire retention period.

(b) Grantees must retain records for equipment, non-expendable personal property, and real property for a period of three years from the date of the item's disposition, replacement, or transfer.

(c) If any litigation, claim, or audit is started before the expiration of the three-year records retention period, the grantee must retain the records under review until the resolution of all litigation, claims, or audit findings.

Effective date: 10/17/17, 42 TexReg 5669

Sec. 173.304. EXPENDITURE REPORTS.
(a) Recipients of grants may be required to submit program expenditure reports to the Commission in addition to the annual expenditure report required for all counties under Texas Government Code §79.036(e).

(b) The Commission will provide the appropriate forms and instructions for expenditure reports and deadlines for their submission. The financial officer shall be responsible for submitting the expenditure reports.

(c) Grantees must ensure that actual expenditures are adequately documented. Documentation may include, but is not limited to, ledgers, purchase orders, travel records, time sheets or other payroll documentation, invoices, contracts, mileage records, telephone

bills and other documentation that verifies the expenditure amount and appropriateness to the funded program. Expenditure documentation must be provided to the Commission upon request.

Effective date: 10/17/17, 42 TexReg 5669

Sec. 173.305. PROVISION OF FUNDS.
(a) After a grant has been awarded and if there are no outstanding special conditions or other deficiencies, the Commission may disburse funds to the grantee. Funds will be disbursed to the grantee quarterly unless specific permission for an alternative disbursement schedule is granted in writing from the executive director.

(b) Disbursement of funds is always subject to the availability of funds.

(c) Discretionary grant funds will be paid only after the expenditure report has been submitted. Funds must be expended, not obligated, before being included in the funding expenditure report.

Effective date: 10/17/17, 42 TexReg 5669

Sec. 173.306. DISCRETIONARY GRANT ADJUSTMENTS.
(a) The authorized official must sign all requests for grant adjustments.

(b) Budget Adjustments. Grant adjustments consisting of reallocations of funds among or within budget categories in excess of $10,000 or ten percent of the original grant award, whichever is less, are considered budget adjustments, and are allowable only with prior approval of the executive director of the Commission. Grantees must notify the Commission in writing of reallocations of funds among or within budget categories below this threshold. If a reallocation of funds among or within budget categories results in the cumulative amount of budget changes within the same fiscal year reaching $10,000 or 10% of the original grant award, whichever is less, the adjustment is allowable only with the prior approval of the executive director of the Commission.

(c) Non-Budget Grant Adjustments. The following rules apply to other grant adjustments:

(1) Requests to revise the scope, target, or focus of the project, or alter project activities require advance written approval from the Commission.

(2) The grantee shall notify the Commission in writing of any change in the designated program director, financial officer, or authorized official within ten days following the change.

Effective date: 10/17/17, 42 TexReg 5669

Sec. 173.307. REMEDIES FOR NONCOMPLIANCE.
(a) If a grantee fails to comply with any term or condition of a grant or rule, the Commission may take one or more of the following actions:

(1) disallow all or part of the cost of the activity or action that is not in compliance and seek a return of the funds;

(2) impose administrative sanctions, other than fines, on the grantee;

(3) temporarily withhold all payments pending correction of the deficiency by the grantee;

(4) withhold future grant payments from the program or grantee; or

(5) terminate the grant in whole or in part.

(b) The Commission shall provide reasonable notice prior to imposing a remedy under subsection (a) of this section. If a grantee disputes the finding, the authorized official may request that one or more representatives of the grantee appear before the Commission. If the Commission receives such a request, it will consider the grantee's presentation at the Commission's next scheduled meeting. The administrative determination rendered by the Commission is final.

Effective date: 10/17/17, 42 TexReg 5669

Sec. 173.308. TERM OF GRANT OR OTHER FUNDS.
(a) The term of a grant shall be specified in the award statement or other funding document.

(b) If a grantee wishes to terminate a grant in whole or in part before the end of the award period, the grantee must notify the Commission in writing. The Commission or its designee will make arrangements with the grantee for the early termination of the award, which may include transfer or disposal of property and return of unused funds.

(c) The Commission may terminate any grant, in whole or in part, when:

(1) the grantee and the executive director of the Commission agree to do so;

(2) indigent defense funds are no longer available; or

(3) conditions exist that make it unlikely that grant or program objectives will be accomplished.

(d) A grantee may submit a written request for an extension of the funding period. The Commission must receive requests for funding extensions at least 30 days prior to the end of the funding period. The executive director of the Commission may approve extensions of the funding period for up to six months. Requests to extend the funding period beyond six months of the original term must be approved by the Commission.

Effective date: 10/17/17, 42 TexReg 5669

Sec. 173.309. VIOLATIONS OF LAWS.
If the grantee has a reasonable belief that a criminal violation may have occurred in connection with Fair Defense Account funds, including the misappropriation of funds, fraud, theft, embezzlement, forgery, or any other serious irregularities indicating noncompliance with the requirements of a grant or other funds, the grantee must immediately notify the Commission in writing of the suspected violation or irregularity. The grantee may also notify the local prosecutor's office of any possible criminal violations. Grantees whose programs or personnel become involved in any litigation arising from the grant or award of other funds, whether civil or criminal, must immediately notify the Commission and forward a copy of any demand notices, lawsuits, or indictments to the Commission.

Effective date: 10/17/17, 42 TexReg 5669

Sec. 173.310. PROGRESS REPORTS FOR DISCRETIONARY GRANTS AND OTHER FUNDS.
Each grantee must submit reports regarding performance and progress towards goals and objectives in accordance with the instructions provided by the Commission or its designee. To remain eligible for funding, the grantee must be able to show the scope of services provided and the impact and quality of those services.

