



# Interim Report

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## to the 84th Legislature

House Committee on  
Criminal Jurisprudence



January 2015

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**HOUSE COMMITTEE ON CRIMINAL JURISPRUDENCE  
TEXAS HOUSE OF REPRESENTATIVES  
INTERIM REPORT 2014**

**A REPORT TO THE  
HOUSE OF REPRESENTATIVES  
84TH TEXAS LEGISLATURE**

**REP. ABEL HERRERO  
CHAIRMAN**

**COMMITTEE CLERK  
MIGUEL LISCANO**

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Committee On  
Criminal Jurisprudence

January 12, 2015

Rep. Abel Herrero  
Chairman

P.O. Box 2910  
Austin, Texas 78768-2910

The Honorable Joe Straus  
Speaker, Texas House of Representatives  
Members of the Texas House of Representatives  
Texas State Capitol, Rm. 2W.13  
Austin, Texas 78701

Dear Mr. Speaker and Fellow Members:

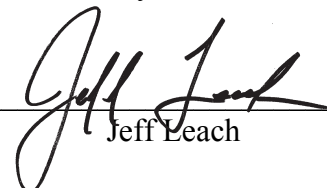
The Committee on Criminal Jurisprudence of the Eighty-third Legislature hereby submits its interim report including recommendations and drafted legislation for consideration by the Eighty-fourth Legislature.

Respectfully submitted,

  
Abel Herrero

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Stefani Carter

  
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Terry Canales

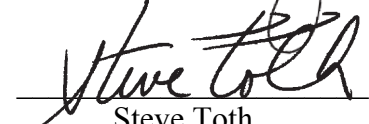
  
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## COMMITTEE ON CRIMINAL JURISPRUDENCE

At the beginning of the 83rd Legislature, the Honorable Joe Straus, Speaker of the Texas House of Representatives, appointed nine members to the House Committee on Criminal Jurisprudence.

The Committee membership includes the following appointees:

Abel Herrero, Chair; Stefani Carter, Vice-Chair; Lon Burnam; Terry Canales; Bryan Hughes; Jeff Leach; Joe Moody; Matt Schaefer, and Steve Toth.

The Committee was given jurisdiction over all matters pertaining to:

- (1) criminal law, prohibitions, standards, and penalties;
- (2) probation and parole;
- (3) criminal procedure in the courts of Texas;
- (4) revision or amendment of the Penal Code; and
- (5) the following state agencies: the Office of State Prosecuting Attorney and the Texas State Council for Interstate Adult Offender Supervision.

During the interim, Speaker Straus issued eight interim charges to the Committee to study and report back with facts, findings, and recommendations. To study the charges, the Committee held three public hearings in Austin on March 25, April 22 and October 7, 2014 and one public hearing in Corpus Christi on July 29, 2014.

The Committee also accepted written testimony and research from the practitioners, researchers and other stakeholders in the course of compiling this report. The committee appreciates the input of those who participated in the hearings and offered their valuable insight throughout this process.

The Committee also partnered with the Lyndon B. Johnson School of Public Affairs at the University of Texas at Austin on a year-long research project examining issues related to two of the interim charges, raising the age of juvenile jurisdiction and co-occurring mental illness and substance abuse disorders. The Committee would like to thank the hard work of the graduate students who helped with this report.

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## **Interim Charges**

Charge 1: Study the classification of 17-year-olds as adults in the criminal justice system of Texas.

Charge 2: Study the effectiveness of deferred adjudication and orders for non-disclosure in spite of the many exceptions to the statute. Study extending the use of expunction of criminal records history and non-disclosures to certain qualified individuals with low-level, non-violent convictions. Examine the statutorily allowed but underused non-disclosure and expunction of criminal records, and the use of deferred adjudication.

Charge 3: Study the impact of SB 1289 (83R). Examine the sale of criminal histories that may be erroneous as well as the lasting impact that arrest records have on individuals who are arrested but not charged or convicted. Assess the need for revision of existing statutes and consider designating an agency responsible for regulating entities involved in the industry.

Charge 4: Examine the association between co-occurring serious mental illness and substance use disorders and parole revocation among inmates from the Texas Department of Criminal Justice. Review current policies and procedures for incarcerating individuals with a dual mental health diagnosis in both state and county correctional facilities and examine potential remedies within the State's criminal justice system to ensure that the public is protected and that individuals with a mental health diagnosis receive a continuum of mental health services. (Joint charge with the House Committee on Corrections)

Charge 5: Examine the current pecuniary loss thresholds associated with graffiti offenses. Study the costs of enhancing the penalties associated with the offense of graffiti, as well as a study of pretrial diversion programs that exist in other states and are specific to persons convicted of graffiti offenses. Study the existing Graffiti Abatement Programs in Texas.

Charge 6: Evaluate the approximately 1,500 non-traditional criminal offenses that can be found outside of the Penal Code. Study the feasibility of streamlining these offenses and examine ambiguities in the law. Study the existing use of the Rule of Lenity and Mens Rea requirements in Texas and the benefit of codifying both of these standards.

Charge 7: Examine the utilization of community supervision in state jail felonies and the effectiveness of the state jail in light of its original purpose.

Charge 8: Conduct legislative oversight and monitoring of the agencies and programs under the committee's jurisdiction and the implementation of relevant legislation passed by the 83rd Legislature. In conducting this oversight, the committee should:

- a. consider any reforms to state agencies to make them more responsive to Texas taxpayers and citizens;
- b. identify issues regarding the agency or its governance that may be appropriate to investigate, improve, remedy, or eliminate;
- c. determine whether an agency is operating in a transparent and efficient manner; and
- d. identify opportunities to streamline programs and services while maintaining the mission of the agency and its programs.

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## **Charge 1: Age of Juvenile Jurisdiction**

### **Public Hearing**

On March 25, 2014, the House Committee on Criminal Jurisprudence held a public hearing to consider testimony from stakeholders and experts regarding Charge 1, relating to raising the age of juvenile jurisdiction. The hearing was held at the Texas Capitol, Room E2.016.

The following portion of this report is based largely on the oral and written testimony from that hearing, along with research performed by graduate students at the LBJ School of Public Affairs as part of a yearlong research project.

### **Introduction**

The Committee examined possible effects of changing the classification of 17-year-olds as adults in the criminal justice system of Texas. In addition to the public hearing in March, our study of this issue also included several focus groups comprised of stakeholders, including prosecutors, juvenile probation chiefs and juvenile judges, and sheriffs and county representatives. We also gathered and analyzed data pertinent to this issue, analyzed current law and relevant statutes, and conducted research about the experiences of other states.

### **Background**

Texas is one of only nine states in the U.S. that prosecutes youth under age 18 as adults.<sup>1</sup> Under Title III of the Texas Family Code, the juvenile court has jurisdiction over youth between the ages of 10 and 16. Therefore, all 17-year-olds arrested in Texas, including misdemeanants, are prosecuted in the adult criminal justice system without consideration for mitigating factors.<sup>2</sup> On the books since 1918, this statute does not take into account recent research on adolescent brain differences, or evidence of better outcomes for youth in the juvenile system and has led to conflicts with federal law. Since 2007, numerous states including Illinois, Connecticut, Massachusetts, Mississippi, New Hampshire, and Rhode Island have raised the age of juvenile jurisdiction in their state to 18 in response to these complications that arise when treating 17-year-olds as adults in the criminal justice system.

#### *17-year olds in the Criminal Justice System*

Like teenagers in the juvenile system, 17-year-olds are typically arrested for non-violent, relatively minor offenses as demonstrated. In 2013, for example, 44 % of all 17-year-olds arrested were arrested for larceny, marijuana possession, violating liquor or public drunkenness.<sup>3</sup> Also, between 2012 and 2013, arrests of 17-year-olds dropped by 20 %, going from 32,981 arrested in 2012 to 26,274 arrested in 2013.<sup>4</sup>

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While raising the age of criminal responsibility would increase the number of youth involved in the juvenile system, the vast majority of 17-year-olds will likely receive probation.<sup>5</sup>

According to a University of Texas study that projected the pattern of offenses if Texas were to raise the age of juvenile jurisdiction, 72.5% of the 17-year-olds arrested would be misdemeanants and 89.9% of the dispositions would be for county non-residential probation. The study also found that 17-year-olds aligned much more closely with the 16-year-old population than the adult population in terms of their criminal histories and offenses.<sup>6</sup>

### *17-year-olds have significant unmet needs*

The data show that 17-year-old offenders are similar to their 16-year old counterparts in terms of their needs, most of which go substantially unmet in the adult system:<sup>7</sup>

- Education: most have completed only 9<sup>th</sup> through 11<sup>th</sup> grade;
- Trauma: many have experienced physical or sexual assault, parental abuse, or parental neglect.
- Mental Health: 70% of youth in custody have mental illness, and 27% have severe mental health issues;
- Substance Abuse: 17-year-olds are not eligible for The Substance Abuse Felony Punishment (SAFP) program or Intermediate Sanction Facility (ISF) program beds, and the youths are difficult to place in Residential Treatment Centers because of their age.

### *Institutional Challenges of Housing Youth in Adult Facilities*

17-year-olds constitute a small percentage of the population in jails – 17-year-olds added up to about 3 % of all adult arrests in 2013<sup>8</sup> – so attempts to separate youth under 18 from adult offenders often result in isolation, which can have negative effects on mental health.<sup>9</sup> Youth under 18 held in adult jails are also 36 times more likely to commit suicide than youth held in juvenile detention.<sup>10</sup>

Youth under age 18 represent an operational and financial burden particularly for county jails in Texas. In 2012, the U.S. Attorney General issued the Prison Rape Elimination Act (PREA) Standards,<sup>11</sup> which among other requirements mandate that youth under age 18 be kept sight and sound separated from adult offenders, without use of isolation or denial of programming.<sup>12</sup> This is a requirement that the vast majority of adult county jails in Texas are currently unable to meet. Local jails tend to house 17-year olds either with adult offenders or in solitary confinement due to architectural and staffing constraints.<sup>13</sup> Even where they are kept separate, simply moving youth through a hallway to the recreation yard, infirmary, or showers compliance requires the removal of all adult inmates from those areas. To comply with the PREA Standards, counties would have to retrofit the jails, bring the entire facility up to architectural code, and provide new services for these youth, all at massive expense. Failure to meet these standards places the jails and county officials at risk of substantial liability if a sexual assault occurs.

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While legislation passed in 2011 created the option for certified youth ages 14 to 16 to be held in juvenile detention facilities instead of jails while awaiting trial,<sup>14</sup> there is no such option for 17-year-olds, since they are considered adults under Texas law.

## **Discussion**

Current Texas law assumes that 17-year-olds understand their rights as adult defendants and are equally culpable as adult offenders. Thus, they are subjected to the same court processes and sentences as adults (with the exception of the death penalty and life without parole). However, advocates argue that including 17-year-olds in the adult system increases their risk of harm, reduces their access to needed services, and makes it difficult and costly to comply with federal standards, such as the 2003 federal Prison Rape Elimination Act (PREA).<sup>15</sup> Those in favor of raising the age of juvenile jurisdiction argue that the juvenile justice system is considered a more appropriate place for 17-year-olds for the following reasons.

### *The Adolescent Brain is Still Developing*

Recent research on the human brain confirms that adolescent brains are anatomically different than adult brains. Adolescents' emotions are more volatile, and they have lower psychosocial capacity than adults.<sup>16</sup> These differences affect youth culpability as well as potential for rehabilitation. Scientific research proves that the brain's frontal lobe is not fully developed until a person is in their mid-twenties, so teenagers often struggle with shortsighted decision-making and poor impulse control.<sup>17</sup> In addition, research indicates that adolescents are typically more responsive to treatment than adults because their personalities are still developing. Choices at this age are often the result of poor judgment and susceptibility to peer pressure rather than deficiencies of character.<sup>18</sup> Young people may be very bright and able to distinguish right from wrong, but their ability to control impulsive behavior is simply not equivalent to that of adults.

### *The Juvenile System Has Better Outcomes*

Advocates say keeping youth in the juvenile system reduces the number of violent crimes committed later in life, thus reducing victimization, improving public safety, and providing superior rehabilitation and opportunities for success. Recent research from the Centers for Disease Control examining recidivism rates at a national level for various levels of violent and nonviolent crime found a median 34% increase in felony rearrests for youth who were transferred to the adult system.<sup>19</sup> And in a 2010 research bulletin, the Office of Juvenile Justice and Delinquency Prevention (OJJDP) pointed out that adjudication in adult court alone could increase recidivism, as youth are more likely to internalize feelings of injustice and identities as criminals.<sup>20</sup>

Better outcomes are attributable to some significant differences between the juvenile and adult systems. These differences include:

- Smaller caseloads for probation officers and lower staff-to-youth ratios in secure facilities;
- More structured probation requirements and more interaction with probation officers;

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- Individualized education and rehabilitation programs, including those focused on mental health, graduation, family preservation, and substance abuse;
  - Programs stressing accountability, personal responsibility and learning from mistakes;
  - Access to age-appropriate substance abuse treatment programs. In the adult system, many substance abuse programs require that participants be at least 18 years of age or older;
  - Probation officers engage with family in the juvenile system to a far greater extent than in the adult system;
  - The juvenile system takes a multi-systems approach to coordinate with families, schools, CPS, and community-based resources;

### *Collateral Consequences of a Criminal Record*

As participants in the adult system, 17-year-olds are afforded no confidentiality during prosecution and typically cannot have their court records sealed. This exposure and resulting criminal record can disadvantage him or her for the rest of their lives, since they must disclose their criminal histories on every job application or college application. The Vera Institute of Justice estimates that youth with adult criminal records could lose an average of \$61,691 per person in potential earnings over a lifetime.<sup>21</sup> Criminal records can also prevent youth from access to educational loans and public housing, and they may be restricted from obtaining certain vocational licenses.

