

SUBJECT: Appointment, reimbursement of indigent defense counsel in a capital case

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 7 ayes — Peña, Riddle, Escobar, Hodge, Mallory Caraway, Pierson,
Talton

0 nays

2 absent — Vaught, Moreno

SENATE VOTE: On final passage, April 2, 2007 — 30-0

WITNESSES: For — Mark Mendez, Tarrant County; (*Registered, but did not testify:*
Craig Pardue, Dallas County; Michael Pitchinson, Texas Conference of
Urban Counties; Celeste Villareal, Texas Criminal Defense Lawyers
Association)

Against — None

BACKGROUND: Under Code of Criminal Procedure, art. 26.052(e), a judge must appoint
two attorneys for an indigent defendant as soon as possible after charges
are filed in a capital case, unless the prosecutor gives written notice to the
court that the state will not seek the death penalty.

DIGEST: SB 306 would amend art. 26.052, Code of Criminal Procedure, by altering
the method in which attorneys are appointed to represent an indigent
defendant in a capital case. A judge would appoint an attorney, who would
be specifically qualified under Code of Criminal Procedure, ch. 26, to
represent an indigent defendant as soon as practicable after the charges
were filed.

Unless the prosecutor filed a written notice in the case that the state would
not seek the death penalty, the judge would appoint a second attorney to
the case on the earlier of:

- the date the prosecutor filed written notice that the state would seek
the death penalty; or

- 90 days after the date on which the defendant was charged with a capital offense by indictment, or by complaint if that occurred first.

The second attorney would not need to be qualified under Code of Criminal Procedure, ch. 26 to be eligible for appointment.

A case in which the state sought the death penalty could not proceed to trial on the merits sooner than 180 days after the date on which a second attorney was appointed to the case. If, after the second attorney was appointed, the prosecutor filed written notice that the state would not seek the death penalty, the judge could remove the second attorney from the case. The second attorney still would be entitled to reasonable payment for services rendered before removal in accordance with the local guidelines for payment.

SB 306 also would allow appointed counsel to file with the trial court a pretrial ex-parte confidential request for advance payment of expenses to investigate mitigation evidence in addition to potential defenses.

The bill also would direct the court to timely grant such a request for advance payment of expense in whole or in part if the request was reasonable.

The bill would take effect on September 1, 2007, and would apply only to an offense committed on or after the effective date.

**SUPPORTERS
SAY:**

SB 306 would relieve some of the pressure on tight county budgets for indigent defense by directing a judge to appoint a second attorney only when the death penalty was a possibility in a capital case. In order to ensure that the appointed attorneys had adequate time to prepare, such cases could not proceed to trial on the merits sooner than 180 days after the date on which a second attorney was appointed. This would help to ensure an adequate defense.

Current law does not explicitly authorize judges to dismiss a second attorney once the prosecutor has informed the court that the state will not seek the death penalty. Some judges believe they are implicitly empowered to do so, while others do not. SB 306 would clear up this confusion by specifically empowering judges to dismiss the second attorney while ensuring that these attorneys were paid properly for any work performed.

SB 306 also would improve the ability of indigent defense attorneys to provide a defense by allowing them to seek advance payment of expenses to investigate mitigation evidence in addition to potential defenses. In Texas, capital cases are split into two phases. The first is the guilt phase, where the jury decides if the defendant is guilty of the crime. The second is the sentencing phase, where the jury decides on a sentence. Additional evidence may be presented to the jury during the sentencing phase, and the most important kind additional evidence, from the defense standpoint, is mitigating evidence, which can help the jury see the offender as an individual human being and not as a member of a faceless group deserving execution. Allowing indigent defense attorneys to seek money in advance works to ensure that adequate mitigating evidence would be investigated and presented. Ensuring a proper presentation of mitigating evidence ensures a fairer trial.

**OPPONENTS
SAY:**

Capital crimes are the most serious cases that can come before a jury. One method to help ensure adequate representation in capital cases is to appoint two attorneys. The current system directs the judge to appoint two attorneys as soon as possible after charges are filed in a capital case, unless the prosecutor already has informed the court that the state will not seek the death penalty. This ensures that the defendant will have a legal team working on the case as soon as the charges are filed.

One the most important pretrial strategies that defense attorneys employ in capital cases is to convince the prosecutor not to seek the death penalty. They do this by negotiating with the prosecutor and making arguments based on the facts of the case that would lead a jury to conclude that the death penalty would not be appropriate for their defendant. SB 306 would deny the defendant a second attorney during this crucial phase of the trial. Having only one attorney at the beginning and then adding a second one later would force the defense team to play catch up for the rest of the trial.