Effective date: 10/17/17, 42 TexReg 5669

Sec. 173.311. CONTRACT MONITORING.
Grantees that use grant funds to contract for services must develop and include in the contract provisions to monitor each contract that is for more than $10,000 per year. These provisions must include specific actions to be taken if the grantee discovers that the contractor's performance does not meet the operational or performance terms of the contract. In the case of contracts for public defender offices and managed assigned counsel programs, these provisions must include a review of utilization and activity, reporting of financial data to evaluate the contractor's performance within the budget required by statute for such programs. Commission staff must review each contract at least once every two years and notify the grantee if it is not sufficient.

Effective date: 9/13/12, 37 TexReg 7083

SUBCHAPTER D. FISCAL MONITORING AND AUDITS

Sec. 173.401. FISCAL MONITORING.
(a) The Commission or its designees will monitor the activities of grantees as necessary to ensure that Commission grant funds are used for authorized purposes in compliance

with laws, regulations, and the provisions of grant agreements.

(b) The monitoring program may consist of formal audits, monitoring reviews, and technical assistance. The Commission or its designees may implement monitoring through on-site review at the grantee location or through a desk review based on grantee reports. In addition, the Commission or its designees may require grantees to submit relevant information to the Commission to support any monitoring review. The Commission may contract with an outside provider to conduct the monitoring.

(c) Grantees must make available to the Commission or its designees all requested records relevant to a monitoring review. The Commission or its designees may make unannounced monitoring visits at any time. Failure to provide adequate documentation upon request may result in disallowed costs or other remedies for noncompliance as detailed under §173.307 of this chapter (relating to Remedies for Noncompliance).

(d) After a monitoring review, the fiscal monitor shall issue a report to the authorized official and financial officer within 45 days of the on-site monitoring visit to a county, unless a documented exception is provided by the executive director, with an alternative deadline provided, not later than 90 days from the on-site monitoring visit. The report shall contain each finding of noncompliance.

(e) Within 60 days of the date the report is issued, the authorized official or financial officer shall respond in writing to each finding of noncompliance, and shall describe the proposed corrective action to be taken by the county. The County may request the executive director to grant an extension of up to 60 days.

(f) The corrective action plan shall include the:

(1) titles of the persons responsible for implementing the corrective action plan;

(2) corrective action to be taken; and

(3) anticipated completion date.

(g) If the grantee believes corrective action is not required for a noted deficiency, the response will include an explanation, specific reasons, and supporting documentation.

(h) The Commission or its designees will approve the corrective action plan and may require modifications prior to approval. The grantee's replies and the approved corrective action plan, if any, will become part of the final report.

(i) The grantee will correct deficiencies identified in the final report within the time frame specified in the corrective action plan.

(j) The fiscal monitor shall conduct an additional on-site visit or remote follow-up review to counties where the report included significant noncompliance findings. The follow-up visit or desk review shall occur within 12 months following receipt of a county's response to the report. The fiscal monitor shall review a county's implementation of corrective actions and shall report to the county and Commission any remaining issues not corrected. Within 30 days of the date the follow-up report is issued by the fiscal monitor, the authorized director or financial officer shall respond in writing to each finding of noncompliance, and shall describe the proposed corrective action to be taken by the county. The county may request the director to grant an extension of up to 30 days.

(k) If a county fails to respond to a monitoring report or follow-up report within the required time, then a certified letter will be sent to the authorized official, financial officer, county judge, local administrative district court judge, local administrative statutory county court judge, and chair of the juvenile board notifying them that all further payments will be withheld if no response to the report is received by the Commission within ten days of receipt of the letter. If funds are withheld under this section, then the funds will not be reinstated until the Commission or the Grants and Reporting Committee approves the release of the funds.

(l) If a county fails to correct any noncompliance findings, the Commission may impose a remedy under §173.307 of this title.

Effective date: 10/17/17, 42 TexReg 5669

Sec. 173.402. AUDITS NOT PERFORMED BY THE TEXAS INDIGENT DEFENSE COMMISSION.
(a) Grantees must submit to the Commission copies of the results of any single audit conducted in accordance with the State Single Audit Circular issued under the Uniform Grant Management Standards. Grantees must ensure that single audit results, including the grantee's response and corrective action plan, if applicable, are submitted to the Commission within 30 days after grantee receipt of the audit results or nine months after the end of the audit period, whichever is earlier.

(b) All other audits performed by auditors independent of the Commission must be maintained at the grantee's administrative offices pursuant to §173.303 of this chapter (relating to Retention of Records) and be made available upon request by the Commission or its representatives. Grantees must notify the Commission of any audit results that may adversely impact the Commission grant funds.

(c) Nothing in this section should be construed so as to require a special or program-specific audit of a grantee's Indigent Defense grant program.