### *Inconsistencies with Other Texas and Federal Laws*

In the last decade, the U.S. Supreme Court issued four opinions that touch on age of maturity – *Roper v. Simmons*, *Graham v. Florida*, *J.D.B. v. North Carolina*, and *Miller v. Alabama* – each emphasizing that children differ from adults and that society draws the line between childhood and adulthood at 18.<sup>22</sup> The rulings underscore the lessened culpability of those under age 18 and their greater potential for change.

Treating 17-year-olds as adults in the justice system is also inconsistent with federal standards. The Prison Rape Elimination Act (PREA) standards, mentioned above, apply different rules for those under and over 18. Similarly, the federal Juvenile Justice and Delinquency Prevention Act establishes age 18 as the dividing line for its requirements. The fact that Texas draws the line at 17 makes compliance with federal standards difficult for state and local facilities, exposing agencies to possible liability issues and potential loss of federal contracts and funding.

Also, the age of juvenile jurisdiction is inconsistent with other laws. For example, by law 17-year-olds cannot vote, join the military, enter into binding contracts, buy cigarettes, or serve on juries. These laws are based on the assumption that 17-year-olds, because of their compromised ability to make sound choices, continue to need protection from the state. Yet these same teens are treated as adults when accused of a crime.

### *Inconsistencies with Other States and the International Community*

The majority of states set the maximum age of juvenile jurisdiction at 18. Since 2007, six states –

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Illinois, Mississippi, Connecticut, Rhode Island, and most recently, Massachusetts and New Hampshire— have raised their ages of juvenile jurisdiction. These changes leave only eight states other than Texas that treat youth under 18 as adults.<sup>23</sup>

National commissions and international standards support setting the age at 18. The American Bar Association considers 18 the appropriate minimum age for adult court jurisdiction.<sup>24</sup> In 2012, The US Attorney General’s National Task Force on Children Exposed to Violence recommended abandoning policies that prosecute, incarcerate, or sentence youth under 18 in adult criminal court.<sup>25</sup> Similarly, the UN Convention on the Rights of the Child considers any person under 18 a child and encourages all states with the age of majority set below 18 to raise that age.<sup>26</sup>

### **Likely Impact on Stakeholders**

A shift of 17-year-olds in the juvenile system will likely add to juvenile court dockets, shift caseloads from adult to juvenile probation workers, add to populations in state and local secure juvenile facilities, and require programming adjustments to meet the needs of older youth. Juvenile probation departments will experience the greatest impact of the change.

Among juvenile populations, the percentage of arrests of 16-year-olds resulting in referral to a probation department has averaged 57.9 % in the last 6 years.<sup>27</sup> Based on 2013 arrest patterns and assuming that 17-year-olds are referred to probation at the same rate as other youth, TJJD projected 15,213 referrals of 17-year-olds to probation departments per year for 2014 to 2016.<sup>28</sup>

Among 16-year-olds referred by law enforcement and disposed in 2013, 51.9 % receive dispositions involving supervision. If 17-year-olds receive similar dispositions in 2014 and 2015, TJJD projects 7,896 dispositions for 17-year-old cases.<sup>29</sup>

It is important to note that these numbers do not take into account a projected continued decline in the number of arrests, commitments, and probation dispositions. Between 2014 and 2019, the Legislative Budget Board projects a 3.2% decline in average daily population at state residential facilities, and a 1.2% decline in juvenile community supervision, which includes probation, deferred prosecution, and conditional release.<sup>30</sup> In addition, these numbers do not include 17-year-olds who may be certified as adults. Therefore, the actual numbers could be much lower and will vary from county to county.

As a point of comparison, CJAD reported that as of August 31, 2013, there were 1,550 17-year-old offenders under adult community supervision.<sup>31</sup> That number included adjudicated, deferred, and pretrial offenders. TDCJ reported that the number of youth between 17 and 18 in prisons and state jails as of May 31, 2014 was 62.<sup>32</sup> These numbers give a different picture of the potential impact to the juvenile system if the age of jurisdiction is raised so that 17-year-olds are under juvenile court jurisdiction.

The Office of Court Administration (OCA) projects that raising the age of juvenile jurisdiction will increase juvenile court caseloads by 30%, but will have only a slight impact on the number



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of judges needed to hear cases. Based on TDCJ estimates regarding the number of 17-year-olds currently in the system, a weighted caseload analysis by OCA found that only two additional judges would be needed to hear those cases statewide.<sup>33</sup>

It is worth keeping in mind that any operational impact of the proposal would be gradual rather than overnight; all projected incoming 17-year-olds would not come into the juvenile system on the same day but over the course of a year.

### *Views of Stakeholders*

A diverse group of juvenile justice system practitioners testified at the interim hearing, as well as during focus group discussions and in personal interviews conducted by researchers working with the Committee. Committee staff also attended a two-day convening of juvenile justice stakeholders from around the state organized by Texans Care for Children, which further allowed for the sharing of a wide range of perspectives.

Probation officials from across the state who testified before the committee generally agreed that 17-year-olds would be better served in the juvenile system. However, they cautioned that any change should be well funded to ensure that juveniles receive the programing they need. They also pointed out that the change would increase their caseloads, possibly necessitating increased staff. The new population would also need special programing because they are typically closer to adulthood than the rest of the juveniles, and would need help on how to find a job and live on their own.

The committee also heard from Brazos County Sheriff Chris Kirk, chair of the legislative committee for the Sheriffs' Association of Texas, who recommended removing youth under age 18 from county jails to help sheriffs throughout the state comply with PREA regulations.<sup>34</sup> Housing this population in adult facilities has proven complicated and costly for local jails, he said. For example, Dallas County Sheriff Lupe Valdez testified that the Dallas County Sheriff's Office was forced to open a previously closed jail building, with staff specifically assigned to this unit, to comply with PREA requirements for 17 year-olds. While this alleviated some complications, it costs Dallas County \$80,000 a week, or \$4 million a year, to house approximately 65 youth in compliance with PREA standards.<sup>35</sup> Smaller counties do not have the resources or space to take this approach, and some have indicated that it has not been an issue for them as of the writing of this report. By removing these youth from the jails, Sheriffs could avoid retrofitting their jails at extraordinary cost to taxpayers and avoid liability.

Prosecutors especially emphasized the need for operational simplicity in any change in this law. Uniformly, they requested that the age be changed across the board for all 17-year-olds if the change is made, rather than keeping misdemeanants in the juvenile system and sending felons to adult court. Any split jurisdictional system would be unworkable for them. However, they also emphasized that the certification option for juveniles should remain in place so that there is a mechanism for removing the most violent youth from the juvenile system and prosecuting them in adult court. Some prosecutors noted that 17-year-olds are in high school, and treating them as children makes sense. An adult conviction for a minor crime can follow a 17-year-old and affect their opportunities for employment and education. However, at least one prosecutor mentioned

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that in his experience, 17-year-olds generally are mature enough to know that their actions have consequences and they belong in the adult system.<sup>36</sup> Others shared that in many but not all counties, 17-year-olds who are first-time offenders are typically diverted from the court system through pre-trial programs. Prosecutors were also concerned about housing 17-year-olds in juvenile detention with younger youth, as well as the possibility of diverting funds from treating youth of a younger age to accommodate the older population. They noted juvenile detention facilities in larger counties can separate by age, but smaller counties may not have this ability.

The Committee also heard and appreciated the call from all witnesses to be careful in how this change would be implemented. In particular, local probation departments and counties cautioned against this change being made without adequate allocation of funds. Practitioners said the funding is vital to be sure that resources and programs are available to meet the needs of the older teens. Moreover, there were repeated requests for a delayed implementation date, in order to have a reasonable transition period during which departments could prepare for the change in law and experts could ensure that all relevant statutory provisions are addressed to avoid any complications with implementation. The Committee is also aware that the proposal could have a differential impact on counties depending on their size and location.

#### *Fiscal Impact*

The juvenile system costs more per-person/per-day than the adult system due to more intensive programming and higher staffing levels, it costs on average \$50.04 per day to incarcerate a person at TDCJ. It costs \$366.88 per day to house a youth in a TJJD state-secure facility though sentences are often shorter resulting in lower costs overall. Adult probation costs on average \$2.99 per day not including specialized programs, while juvenile probation costs \$22.42 per day; however, this cost does include programmatic costs.<sup>37</sup> Advocates argue that while raising the age of juvenile jurisdiction would have initial costs, it would save the state money in the long run partly through lower recidivism rates. Should the age of jurisdiction be raised, shifts in programming and staff will be necessary. However, length of stay in juvenile facilities is likely to be shorter than in adult prisons and jails because of the rehabilitative rather than punitive nature of the juvenile system.

Moreover, it is worth noting that Connecticut and Illinois, states that have recently made this change, have found initial costs to be lower than anticipated.<sup>38</sup> In fact, Illinois and Massachusetts made the change with no new infusion of state funds, and in some states, money allocated for county use was left on the table as the actual impact on counties and state institutions fell well below projected figures due to falling arrest rates. In fact, we heard from representatives of other states that the falling arrest rates in those states (similar to falling arrest rates in Texas) is what really helped make the change in policy feasible and cost-effective. In Rhode Island, the age of majority was lowered to 17 in July, 2007 as a cost-saving measure, but it was quickly raised back to 18 several months later after housing the 17-year-olds in the adult system proved to cost more than expected.<sup>39</sup>

Many stakeholders expect long-term savings will stem from the fact that the juvenile justice system does a better job at reducing recidivism than the adult criminal justice system.<sup>40</sup> Each youth who is rehabilitated can save taxpayers between \$1.7 million and \$2.3 million in future

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criminal justice costs.<sup>41</sup> Youth kept in the juvenile system without adult criminal records also have greater lifetime earnings potential and thus provide greater benefit to their communities.<sup>42</sup> Reducing recidivism also means fewer victims, saving communities from the human and financial costs of crime.

To estimate the precise costs and savings of raising the age in Texas, the Legislative Budget Board will need to conduct an in-depth study. Estimates should take into account short- and long-term impact, as significant savings may not be realized immediately. Costs will vary by county based on local courts and detention facilities, funding structures, populations, staffing, and program availability. Analysis should also account for the cost that counties would incur to retrofit adult jails to comply with PREA standards if the age were not raised. The fiscal analysis is complex because it involves a mix of state and county expenses and savings.

Below is a high-level outline of anticipated costs, cost-avoidance, and short- and long-term savings:

*Costs associated with moving 17-year olds to the juvenile system*

- Increased juvenile probation caseloads
- Need for new specialized programs (e.g., independent living skills)
- Possible need for additional county detention or post-adjudication beds  
(Note: more expensive per day than adult jails but likely to use fewer bed days per youth)
- Increased juvenile court dockets and indigent defense expenses
- Additional bed usage within TJJD, but using existing facilities

*Cost-avoidance and immediate savings*

- Counties avoid costs of retrofitting county jails, adding staff and programs to comply with PREA, and bringing facilities up to architectural code (could be millions of dollars for some facilities)
- Removal of 17-year-olds from adult prisons, jails, criminal court dockets, and adult probation caseloads
- Avoid need for specialized programming for 17-year-olds in state jails

*Long-term savings from reduced recidivism*

- Fewer arrests
- Less re-incarceration
- Reduced prison population pressures and reduced need for additional beds
- Fewer victims
- Enhanced earning opportunities for youth by avoiding criminal conviction
- Avoidance of collateral consequences mean more youth in school, higher education, and jobs
- Youth become taxpayers rather than burdens on taxpayers

Most of the immediate costs will fall on county-level juvenile probation departments, but much of the immediate savings and cost avoidance will also come at the county level. Some costs can

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also be shifted between the adult and juvenile systems.

## **Lessons from Other States**

Since 2007, six states have raised their ages of juvenile jurisdiction to include 17-year-olds in their juvenile justice systems. These states' experiences can help guide Texas's approach and help reduce unintended consequences. Lessons from other states include the following:

### *Avoid a Bifurcated Approach to Raising the Age*

In states where the age was originally raised to include some but not all youth under 18 in the juvenile system, stakeholders reported confusion and a desire for a bright line defined by age. In 2010, Illinois raised its age of juvenile jurisdiction for 17-year-old misdemeanants only. This created challenges for law enforcement officers, who had to make quick decisions about whether to take youth to juvenile detention or adult jail, and whether to follow juvenile or adult arrest procedures. This was particularly confusing for crimes that were borderline misdemeanor/felony. For example, theft may be a misdemeanor or felony based on the assessed value of the item stolen. Once an officer made a decision about whether to arrest a 17-year-old for a misdemeanor or felony, it was difficult to reverse course and change the jurisdiction of a case if evidence surfaced later contradicting that determination.<sup>43</sup> It also made it difficult for prosecutors to plea bargain or change an offense type when additional information surfaced because such pleas or downgraded offenses could shift the jurisdiction of the case. Illinois lawmakers decided in 2012 to raise the age for all 17-year-olds to alleviate these complications, following requests from all stakeholder groups. Similar problems occurred when Mississippi originally drew a line between violent and nonviolent offenses; eventually Mississippi brought all offenses committed by 17-year-olds within the scope of the juvenile system.

### *Address Retroactivity*

Lawmakers in Massachusetts raised the age of juvenile jurisdiction in September 2013, and it went into effect immediately. The legislature did not take a position on retroactivity in the initial legislation, and because of that, the state faced several legal challenges. The courts, prosecutors, and Sheriffs' departments were also initially confused about how to handle 17-year-olds with pending cases.<sup>44</sup> Legislation to raise the age should take a clear position on retroactivity to avoid this type of confusion. One suggestion raised by experts in other states is to not make the change retroactive since the logistics would be extremely challenging, but to put in place some protections from collateral consequences (e.g., sealing of records) for youth whose cases arose prior to the effective date of the bill.

