

- SUBJECT:** Prohibiting deferred adjudication community supervision for murder
- COMMITTEE:** Criminal Jurisprudence — committee substitute recommended
- VOTE:** 8 ayes — Gallego, Hartnett, Burkett, Carter, Christian, Y. Davis, Rodriguez, Zedler
- 0 nays
- 1 absent — Aliseda
- WITNESSES:** For — Andy Kahan, City of Houston; Gary Ellison; Tonya Hardin; (*Registered, but did not testify*: Nikki Ellison; Carolyn Hardin)
- Against — None
- BACKGROUND:** Under Code of Criminal Procedure, art. 42.12, sec. 5, a judge may, after receiving a plea of guilty or no contest, defer further proceedings without entering an adjudication of guilt and place the defendant on community supervision (probation). If the defendant successfully completes probation, the judge must dismiss the charges and discharge the defendant. This process is known as deferred adjudication. Art. 42.12 sec. 5(d) prohibits the use of deferred adjudication for certain offenses, including certain intoxication offenses, certain drug-free zone offenses, and certain sex offenses.
- DIGEST:** CSHB 371 would add murder to the list of offenses for which deferred adjudication could not be used. The bill would create an exception to this prohibition by allowing deferred adjudication to be used if the judge determined that the defendant did not cause the death, did not intend to kill the victim or another person, and did not anticipate that human life would be taken.
- The bill would take effect September 1, 2011, and would apply only to offenses committed on or after that date.
- SUPPORTERS SAY:** CSHB 371 is necessary to close a loophole in current law that allows persons charged with murder to receive deferred adjudication, a type of

probation that allows dismissal of the charges if the defendant successfully meets certain conditions. Current law already prohibits judges and juries from giving probation to a person convicted of murder. It makes no sense to allow defendants in these cases to receive probation through another means.

The bill also would rectify an inequity in current law that prohibits the use of deferred adjudication for persons charged with lesser crimes than murder, including some drug and alcohol offenses. For instance, a person cannot get deferred adjudication for boating while intoxicated. Murder obviously is a serious crime, and the consequences should match the seriousness of the crime.

Deferred adjudication sometimes may be granted in murder cases in which the court did not feel the victim's life was valuable, such as cases in which one drug dealer kills another. Sometimes deferred adjudication is used in inappropriate cases because the evidence is not strong or because of plea agreements. A loophole in the law should not be used to clear out weak murder cases or to punish some types of murders lightly. If the case cannot be made on the charge of murder, then the lesser charge should be brought. Texas law governing murder cases should ensure that all lives are valued and should treat victims equitably.

Discretion in bringing charges, sentencing, and other tools exist to ensure that murder cases involving battered spouses, mercy killings, or other mitigating circumstances are handled appropriately. The bill would build some discretion into the law by allowing deferred adjudications in cases in which the defendant did not cause the death, did not intend the death, and did not anticipate the death. For example, deferred adjudication still would be possible for a conspirator defendant who drove the getaway car but was not present for and did not anticipate or intend the murder. Judges would use their discretion in determining whether the elements of the exception had been met and could reject pleas if the facts were in dispute.

**OPPONENTS
SAY:**

Prohibiting the use of deferred adjudication for murder cases would restrict courts' ability to treat cases appropriately. Having the option of deferred adjudication in murder cases is not a loophole in current law, but a safety valve for those cases in which it may be appropriate or useful for a plea agreement. Art. 42.12 of the Code of Criminal Procedure specifically states that it is the purpose of the community supervision statute to give discretion to the courts and to remove from existing statutes the limitations

that have acted as barriers in the past to effective systems of community supervision in the public interest. There are good reasons to honor this intent, and judges are elected officials accountable to their communities for how they use their discretion.

In some cases, mitigating circumstances may warrant deferred adjudication even though the crime committed was murder. For example, deferred adjudication may be appropriate in cases in which the defendant was a battered spouse or in which a murder was a mercy killing of a terminally ill person who wanted to die. A recent case in Fort Bend County highlights the need for this discretion; the judge in the case gave a woman deferred adjudication as part of a plea bargain after her first trial in 2009 ended with a hung jury, and she maintained that she killed her husband in self-defense after decades of abuse. Current law allows judges to evaluate the unique circumstances in such cases. Deferred adjudication in murder cases is not used to make statements about the value of victims' lives, but rather is used by judges to serve the interests of justice.

**OTHER
OPPONENTS
SAY:**

The exception in CSHB 371 may be too broad. It could allow someone who should have anticipated a murder to receive deferred adjudication, and this may not be desirable.

Deferred adjudication has no fact-finding process, but the elements of the exception in the bill are generally fact-intensive determinations, so the judge could base a deferred adjudication on faulty assumptions.

NOTES:

The committee substitute is the Legislative Council version of the originally filed bills.

During the 2009 regular session, an identical bill, HB 825 by Hochberg, passed the House, but was left pending in the Senate Criminal Justice Committee.