Effective date: 10/17/17, 42 TexReg 5669

CHAPTER 174. INDIGENT DEFENSE POLICIES AND STANDARDS

SUBCHAPTER A. MINIMUM CONTINUING LEGAL EDUCATION REQUIREMENTS

Sec. 174.1. APPOINTMENT IN CRIMINAL CASES.
An Attorney who meets the requirements of this rule may be appointed to represent an indigent person arrested for or charged with a crime, if the attorney is otherwise eligible under the procedures developed under Article 26.04, Code of Criminal Procedure. Crime has the meaning assigned by §173.102(3). An attorney may be appointed under this rule only if an attorney:

(1) Completes a minimum of six hours of continuing legal education pertaining to criminal law during each 12-month reporting period. The judges of criminal courts of the county shall set the 12-month reporting period applicable to the jurisdiction. Continuing legal education may include activities accredited under Section 4, Article XII, State Bar Rules, self-study, teaching at an accredited continuing legal education activity, attendance at a law school class or legal research-based writing. The judges may require attorneys to complete more than the minimum number of hours of continuing legal education in criminal law in the procedures developed under Article 26.04, Code of Criminal Procedure; or

(2) Is currently certified in criminal law by the Texas Board of Legal Specialization.

Effective date: 4/27/03, 28 TexReg 3493; amended to be effective 1/10/18, 43 TexReg 229

Sec. 174.2. APPOINTMENT IN JUVENILE CASES.
An attorney who meets the requirements of this rule may be appointed to represent an indigent juvenile detained for or accused of engaging in delinquent conduct or conduct indicating a need for supervision, if the attorney is otherwise eligible under the plan developed under Section 51.101, Family Code. An attorney may be appointed under this rule only if an attorney:

(1) Completes a minimum of six hours of continuing legal education pertaining to juvenile law during each 12-month reporting period. The juvenile board shall set the 12-month reporting period applicable to the jurisdiction. Continuing legal education may include activities accredited under Section 4, Article XII, State Bar Rules, self-study, teaching at an accredited continuing legal education activity, attendance at a law school class or legal research-based writing. A juvenile

board may require an attorney to complete more than the minimum number of hours of continuing legal education in juvenile law in the plan developed under Section 51.101, Family Code; or

(2) Is currently certified in juvenile law by the Texas Board of Legal Specialization.

Effective date: 4/27/03, 28 TexReg 3493

Sec. 174.3. REPORTING PERIOD.
(a) Continuing legal education activity completed within a one-year period immediately preceding an attorney's initial reporting period may be used to meet the educational requirement for the initial year.

(b) Continuing legal education activity completed during any reporting period in excess of the minimum six-hour requirement for such period may be applied to the following period's requirement. The carryover provision applies to one year only.

Effective date: 4/27/03, 28 TexReg 3493

Sec. 174.4. EMERGENCY APPOINTMENT.
If no attorney who meets the continuing legal education or board certification requirements contained in this subchapter is available by the time an attorney must be appointed in the case, another attorney may be appointed. The person making an appointment under this section shall give priority to an attorney with experience in criminal or juvenile law, respectively.

Effective date: 4/27/03, 28 TexReg 3493

SUBCHAPTER B. CONTRACT DEFENDER PROGRAM REQUIREMENTS.

DIVISION 1. DEFINITIONS.

Sec. 174.10. SUBCHAPTER DEFINITIONS.
The following words and terms when used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise.

(1) Appointing Authority. The appointing authority is the:

(A) Judge or judges who have authority to establish an indigent defense plan and approve attorneys to represent indigent defendants in criminal cases under Article 26.04, Code of Criminal Procedure; and/or

(B) Juvenile board that has authority to establish an indigent defense plan and approve attorneys to represent indigent respondents in juvenile cases under §51.102, Family Code.

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

(3) Contracting Authority. The contracting authority is the county or counties that have the authority to conclude a contract and to obligate funds for the provision of indigent defense services.

(4) Contractor. The contractor is an attorney, law firm, professional association, lawyer's association, law school, bar association, non-profit organization or other entity that can be bound by contract.

(5) Itemized Fee Voucher. An itemized fee voucher is any instrument, such as an invoice, that details services provided by a contractor providing indigent defense services. The itemized fee voucher may be in paper or electronic form. It shall include at a minimum all the information necessary for the county auditor or other designated official to complete the expenditure report required to be submitted to the Texas Indigent Defense Commission by §79.036, Government Code.

Effective date: 1/1/07, 31 TexReg 10094; amended to be effective 1/10/18, 43 TexReg 229

DIVISION 2. APPLICATION OF STANDARDS AND CONTRACTING PROCEDURES.

Sec. 174.11. APPLICATION OF SUBCHAPTER.
This subchapter applies to all contract defender programs in which legal representation is provided for a period of more than one week. Contract defender programs for terms of one week or less are governed by the alternative appointment programs provisions in Article 26.04(g)-(h) and subject to § 174.28(c)(5) related to the distribution of appointments in assigned counsel systems. This Subchapter does not apply to public defender or managed assigned counsel programs established and governed by Chapter 26, Code of Criminal Procedure.

Effective date: 1/1/07, 31 TexReg 10094; amended to be effective 1/10/18, 43 TexReg 229

Sec. 174.12. APPLICATION PROCESS.
The appointing authority shall solicit and select contractors in accordance with the procedure governing alternative appointment programs contained in Article 26.04, Code of Criminal Procedure.

(1) Notification. The notification of the opportunity to apply (NOA) to be a contractor shall be distributed in a manner that reasonably covers all practicing members of the bar within the county or other region designated by the appointing authority. The notification shall inform attorneys of all requirements for submitting applications.

(2) Opportunity to Respond. All potential contractors shall have the same opportunity to respond to the NOA and be considered for the award of a contract. All potential contractors shall have at least 30 days from the issuance of the NOA to respond. The appointing authority may provide for less than 30 days to respond if a contract needs to be awarded on an emergency basis. A contract awarded on an emergency basis may not exceed 90 days in duration.