### *Fund Appropriately*

Connecticut, Illinois, and Massachusetts each budgeted funds to ensure adequate resources based on projections of how many additional youth would be added to their juvenile systems. Connecticut and Illinois found that the costs were less than anticipated. Connecticut raised its age from 16 to 17 in 2010, and from 17 to 18 in 2012, and budgeted \$18.7 million for the first year and \$19.7 million for the second. It ended up leaving \$7.1 million unspent in 2010 and \$4.8

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million unspent in 2011, a total of nearly \$12 million less than budgeted.<sup>45</sup> When Illinois raised its age, it set aside funds from which counties could draw, but no counties requested these funds.<sup>46</sup> According to Illinois' Department of Human Services, juvenile arrests, probation, and detention actually went down substantially in 2011 following the inclusion of 17-year-old misdemeanants. This was in line with national trends toward lower youth crime rates and reduced juvenile arrests. Illinois' stakeholders credit this drop in arrests with the fact that the change in age of jurisdiction could be accomplished with no new funds.<sup>47</sup> Note that 17-year-old felons were not added to juvenile caseloads in Illinois until 2014, and the data does not yet reflect the impact of this latest change.

According to experts in other states, if Texas raises its age of juvenile jurisdiction, the Legislature should ensure that counties and TJJD have adequate funds to adjust to increased caseloads and to develop specialized programming to meet the unique needs of the 17-year-old population, but should also recognize that costs may be lower than anticipated.

### *Include a Transition Period*

Connecticut, Illinois, Mississippi and New Hampshire each passed raise the age legislation with delayed effective dates to allow system stakeholders time to prepare. Illinois<sup>48</sup> and Mississippi<sup>49</sup> and New Hampshire<sup>50</sup> delayed implementation for one year after bill passage. Connecticut passed legislation in 2007 to raise its age of juvenile jurisdiction. The state incorporated 16-year-olds into its juvenile system in 2010 and 17-year-olds into its juvenile system in 2012. In contrast, Massachusetts passed legislation in September 2013 that went into effect immediately. While stakeholders report that the process has mostly gone smoothly, Massachusetts has experienced issues relating to retroactivity as noted above.

A transition period allows juvenile system stakeholders time to coordinate and plan, as well as identify and address potential issues. Moreover, a transition period of one year allows juvenile probation departments to seek additional funding from county commissioners within the appropriate budget cycle. Experts recommended ensuring that there be at least some time for the change to be in effect prior to the next legislation session so that any kinks in the law can be identified and addressed quickly during the next session.

## **Recommendations: Age of Juvenile Jurisdiction**

- **Raise the age of criminal responsibility from 17 to 18 for all offenses if appropriate funding to support the change in law is provided.**

The Committee recommends that the Legislature raise the age of criminal responsibility so that all 17-year-olds are included in the juvenile rather than the adult criminal justice system. The change in jurisdiction should apply for both misdemeanors and felonies, to ensure a clean and simple operational impact.

If the age is raised, the Legislature should provide adequate funding for juvenile probation departments to incorporate 17-year-olds into the juvenile system. Stakeholders stressed that for adequate programming to be provided, counties must receive increased funds for staffing and

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training needs. Not providing adequate funding would negate the positive effects that could come from 17-year-olds being placed in the juvenile system.

- **Provide a minimum of one year for a transition period before the age raise goes into effect.**

The Committee recommends a delay of at least one year between passage of a law raising the age of juvenile jurisdiction and implementation of that law, in order to provide county and state agency stakeholders adequate time to prepare for the change. The Legislature should appoint a Task Force comprised of juvenile justice system stakeholders to meet during the interim period to continue to identify any implementation issues that arise for practitioners and to develop any needed statutory changes for the next legislative session.

- **During the transition period, provide immediate relief to jails by creating an opt-in system that allows transfer of 17-year-olds to juvenile detention facilities.**

During the transition period, the Committee recommends that the Legislature grant counties immediate permission to begin housing 17-year-olds awaiting trial in juvenile detention facilities instead of jails. This provision would replicate the language and process of Senate Bill 1209, passed during the 82<sup>nd</sup> session, which allowed counties to hold juveniles transferred to adult court in juvenile detention facilities, but only up until they reached the age of 17. To help accommodate for the new population, the state should increase funding to these facilities by an appropriate amount. This change would help provide at least some immediate relief to county jails that are struggling to comply with federal standards requiring sight-and-sound separation of youth under 18 from adults.

- **Adjust related statutes to ensure that there is sufficient time to rehabilitate 17-year-old youths in the juvenile system.**

The Committee recommends that legislation to raise the maximum age of juvenile jurisdiction include provisions that give judges discretion to keep youth accused of crimes committed at age 17 on probation in the juvenile system until their 19<sup>th</sup> birthday and on determinate sentence probation in the juvenile system until their 20<sup>th</sup> birthday. Also, the maximum age of commitment to TJJD's secure facilities should be raised to age 20 for these youth, in individual cases where the judge orders the extended stay so as to ensure sufficient time for the youth to complete a rehabilitative program. These changes would not apply to youth under the age of 17 in order to prevent net widening and to avoid unnecessary costs.

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## **Charge 2: Expunctions and Non-disclosures**

### **Public Hearing**

The House Committee on Criminal Jurisprudence held two public hearings to consider testimony from stakeholders and experts regarding Charge 2, expunctions and non-disclosures. The hearings were held at Texas A&M University Corpus Christi on July 29, 2014 and at the Texas Capitol, Room E2.016, on Oct. 7, 2014.

The following portion of this report is based largely on the oral and written testimony from those hearings, along with other research.

### **Introduction**

The committee was charged with evaluating the effectiveness of deferred adjudication and orders for non-disclosure in spite of the many exceptions to the statute. The committee was also instructed to study extending the use of expunction of criminal records history and non-disclosures to certain individuals with low-level, non-violent convictions. The committee heard testimony that focused on the current use of expunctions and non-disclosures, the difficulty those who qualify for such orders face when applying, and what can be done to improve the system.

### **Background**

#### *Expunctions*

An expunction, or clearing a record, removes an arrest from a record. Expunctions are available only if a person is acquitted after a trial or pardoned for an offense as long as that person has not been convicted of another crime stemming from the same incident.<sup>51</sup>

Those seeking expunction must wait a certain period after the offense date: three years for a felony, one year for a Class B or A misdemeanor, and 180 days for a Class C misdemeanor.<sup>52</sup>

Expunctions are not available for people who have completed deferred adjudication. However, under current law someone who completes a pretrial diversion program would be eligible as long as the case is dismissed, there is no conviction and the case is no longer pending.<sup>53</sup>

#### *Non-disclosures*

An order of nondisclosure, or sealing of a record, is a court order prohibiting public entities, such as courts and jails, from disclosing certain criminal records. It also legally frees a person from having to disclose information about criminal history on job applications. The law, however, does not prevent agencies from sharing information with each other. The order can be issued for various offenses, including certain misdemeanors and felonies.<sup>54</sup>

Only people who have first been placed on, and completed, deferred adjudication are eligible for



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a non-disclosure order. Some offenses are not eligible for non-disclosure even if the offender has completed deferred adjudication, including kidnapping, sex crimes, abandonment or endangerment of a child, injury to a child, the elderly or disabled, violation of a protective order, stalking or crimes involving family violence.

Those convicted of a crime are not eligible for an order of non-disclosure, even if the punishment is community supervision. And if someone is issued an order of non-disclosure, certain state agencies, such as school districts, can still obtain information about an offense.

For most low-level misdemeanors, non-disclosure is available immediately after completion of deferred adjudication. For other misdemeanors, there is a two-year waiting period. And for eligible felonies, there is a five-year waiting period.<sup>55</sup>

Those arguing for greater use of non-disclosure orders point out that criminal records hinder a person's ability to gain employment, housing and higher education by having to disclose it on every application. One way to change this could be to expand the use of expunctions and non-disclosure orders and shorten the waiting periods for their use.

Others say that many offenders simply do not know they can have offenses removed from their record, and they do not apply for non-disclosure even though they have completed deferred adjudication. A misconception exists that after completion of deferred adjudication, criminal records are cleared, which is not the case.

## **Discussion**

Having an arrest or conviction on a person's record can affect that person for life, making it harder to gain admission to a university, find a job or merely be approved for a lease on an apartment. Often times, arrests that do not lead to a conviction or that were disposed of after a certain amount of community service can still show up on a record, hurting their chances of fully participating in society. Expunctions and non-disclosures are meant to help keep an individual's contact with the criminal justice system from following them throughout life. Unfortunately, numerous complications keep many who might be eligible from applying for an expunction or non-disclosure and some argue that these complications have rendered such relief irrelevant.

Practitioners argue that not as many people who could benefit from an expunction or non-disclosure are even trying to apply. Research suggests that less than 5 % of those who can take advantage of such relief actually do so. To further illustrate this fact, consider that in 2013, judges issued 4,428 orders of nondisclosure.<sup>56</sup> By contrast, that same year Texas district judges placed 49,513 people on deferred adjudication, most of whom would eventually qualify for a non-disclosure order if they complete their program requirements.<sup>57</sup> When they do participate, a number of roadblocks weaken the usefulness of going through the trouble of applying for an expunction and non-disclosure. The committee identified numerous weaknesses in the state's expunction and non-disclosure laws.

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### *Lack of adequate representation*

Since deferred adjudication is more available to individuals accused of a misdemeanor, these individuals are more likely to be eligible to apply for an order of non-disclosure once they complete deferred adjudication. However, these individuals are typically less likely to hire an attorney than those accused of a felony and are more likely to be looking for a quick resolution to their case.<sup>58</sup> For these individuals, spending a short time in jail and paying a fine might sound better than a prolonged period of deferred adjudication. But such a choice fails to take into account the residual effects of having a criminal record, even for a low-level drug offense.

Another issue stems from the misconception that completing deferred adjudication in and of itself removes a charge from their record. It does not. After a person has completed deferred adjudication, that person must apply for an order of non-disclosure. Judges and probation officers are required to inform offenders of this fact, but practitioners were unclear as to whether offenders who are eligible pay attention.

### *Exceptions*

Even if a person completes a court-ordered deferred adjudication program and is granted a non-disclosure order, this information is still not secret. While such an order allows individuals the right to leave out their criminal record when applying for a job, these records are still available to at least 30 excepted government agencies and organizations.<sup>59</sup> These agencies include the State Bar of Texas, State Board of Education, municipal and volunteer fire departments and the Texas Board of Nursing. That means that an individual who might have received a order of non-disclosure for a low level drug offense might still have it affect their ability to become a teacher or obtain a nursing license.

These exceptions were not included in the bill that created the non-disclosure law, but many were added in the following legislative session. Practitioners suggested that reducing the number of excepted agencies could strengthen the law. Others suggested that making only certain types of offenses available to specific agencies where the charge would be relevant could also help.

### *Sale of criminal history*

After an individual has obtained an order of expunction or non-disclosure, that person might come up against another roadblock relating to the public domain. With the Internet providing easier access to public information, companies that sell access to a person's public information, including criminal histories, have become more prevalent within the last two decades.

These companies obtain information from state and local agencies, typically through public information requests, and then sell access to the information online. When it comes to expunctions and non-disclosures, however, that data could be purchased before an order was granted and whoever purchased the data has incorrect information. Entities who originally sold the data have no way of keeping track of it after the first point of sale. That means that even if a judge has ordered a criminal history be destroyed, the information likely still exists somewhere in the public domain.

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This report covers the sale of criminal histories in detail, but it is important to recognize that these two subjects often are mentioned in the same conversation. Anecdotally, practitioners have said that the roadblocks posed by these online resources has led some defense attorneys to advise their clients against trying to obtain an order of non-disclosure or expunction because the benefits are so severely limited when compared to the cost.<sup>60</sup>

### *Lack of Incentives*

One of the main barriers to the utilization of non-disclosures is the waiting times associated with offenses. For example, if a person sentenced to deferred adjudication must wait for up to two years for a misdemeanor and five years for an eligible felony after completing their program before petitioning for an order of non-disclosure. Experts argue that the length of time a person must wait before being allowed to seal their record reduces the incentive to take advantage of the option and the wait times should be shortened. Further, research has shown that after seven years, an offender is no more likely to re-offend than someone without a criminal record, so with that in mind a five-year waiting period might seem arbitrary to some.<sup>61</sup>

Others argue that the process of petitioning for an order of non-disclosure is too complicated and costly, typically involving hiring an attorney, to be effective. This is on top of the approximately \$280 fee<sup>62</sup>, plus other costs for filing a civil petition, associated with filing a petition. One practitioner who has headed an expunction and non-disclosure law clinic at the University of Texas School of Law noted that it often takes multiple attorneys to figure out if a person is eligible and to round up all the necessary paperwork before filing a petition. The Office of Court Administration includes information about the non-disclosure process and a model petition on its Website. However, while acknowledging that the effort is helpful, practitioners testified that they often still have trouble navigating the process for clients<sup>63</sup>.

### *Expanding non-disclosures to convictions*

One of the suggestions regarding orders of non-disclosures has centered on the possibility of allowing those convicted of low-level non-violent crimes to be eligible for an order of non-disclosure. The thought behind the idea is that convictions of offenses like possession of small amounts marijuana can follow a person throughout life, causing more residual harm to that person's future than the amount of punishment for the crime merits.

Those opposed to this idea worry that it could lead to repeat offenders periodically sealing multiple charges from their record over time.

## **Recommendations**

- **Shorten the length of waiting periods required before a person is eligible to petition for an expunction or order of non-disclosure.**

Shortening waiting periods would make it easier for those eligible for an expunction or non-disclosure to move on with their lives, find employment or work toward advancing their

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education. The legislature should examine all waiting periods and identify which could be changed to best serve the needs of someone who is eligible for a non-disclosure or expunction while also considering the needs of Texas in ensuring public safety.

- **Expand the eligibility for expunctions to include low-level offenders after a certain period of time.**

Expanding the eligibility for expunctions to low level offenders who have completed deferred adjudication would help those who commit non-violent crimes, such as illegal drug possession, from having that charge affect their ability to get a job or housing for the rest of their lives. It also could provide an incentive for an individual to stay away from the criminal justice system with a clean record as a reward.

- **Reduce the number of exceptions allowed to state agencies and other entities in the non-disclosure law.**

Stakeholders pointed out that the number of exceptions to the non-disclosure law has made it less effective since so many government entities and other agencies can still view sealed criminal histories. Reducing the number of exceptions would make it easier for someone who has been awarded a non-disclosure order to move on with their lives. The legislature should take a careful look at these exceptions and identify which agencies could be taken off the list, or identify which agencies could receive specific exceptions based on a person's charge.

