



Texas Fair Defense Project

H.B. 1178 (Escobar)

Questions and Answers

General Questions

What is the purpose of HB 1178?

- The purpose of HB 1178 is to ensure that defendants facing jail time understand that they have a right to a lawyer and have an opportunity to request the assistance of a defense lawyer before they talk to a prosecutor about the facts of their case and/or agree to a plea bargain. The bill also changes current law to ensure that defendants can try to hire a lawyer on their own without losing the opportunity to request appointed counsel if it turns out that they can't afford to hire a lawyer.

Why is HB 1178 needed?

- Court monitors have documented numerous practices that prevent defendants from making an informed decision about whether to seek the assistance of a lawyer. HB 1178 is designed to stop those practices, which include:
 - Requiring defendants to talk to prosecutors before they are told of the right to counsel or have an opportunity to request counsel
 - Telling defendants that there's nothing a lawyer can do to help them with their case
 - Informing defendants that they have a right to counsel at trial, but not informing them that they have a right to counsel during plea negotiations or other proceedings
 - Refusing to answer direct questions about how to apply for a lawyer, and refusing to give defendants applications for appointed counsel upon request
 - Delaying rulings on requests for appointed counsel and directing or encouraging defendants to enter into plea negotiations without the assistance of counsel even after the defendant has asserted the right to counsel
 - Encouraging defendants to try to hire counsel on their own, but then refusing to allow them to apply for appointed counsel – and sometimes even revoking their bond and throwing them in jail – after they obtain price quotes that demonstrate that they can't afford to hire a lawyer.
- These practices invite constitutional challenges to the finality of convictions by raising serious questions about whether any waiver of the right to counsel that is obtained subject to such practices can be knowing and voluntary, and thus valid.

Don't defendants already know that they have a right to a lawyer, even without the changes made by HB 1178?

- Most of us have heard the Miranda warnings many times on TV, making it attractive to think that a bill such as HB 1178 isn't necessary. However, the court system can't rely on television to ensure that defendants understand that they have a right to a lawyer.

Moreover, hearing TV cops tell suspects that they have a right to a lawyer during questioning by the police does not inform defendants that they have the right to assistance of counsel during plea negotiations or at proceedings such as arraignment (entry of a plea) and sentencing.

- Many people also assume that police officers read Miranda warnings to every arrested defendant. That is not true – the police only have to inform defendants about the right to counsel if they question them, and defendants frequently are not questioned after arrest. Texas magistrates also are required to read defendants Miranda warnings shortly after arrest (Code of Crim. Proc. art. 15.17(a)). However, defendants may be released before they appear before the magistrate, and a defendant in that situation will not receive Miranda warnings before making his or her first appearance in court. In any event, even when they give Miranda warnings, police officers and magistrates only advise defendants of their right to counsel during questioning, not of their right to counsel during plea negotiations or court proceedings.
- Finally, even defendants who appear in court and have a general understanding that they have a right to counsel often do not understand when they are supposed to get a lawyer or how to request the assistance of counsel. HB 1178 ensures that defendants will be given this information before they are directed to speak to a prosecutor and asked to make binding decisions about the disposition of their cases.

Will HB 1178 force defendants to get a lawyer?

- No. The implementation of HB 1178 will not force, or even encourage, any defendant to get a lawyer. The bill simply ensures that defendants will receive the information they need to make intelligent decisions about whether to request or waive counsel, and that any defendants who decide to seek the assistance of counsel will have a reasonable opportunity to do so.

Will HB 1178 force judges to appoint lawyers for defendants who appear without counsel?

- No. HB 1178 only requires judges to give defendants information about the right to counsel and to rule on any requests for counsel that are made. Defendants still will only qualify for appointed counsel if they are "indigent" as defined in the Code of Criminal Procedure and a county's local indigent defense rules. HB 1178 does not expand the definition of who qualifies for appointed counsel and it does not require judges to grant a request for counsel if a defendant does not qualify.

Will HB 1178 limit a defendant's constitutional right to represent himself or herself?

- No. Defendants will retain the right to represent themselves. HB 1178 only ensures that defendants will make informed waivers of the right to counsel before representing themselves in court proceedings. Constitutional law already requires that defendants must validly waive the right to counsel before they can properly invoke the right to self-representation.

Will HB 1178 increase counties' indigent defense expenditures?

- The fiscal note for HB 1178 does not anticipate any significant fiscal impact on local government.
- HB 1178 creates the conditions under which defendants can validly waive the right to counsel. It does not require any defendant to seek the assistance of counsel, or require any judge to grant a request for counsel made by a defendant who is not already qualified under statute and local rule. Most courts that are not already in compliance with HB 1178's requirements will be able to implement the law by making relatively minor changes to their court processes in order to ensure that defendants have information about the right to counsel before they are approached by or are directed to speak to prosecutors. Because most of the practices prohibited by HB 1178 also are prohibited by constitutional law, the bill also will help counties avoid litigation challenging constitutionally invalid waivers.
- In the event that there is a small increase in the number of counsel requests made by defendants who are qualified to receive appointed counsel, there are several strategies counties can pursue to offset or limit increased indigent defense expenditures. For example, press reports have discussed how a recent increase in defense lawyer appointments in misdemeanor cases in Kaufman County has enabled the county to reduce its jail expenses since the defense attorneys help incarcerated defendants get out of jail more quickly. Other counties routinely reduce Class B offenses such as theft by check and driving with an invalid license to Class C offenses – for which there is no right to appointed counsel – if the defendant makes restitution or clears the license. The Task Force on Indigent Defense offers technical assistance and grant funding to counties seeking to control indigent defense expenses while complying with legal requirements.

Questions about changes to section (e) of Article 1.051

Why does HB 1178 give defendants who say they will hire a lawyer but then fail to do so an opportunity to request appointed counsel?