(3) Application. All applications must be submitted in writing and shall be maintained by the appointing authority or contracting authority in accordance with the Texas State Library and Archives Commission Retention Schedule for Local Records-Local Schedule GR.

Effective date: 1/1/07, 31 TexReg 10094; amended to be effective 1/10/18, 43 TexReg 229

Sec. 174.13. APPLICATION REVIEW PROCESS.
Following the review of all applications the appointing authority shall by a majority vote select contractor(s), specify the types of cases each contractor is qualified to handle, and authorize the contracting authority to enter into a contract. The attorneys associated with the selected contractor(s) must meet the attorney qualification requirements contained in the indigent defense procedures adopted pursuant to Article 26.04, Code of Criminal Procedure. If the contract does not exclude capital cases in which the death penalty is sought, the attorneys associated with the selected contractor(s) must also meet the attorney qualifications set by the regional selection committee and be approved by the regional selection committee to represent clients in capital cases. The appointing authority shall consider at least the following factors when evaluating applications:

(1) Experience and qualifications of the applicant;

(2) Applicant's past performance in representing defendants in criminal cases;

(3) Applicant's disciplinary history with the state bar;

(4) Applicant's ability to comply with the terms of the contract; and

(5) Cost of the services under the contract.

Effective date: 1/1/07, 31 TexReg 10094

Sec. 174.14. AWARDING THE CONTRACT.
In accordance with Article 26.04(h), Code of Criminal Procedure, the contracting authority may approve the recommended contractor(s) and enter into a contract for services. The

contracting authority shall enter into a contract only if it complies with these standards and all applicable law governing professional services contracts entered into by counties. A contract shall not be awarded solely on the basis of cost.

Effective date: 1/1/07, 31 TexReg 10094

DIVISION 3. REQUIRED ELEMENTS OF A CONTRACT FOR INDIGENT DEFENSE SERVICES (EACH COMPONENT BELOW SHALL BE INCLUDED IN A CONTRACT FOR INDIGENT DEFENSE SERVICES AND SHALL SERVE AS THE BASIS FOR THE NOA).

Sec. 174.15. PARTIES.
Identify the appointing authority, contracting authority, and contractor.

Effective date: 1/1/07, 31 TexReg 10094

Sec. 174.16. TERM OF CONTRACT.
The contract shall specify the term of the contract, including any provision for renewal, and a provision for terminating the contract by either party.

Effective date: 1/1/07, 31 TexReg 10094; amended to be effective 1/10/18, 43 TexReg 229

Sec. 174.17. SCOPE OF CONTRACT.
The contract shall specify the categories of cases in which the contractor is to provide services.

Effective date: 1/1/07, 31 TexReg 10094

Sec. 174.18. MINIMUM ATTORNEY QUALIFICATIONS.
The contract shall specify minimum qualifications for attorneys covered by the contract and require such attorneys to maintain the qualifications during the term of the contract. The qualifications shall equal or exceed the qualifications provided in the indigent defense procedures adopted pursuant to Article 26.04, Code of Criminal Procedure. If the contract does not exclude capital cases in which the death penalty is sought, the qualifications shall equal or exceed the minimum attorney qualifications set by the regional selection committee and the attorneys covered by the contract shall be required to be on the list of attorneys approved by the regional selection committee to represent clients in capital cases. If a contract covers services provided by more than one attorney, qualifications may be graduated according to the seriousness of offense and each attorney shall be required to meet and maintain only those qualifications established for the offense level(s) for which the attorney is approved to provide defense services.

Effective date: 1/1/07, 31 TexReg 10094

Sec. 174.19. DURATION OF REPRESENTATION.
The contract shall specify that the contractor has the responsibility to complete all cases once representation is commenced during the term of the contract, unless an attorney covered by the contract is relieved or replaced in accordance with Article 26.04(j)(2), Code of Criminal Procedure.

Effective date: 1/1/07, 31 TexReg 10094

Sec. 174.20. SUBSTITUTION OF ATTORNEYS.
The contract shall identify the attorney(s) who will perform legal representation in each category of case covered by the contract and prohibit the substitution of other attorneys without prior approval by a majority of the appointing authority. Nothing in the contract shall prohibit an attorney covered by the contract from being relieved or replaced in accordance with Article 26.04(j)(2) of the Code of Criminal Procedure.

Effective date: 1/1/07, 31 TexReg 10094

Sec. 174.21. CASELOAD LIMITATIONS.
The contract shall set the maximum number of cases or workload each attorney may be required to handle pursuant to the contract, which may include a maximum caseload not exceeding the annual full-time equivalent caseload established by the Guidelines for Indigent Defense Caseloads and the Juvenile Addendum and Appellate Addendum: Guidelines for Indigent Defense Caseloads, published by the Texas Indigent Defense Commission pursuant to House Bill 1318, 83rd Texas Legislature.

Effective date: 1/1/07, 31 TexReg 10094; amended to be effective 1/10/18, 43 TexReg 229

Sec. 174.22. STANDARDS OF REPRESENTATION.
The contract shall require that the contractor provide zealous legal representation to all clients in a professional, skilled manner consistent with all applicable laws and the Texas Disciplinary Rules of Professional Conduct.

Effective date: 1/1/07, 31 TexReg 10094

Sec. 174.23. CONFLICTS OF INTEREST.
The contract shall state a policy to assure that the contractor and its attorneys do not provide representation to defendants when doing so would involve a conflict of interest.

Effective date: 1/1/07, 31 TexReg 10094

Sec. 174.24. INVESTIGATORS AND EXPERTS.
The contract shall specify how investigation services and experts that are necessary to provide competent representation will be made available in a manner consistent with Article 26.05(d), Code of Criminal Procedure.