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## **Charge 3: Sale of Criminal Histories**

### **Public Hearing**

On Oct. 7, 2014, The House Committee on Criminal Jurisprudence held a public hearing to consider testimony from stakeholders and experts regarding Charge 3, the sale of criminal histories that might include erroneous information. The hearing was held at the Texas Capitol, Room E2.016.

The following portion of this report is based largely on the oral and written from those hearings, along with other research.

### **Introduction**

The committee was charged with studying the impact of SB 1289 (83R), examining the sale of criminal histories that may be erroneous as well as the lasting impact that arrest records have on individuals who are arrested but not charged or convicted. The committee was also charged with assessing the need for revision of existing statutes and considering designating an agency responsible for regulating entities involved in the industry. The committee heard testimony that focused on the effects of the sale of criminal history in bulk, and the effects of data that have changed after the point of sale.

### **Background**

This is a privacy vs. public information argument. That is, some say that because the government collects data on all individuals, the collected data should be public for everyone to see. A conflict emerges, however, when erroneous information in online criminal histories stops an individual from obtaining a job or housing. Judges and lawyers say the collateral consequences are something they hear about frequently.

SB 1289, passed in the 83rd regular session, sought to help by imposing civil penalties for inaccurate information and making it illegal to charge for a correction on a criminal history. However, the onus is on the individual to search the websites and ensure information is accurate.

The main sources for buying records in bulk are the Department of Public Safety, which serves as a repository for criminal records, and local District and County Clerk offices. It's unclear how much money clerks make from these sales, other than recouping costs associated with satisfying open records requests.

After the records are bought from DPS or another agency, some companies then turn around and sell that information. There is currently no way for the state to track who the records are sold to. This is where the main problem occurs since it's difficult to find all places that have inaccurate information, especially if a case is expunged or a person is issued an order of non-disclosure.

Most of these records are obtained through open records requests. Some county and district

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clerk's offices are more equipped for such large requests than others. Clerks in jurisdictions without funds for the latest technology have complained that pulling the records together takes up large amounts of staff work time.

DPS's data is kept in the Computerized Criminal History System. Local entities send criminal histories, including arrests and dispositions, to the state agency because it is the statewide repository for such information.

## **Discussion**

Erroneous or incomplete criminal information in the public domain can have detrimental effects on a person's ability to find a job, secure housing or apply for college. Unfortunately, with the advent of the Internet, such information has become commonplace in today's society, affecting people as they attempt to move past an incident where they came into contact with the criminal justice system. That means that in some cases a person who has obtained an expunction or non-disclosure, who by law can leave out their involvement in the justice system on an application, is accused of lying after an employer runs a background check and finds a criminal charge on a website. Stakeholders argued that action should be taken to ensure that only the most accurate information is released when information is sold in bulk. Otherwise, people's lives will continue to be affected by incorrect information in the public domain.

### *Where does the information come from*

Criminal history is housed by various governmental entities, including police departments, county clerks, district clerks and the Department of Public Safety. These entities are required by law<sup>64</sup> to provide public portions of criminal histories through open records requests. The records can be asked for individually or in bulk. The Department, which typically<sup>65</sup> collects criminal information for Class B misdemeanors and above, only makes public cases with a disposition. Serving as a state depository for this information, the Department has roughly 8.5 million criminal records and about 4.5 million of those records DPS does not release arrest information without a disposition, a fact that separates it from most other government entities.<sup>66</sup>

County and district clerk offices do, however, release information that does not include a disposition in order to comply with an open records request. That is, if the entities receive a request for all of their criminal history information, they provide what they have. And the information they have might include cases that have not been disposed.<sup>67</sup>

Individuals can also walk into a courthouse and ask for an individual's records in accordance with public information laws. Such information is typically also available online through county and district clerk websites and from DPS's website.<sup>68</sup>

The Department of Public Safety maintains a list of which entities the agency sells data to in bulk. The agency lists 22 entities that purchase data in bulk, and 17 of them are regular customers. Entities that buy the data in bulk range from Texas Department of Licensing and Regulation, the news media and background companies.

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Criminal information can also come from police departments, courthouses and other entities. One company that collects criminal histories and sells access to the information on the Internet reported that it taps more than 10,000 entities for information.

### *Dissemination of criminal history*

Because the indexes sold can contain millions of files, information released in bulk is typically provided through a File Transfer Protocol, or FTP, which is a standard network used to distribute large amounts of information over the Internet. The Department of Public Safety provides information on a weekly basis to companies that have an agreement with the agency for regular updates. Information not sold in bulk is readily available through local and state government websites, or by walking into a local courthouse.

Some of the entities that buy the data turn around and sell the data to paid subscribers. While state government entities are only allowed to recoup costs for the information, the reselling of such information has become a multi-million dollar industry nationwide. Companies that resell the data say that they are merely making available information that is already available to the public, and that the general public should have easy access to all data the government collects on its citizens.<sup>69</sup> In their view, these companies are providing a public service by providing easy access to public information. But this is where the main issue regarding the data comes into play, since it's difficult to track where the information ends up.

Similarly, county and district clerk offices sell data in bulk. But to comply with open records laws, these entities provide the information they have at the time, which might include cases that have yet to be disposed. Typically, counties receive \$2 to \$25 for a copy of a disk with the bulk data.<sup>70</sup> Complying with such large requests can take up hours of work time in offices with a small staff.<sup>71</sup>

### *Complications with data*

Since data sold in bulk can come from multiple sources and in multiple levels of completeness, keeping track of where the information ends up can be an arduous task. And because there are so many companies that sell this information online, it would be nearly impossible for a regular person with an error in their criminal record to track down every entity that has that record and have it corrected or removed. Various stakeholders equated this phenomenon to a genie being released from a bottle and not being able to put him back in or water sprayed all over a yard and not knowing where it truly ends up. Whatever the metaphor, the Internet is making the information much easier to spread and harder to reel back in when needed.

Once information enters into the public domain, it is generally up to an individual to correct erroneous information. And while the Department of Public Safety notifies those who buy information from them of changes in the records, those companies are under no obligation to inform secondary purchasers of changes.

Some stakeholders explained that eliminating the bulk sale of criminal histories altogether would push companies to buy individual records instead, thereby also forcing them to verify accuracy



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on a record-by-record basis.<sup>72</sup> However, this approach could find resistance among those who argue that all information collected on citizens should be public.

### *Expunctions and non-disclosures*

There is currently no way to follow the dissemination trail of data after the first point of sale, which makes it difficult for anyone attempting to correct erroneous information. This is particularly bad for a job applicant accused of lying for not disclosing an expunged offense, even though they have received an order of non-disclosure or order of expunction. The situation has led some attorneys to advise their clients not to even seek relief under the statutes or encourage clients who have received relief to disclose an offense anyway to avoid the risk.<sup>73</sup>

DPS includes any changes regarding cases involving orders of non-disclosures and expunction with the information purchased by companies with subscriptions.<sup>74</sup> It also sends expunction orders to the companies in case the companies bought information from an entity other than DPS and the information might contain incomplete information.<sup>75</sup>

Even though courts and government agencies try to get the message out that an expunction or order of non-disclosure has been issued, they can only inform those who they know have the information. For an agency like DPS, that means only the company that bought the information from them is contacted. Past that, it's unclear whether anyone else gets the message and the information remains in the public domain.<sup>76</sup>

Another complication specifically relating to expunctions stems from the fact that local jurisdictions destroy records within 60 days to a year after an expunction order is written. Say someone who received an expungement order writes on a job application that they do not have a criminal record, and then the potential employer finds an arrest and criminal charge online. If government agencies have already destroyed their records, that person would have a difficult time proving that they are not lying because it no longer exists, but it does exist in certain databases that have been sold.<sup>77</sup>

### *SB 1289*

Senate Bill 1289 was meant to help make sure published criminal history information is accurate and that if there is a mistake that individuals are not charged to correct the information. Information is considered accurate as long as the record was obtained directly from the Department of Public Safety within 60 days. Once a company receives an inquiry from a citizen, it has 45 days to conduct an investigation and if a change needs to be made, the company has five more days to do so on its website. For each charge that needs to be updated and is not, the company is liable for a civil penalty of \$500 per charge per day to the state and to the individual.<sup>78</sup> While stakeholders praised the bill for its effort, it was difficult to evaluate the impact of the new law in protecting citizens.

While the new law provides for a civil penalty for non-compliance, as of mid-October the Texas Office of the Attorney General had not filed any lawsuits relating to violations of the new law since it was enacted. And while numerous private lawsuits against companies that sell criminal

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information have been filed around the country, none had been filed in Texas as of the writing of this report.<sup>79</sup> The Texas Office of Court Administration also reported that it was unaware of any civil penalties assessed for violations of the new law's provisions.<sup>80</sup>

Also, stakeholders have said that the fact that it's unclear who has the information makes this law difficult to enforce.<sup>81</sup> That's partly because the onus is on the individual with a criminal history to find the information online and try to correct it. Also, the law only applies to companies that charge a fee for removing or correcting data, leaving other companies a loophole by being able to say that they do not charge for correcting data but also will not correct it.<sup>82</sup> One company with this policy instead directs an individual with a criminal record to the entity that dispersed the information and works with them to correct it.<sup>83</sup>

## Recommendations

- **Consider making the Department of Public Safety the only state entity authorized to sell criminal history in bulk, for cases involving Class B misdemeanors and above.**

The general consensus among stakeholders was there needs to be a uniform system or one source for criminal records availability in bulk in Texas. The Department of Public Safety has both in place and already provides the data. Anyone asking for information on an arrest without a disposition would still have access to individual criminal records from local entities. If the legislature chooses this approach, lawmakers must first evaluate whether the Department is equipped for a possible increase in requests for data, since the agency would then be the sole provider.

- **Create a uniform system or protocol for the dissemination of public records sold in bulk based on the policies already in place at the Department of Public Safety.**

Creating a uniform system based on the DPS model would strengthen oversight of records and strengthen the public's ability to track their own records and allow expunction and non-disclosure statutes to function properly. The state could set up a protocol for all local entities to follow, based on the DPS model. This would reduce the amount of erroneous information in the public domain since only information with dispositions would be sold in bulk.

- **Require all government agencies to provide easily accessible information to the public revealing who the agencies have sold criminal records to in bulk.**

Since one of the main concerns relating to the bulk sale of criminal histories relates to being able track where the records go, providing this information might make it easier to remove records from the public domain if they have been expunged or an order of non-disclosure have been issued in a case. Being able to identify where records end up is vital, and this information would provide at least a first point of contact.

- **Require public and private entities that sell criminal records to make easily available information on who to contact if a record is inaccurate.**

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Many times it's unclear what a person who realizes their criminal history is inaccurate can do to correct the record. Mandating that entities that provide this information also provide a guide to clearing erroneous information would aid anyone in this situation. The contact information and instructions on how to change erroneous data should be readily available on an agency's website.

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## **Charge 4: Serious Mental Illness and Substance Use Disorders**

### **Public Hearing**

The House Committee on Criminal Jurisprudence held two public hearings to consider testimony from stakeholders and experts regarding Charge 4, co-occurring serious mental illness and substance use disorders. The first hearing, held jointly with the House Committee on Corrections, was held on April 22, 2014 at the Texas Capitol, Room E2.016. The second was held on July 29, 2014 at Texas A&M University Corpus Christi.

The following portion of this report is based largely on the oral and written testimony from those hearings, along with research performed by graduate students at the LBJ School of Public Affairs as part of a yearlong research project.

### **Introduction**

The committee was charged with examining the association between co-occurring serious mental illness and substance use disorders and parole revocation among inmates from the Texas Department of Criminal Justice. The committee was also instructed to review current policies and procedures for incarcerating individuals with a dual mental health diagnosis in both state and county correctional facilities and examine potential remedies within the State's criminal justice system to ensure that the public is protected and that individuals with a mental health diagnosis receive a continuum of mental health services. Since separate programs and opportunities currently exist for adults and juveniles with mental illness in our criminal justice system, this portion separates the two aspects of the charge.

## **I. Adults with mental illness and substance use disorders**

### **Background**

A convergence of policy changes across multiple social service systems in Texas over the last two decades shifted responsibility for adults with co-occurring serious mental illness and substance use disorders to the Texas Department of Criminal Justice (TDCJ) and county jails, posing challenges to appropriate service delivery for this population. In a state that ranks 49<sup>th</sup> in the nation for the amount it spends per capita on mental health care,<sup>84</sup> 35% of inmates in state correctional facilities and 40% of people booked in county jails have a history of mental illness.<sup>85</sup> Despite recent reform efforts in certain counties, Texas communities lack appropriately coordinated and integrated community-based services for adults with co-occurring serious mental illness and substance use disorders who make contact with the criminal justice system. Without appropriate evaluation and effective treatment services, an adult with a co-occurring condition is likely to deteriorate, resulting in a worsening of emotional and behavioral problems and an increased likelihood of making contact with law enforcement.

To appropriately address the needs of this population, Texas must address two seemingly

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conflicting goals: creating incentives to divert the majority of adults with co-occurring diagnoses from the criminal justice system through community-based services while still ensuring an appropriate range of critical services for the segment of this population whose criminal behavior requires a secure placement. Texas can address these issues by simultaneously implementing reforms between agencies at the state and county levels of government.

## **Discussion**

### *Unique characteristics of co-occurring diagnoses*

People with co-occurring serious mental illness and substance use disorders may present different behaviors. For example, research suggests risk factors for crime and violence are the same for persons with mental illness as persons in the general population.<sup>86</sup> People with serious mental illness are more likely to be the victims of violent activity.<sup>87</sup> In fact, the vast majority of people with a diagnosable serious mental illness never engage in violence.<sup>88</sup> The risk of violent behavior is increased when a substance use disorder is present.<sup>89</sup> Therefore, it is important to understand the nuanced behaviors of people with co-occurring diagnoses, which can be different from people with a singular mental illness or substance use disorder.

