

- SUBJECT:** Restricting prosecutors from encouraging waiver of right to counsel
- COMMITTEE:** Criminal Jurisprudence — committee substitute recommended
- VOTE:** 8 ayes — Peña, Vaught, Riddle, Escobar, Hodge, Mallory Caraway, Pierson, Talton
- 0 nays
- 1 absent — Moreno
- WITNESSES:** For — Dominic Gonzales, Texas Criminal Justice Coalition; David Gonzalez, Texas Criminal Defense Lawyers Association; Andrea Marsh, Texas Fair Defense Project (*Registered, but did not testify*: M. Madison Sloan, Texas Appleseed)
- Against — D. Ryan Locker, Brown County Attorney's Office, Brown County Court at Law Judge Frank Griffin, 35th Dist. Court Judge Stephen Ellis
- BACKGROUND:** Individuals have a constitutional right to counsel in all adversarial judicial proceedings. At trial and appellate stages, and in habeas corpus proceedings, indigent defendants have the right to have counsel appointed in any adversarial judicial proceedings that may result in confinement. Constitutional case law states that defendants may waive their right to counsel only if they have done so knowingly and voluntarily.
- DIGEST:** CSHB 1178 would amend Code of Criminal Procedure, Art. 1.051, to prohibit prosecutors from encouraging or initiating a defendant's waiver of the right to counsel in an adversary judicial proceeding that could result in punishment by confinement. In addition, prosecutors could not communicate with a defendant claiming indigent status who had requested the appointment of counsel unless the court had denied the request and after the denial the defendant was given a reasonable opportunity to retain and had failed to retain private counsel or had waived the opportunity to retain private counsel.
- Also, in an adversary judicial proceeding that could result in punishment by confinement, a court could not ask a defendant to communicate with a

prosecutor until the court advised the defendant of the right to counsel and how to obtain counsel and the defendant had been given a reasonable opportunity to do so. Also, if a defendant claiming indigent status had requested counsel, a court could not encourage the defendant to speak with the prosecutor unless the defendant's request for appointed counsel had been denied and subsequent to the denial the defendant had a reasonable opportunity to retain and had failed to retain private counsel or had waived the opportunity to retain private counsel.

A defendant's waiver obtained in violation of these rules would be presumed invalid.

Under CSHB 1178, a judge could not order the defendant to be rearrested or require the accused to give another bond in a higher amount because the defendant either withdrew a waiver of the right to counsel or requested the assistance of counsel.

The bill would take effect on September 1, 2007. The changes made to Art. 1.051(e), Code of Criminal Procedure, would apply only to a proceeding at which an indigent defendant appeared without counsel after having refused appointed counsel if the proceeding occurred on or after September 1, 2007. The changes made to Art. 1.051(f), Code of Criminal Procedure, would apply only to a waiver of counsel or a communication with a defendant that occurred on or after September 1, 2007.

**SUPPORTERS
SAY:**

CSHB 1178 would help to ensure that defendants made fully informed and intelligent decisions about whether to request or waive counsel. In many counties, current practices interfere with this decision. In some counties, a defendant charged with a misdemeanor is instructed to meet with the prosecutor before retaining or having counsel appointed.

Prosecutors and courts frequently will discourage a defendant from seeking counsel in order to expedite dockets. For example, defendants sometimes are told that they can resolve their cases more quickly if they do not speak with an attorney, or a prosecutor will threaten to increase a defendant's punishment if the defendant chooses to get an attorney, or a court may continue to reschedule a hearing until the defendant relents and pleads out the case. Not realizing that the prosecutor represents the state, the defendant might rely on the prosecutor for legal advice or reveal information that could later be used against the defendant.

CSHB 1178 would help to curtail these practices by requiring an unrepresented defendant to waive knowingly and voluntarily the right to counsel or to accept counsel before speaking with a prosecutor. When law enforcement can coerce a defendant to give up the right to counsel based on false information or pretenses, the constitutional right to counsel is rendered meaningless. This can result in unnecessarily harsh sentencing and guilty pleas from those who are innocent. This is unfair to defendants and lowers public confidence in the administration of justice.