Effective date: 1/1/07, 31 TexReg 10094

Sec. 174.25. COMPENSATION AND PAYMENT PROCESSES.
The contract shall set the amount of compensation to be paid to the contractor and the designated method and timing of payment. The contract shall state that the contractor shall be required to submit an itemized fee voucher. The voucher must be approved by a member of the appointing authority prior to being forwarded to the county financial officer for approval and payment. The contract shall also specify how a contractor is to be compensated for cases assigned but not disposed within the term of the contract as provided in §174.19 of this subchapter.

Effective date: 1/1/07, 31 TexReg 10094

SUBCHAPTER C. POLICY MONITORING REQUIREMENTS

DIVISION 1. DEFINITIONS.

Sec. 174.26. SUBCHAPTER DEFINITIONS.
The following words and terms when used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise.

(1) Executive Director – The executive director of the Commission.

(2) Authorized Official – The county judge or other designee authorized to apply for, accept, decline, modify, or cancel a grant designated under §173.301 of this title. (relating to Grant Officials).

(3) Period of review – The ~~12 months~~ fiscal year preceding the date of the monitoring visit., other agreed time period, or reasonable time period as determined by the Commission.

(4) Policies and Standards Committee – A committee of the Commission charged with developing policies and standards related to improving indigent defense services.

(5) Policy Monitor – The employee of the Commission who monitors the effectiveness of a county's indigent defense policies, standards, and procedures.

(6) Risk Assessment – A tool to rank each county's potential risk of not being in compliance with indigent defense laws.

(7) Commission – Commission means the Texas Indigent Defense Commission.

(8) Full review – An on-site policy monitoring review covering all the core requirements in §174.28(c) of this chapter (relating to relating to On-Site Monitoring Process).

(9) Limited scope review – An on-site policy monitoring review covering fewer than all of the core requirements in §174.28(c) of this chapter.

(10) Drop-in visit – An informal, on-site visit to assess indigent defense processes of a county.

Effective date: 9/23/15, 40 TexReg 6349; amended to be effective 4/13/20, 45 TexReg 2409

COMMENTARY: Rule 174.26(3) was amended in 2020 to change the time period for review from the prior 12 months to the prior fiscal year, other agreed time period, or other reasonable time period as determined by TIDC.

Section 174.26(8)-(10) were added to define full reviews, limited scope reviews, and drop-in visits. The various types of policy monitoring visits are meant to allow TIDC to efficiently review practices in counties of varying sizes and situations.

DIVISION 2. POLICY MONITORING PROCESS AND BENCHMARKS.

Sec. 174.27. RISK ASSESSMENT.

(a) A risk assessment of each county shall be conducted by the policy ~~monitor~~ monitoring team each fiscal year as the primary means of determining which counties will be selected for on-site policy monitoring. On-site monitoring visits to counties shall then be apportioned by administrative judicial region, county size, risk assessment scores, past visits, and other documented factors. The risk assessment shall use a variety of factors related to the provision of indigent defense services, including but not limited to the following:

(1) ~~Whether a county reported investigation~~ Investigations and expert witness expenses;

(2) ~~Whether a county reported reimbursements~~ Reimbursements for attorney fees;

(3) ~~Amount of per~~ Per capita indigent defense expenses;

(4) Felony, misdemeanor, and juvenile attorney appointment rates;

(5) ~~Population of a county~~ County Populations;

(6) ~~Whether complaints~~ Complaints about a county ~~have been~~ received by the Commission;

(7) ~~Whether a county received a multi-year discretionary~~ Receipt of a TIDC improvement grant;

(8) ~~Whether the justices of the peace or municipal judges reported requests~~ Requests for counsel ~~in their Texas Judicial Council Monthly Court Activity Reports;~~ during magistrate warnings under Article 15.17, Code of Criminal Procedure; and

~~(9) the ratio of misdemeanor requests for counsel from Article 15.17 hearings as reported in Texas Judicial Council Monthly Activity Reports to the number of misdemeanor cases paid reported by the county; and~~

~~(10) Whether a county reported appeals~~ (9) Appellate cases.

(b) Counties may receive monitoring visits as a result of factors outside of the risk assessment. ~~An elected state or local official may~~ , including findings from a previous visit, a complaint, media reports, or a request ~~a monitoring visit~~ from an elected state or local official. If Commission staff make a drop-in visit, fiscal monitoring review, or grant program review~~,~~ and ~~determines~~ determine that violations of the Fair Defense Act or Commission rules may be present in a county, the monitor may conduct a ~~limited scope review~~ monitoring visit of the county's procedures.

Effective date: 9/23/15, 40 TexReg 6349; amended to be effective 4/13/20, 45 TexReg 2409

COMMENTARY: Rule 174.27 was amended in 2020 to reflect minor grammar changes to the text.

Sec. 174.28. ON-SITE MONITORING PROCESS.

(a) Purpose. The process promotes local compliance with the requirements of the Fair Defense Act and Commission rules and provides technical assistance to improve processes where needed.

(b) Monitoring Process. The policy monitor examines the local indigent defense plans and local procedures and processes to determine if the jurisdiction meets the statutory requirements and rules adopted by the Commission. The policy monitor also attempts to randomly select samples of actual cases from the period of review by using a 15% confidence interval for a population at a 95% confidence level.