### *Historically bifurcated service systems*

In 2003, the 78<sup>th</sup> Texas Legislature authorized the establishment of the Department of State Health Services (DSHS) to be the state mental health and substance abuse authority for Texas. Lawmakers merged four state agencies, including the Texas Department of Mental Health and Mental Retardation and the Texas Commission on Alcohol and Drug Abuse. Historically, these agencies operated distinctly from one another. When the Legislature authorized DSHS, it created the Mental Health and Substance Abuse Services Division (MHSA), which oversees the public behavioral health service delivery system. It includes community mental health services, substance use services and hospital services.<sup>90</sup> Bifurcated systems may not address the unique characteristics of co-occurring diagnoses.

Between 2003 and 2013, the amount of funding spent on the state's public behavioral health system remained relatively similar per year. The Texas Legislature appropriated an additional \$350 million for Fiscal Years 2014 and 2015 than was allotted in the previous biennium.<sup>91</sup> Funding for adult community mental health services is budgeted to increase at a higher rate (approximately 25%) than funding for substance abuse services (approximately 10%).<sup>92</sup> These distinctly different rates may be indicative of a lack of integrated services.

Moreover, according to the National Association of Mental Illness (NAMI), states that attempted to restore previous levels of mental health spending may not be able to adequately compensate for the challenges caused by underfunding public mental health systems.<sup>93</sup> Therefore, despite the increased funding appropriated to DSHS by the 83<sup>rd</sup> Legislature, the previous decade of stagnant funding may continue to result in gaps in community-based services for adults with co-occurring diagnoses.<sup>94</sup>

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### *Utilization rate of community mental health services*

From FY 2008 through FY 2013, approximately 1.1 million adults and children received community mental health services in Texas through local mental health authorities (LMHAs).<sup>95</sup> The number of persons provided mental health services through these entities has increased by approximately 40 % during this period.<sup>96</sup> This growth is largely driven by increased utilization from adults.<sup>97</sup> However, according to DSHS, only 31% of the need is being met.<sup>98</sup> This suggests a vast majority of Texans with mental health needs are not receiving treatment for their mental illness or substance use disorder.

### *Priority Population Requirements*

Priority population requirements for both mental health and substance abuse services through DSHS may be exacerbating the under utilization rates. The priority population for adult mental health services is defined as those with a severe and persistent mental illness diagnosis of schizophrenia, bipolar disorder or major depression requiring ongoing and long-term support and treatment.<sup>99</sup> Three populations receive priority for admission to substance use services before all others: pregnant, intravenous substance users, pregnant substance users, and intravenous drug users. After these populations have been admitted to services, DSHS will place other individuals referred from the Department of Family and Protective Services into treatment. These requirements may not prioritize the treatment of co-occurring diagnoses despite the evidence that shows a potentially elevated risk of violence among adults with both diagnoses.

The TDCJ operating budget for FY 2013 was \$3,118,728,577, but only 0.65% was spent on Special Needs Offenders, which includes inmates with serious mental illness.<sup>100</sup> The agency spends \$50.04 per day on housing and food and between \$42 and \$49 on medical care at a TDCJ prison.<sup>101</sup> By comparison, the average cost per day for an inmate in a psychiatric correctional facility is \$138.<sup>102</sup>

As the front-end institution of the criminal justice system, county and city jails are required to provide constitutionally appropriate care for inmates and pre-trial detainees. However, mental health care at jails is costly. For example, a study by the Mental Health and Mental Retardation Authority of Harris County and Harris County's Office of Budget and Management found that Harris County's annual costs for an inmate with mental illness was \$7,017 per year, compared to \$2,599 for other inmates (excluding police and court costs).<sup>103</sup> These costly services may not produce an equivalent return on safety. Comprehensive national data show that suicide occurs roughly three times more frequently in jail than among the general population.<sup>104</sup>

### *Mental Illness exacerbated by incarceration*

In addition to mental health conditions existing prior to incarceration, an inmate may have his or her condition exacerbated by the conditions of confinement.<sup>105</sup> Isolation is a form of confinement that may have particularly detrimental psychological effects. In 2011, TDCJ housed 8,784 inmates in isolation. More than 2,000 of those inmates had a diagnosis of either serious mental illness or intellectual disability.<sup>106</sup> People with mental health conditions are overrepresented in

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this population and the practice can have long-term effects on an inmate's mental health.<sup>107</sup> This suggests incarceration may be antithetical to the treatment needs of people with co-occurring mental illness and substance use disorder.

### *Trauma*

Many people seeking behavioral health treatment or who are in other programs such as homeless and domestic violence shelters, foster care, or juvenile or criminal justice systems have histories of physical and sexual abuse and other types of trauma-inducing experiences.<sup>108</sup> Left unrecognized and untreated, these traumatic experiences can lead to mental health problems, chronic health conditions, substance use and eating disorders, as well as contact with the criminal justice system.<sup>109</sup> For example, female inmates have distinct and possibly greater health and mental health needs as compared to male inmates. A significant portion of incarcerated females report a history of sexual, emotional, and physical abuse.<sup>110</sup>

Moreover, the trauma of incarceration itself may exacerbate an individual's previous trauma. A 2008 study by the Bureau of Justice Statistics ranked 5 Texas prisons among the 10 U.S. prisons with the highest inmate-reported sexual assault complaints. The Prison Rape Elimination Act (PREA), a federal law passed in 2003, seeks to address prison rape by instituting a zero-tolerance policy in correctional settings. Within TDCJ, a PREA Ombudsman is responsible for ensuring that TDCJ is in compliance with federal regulations to monitor and implement efforts to eliminate sexual assaults in the facilities. In FY 2013 the PREA Ombudsman Office reviewed 742 administrative investigations of offender-on-offender sexual abuse allegations.<sup>111</sup> Disciplinary cases for convictions of assailants may be sexual misconduct, sexual fondling, or sexual abuse.<sup>112</sup>

### *Competency Restoration*

If found incompetent to stand trial, a defendant must be restored to competency before the legal process can continue and be able to participate in their own defense.<sup>113</sup> Competency restoration generally takes place in a state psychiatric hospital.<sup>114</sup> The number of inpatient forensic commitments has increased in recent years, compromising the availability of psychiatric beds in state hospitals and extending defendants' stay in jails.<sup>115</sup> Sometimes defendants are detained in jail longer than the maximum sentence for the crime charged because they are waiting for a forensic inpatient bed.<sup>116</sup> Because jails may not provide adequate mental health treatment, a defendants' extended stay could exacerbate their behavioral health conditions.

### *Diversion programs, Specialty Courts and Peer Support*

Jail diversion programs offer an alternative to incarceration for people with mental health conditions for whom treatment in a community-based setting is appropriate.<sup>117</sup> Criminal justice and mental health systems in Texas are collaborating to identify people with mental illness at different points along the continuum of criminal justice involvement and engage them in mental health services.<sup>118</sup> This effort steers those with a mental illness away from local jails and toward the programs that might help keep them from having contact with law enforcement in the future.

Along the same lines, specialty courts have been credited with reducing the number of

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incarcerated individuals in Texas jails and prisons; however, the state has not allocated the necessary resources to measure the performance and outcomes of specialty courts.<sup>119</sup> According to a 2013 Criminal Justice Advisory Council report, there are approximately 140 operational specialty courts in Texas.<sup>120</sup> Specialty courts often are utilized as one piece of a locality's larger jail diversion plan, serving people with serious mental illness and substance use conditions.<sup>121</sup> These courts utilize problem-solving processes to provide community-based alternatives to incarceration and operate under a model that requires the collaboration of judges, prosecutors, defense attorneys, law enforcement and mental health professionals.<sup>122</sup> The most common types of specialty courts relevant to criminal law and mental health/substance use are mental health courts, drug courts, family drug courts, DWI courts, and veteran's courts.

Despite counties' recent efforts to implement jail diversion programs and specialty courts for adults with mental illness and substance use disorders, these programs are largely bifurcated and vary between counties. They also serve a small portion of the population of adults who make contact with the local criminal justice system. The majority of witnesses at both hearings advocated for increased use of these programs, arguing that those with a mental illness are not best served in a jail.<sup>123</sup>

Another initiative that has increased opportunities for recovery for individuals experiencing behavioral health conditions is the use of certified peer support specialists throughout Texas. Peer support programs allow individuals who have both experience as someone seeking recovery and relevant training to aid in the recovery of others experiencing mental health conditions by focusing on recovery, wellness, self-direction, responsibility and independent living.<sup>124</sup>

Peer support specialists are a cost-effective and clinically effective intervention to reduce the frequency of other more intensive and more expensive services, resulting in lower costs and better outcomes. They provide an individual with mentorship, guiding someone re-entering society through where to find services and how to cope with the transition from jail to normal life.

#### *Mental Health workforce*

While the population in Texas has increased and become more diverse and health care needs have grown more complex, the supply of psychologists and social workers has remained flat, causing an overall decline in the ratio of provider to population.<sup>125</sup> As of March 2009, 173 out of 254 Texas counties, or 68%, and two partial counties were designated as Health Profession Shortage Areas (HPSAs) for mental health, indicating these counties have a shortage of mental health professionals such as social workers, counselors, psychologists and psychiatrists.<sup>126</sup> In fact, 171 counties did not have a single psychiatrist.<sup>127</sup> By July 2013, 25 additional counties were designated as HPSAs; there are now 198 Texas counties included in this category.<sup>128</sup> In order for programs like jail diversion to work, the community must have an adequate number of psychologists and social workers to serve the needs of those being diverted.



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## Recommendations

- **Provide more funds for pre-trial diversion and community-based rehabilitation programs.**

Law enforcement officials across the state have sounded the alarm that individuals with mental illness who would be better served in community-based treatment programs too often populate their jails. Expanding the use of pre-trial diversion programs, during pre-booking and post-booking, would alleviate this issue by directing individuals away from jails and toward receiving the help they need.

- **Expand the prevalence of mental health courts and of peer support programs in all jurisdictions.**

Specialty courts are a proven tool in identifying the specific needs of those accused of a crime. And mental health courts have worked to steer those identified as having a mental illness to the services that can best prevent them from getting caught in the criminal justice system.

Similarly, peer support groups offer those accused of a crime support from people who have been through the system and are familiar with where to get help and how to avoid pitfalls that can land someone back behind bars. These programs have proven useful and expanding their use can keep people out of jail.

- **Expand the availability of community-based mental health and rehabilitation services.**

In order for diversion programs to work, law enforcement officials must have a place to send those needing help. In communities where such services are lacking, individuals with mental illness end up in county jails far too often. And jails do not provide the therapeutic environment needed to aid these individuals.

## II. Juvenile Justice and mental health

### Background

Similar to the adult system, policy changes across multiple social service systems in Texas over the last two decades shifted much of the responsibility for youth with mental health needs to a state agency, the Texas Juvenile Justice Department (TJJD). The change poses challenges to appropriate service delivery for this population of youth. In Texas, 54% of youth in TJJD's state secure facilities and 47% of youth on community probation have at least one mental illness.<sup>129</sup> Nationally, roughly 21% of children in the general population have a mental health diagnosis.<sup>130</sup> Without appropriate evaluation and effective treatment services, a child with a mental health condition is more likely to make contact with the juvenile justice system.<sup>131</sup>

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The vast majority of youth with mental health needs who make contact with the juvenile justice system can be better served in their communities, where treatment is cheaper and leads to better outcomes.<sup>132</sup> Research shows that only a small portion of this population has a mental illness so severe it impairs their ability to function as a young person such that it may require out-of-home residential care in order to address their behavioral health needs and to ensure public safety.<sup>133</sup> Nationally, 70% of youth in custody have a mental illness, and for 27% of them, the mental illness is so severe it impairs their ability to function as a young person and grow into a responsible adult.<sup>134</sup> Therefore, to appropriately address the needs of this population, Texas must create incentives to divert the majority of youth from the juvenile justice system through community-based services while still ensuring an appropriate range of critical services for the segment of this population requiring out-of-home placement.<sup>135</sup>

However, Texas counties lack appropriately coordinated diversion services for these youth. And at the state-level, TJJD lacks small, treatment-oriented secure facilities in which to house this small portion of youth. The agency also lacks a supportive training program for staff working with and treating this particularly vulnerable and challenging population. The closure of Corsicana Residential Treatment Center (CRTC) for youthful offenders with serious mental health needs presented an opportunity to agency officials to examine and develop appropriate and cost-effective alternatives to incarcerating the population of youth with mental health needs who engage in delinquent behavior, but the challenge to mental health service delivery for the agency extends beyond the 68 youth who moved out of CRTC when it closed.

## **Discussion**

### *Low levels of funding appropriated to the public mental health system*

In 2012, Texas spent \$38 per capita annually on mental health services, compared to a national average of \$120.56.<sup>136</sup> The 83<sup>rd</sup> Texas State Legislature increased the funding appropriated to mental health services, providing the Department of State Health Services (DSHS) nearly \$350 million above the previous biennium's budget for a variety of new and expanded mental health services,<sup>137</sup> \$75 million of which was appropriated to children's community mental health services.<sup>138</sup>

Research shows poverty is the largest common denominator for delinquent youth, and the public mental health system primarily serves low-income families.<sup>139</sup> This means that youth with mental health needs from resource-rich neighborhoods are more often treated through private health care systems, preventing their contact with law enforcement, while disadvantaged youth penetrate more deeply into the juvenile justice system.<sup>140</sup>

### *Low percentage of the population utilizing Local Mental Health Authorities (LMHAs)*

Mental health services in Texas are primarily provided through designated local mental health authorities (LMHAs), commonly known as community mental health centers. DSHS contracts with 39 LMHAs to provide or arrange for the delivery of community mental health services for a specific geographic area.<sup>141</sup> The LMHAs are required to plan, develop and coordinate local policy and resources for mental health care.<sup>142</sup> A recent report revealed a low percentage of eligible Texan children, 17%, using LMHA services compared with the rate of U.S. population

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using community behavioral health services, 21%.<sup>143</sup> The small proportion of children accessing community mental health services suggests that Texas children may be more likely to receive mental health services from TJJJ than from the state’s public mental health system.