- Defendants who want a lawyer's assistance must and should hire a private lawyer if they can afford to do so. Because many defendants don't know how much it costs to hire a lawyer, they may intend to hire a lawyer and then discover that they can't afford to do so once they get price quotes. Judges also often encourage defendants to obtain price quotes and to try to work out payment plans that will enable them to hire a lawyer. Current law

penalizes defendants who try to do the right thing by stripping them of the right to apply for appointed counsel if it turns out that they can't afford to hire a lawyer.

Will HB 1178 give indigent defendants an extra 10 days before disposition of their case if they initially refuse appointed counsel in order to retain private counsel?

- No. Under current law, judges already have to wait 10 days before disposing of a case when an indigent defendant tries to retain private counsel but then appears without counsel. HB 1178 requires the court to give the defendant an opportunity to apply for appointed counsel when the defendant appears without counsel, but the court still can proceed to disposition 10 days after that appearance.

Questions about changes to section (f) of Article 1.051

Why does HB 1178 create a presumption that waivers of counsel obtained in violation of specified procedures are invalid?

- Waivers of the right to counsel are valid only if they are knowing and voluntary. The procedures prohibited in subsections (f-1) and (f-2) create such a significant risk that a resulting waiver is not knowing and voluntary that a presumption of invalidity is warranted and promotes judicial economy.

Does HB 1178 shift the burden of showing that a waiver of counsel is valid from the defense to the prosecution?

- No. The prosecution already has the burden of proving that a waiver of counsel is valid (*Brewer v. Williams*, 430 U.S. 387), and HB 1178 does not change this.

Are there other precedents for using presumptions in criminal law?

- Yes. For example, the law governing theft offenses relies heavily on presumptions (Tex. Pen. Code §§ 31.03 (Theft), 31.04 (Theft of Service), 31.06 (Theft by Check), 32.41 (Issuance of Bad Check)), and in certain circumstances a defendant will be presumed competent to be executed (Code. Crim. Proc. art. 46.05). Like the presumption created by HB 1178, these presumptions are designed to promote judicial economy.

Questions about changes to section (f-1) of Article 1.051

Does HB 1178 exceed existing limitations on prosecutor's interactions with unrepresented defendants?

- HB 1178 is narrowly tailored to codify existing ethical and constitutional rules governing prosecutor's conduct. Subsection (f-1)(1) parallels the language in Texas Rule of Disciplinary Procedure 3.09(c), which bars prosecutors from initiating or encouraging efforts to obtain from an unrepresented defendant a waiver of any important right, including the right to counsel. Subsection (f-1)(2) codifies the rule that prosecutors cannot communicate with an unrepresented defendant after the defendant asserts the right to counsel (*Michigan v. Jackson*, 475 U.S. 625).

Will HB 1178 prohibit prosecutors from reading defendants their rights?

- No. Unless a defendant has already asserted the right to counsel, prosecutors may inform defendants of their rights, including the right to counsel, under HB 1178. Consistent with their ethical rules, prosecutors just can't try to get defendants to waive the right to counsel.

Will HB 1178 prohibit a prosecutor from talking to a defendant who contacts the prosecutor prior to a court date to discuss resolution of a criminal case?

- No. In that situation, it would be the defendant who initiated the uncounseled communication, not the prosecutor. The prosecutor could talk to the defendant as long as the prosecutor, consistent with existing ethical rules, did not encourage the defendant to waive the right to counsel.

Questions about changes to section (f-2) of Article 1.051

Does HB 1178 exceed existing limitations on judges' interactions with unrepresented defendants?

- HB 1178 is narrowly tailored to ensure that trial court judges satisfy their obligation to obtain a knowing and voluntary waiver of the right to counsel from defendants who appear without counsel. Texas law places the duty to obtain a valid waiver of counsel on the judges, not on other court personnel (*Oliver v. State*, 872 S.W.2d 713). In order for a waiver to be valid, the record must show that the defendant was informed specifically of the right to the assistance of appointed or retained counsel and that the defendant clearly rejected such assistance (*Carnley v. Cochran*, 369 U.S. 513). Also, as a state actor, judges, just like prosecutors, cannot encourage an unrepresented defendant to waive counsel after that defendant asserts the right to counsel.

Questions about changes to section (g) of Article 1.051

Why does HB 1178 require judges to admonish defendants and obtain a voluntary and intelligent waiver of counsel even if they are pleading guilty?

- Defendants have a right to a lawyer if they are pleading to guilty, and a guilty plea obtained in a case in which a defendant did not knowingly and voluntarily waive the right to counsel would be subject to reversal on appeal. HB 1178 protects the finality of convictions by resolving existing statutory ambiguity about whether a judge must obtain an informed waiver in guilty plea cases.

Why does HB 1178 require judges to advise defendants of the nature of the charges against them?

- HB 1178 brings Texas statute into conformance with a recent Supreme Court case holding that judges must inform defendants of the nature of the charges against them in order to obtain a valid waiver of the right to counsel, particularly in guilty plea cases (*Iowa v. Tovar*, 541 U.S. 77). If courts do not inform defendants of the nature of the charges against them, any resulting guilty plea will be invalid.

Questions about changes to Article 17.09

Why does HB 1178 prohibit judges from increasing a defendant's bond if the defendant requests appointment of counsel or withdraws a waiver of the right to counsel?

- A defendant has a constitutional and statutory right to withdraw a waiver of the right to counsel at any time, although pursuant to Article 1.051 (h) a defendant who withdraws a waiver is not entitled to repeat a proceeding that was held before the waiver was withdrawn. There is an extremely high risk that a court would find that a defendant's decision to waive the right to appointed counsel was involuntary if the defendant only entered or persisted in the waiver in order to avoid incarceration.