(c) Core Requirements. On-site policy monitoring focuses on the six core requirements of the Fair Defense Act and related rules. Policy monitoring may also include a review of statutorily required reports to the Office of Court Administration and Commission. This rule establishes the process for evaluating policy compliance with a requirement and sets benchmarks for determining whether a county is in substantial policy compliance with the requirement. For each of these elements, the policy monitor shall review the local indigent defense plans and determine if the plans are in compliance with each element.

(1) Prompt and Accurate Magistration.

(A) The policy monitor shall check for documentation indicating that the magistrate or county has:

(i) Informed and explained to an arrestee the rights listed in Article 15.17(a), Code of Criminal Procedure, including the right to counsel;

(ii) Maintained a process to magistrate arrestees within 48 hours of arrest;

(iii) Maintained a process for magistrates not authorized to appoint counsel to transmit requests for counsel to the appointing authority within 24 hours of the request; and

(iv) Maintained magistrate processing records required by Article 15.17(a), (e), and (f), Code of Criminal Procedure, and records documenting the time of arrest, time of magistration, whether the person requested counsel, and time for transferring requests for counsel to the appointing authority.

(B) A county is presumed to be in substantial compliance with the prompt magistration requirement if magistration in at least 98% of the policy monitor's sample is conducted within 48 hours of arrest.

(2) Indigence Determination. The policy monitor checks to see if procedures are in place that comply with the indigent defense plan and the Fair Defense Act.

(3) Minimum Attorney Qualifications. The policy monitor shall check that attorney appointment lists are maintained according to the requirements set in the indigent defense plans. Only attorneys approved for an appointment list are eligible to receive appointments.

(4) Prompt Appointment of Counsel.

(A) The policy monitor shall check for documentation of timely appointment of counsel in criminal and juvenile cases.

(i) Criminal Cases. The policy monitor shall determine if counsel was appointed or denied for arrestees within one working day of receipt of the request for counsel in counties with a population of 250,000 or more, or three working days in other counties. If the policy monitor cannot determine the date the appointing authority received a

request for counsel, then the timeliness of appointment will be based upon the date the request for counsel was made plus 24 hours for the transmittal of the request to the appointing authority plus the time allowed to make the appointment of counsel.

(ii) Juvenile Cases. The policy monitor shall determine if counsel was appointed prior to the initial detention hearing for eligible in-custody juveniles. If counsel was not appointed, the policy monitor shall determine if the court made a finding that appointment of counsel was not feasible due to exigent circumstances. If exigent circumstances were found by the court and the court made a determination to detain the child, then the policy monitor shall determine if counsel was appointed for eligible juveniles immediately upon making this determination. For out-of-custody juveniles, the policy monitor shall determine if counsel was appointed within five working days of service of the petition on the juvenile.

(B) A county is presumed to be in substantial compliance with the prompt appointment of counsel requirement if, in each level of proceedings (felony, misdemeanor, and juvenile cases), at least 90% of appointments of counsel and denials of indigence determinations in the policy monitor's sample are timely.

(5) Attorney Selection Process. The policy monitor shall check for documentation indicating:

(A) In the case of a contract defender program, that all requirements of §§174.10 – 174.25 of this title are met;

(B) In the case of a managed assigned counsel program, that counsel is appointed according to the entity's plan of operation;

(C) That attorney selection process actually used matches what is stated in the indigent defense plans; and

(D) For assigned counsel and managed assigned counsel systems, the number of appointments in the policy monitor's sample per attorney at each level (felony, misdemeanor, juvenile, and appeals) during the period of review and the percentage share of appointments represented by the top 10% of attorneys accepting appointments. A county is presumed to be in substantial compliance with the fair, neutral, and non-discriminatory attorney appointment system requirement if, in each level of proceedings (felony, misdemeanor, and juvenile cases), the percentage of appointments received by the top 10% of recipient attorneys does not exceed three times their respective share. The top 10% of recipient attorneys is the whole attorney portion of the appointment list that is closest to 10% of the total list. For this analysis, the monitor will include ~~attorneys who may have been temporarily unavailable for part of the year but will exclude~~ only attorneys who were ~~not~~ on an appointment list for ~~any part of~~ the entire time period under review.

(6) ~~Payment Process.~~ Data Reporting. The policy monitor shall check for documentation indicating that the county has established a process for collecting and reporting itemized indigent defense expense and case information.

(d) Report.

(1) Report Issuance. ~~The~~ For full and limited-scope reviews, the policy monitor shall issue a report to the authorized official within 60 days of the on-site monitoring visit to a county, unless a documented exception is provided by the director, with an alternative deadline

provided, not later than 120 days from the on-site monitoring visit. The report shall contain recommendations to address ~~areas~~ findings of noncompliance. For drop-in visits, the policy monitor may issue a letter with recommendations.

(2) County Response. Within 60 days of the date ~~the~~ a report is issued by the policy monitor, the authorized official shall respond in writing to each finding of noncompliance, and shall describe the proposed corrective action to be taken by the county. The county may request the director to grant an extension of up to 60 days.

(3) Follow-up Reviews. The policy monitor shall conduct follow-up reviews of counties where ~~the~~ a report included noncompliance findings. The follow-up review shall occur within a reasonable time but not more than two years following receipt of a county's response to ~~the~~ a report. The policy monitor shall review a county's implementation of corrective actions and shall report to the county and to the Commission any remaining issues not corrected. Within 30 days of the date the follow-up report is issued by the policy monitor, the authorized official shall respond in writing to each recommendation, and shall describe the proposed corrective action to be taken by the county. The county may request the director to grant an extension of up to 30 days.