### *Mental health workforce shortages*

Similar to the adult system, workforce shortages for mental health services for youth account for the most severe health professional shortages in the state, depriving Texan children of critical services they need for their mental health and contributing to the use of more expensive and less effective services provided through juvenile justice programs.<sup>144</sup> At the request of TJJJ, experts reviewed the case files of youth receiving mental health treatment at Corsicana Residential Treatment Facility before it closed and identified three typical experiences of the population: mental health issues frequently predate or even lead to youths’ commitments to secure detention; in some cases, the juvenile justice system may have been the first to attempt to serve their needs; in some cases, their problems persisted in spite of attempted interventions by their families, schools, mental health systems, child welfare agencies and other child-serving institutions.<sup>145</sup>

### *Low levels of funding from federally funded entitlement programs*

Nationally, Medicaid and CHIP are rapidly becoming the largest source of funding of public mental health services for children, youth, and adults living with mental illness or serious emotional disturbance.<sup>146</sup> In FY 2009, 48% of states’ mental health funding came from Medicaid. In contrast, only 16% of Texas’ mental health funding came from Medicaid, suggesting limited access to mental health services for Texas children on Medicaid.<sup>147</sup> Compounding these low funding levels, detained youth in Texas, as in many or most jurisdictions nationwide, are routinely denied Medicaid coverage based on a federal law that prohibits coverage for individuals who are “inmates” of public institutions.”<sup>148</sup>

Recent changes in Medicaid expansion have improved these outcomes slightly. In FY 2010, the Youth Empowerment Services (YES) Waiver, a Medicaid 1915(c) waiver for children up to 19 years of age was developed to help reduce the need for parents to give up custody of their children in order to obtain intensive behavioral health services that are not otherwise available or they cannot afford.<sup>149</sup> In Texas, the YES Waiver pilot programs in Travis, Bexar, and Tarrant counties are showing initial signs of improved outcomes for treating youth mental health needs locally, even for youth in county probation departments.<sup>150</sup> However, there were only 300 total YES Waivers allotted among these three pilot counties, 100 per county.<sup>151</sup> The 83<sup>rd</sup> Texas Legislature passed Rider 80, which directs HHSC and DSHS to expand the YES waiver statewide

### *Fragmented social service systems*

The fragmented structure of the state’s behavioral health system makes it difficult for families to navigate mental health treatment options because it does not align with the needs of youth with mental illness. That’s because their needs often cross the jurisdiction of multiple social service systems.<sup>152</sup> The system includes the health care system, the mental health system, child welfare system, financial welfare system, substance abuse treatment system, and education systems. The

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multiple funding “silos” that support each of these social service systems facilitated the fragmented structure of the state’s behavioral health system.<sup>153</sup>

Many states attempting to reduce the proportion of youth with mental health needs who make contact with the juvenile justice system are incentivizing collaborations between multiple social service systems, recognizing that no one system bears sole responsibility for these youth.<sup>154</sup> However, the availability of collaborative services in Texas is limited. The counties who do provide these services, such as Bexar, Dallas, Harris, Travis, and Tarrant counties have successful outcomes, but they face various challenges providing services that are inclusive of all social service systems, providing preventive services before youth commit crimes, only have limited access to community-based resources or only have the capacity to serve a small number of youth with mental health needs.<sup>155</sup> Collaborative statewide services would expand services in these counties and replicate their success in other Texas jurisdictions in order to better address the needs of youth with mental illness who engage in delinquent behavior.

#### *Disparate use of assessment tools*

In general, mental health disorders are more complicated and difficult to treat in young people than in adults.<sup>156</sup> Adolescence is a unique developmental period characterized by growth and change, and as such, mental health disorders in adolescents are also subject to change as these youth continue to develop.<sup>157</sup> Because of these developmental changes, aggregate data on the prevalence of mental health needs among the population of justice-involved youth can be confusing due to differing criteria used to identify mental health conditions across jurisdictions and the similarities between these criteria and the general characteristics of delinquent youth.<sup>158</sup> Therefore, ongoing screening and assessment are critical components for treating this population. Screening tools attempt to identify the youths who warrant immediate mental health attention and further evaluation.<sup>159</sup> Since 2001, TJJ’s probation departments began administering the Massachusetts Youth Screening Instrument Version 2 (MAYSI-2), an evidence-based tool for identifying high-risk youth upon initial referral and upon admission into a pre-adjudication detention facility. While all juvenile probation departments in Texas are required to administer the MAYSI-2, departments refer youth who score a positive screening to a local mental health provider for further assessment.<sup>160</sup> However, because local juvenile probation departments rely heavily on county and local funding sources, the type and availability of these assessments vary across jurisdictions.<sup>161</sup> If mentally ill youth are not appropriately evaluated and provided effective treatment services, their mental health is likely to deteriorate, resulting in a worsening of emotional and behavioral problems and an increased likelihood that youth will make contact with or have further involvement with the more costly juvenile justice system.<sup>162</sup>

#### *High rate of co-occurring diagnoses of mental illness and substance abuse*

Research shows that mental illness, especially depression, often co-occur with other disabilities, which may be due to factors such as psychological stress related to a disability, social isolation, trauma, institutionalization.<sup>163</sup> Many youth in the juvenile justice system have more than one disorder. The most common co-occurrence for this population is substance abuse with a mental illness.<sup>164</sup> Many juveniles who commit delinquent acts have a history of substance abuse,<sup>165</sup> and national studies have shown that up to two-thirds of juveniles in the justice system with any mental health diagnosis had dual disorders, most often including substance abuse.<sup>166</sup> In 2014,

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TJJD reported that 81% of youth in state-level secure custody have two or more specialized treatment needs.<sup>167</sup> These disorders put children at risk for troublesome behavior and delinquent acts,<sup>168</sup> and dually-diagnosed adolescents often require behavioral treatments unique to their mental health disorders in addition to those treatments required for substance abuse.<sup>169</sup>

### *High incidence of trauma*

Youth in the juvenile justice system are more likely than other children generally to have mental health and substance use issues,<sup>170</sup> and this higher prevalence may be due to risk factors such as exposure to trauma.<sup>171</sup> Anxiety disorders, post-traumatic stress disorder in particular, are prevalent among juvenile offenders, especially girls.<sup>172</sup> At least 75% of youth in the juvenile justice system have experienced traumatic victimization,<sup>173</sup> and 93% of youth in detention reported exposure to traumatic events including accidents, serious illnesses, physical and sexual abuse, domestic and community violence, and the majority of these youth were exposed to six or more events.<sup>174</sup> These events increase the likelihood of youth engaging in delinquent behavior and making contact with law enforcement. For example, studies have found that child abuse and neglect increase the risk of being arrested by 55 % and increase the risk of being arrested for violent crime by 96 %.<sup>175</sup>

### *Community-based programs lead to better outcomes for youth:*

For most youth with mental health needs, the time spent in a secure facility impedes, rather than helps, rehabilitation.<sup>176</sup> Serving youth's mental health needs in the community reduces recidivism, keeps kids and staff safer, and costs less than secure facilities because community-based programs leverage community resources at the local level and are more conducive to youth rehabilitation.<sup>177</sup> The cost for serving youth in a TJJD secure facility costs taxpayers approximately \$359 per day per youth, whereas in-home diversion programs cost on average between \$48 and \$73 a day.<sup>178</sup> The prevalence of youth with mental health needs in the Texas juvenile justice system suggests that not all Texas counties have appropriate options for addressing the needs of this population locally. For some counties, the state's juvenile justice system has become the default placement for many youth with mental health disorders who do not receive appropriate psychological and psychiatric treatment in the community.

## **Recommendations**

### **• Increase diversion of youth with mental health needs through county-based treatment.**

Research shows that whenever possible, consistent with public safety considerations, youth with serious mental health disorders should be diverted into effective community-based treatment.<sup>179</sup> Effective local options require the coordination of various agencies and local service providers. Diverting youth from the juvenile justice system would help them receive the care they need in the community they live.

### **• Develop four small residential mental health treatment facilities to be operated by TJJD as regional alternatives to existing secure facilities for this population of youth with mental illness.**

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Even with workable and effective diversion options, some youth with mental illness have committed offenses serious enough to require placement in secure facilities. Research shows that these youth need effective treatment services provided in a secure setting because small rehabilitation centers give young people the care and interaction they need.<sup>180</sup> Therefore, while states will continue to incarcerate youth who pose serious risks to public safety, confinement of young people in locked facilities must be an option of last resort.<sup>181</sup> TJJJ needs to develop such placement options as a replacement for the services previously provided at the Corsicana facility.

Accordingly, we recommend that TJJJ develop four small (20-24 bed capacity) mental health treatment facilities located in four areas of need around the state for youth with significant mental health needs who have committed serious crimes and who cannot be safely diverted to community-based options.

- **Develop a specialized supportive training program for TJJJ staff.**

One of TJJJ's pressing challenges involves a shortage of staff (both treatment staff and Juvenile Correctional Officers) who have specialized training to deal with the population of youth with mental illness. This leads to less effective treatment for this group of youth, as well as high levels of violent disturbances by the youth that are not successfully managed by staff. Creating and implementing an incentivized training program for staff at all levels of intervention within TJJJ to deal with youth with severe mental health disorders could help alleviate the situation.

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## **Charge 5: Graffiti Penalties and Abatement Programs**

### **Public Hearing**

The House Committee on Criminal Jurisprudence held two public hearings to consider testimony from stakeholders and experts regarding Charge 5, graffiti penalties and abatement programs. The hearings were held at Texas A&M University Corpus Christi on July 29, 2014 and at the Texas Capitol, Room E2.016, on Oct. 7, 2014.

The following portion of this report is based largely on the oral and written testimony from those hearings, along with other research.

### **Introduction**

The committee was charged with examining the current pecuniary loss thresholds associated with graffiti offenses and to study the costs of enhancing the penalties associated with the offense of graffiti. The committee was also asked to examine pretrial diversion programs for graffiti that exist in other states as well as studying the existing Graffiti Abatement Programs in Texas.

### **Background**

The Texas Penal Code defines a graffiti offense as the intentional markings, including inscriptions, slogans, drawings, or paintings, on the tangible property of a non-consenting owner.<sup>182</sup> Under current Texas law, the offense of graffiti is punishable by a Class B misdemeanor if pecuniary loss is less than \$500 and a Class A misdemeanor if the pecuniary loss is between \$500 and \$1,500. The offense becomes a state jail felony if the amount of pecuniary loss is between \$1,500 and \$20,000, or if the marking is made on a school, an institution of higher education, a place of worship or human burial, a public monument, or a community center that provides medical, social, or educational programs and the pecuniary loss to real property is less than \$20,000. A graffiti offense is a third degree felony if the pecuniary loss is between \$20,000 and \$100,000; a second-degree felony if the pecuniary loss is between \$100,000 and \$200,000; a first-degree felony if the pecuniary loss is \$200,000 or more.

Graffiti can cost cities millions of dollars in cleanup every year. These costs have sparked legislative debates over how best to update current graffiti laws to address the ongoing problem. The debate is typically between increasing punitive measures or utilizing abatement and restorative approaches, which avoids criminalizing individuals. Advocates of increasing punitive measures argue that graffiti offense pecuniary loss thresholds fail to account for inflation since they have not changed since 1993. Proponents of abatement programs note that the criminalization of graffiti offenders poses lifelong barriers to the mainly youthful population involved in the crimes as well as costing the state money to jail low-level non-violent offenders.



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## Discussion

### *Taggers and cleanup costs*

Graffiti is often associated with street gangs. However research suggests gang related graffiti only accounts for 10% to 15% of total graffiti offenses.<sup>183</sup> The majority of graffiti is created by individuals, or group "taggers," in search of notoriety. Furthermore, the majority of offenders are under the age of 21. There are many types of graffiti ranging from individual symbols and artistic designs to offensive content including images or profanity.

Regardless of who the offender is, or what type of graffiti that person created, cities and private property owners typically incur the monetary repercussions of removing graffiti markings. Private property costs may include loss of business, personal repair costs, and destruction of sentimental property. Cities typically spend tens of thousands of dollars clearing walls of the spray paint. For example, larger cities like San Antonio and Dallas reportedly maintain graffiti budgets of almost \$1 million.<sup>184</sup> In comparison, the city of Corpus Christi retains an annual budget of almost \$300,000 for graffiti abatement programs. Between 2009 and 2013, the Corpus Christi Police Department reported that graffiti removal costs averaged about \$236,500 per year.<sup>185</sup>

### *Cost of incarcerating taggers*

From 2009 through 2011, Texas sentenced 22 adults to state jail for graffiti, for a total of 9,475 days and cost Texas taxpayers \$420,000 to incarcerate these individuals.<sup>186</sup> From January 2010 to December 2011, Travis County reported the arrest and conviction of 72 adults with felony-level graffiti-related crimes. These crimes amounted to 20 days in county jail and cost \$59 a day, per person.<sup>187</sup> In 2010, the whole state of Texas convicted and sentenced 289 offenders to probation or jail.<sup>188</sup> Typically, most graffiti offenses do not lead to an arrest. The city of Corpus Christi reported an average of 4,700 cleanup sites per year between 2009 and 2014. Yet, the city only filed about 20 criminal cases involving graffiti per year.<sup>189</sup>

### *How to reduce graffiti*

With such a low arrest rate and increasing cleanup costs, the debate over graffiti laws is how the state can appropriately decrease the number of graffiti offenses without incurring heavy costs. Suggestions to the committee included increasing pecuniary loss thresholds to reflect modern inflation rates that have increased between 60% and 70% since 1993, the last time the Penal Code was rewritten.<sup>190</sup> Other suggestions to the committee include rapid cleanup, abatement, and restorative justice, which focuses on repairing harm caused by crime. The majority of testimony to the committee has rejected increasing jail time for offenders due to the costs to taxpayers for incarcerating low-risk offenders and settling the youths who commit the crimes with a criminal record.

