

SUBJECT: Indigent defense appointments, withdrawals, and probation revocations

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 5 ayes — Gallego, Hartnett, Aliseda, Burkett, Zedler

0 nays

1 present not voting — Carter

3 absent — Christian, Y. Davis, Rodriguez

SENATE VOTE: On final passage, April 29 — 31-0

WITNESSES: For — Andrea Marsh, Texas Fair Defense Project

Against — None

On — (*Registered, but did not testify*: Jim Bethke, Task Force on Indigent Defense)

BACKGROUND: Courts must appoint attorneys for indigent criminal defendants, for both trials and appeals. As part of the Fair Defense Act, Code of Criminal Procedure, art. 26.04 requires judges in each county to adopt countywide procedures for appointing attorneys for indigent defendants arrested for or charged with felonies or misdemeanors punishable by confinement.

Courts are required to appoint attorneys from a public appointment list using a system of rotation that complies with Code of Criminal Procedure, ch. 26 and other laws. Judges establish the appointment list and determine objective qualifications necessary to be on it. Judges may establish more than one appointment list graduated according to the degree of seriousness of the offense and the attorneys' qualifications. Art. 26.04 also allows counties to use public defender offices and other alternative programs to provide indigent defense if they meet specific criteria.

Code of Criminal Procedure, art. 42.12, sec. 21 deals with hearings held for a person accused of violating probation, and states that defendants

have a right to counsel at such hearings. Code of Criminal Procedure, art. 15.17 requires a magistrate to inform a person arrested on a new offense of his or her rights either in person or through an electronic broadcast system.

DIGEST:

SB 1681 would include appeals of convictions and probation revocation hearings for indigent defendants in the types of criminal proceedings for which courts had to appoint attorneys by using a public appointment list and a rotation system. Attorney appointment lists and attorney appointments through an alternative program could be graduated based on whether representation would be provided in trial court proceedings, appellate proceedings, or both.

An appointed attorney would be required to represent the defendant not until relieved of his duties, as under current law, but until the attorney was permitted or ordered by the court to withdraw as counsel. After a finding of good cause, before withdrawing as counsel for a defendant not represented by other counsel, the appointed attorney would be required to:

- advise the defendant of his or her right to file a motion for new trial and a notice of appeal;
- if the defendant wished to pursue either or both of those options, assist him or her in requesting prompt appointment of replacement counsel; and
- if replacement counsel were not appointed promptly and the defendant wished to pursue an appeal, file a timely notice of appeal.

For a person arrested on a motion to revoke probation, the arresting officer would be required to take the person before the judge who ordered the arrest for the violation of community supervision without any unnecessary delay, but no later than 48 hours after the person was arrested. If the judge was unavailable, the person could be brought before the county magistrate. The judge or magistrate would be required to perform all appropriate duties and could exercise all appropriate powers as provided under law, except that only the judge who ordered the arrest for the alleged violation could authorize the person's release on bail. The arrested person also could be taken before the judge or magistrate by means of an electronic broadcast system as under Code of Criminal Procedure, art. 15.17.

The bill would take effect September 1, 2011, and would apply to criminal proceedings that began on or after that date.

**SUPPORTERS  
SAY:**

SB 1681 would improve the state's indigent defense system in three important ways:

- by clarifying that the Fair Defense Act requirements for appointment of attorneys for indigent defendants applies to appeals in criminal cases and to probation revocation hearings;
- by ensuring continuous effective appointed counsel through all critical stages of the proceedings after withdrawal of an appointed counsel; and
- by authorizing magistrates to provide warnings to defendants arrested for motions to revoke probation.

These changes were recommended by the Task Force on Indigent Defense, which includes eight ex-officio members and five members appointed by the governor. The ex-officio members include the presiding judge of the court of criminal appeals, the chief justice of the Texas Supreme Court, and one Senate member and one House member. The mission of the task force is to promote justice and fairness for all indigent persons accused of criminal conduct. The Texas Judicial Council also passed resolutions, signed by the chief justice of the Texas Supreme Court, in favor of these improvements to indigent defense.

First, the bill would clarify that state law requiring the impartial appointment of attorneys for indigent defendants applies to appeals in criminal cases and to probation revocation hearings. While many judges currently use the mandated impartial appointment system when making appointments for appeals and probation revocation hearings, some do not.

Some of these judges claim that current law requiring the use of a rotation system does not state explicitly that the system must be used for appeals and probation revocation hearings. This violates the intent of the state's Fair Defense Act that competent attorneys be appointed in a fair, impartial way. It can give the appearance that judges disproportionately are appointing friends or donors or others with whom they have a relationship. SB 1681 would remedy this by stating clearly that the rotation appointment system be used for these proceedings. The goal of the Fair Defense Act is not to move cases as quickly as possible. Providing competent counsel fairly and impartially should not be sacrificed to dispose of cases quickly.

SB 1681 would not expand who qualified for an appointed attorney. Under current law, indigent defendants already must be appointed attorneys for appeals and probation revocation hearings. The bill would change how attorneys were appointed. This provision would have no fiscal impact for counties or the state.

Second, SB 1681 also would ensure continuous effective appointed counsel through all critical stages of proceedings after withdrawal of an appointed counsel. Before being permitted to withdraw from representation, appointed attorneys would be required to advise defendants of their rights to file a motion for new trial or appeal and would be required to help the defendants request appointment of new counsel to pursue those options.

Current law requires an appointed attorney to represent the defendant until charges are dismissed, the defendant is acquitted, appeals are exhausted, or the attorney is relieved or replaced by the court after a finding of good cause. The law contemplates that attorneys will be relieved of duty before appeals are exhausted, but does not ensure that defendants will have continuous effective counsel through the appeals stage. In some cases, appointed attorneys have been allowed to withdraw after trial, and the defendants have been without effective representation during the 30-day window for filing a motion for a new trial. SB 1681 would ensure the effective assistance of counsel as representation transitions from trial counsel to appellate counsel.

Third, SB 1681 also would authorize magistrates to provide warnings to defendants arrested for motions to revoke probation. These warnings would include telling defendants of their rights to appointed counsel. The bill would require the warnings to be provided within 48 hours of arrest as under current law for an arrest for a new offense, but would not allow magistrates to release the defendant on bail.

Current law requires defendants to be brought before the judge that oversee their probation, which sometimes results in long delays in rural parts of the state where judges must sit in multiple counties. Some magistrates already provide these warnings now for both revocations and new offenses, but some only for new offenses. SB 1681 would provide clear authority for magistrates to provide warnings to defendants arrested for motions to revoke probation, which would better serve to inform defendants of their rights in a timely manner.

OPPONENTS  
SAY:

SB 1681 would take away judicial discretion for appointments for appeals and probation revocation hearings. In some cases, judges may choose not to use the rotation system to give defendants a competent attorney who also can move a case quickly.

For example, a judge may know that an attorney present in the courthouse could handle a case without delay or had particular expertise that would be useful on a case. Appointing that attorney could allow a defendant to be released sooner than if the judge used the rotation system.