(4) Failure to Respond to Report. If a county fails to respond to a monitoring report or follow-up report within the required time, then a certified letter will be sent to the authorized official, financial officer, county judge, local administrative district court judge, local administrative statutory county court judge, and chair of the juvenile board notifying them that all further payments will be withheld if no response to ~~the~~ a report is received by the Commission within 10 days of receipt of the letter. If funds are withheld under this section, then the funds will not be reinstated until the Commission or the Policies and Standards Committee approves the release of the funds.

(5) Noncompliance. If a county fails to correct any noncompliance findings, the Commission may impose a remedy under §173.307 of this title~~.~~ (relating to Remedies for Noncompliance).

Effective date: 9/23/15, 40 TexReg 6349 amended to be effective 1/10/18, 43 TexReg 230 amended to be effective 4/13/20, 45 TexReg 2409

COMMENTARY:

Rule 174.28(c)(4)(B) was amended in 2020 to clarify how it is determined if a jurisdiction is meeting the prompt appointment of counsel requirement. As amended, the requirement is met when at least 90% of appointments of counsel or denials of indigence determinations are timely, rather than the determination being based solely on when indigence determinations are made.

Rule 1728(c)(6) was amended in 2020 to change the section heading from "Payment Process" to "Data Reporting" to more accurately describe the processes under review.

Rule 1728(d)(1)-(5) was amended in 2020 to clarify that the Commission will, for full and limited scope reviews, issue a report and require a response to noncompliance findings from local officials and, for drop-in visits, may write a letter with recommendations and without requiring a response.

SUBCHAPTER D. INDIGENT DEFENSE PROCEDURE REQUIREMENTS

Sec. 174.51. INDIGENT DEFENSE PLAN REQUIREMENTS.

The countywide procedures adopted under Art. 26.04(a), Code of Criminal Procedure, must provide a method to allow defendants to obtain the necessary forms for requesting appointment of counsel and to submit completed forms for requesting appointment of counsel at any time after the initiation of adversary judicial proceedings.

Effective date: 4/13/15, 40 TexReg 2087

APPENDIX – CHANGES AFTER 2021 LEGISLATIVE SESSION

CHANGES LISTED BY STATUTE

CODE OF CRIMINAL PROCEDURE

STATUTE	TOPIC	CHANGES
Art. 1.051	Right to Representation by Counsel	None
Art. 1.053	Present Ability to Pay	None
Art. 11.07	Procedure After Conviction Without Death Penalty	Amended by HB 3774
Art. 11.071	Procedure in Death Penalty Case	None
Art. 11.074	Court-Appointed Representation Required in Certain Cases	None
Art. 14.06	Must Take Offender Before Magistrate	None
Art. 15.17	Duties of Arresting Officer and Magistrate	Amended by SB 6 (87(2))
Art. 15.18	Arrest for Out-of-County Offense	None
Art. 15.19	Notice of Arrest	None
Art. 15.20	Duty of Sheriff Receiving Notice	None
Art. 15.21	Release on Personal Bond if Not Timely Demanded	None
Art. 16.22	Early Identification of Defendant Suspected of Having Mental Illness or Intellectual Disability	Amended by SB 49
Art. 16.23	Diversion of Persons Suffering Mental Health Crisis or Substance Abuse Issue	None
Art. 17.032	Release on Personal Bond of Certain Defendants with Mental Illness or Intellectual Disability	Amended by HB 375
Art. 17.033	Release on Bond of Certain Persons Arrested Without a Warrant	None
Art. 17.09	Duration; Original and Subsequent Proceedings; New Bail	None
Art. 17.151	Release Because of Delay	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's Office	None
Art. 26.045	Public Defender Oversight Board	None

Art 26.047	Managed Assigned Counsel Program	None
Art. 26.05	Compensation of Counsel Appointed to Defend	None
Art. 26.051	Indigent Inmate Defense	None
Art. 26.052	Appointment of Counsel in Death Penalty Case; Reimbursement of Investigative Expenses	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. 32.01	Defendant in Custody and No Indictment Presented	None
Art. 38.30	Interpreter	None
Art. 38.31	Interpreters for Deaf Persons	None
Art. 42.15	Fines and Costs	Amended by SB 1373
Art. 42A.301	Basic Discretionary Conditions	Amended by HB 385
Art. 42A.651	Payment as Condition of Community Supervision	None
Art. 42A.652	Monthly Fee	None
Art. 42A.655	Ability to Pay	Amended by HB 385
Art. 42A.751	Violation of Conditions of Community Supervision: Detention and Hearing	Amended by HB 1540
Art. 43.035	Reconsideration of Fine or Costs	None
Art. 43.091	Waiver of Payment of Fines and Costs for Certain Defendants and for Children	None
Art. 64.01	Motion	None
Art. 64.011	Guardians and Other Representatives	None
Art. 64.02	Notice to State; Responses	None
Art. 64.03	Requirements; Testing	None
Art. 64.035	Unidentified DNA Profiles	None
Art. 64.04	Findings	None
Art. 64.05	Appeals	None
Art. 103.001	Costs Payable	None
Art. 103.002	Certain Costs Barred	None

FAMILY CODE

STATUTE	TOPIC	CHANGES
Sec. 51.10	Right to Assistance of Attorney; Compensation	None

Sec. 51.101	Appointment of Attorney and Continuation of Representation	None
Sec. 51.102	Appointment of Counsel Plan	None
Sec. 54.01	Detention Hearing	Amended by SB 2049