There are already over 34 Graffiti Abatement Programs in Texas, all of which are funded with local money and run by county or city employees. The majority of the abatement programs offer on-call graffiti removal services, anti-graffiti education programs and volunteer opportunities.

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These programs allow offenders to avoid the lifelong consequences of a conviction while involving them in the community and educating offenders on the consequences of their actions on the community. Rapid response, on-call graffiti removal has been a successful response to reducing graffiti in cities like Corpus Christi. By removing graffiti within 48 hours taggers lose the notoriety of their tagging and potential hostilities over rival graffiti markings between gangs is limited.<sup>191</sup>

In addition to these programs, it was proposed during public testimony to include restorative justice as a weapon against the proliferation of graffiti. Advocates of restorative justice suggest that graffiti offenders fulfill community service by ridding walls of graffiti. It was also proposed that communities provide opportunities for graffiti artists to use their skills to create positive murals reflecting the values of the community they live in. Restorative justice not only educates offenders, but also eases some of the burden on the victims of graffiti offenses by providing a justice that does not criminalize offenders in the process. One criticism of increasing pecuniary loss thresholds is that most offenders are under the age of 21 and those fines are therefore typically paid by family members who did not commit the crime. Restorative justice would take care of this by punishing the offenders themselves, not their family. Abatement and restorative justice programs have garnered more attention from stakeholders and experts in recent years.

## **Recommendations**

### **• Increase Abatement Programs**

Support legislation that would expand the number of Graffiti Abatement programs across the state. Increasing punitive measures against graffiti offenders would only cost taxpayers more money to incarcerate low-risk offenders. Considering the majority of offenders are under the age of 21, abatement programs allow offenders to avoid lifelong consequences associated with a conviction, while holding them responsible for their actions. Abatement programs could include a form of restorative justice for those offenders caught, including making them a part of rapid response cleanup crews.

### **• Adjust graffiti offense thresholds to reflect inflation**

Stakeholders supported the idea of a Class C misdemeanor with a minimum threshold around \$200-\$250.<sup>192</sup> Experts testified that few graffiti offenses cost just \$50 and current thresholds are too low. Proponents of creating a Class C misdemeanor argue that it more closely reflects the low-level offense that graffiti represents.

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## **Charge 6: Non-Traditional Offenses and Rule of Lenity**

### **Public Hearing**

The House Committee on Criminal Jurisprudence held one public hearing to consider testimony from stakeholders and experts regarding Charge 6, ambiguous laws and the rule of lenity. The hearing was held at the Texas Capitol, Room E2.016 on Oct. 7, 2014,.

The following portion of this report is based largely on the oral and written testimony from that hearing, along with other research.

### **Introduction**

The committee was charged with evaluating the approximately 1,500 non-traditional criminal offenses outside of the Penal Code, streamlining these offenses and examining ambiguities in the law. The committee was also charged with studying the existing use of the Rule of Lenity and *Mens Rea* and the possibility of codifying both standards. The committee heard testimony that focused on the prevalence of such laws and how the rule of lenity is typically applied in Texas.

### **Background**

Each legislative session, the state legislature adds roughly 50 crimes to the penal code and outside of the penal code.<sup>193</sup> Currently there are approximately, 1,500 laws outside of the state penal code, which include dredging for oysters at night and lying in a fishing tournament.<sup>194, 195</sup> When it was rewritten in 1993, the Texas penal code had roughly 200 crimes listed, and roughly 25 have been added in the last 20 years.<sup>196</sup>

The rule of lenity is in essence a statutory tiebreaker in favor of the defendant when a law is ambiguous, meaning different people can interpret it differently. Still, it is rarely used in Texas. In the 2002 Court of Criminal Appeals of Texas Case, Cuellar v Texas, Judge Cochran mentions that the rule of lenity has been referred to seven times in the previous 116 years.<sup>197</sup> However, the rule was recently referred to in a ruling related to former U.S. House Speaker Tom Delay, who was accused of violating elections laws.<sup>198</sup>

### **Discussion**

#### *Laws outside the penal code*

The 1,500 laws outside of the penal code have led to a confusing system of rules that make it difficult for regular citizens to keep up with what is against the law. Some argue that many of these laws are out dated or are covered by other existing law. Many of them could be repealed, they say, to make the justice system easier to understand for the average Texan. However, there is no regular monitoring or streamlining of such laws, so they continue to build up.

Many of the new laws are included within larger bills, such as when a state agency creates an

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administrative penalty. These new laws typically do not move through the criminal jurisprudence committee, but instead are heard by whatever committee the larger bill is assigned to. Such a system makes it difficult to keep track of how many new laws are created each legislative session.

In order to alleviate this, some have argued that eliminating unnecessary laws could help. Others argue that codifying the rule of lenity would also help the situation. Still, others urged that a change in House rules might help reduce the number of laws on the books, such as prohibiting bills that create a penalty from being added to the local and consent calendar or requiring any bill that creates or enhances a penalty to include that in the bill caption.

### *Rule of Lenity and Mens Rea*

Those in favor of codifying the rule of lenity argue that putting it into statute will force judges to use it when a law is ambiguous. Where *mens rea* means someone must have a "guilty mind" to have committed a crime, the rule of lenity says that a specific law wasn't clear enough to give a person the chance to have a "guilty mind." And so codifying the rule of lenity would result in more of a level playing field since judges would be forced to side with a defendant more often, instead of one judge ruling one way and another ruling the opposite way in a similar case.<sup>199</sup> Codifying the rule of lenity might also force legislators to write clearer laws on the front end so they will be easier to understand in practice.<sup>200</sup>

Still, others argue that there is no need to codify the rule of lenity since it already exists in Texas and judges can and have used it in various cases, mostly when addressing laws outside of the penal code. For example, the rule was referred to in the recent case against form U.S. House Speaker Tom Delay, who was accused of violating the Texas Election Code.<sup>201</sup>

Some argue that it is rarely used because the Texas penal code is clearly written. Others argue that its rarity stems from relying on other statutory constructions when encountering an ambiguous law, such as acquiescence on the part of the Legislature and judiciary, the history of legislation, the purpose of a statute and examining language as a whole instead of rigidly construing individual words.<sup>202</sup>

The rule of lenity would generally be used in the appeals process as an argument as to why a certain offender should not have been convicted. Those arguing for and against codifying the rule mentioned that it would likely be used in rare cases and only when other options for statutory interpretation have been exhausted. When used, it would be argued that the charge against them could be construed in various ways, and the defendant interpreted it in a way that does not result in his or her guilt. That is, the accused was not put on notice that their action was criminal in the first place.

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## Recommendations

- **Reduce the number of laws outside the penal code.**

The legislature should set up a commission to identify archaic or duplicative laws. The commission could identify laws outside of the penal code that could be repealed because they are unnecessary or covered by other statutes. The commission would present findings to the legislature for consideration.

- **Continue to study the possibility of codifying the Rule of Lenity.**

State lawmakers should continue to study whether to codify the Rule of Lenity in Texas. In examining the possible effects of codification, careful consideration should be given to how codification of this rule has played out in other states and which kinds of cases codification would affect in Texas.

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## **Charge 7: State Jail Felonies**

### **Public Hearing**

The House Committee on Criminal Jurisprudence held two public hearings to consider testimony from stakeholders and experts regarding Charge 7, relating to state jail felonies. The hearings were held at Texas A&M University Corpus Christi on July 29, 2014 and at the Texas Capitol, Room E2.016, on Oct. 7, 2014.

The following portion of this report is based largely on the oral and written testimony from those hearings, along with other research.

### **Introduction**

The committee was charged with examining the utilization of community supervision in state jail felonies and the effectiveness of the state jail in light of its original purpose. The committee heard testimony from stakeholders and experts who discussed the original purpose of state jails, the current condition of state jails, and proposed ways to improve the current state jail system.

### **Background**

In 1993, the 73rd Legislative Session passed SB 532 and SB 1067, establishing the state jail system and a new class of state jail felonies to alleviate overcrowding in prison and county jails. Under the new law, state jail felonies were punishable by confinement in a state jail facility for 180 days to 2 years and a fine of up to \$10,000. Amendments were made to the Code of Criminal Procedure in conjunction with SB 1067 that mandated judges to immediately suspend a state jail confinement sentence and place the defendant under community supervision for 2-5 years.<sup>203</sup> If the offender did not comply with the terms of their probation the judge could punish them with confinement in a state jail facility for 30 to 180 days. If the offender's community service were revoked completely, that person would serve his or her entire sentence in a state jail. State jail sentences were, and still are, served day-for-day, meaning no accrued time for good behavior or parole.

A judge could also require a person convicted of a state jail felony to serve an upfront sentence at a state jail facility prior to probation. An offender with no prior felonies could be sentenced up to 30 days in a county jail or up to 60 days in a state jail; offenders with one prior felony could be sentenced up to 60 days in a county jail or up to 180 days in a state jail; and offenders with two or more prior felony convictions or certain drug offenses could be sentenced up to one year in a state jail prior to being placed on probation.

The ultimate goal of the state jail felony program was to remove low-level criminals from contact with violent offenders as found in the prison system, reduce overcrowding in the prison system, and emphasize treatment and rehabilitation with the goal of reducing recidivism rates for low-level offenders. State jail offenders were to be referred to as 'detainees' rather than 'inmates', given different uniforms than inmates in prison facilities, and the state jails themselves were to



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have intensive work programs, rehabilitation opportunities, and educational opportunities. However, over the next couple of legislative sessions, lawmakers modified the state jail felony system, altering the original intentions of the state jail program.

In 1995, the 74th legislature passed SB 15, which made placement on community supervision for state jail felons with one previous felony conviction discretionary. The new law modified the maximum amount of 'upfront' time in a state jail from 60 to 90 days for a person without a previous felony conviction; from 90 to 180 days for offenders with one previous felony, and would remove the 1-year limit for persons convicted of two or more felonies. The maximum length of community supervision was also extended from 5 to 10 years for persons previously convicted of two or more felonies. The goal of S.B. 15 was to allow judges greater flexibility when sentencing repeat offenders.<sup>204</sup> In 1997, the 75th Legislature passed SB 663, which removed all mandatory community supervision, allowing direct sentencing to state jail for all state jail felonies. These changes resulted in the direct sentencing to state jails for the majority of state jail felonies.

Beginning in 2003, the legislature passed several bills that rolled back some of the previous changes in state jail felonies. HB 2558 in the 78th legislative session mandated community supervision for certain first-time drug offenses; HB 1610 in the 80th session provided judges the discretion to lower certain state jail felony convictions to a class A misdemeanor; and HB 2649 in the 82nd session introduced the state jail diligent participation credit, enabling most state jail felons to earn up to 20 % of their term in good credit days by completing treatment, vocational, or education programs while in state jail. While these changes demonstrated a small move back towards the original intention of state jails, the facilities are currently considered less effective than state prisons in rehabilitation, too expensive, and are notorious for high recidivism rates.

## **Discussion**

### *State Jail Population*

As of July 2014, Texas housed a population of 10,616 incarcerated individuals sentenced to state jails in the state's 19 state jail facilities.<sup>205</sup> Men comprise 8,226 of the population and 2,390 are female, with an average age of 36.<sup>206</sup> The current population is down from 2008 when it was 13,000. State jail facilities also act as transfer facilities for inmates who are moving into prison facilities.<sup>207</sup> These transfer inmates are housed separately from the state jail inmates but may interact; in an educational program for example. Transfer inmates can be held in a state jail facility for 2 years before they must be moved to a state prison. In 2013, TDCJ received 22,371 offenders into state jails and released 22,601. Of that number, only 118 were released to community supervision.<sup>208</sup>

The average state jail sentence of an offender is one year, with the individual typically spending 8-9 months in the state jail after time spent in county jail. The majority of offenders sentenced to state jails are convicted on property and drug offenses with 50.6 % of offenders convicted of property offenses, 36 % drug offenses, 12.1 % other crimes and just 1.3 % violent crimes.<sup>209</sup> Compared to state prisons that contain 60 % offenders convicted of violent offenses and just 12.5 % convicted of property offenses.<sup>210</sup> State jail offenders typically serve the entirety of their term.

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That means a state jail offender serving a two-year sentence will most likely serve more time than an offender in the penitentiary with a similar two year sentence, since the individuals in state prison have the benefits of time accrued for good behavior and parole.

### *State Jail Facilities*

Critics of the current state jail system cite the poor environment in state jails for low-level offenders. Some witnesses testified that during tours of state jail facilities it was apparent the facilities are not built up to the same code as state prisons, with no A/C, the mixing of state jail felons and “transfer” felons, and minimal work/rehabilitation opportunities. This type of environment is not conducive to helping low-level offenders prepare to become law abiding, productive citizens upon release.

### *Recidivism*

Offenders released from state jails have a recidivism rate of 31.1 % compared to 22.6 % in the state penitentiary.<sup>211</sup> 30.6 % of state jail offenders released in 2008 were re-incarcerated, compared with 22.4 % of those released from prison in 2008. Those rates were down from 2007 when 62.7 % of state jail offenders were re-arrested, compared to 47.2 % of offenders released from prison. This high rate of recidivism is often attributed to the lack of rehabilitation, few work programs and the lack of aftercare or probation for former state jail inmates. These programs were originally the central purpose of state jails, but a lack of funding stripped the programs in the late 1990s.

### *State Jails and Community Supervision Options*

The reliance on keeping offenders in state jails over community supervision has been criticized for costing taxpayers more money per offender. State jails average about \$43 per day per offender.<sup>212</sup> This cost is less than prison inmates cost per day, but when one takes into account the higher recidivism rate of state jail offenders, the fact they do not receive meaningful rehabilitation programs, and no parole, the cost is a poor return on taxpayers’ investment; especially for repeat offenders. In comparison, diversion treatment and community supervision costs an average of \$10 per day. Parole costs \$2.46 cents a day per inmate and is cited as an incentive for ex-inmates not to relapse once released.<sup>213</sup> Critics of the current state jail system argue the state is spending more on warehousing inmates than it is on rehabilitating them, which has a proven track record of lowering recidivism rates.