CSHB 1178 would address several of the governor's major stated objections to an earlier version of the bill, HB 3152 by Escobar, which he vetoed after the 79th Legislature enacted the bill in the 2005 regular session. The bill would establish new requirements for the waiver of counsel only in criminal cases that could result in confinement but would not affect criminal cases punishable only by a fine, such as traffic offenses. As such, plea systems that exist for minor offenses, which are often the ones that generate the most efficiencies, could be left in place by the counties.

The bill would not inhibit the ability of a prosecutor to initiate plea discussions because this already is prohibited by the Texas Disciplinary Rules of Professional Conduct. Rule 3.09 states that a prosecutor shall "not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial, or post-trial rights."

CSHB 1178 would not jeopardize convictions because it would affect only proceedings and waivers that took place on or after the effective date. Attorneys and courts would have plenty of time to implement the changes in the bill. The real threat to the validity of convictions is the current unconstitutional practice of coercing waivers of the right to counsel. Case law clearly has established that convictions obtained after defendants have waived counsel without being informed of their right and opportunity to request counsel are unconstitutional and should be overturned.

The only reason Texas has not seen a significant number of reversals as a result of current practices is because these defendants, because of the nature of the problem, do not have lawyers to assert this constitutional argument or to inform them that they had a right to a lawyer in the first place. Defendants are unlikely to seek out attorneys and try to appeal their convictions because they are unaware of the nature of the right to counsel.

Current practices also create a risk that cases in which the defendant was actually guilty could be overturned on appeal because the waiver of the right of representation was obtained illegally. These situations jeopardize public safety.

While the bill might decrease somewhat the efficiency of the current systems, both urban and rural, the need to protect constitutional rights should trump efficiency. Moreover, according to the fiscal note, CSHB 1178 would not have a significant fiscal impact to the state. CSHB 1178 might save money in the long run because individuals would be less likely to serve unnecessarily long sentences due to uncounseled guilty pleas.

CSHB 1178 would set out a process that would be achievable, enabling courts to run efficiently while ensuring the defendants their constitutional rights. The bill would ensure that a defendant was granted basic protections required the U.S. and Texas constitutions.

OPPONENTS
SAY:

CSHB 1178 would unnecessarily clog courts and increase costs to local governments by delaying pleas and requiring more court-appointed lawyers. In addition, CSHB 1178 would create confusion in the offices of prosecutors and court rooms across the state because it would require a reworking of plea systems. These systems were worked out to provide efficiency and already are overseen by the courts.

Under CSHB 1178, those who wish to negotiate with prosecutors to resolve their cases would be prohibited from doing so unless a specific waiver was filed, and neither a judge nor a prosecutor could ask a defendant to file the waiver.

CSHB 1178 disproportionately would affect rural counties because they do not have public defenders' offices and the local defense bar could be too short of members to implement adequately the required changes. Also, CSHB 1178 would increase the time it takes to move a defendant through the criminal justice system because it would require additional hearings to ensure the defendant had been informed of the right to counsel. More hearings mean more cost and delays.

Current law provides adequate protections for defendants who wish to waive their right to an attorney. If defendants' rights have been violated, they have recourse to the appeals courts. No recent wave of overturned convictions has arisen based on the denial of a right to counsel, so there is

no demonstrable problem in need of a remedy. Current law is the result of careful balancing by lawmakers, administrators, and judges. This balance does a good job of protecting the rights of the defendants along with the needs of society for an efficient and affordable system of justice.

NOTES:

HB 1178 as filed would have prohibited penalizing a defendant for withdrawing a waiver of the right to counsel. The committee substitute would specify that a judge could not order the defendant to be rearrested or require the defendant to give another bond in a higher amount because the defendant either withdrew a waiver of the right to counsel or requested the assistance of counsel.

The committee substitute also would specify that a prosecutor could not communicate with an indigent defendant and a court could not encourage a defendant to speak with a prosecutor if an indigent defendant had requested counsel unless after a court's denial of that request the defendant, after a reasonable opportunity, had failed to retain private counsel or had waived the opportunity to do so.

The companion bill, SB 454 by Ellis, has been referred to the Senate Criminal Justice Committee.

HB 1178 is similar to HB 3152 by Escobar, which was enacted by the 79th Legislature during the 2005 regular session, but was vetoed by the governor.