GOVERNMENT CODE

STATUTE	TOPIC	CHANGES
Sec. 41.258	Assistant Prosecutor Supplement Fund and Fair Defense Account	None
Sec. 71.001	Definitions	None
Sec. 71.0355	Plan and Report on Court-Ordered Representation	None
Sec. 78.001	Definitions	None
Sec. 78.002	Establishment of Committee; Duties	Amended by SB 280
Sec. 78.003	Appointment and Composition of Committee	Amended by SB 280
Sec. 78.004	Recommendation and Appointment of Director of Office of Capital and Forensic Writs	None
Sec. 78.051	Definitions	None
Sec. 78.052	Establishment; Funding	None
Sec. 78.053	Director; Staff	None
Sec. 78.054	Powers and Duties	None
Sec. 78.055	Compensation of Other Appointed Attorneys	None
Sec. 78.056	Appointment List	None
Sec. 79.001	Definitions	None
Sec. 79.002	Establishment of Commission	None
Sec. 79.011	Establishment of Board; Composition	None
Sec. 79.012	Executive Director	None
Sec. 79.013	Ex Officio Members	None
Sec. 79.014	Appointments	None
Sec. 79.015	Presiding Officer	None
Sec. 79.016	Disclosure Required	None
Sec. 79.017	Vacancies	None
Sec. 79.018	Meetings; Quorum; Voting	None
Sec. 79.019	Compensation	None

Sec. 79.020	Immunity from Liability	None
Sec. 79.021	Rules	None
Sec. 79.031	Fair Defense Account	None
Sec. 79.032	Acceptance of Gifts, Grants, and Other Funds; State Grants Team	None
Sec. 79.033	Administrative Attachment; Support; Budget	None
Sec. 79.034	Policies and Standards	None
Sec. 79.035	County Reporting Plan; Commission Reports	None
Sec. 79.036	Indigent Defense Information	None
Sec. 79.037	Technical Support; Grants	Amended by HB 295
Sec. 79.039	Exoneration Reports	None
Sec. 79.040	Indigent Defense Information System	None
Sec. 79.042	Succession Plan for Certain Public Defenders' Offices	None
Sec. 81.054	Membership Fees and Additional Fees	None
Sec. 103.027	Miscellaneous Fees and Costs	Repealed by SB 41

LOCAL GOVERNMENT CODE

STATUTE	TOPIC	CHANGES
Sec. 133.102	Consolidated Fees on Conviction	None
Sec. 133.122	Allocation of Fees to Jury Service Fund	None

TAX CODE

STATUTE	TOPIC	CHANGES
Sec. 26.0442	Tax Rate Adjustment for County Indigent Defense Compensation Expenditures	Amended by HB 295

TEXAS ADMINISTRATIVE CODE

STATUTE	TOPIC	CHANGES
Sec. 173.101	Applicability	None
Sec. 173.102	Definitions	None
Sec. 173.103	Process for Submitting Applications for Grants and Other Funds	None
Sec. 173.104	Grant Resolutions	None
Sec. 173.105	Selection Process	None
Sec. 173.106	Grant Funding Decisions	None

Sec. 173.107	Grant Acceptance	None
Sec. 173.108	Adoptions by Reference	None
Sec. 173.109	Use of the Internet	None
Sec. 173.201	Eligibility	None
Sec. 173.202	Use of Funds	None
Sec. 173.203	Expenditure Categories	None
Sec. 173.204	Program Income	None
Sec. 173.205	Equipment	None
Sec. 173.301	Grant Officials	None
Sec. 173.302	Obligating Funds	None
Sec. 173.303	Retention of Records	None
Sec. 173.304	Expenditure Reports	None
Sec. 173.305	Provision of Funds	None
Sec. 173.306	Discretionary Grant Adjustments	None
Sec. 173.307	Remedies for Noncompliance	None
Sec. 173.308	Term of Grant or Other Funds	None
Sec. 173.309	Violations of Laws	None
Sec. 173.310	Progress Reports for Discretionary Grants and Other Funds	None
Sec. 173.311	Contract Monitoring	None
Sec. 173.401	Fiscal Monitoring	None
Sec. 173.402	Audits Not Performed by the Task Force on Indigent Defense	None
Sec. 174.1	Appointment in Criminal Cases	None
Sec. 174.2	Appointment in Juvenile Cases	None
Sec. 174.3	Reporting Period	None
Sec. 174.4	Emergency Appointment	None
Sec. 174.10	Subchapter Definitions	None
Sec. 174.11	Application of Subchapter	None
Sec. 174.12	Application Process	None
Sec. 174.13	Application Review Process	None
Sec. 174.14	Awarding the Contract	None
Sec. 174.15	Parties	None

Sec. 174.16	Term of Contract	None
Sec. 174.17	Scope of Contract	None
Sec. 174.18	Minimum Attorney Qualifications	None
Sec. 174.19	Duration of Representation	None
Sec. 174.20	Substitution of Attorneys	None
Sec. 174.21	Caseload Limitations	None
Sec. 174.22	Standards of Representation	None
Sec. 174.23	Conflicts of Interest	None
Sec. 174.24	Investigators and Experts	None
Sec. 174.25	Compensation and Payment Processes	None
Sec. 174.26	Subchapter Definitions	Amended in 2020
Sec. 174.27	Risk Assessment	Amended in 2020
Sec. 174.28	On-Site Monitoring Process	Amended in 2020
Sec. 174.51	Indigent Defense Plan Requirements	None

TEXAS INDIGENT DEFENSE COMMISSION

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