An often cited divergence from the original purpose of state jails was to use the jail for “shock probation” and to serve as a backup option, used only to support offenders with rehabilitation services if they failed to meet the requirements of their probation. Community supervision was intended to be judges’ first response to state jail felonies, but over time state jail has become the first choice.<sup>214</sup> Currently after the first 75 days served in state jails, offenders can be bench warranted back into community supervision, yet experts testified that this rarely occurs because judges do not have an adequate mechanism to monitor this benchmark for each offender.<sup>215</sup> Therefore, state jails are no longer the backup to community supervision, but are the primary response to state jail felonies with minimal rehabilitation opportunities and maximum sentences

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served.

Although the original purpose of state jails was not successful in Texas, experts testified that “shock probation” has been successfully implemented in Hawaii’s Opportunity Probation Enforcement or HOPE probation.<sup>216</sup> The HOPE probation program has received national praise for successfully implementing a program similar to the original purpose of the state jail program. In the HOPE probation program, jail is used as a sanction for offenders who violate their probation. Those offenders, who do not violate their probation, undergo high-intensity community supervision that has resulted in lowered recidivism rates among drug offenders and other low-level offenders. Proponents of returning state jails to their original purpose reference the HOPE probation program as a model for its potential in Texas.

## **Recommendations**

- **Encourage judges to utilize community supervision.**

While the 1995 and 1997 revisions to the state jail system significantly increased the ability of judges to directly sentence offenders to state jail facilities, it did not remove their discretion to place those offenders on immediate community supervision. Proponents of community supervision argue that keeping low-level offenders closer to home and under more intense rehabilitation programs reduces rates of recidivism and is more cost-effective in comparison to the daily cost of housing a state jail offender. Experts argue that judges should use their discretion during sentencing to place more offenders on community supervision, rather than sending the majority directly to a state jail. A mechanism could be created to notify judges when inmates are eligible for their 20 % reduction in time served or when they are eligible for community supervision after 75 days served.

- **Implement a split-sentencing program.**

Split sentencing combines equal stays in state jail facilities and on community supervision to provide more effective punishment and rehabilitation. Judges could decide to suspend an offender’s state jail sentence halfway through and place the individual on community supervision for the remainder of their sentence.

- **Restore funding for rehabilitation and work programs.**

The state jail system was created in large part to provide more intensive opportunities for rehabilitation to those offenders that the state considers easily re-incorporated into society (low-level offenders). Funding for many of these programs has been cut over the years, reducing the value of the state jail system. Restoring funding for drug, alcohol, and other treatment programs aids in reducing rates of recidivism and returns the state jail system to one focused on the rehabilitation and re-incorporation of low-level offenders back into society.

- **Separate the transfer inmate population from the state jail inmate population.**

While the transfer inmate population has housing separate from that of state jail inmates, critics

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of the state jails argue that state jail inmates still have substantial and ultimately negatively-affecting interactions with transfer inmates in education programs, during dining, and in other day-to-day operations of the state jail. These critics argue that this interaction is counter-productive, as the goal of the state jail system was to remove low-level offenders from general felons and thus separate them from an influence that arguably encourages an escalation of criminal activity. Complete separation of the transfer inmate population from the state jail inmate population would reduce a factor that may influence rates of recidivism.

- **Add a work release option to offenders with certain crimes.**

Many state jail offenders, 49.9%<sup>217</sup> of all those received in 2013, are convicted of low-level property crimes. These offenses are often associated with financial difficulty. As such, a work release option would provide infrastructure for those state jail felons convicted of property crimes to help them gain the skills needed to obtain employment.

- **Institute post-release aftercare and supervision programs.**

The current state jail felony system does not mandate parole after a sentence in a state jail facility. As a result, individuals who spend time in a state jail are released without the appropriate support structure to prevent a relapse into criminal behavior. Instituting mandatory supervision and aftercare programs would work to reduce recidivism rates by aiding released offenders with their re-integration into society.

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## **Charge 8: Oversight and Monitoring**

### **Public Hearing**

The House Committee on Criminal Jurisprudence held no public hearings regarding Charge 8, oversight and monitoring of agencies and programs.

The Committee continues to monitor agencies under its jurisdiction, the Office of State Prosecuting Attorney and the Texas State Council for Interstate Adult Offender Supervision, to ensure the agencies are using taxpayer money effectively and efficiently.

### **Recommendations**

The House Committee on Criminal Jurisprudence at this time makes no recommendations regarding Charge 8, relating to oversight and monitoring of agencies and programs under its jurisdiction.

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## **APPENDICES**



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## Appendix A: Letter from Rep. Matt Schaefer

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### TEXAS HOUSE OF REPRESENTATIVES



**MATT SCHAEFER**

*District 6*

14 January 2015

After reviewing the 2014 Interim Report submitted by the House Committee on Criminal Jurisprudence, I submit the following comments and qualifications to the report:

With respect to Interim Charge Four regarding Serious Mental Illness and Substance Use Disorders, I recognize that mental health and substance abuse is an area of significant need for many in the State of Texas and that the majority of the Committee findings and recommendations would be beneficial programs to pursue. However, before recommending additional funding for the Committee's Recommendations, I wish to see further investigation into the Legislature's prior allocation of funds towards mental health and substance abuse.

Specifically, the Committee should examine whether previously allocated funds have been appropriately and efficiently utilized to maximize benefits in this area before recommending expansion and further funding of programs. Senate Bill 1, passed by the House of Representatives during the 83rd legislative session in 2013, authorized a \$259 million general revenue funding increase for mental health service expansion. I respectfully request that before this Committee recommends additional increases in funding, that the Committee conduct a thorough investigation to ensure that previous allocations have been appropriately and efficiently disbursed to the areas of greatest need for the citizens of Texas. As it stands, and without further investigation, I cannot in good conscience recommend further expansion of funding in this area.

Additionally, concerning all the recommendations contained in the Interim Report, I reaffirm my commitment to principles of transparency and fiscal responsibility. I support good stewardship of the resources provided by the taxpayers of Texas, which have been entrusted to the Legislators of the State of Texas for sensible and responsible management.

Respectfully submitted,

A handwritten signature in black ink that reads "M. Schaefer".

Honorable Matt Schaefer



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## **Appendix B: Raise the Age Witness List**

The following individuals testified on the issue:

Michele Deitch, Senior Lecturer, Lyndon B. Johnson School of Public Affairs, the University of Texas at Austin  
Mike Griffiths, Executive Director, Texas Juvenile Justice Department  
District Judge Laura Parker, Tarrant County  
Senior District Judge Jeanne Meurer, Travis County  
Jason Wang, Self-employed business owner; formerly incarcerated at the Texas Youth Commission  
Riley Shaw, Tarrant County Assistant District Attorney  
Dee Hobbs, Williamson County County Attorney  
Brandon DeKroub, Williamson County Deputy County Attorney  
Randy Turner, Chief Juvenile Probation Officer, Tarrant County  
Marc Bittner, Chief Juvenile Probation Officer, Burnet, Blanco, San Saba, and Gillespie counties  
Sheriff Christopher Kirk, Brazos County; representing Sheriffs Association of Texas  
Brandon Wood, Executive Director, Texas Commission on Jail Standards  
Sheriff Lupe Valdez, Dallas County  
Captain Shelley Knight, Dallas County Sheriff's Office  
Mark Skurka, District Attorney, Nueces County  
David Slayton, Administrative Director, Texas Office of Court Administration; Texas Judicial Council  
Kameron Johnson, Juvenile Public Defender, Travis County  
Ellen Marrus, law professor, University of Houston; Director, Southwest Juvenile Defender Center  
Christene Wood, Pro Bono Attorney in Cameron Moon case  
Jack Carnegie, Pro Bono Attorney in Cameron Moon case  
Derek Cohen, Policy Analyst, Texas Public Policy Foundation  
Cathryn Crawford, Attorney  
Elizabeth Henneke, Policy Attorney, Texas Criminal Justice Coalition  
Laurie Molina, Manager, Criminal Justice Data Analysis Team, Legislative Budget Board  
Lynda Frost, Director of Planning and Programs, Hogg Foundation for Mental Health  
Ray Allen, representing Texas Probation Association  
Shannon Edmonds, representing Texas District and County Attorneys Association  
Lauren Rose, Juvenile Justice Policy Associate, Texans Care for Children  
Karla Vargas, Texas Appleseed  
Ron Potts, Retired Police Lieutenant, Austin  
Jeremy Potts, Self  
Rosemary Fain, Self

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## **Appendix C: Expunctions and Non-disclosures Witness List**

The following individuals testified on the issue:

Corpus Christi hearing:

Kyle Hoelscher, President of criminal law section of Corpus Christi Bar Association  
Lucinda J. Garcia, President of Corpus Christi Bar Association, attorney and former prosecutor  
Joe A. Gonzalez, Nueces County Commissioner, Precinct 2  
Mark Gonzalez, defense attorney  
Vikrant Reddy, Texas Public Policy Foundation Center for Effective Justice  
Mark Skurka, Nueces County District Attorney  
Javed Syed, Texas Probation Association  
Honorable Robert Vargas, County Court at Law 1

Texas Capitol hearing:

Patricia Cummings, Texas Criminal Defense Lawyers Association  
Robert Doggett, Texas Family Council  
Shannon Edmonds, Texas District and County Attorneys Association  
Honorable David Fraga, City of Houston Associate Presiding Municipal Court Judge  
Helen Gaebler, William Wayne Justice Center  
Skylor Hearn, Assistant Director, Texas Department of Public Safety  
Judge Jean Hughes, Chair, State Bar Judicial Criminal Justice Legislative Committee, Judge, Harris County Court at Law No. 15  
Marc Levin, Texas Public Policy Foundation Center for Effective Justice  
Sarah Pahl, Texas Criminal Justice Coalition  
Paul Quinzi, Self, defense attorney  
Bruce Stringfellow, CEO of PublicData.com  
Richard Tenenbown, Houston area attorney

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## **Appendix D: Sale of Criminal Histories Witness List**

The following individuals testified on the issue:

Patricia Cummings, Texas Criminal Defense Lawyers Association  
Robert Doggett, Texas Family Council  
Helen Gaebler, William Wayne Justice Center  
Skylor Hearn, Assistant Director, Texas Department of Public Safety  
Marc Levin, Texas Public Policy Foundation Center for Effective Justice  
Sarah Pahl, Texas Criminal Justice Coalition  
Paul Quinzi, Self, defense attorney  
Bruce Stringfellow, CEO of PublicData.com  
Ted Wood, Office of Court Administration  
Sheri Woodfin, Tom Green County District Clerk; County and District Clerks  
Association of Texas

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## **Appendix E: Co-occurring Mental Illness and Substance Use Witness List**

The following individuals testified on the issue:

Corpus Christie Hearing:

Hailey Gonzalez, Self  
Hannah Gonzalez, Self  
Kyle Hoelscher, Pres. of criminal law section of Corpus Christi Bar  
Joe A. Gonzalez, Nueces County & Behavioral Center  
Coretta Graham, Self  
Amy Granberry, Charlie's Place Recovery Center and Association of Substance Abuse Programs  
Diane Lowrance, Behavioral Health Center of Nueces County  
Javed Syed, Texas Probation Association  
Judge Robert Vargas, Nueces County Court at Law 1

Texas Capitol Hearing:

Home Flores, Nueces County Juvenile Services  
Lynda Frost, Hogg Foundation for Mental Health  
Susan Garnett, MHMR of Tarrant County  
Angela Isaack, Legislative Budget Board  
Marc Levin, Texas Public Policy Foundation Center for Effective Justice  
Kathryn Lewis, Disability Rights Texas  
Jill Mata, Bexar County District Attorneys Office  
Scott Matthew, Williamson county juvenile services  
Estela Medina, Travis county juvenile probation department)  
Senior District Judge Jeanne W. Meurer, Travis County  
Kevin Niemeyer, Legislative Budget Board  
Danny Pirtle, Dallas County Juvenile Department  
Josette Saxton, Texans Care for Children  
Teresa Stroud, Texas Juvenile Justice Department  
Debbie Unruh  
Andrea Vela, Behavioral Health Center of Nueces County  
Jeannie Von Stultz, Bexar County juvenile probation  
James Williams, Texas Juvenile Justice Department  
Nelda Cacciotti, Tarrant County District Attorney's Office  
Douglas Denton, Association of Substance Abuse Programs  
Lynda Frost, Hogg Foundation for Mental Health  
Greg Hansch, National Alliance on Mental Illness of Texas  
Jennifer Herring, Harris County Sheriffs Office  
Joshua Houston, Texas Impact  
Cynthia Humphrey, Self

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Tracy Koller, MHMR of Tarrant County  
Marc Levin, Texas Public Policy Foundation Center for Effective Justice  
Brad Livingston, Texas Department of Criminal Justice  
Lance Lowry, AFSCME Texas Correctional Employees  
John Newton, Legislative Budget Board  
Rissie Owens, Texas Board of Pardons and Paroles  
Sarah Pahl, Texas Criminal Justice Coalition  
Joseph Penn, UTMB CMC  
Megan Randall, Center for Public Policy Priorities  
Javed Syed, Texas Probation Association & Nueces CSCD

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## **Appendix F: Graffiti Witness List**

The following individuals testified on the issue:

Corpus Christi hearing:

Hollis Bowers, Corpus Christi Police Department  
Homer Flores, Nueces County Juvenile Services  
Vikrant Reddy, Texas Public Policy Foundation  
Mark Skurka, Nueces County District Attorney's Office

Texas Capitol hearing:

Marc Levin, Texas Public Policy Foundation Center for Effective Justice  
Jorge Renaud, Texas Criminal Justice Coalition



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## **Appendix G: Non-traditional Offenses and Rule of Lenity Witness List**

The following individuals testified on the issue:

Marc Levin, Texas Public Policy Foundation Center for Effective Justice

Elizabeth Henneke, Texas Criminal Justice Coalition

Patricia Cummings, Texas Criminal Defense Lawyers Association

Shannon Edmonds, Texas District and County Attorneys Association

Ed Heimlich, Self; Honor Quest

Noe Perez, Self

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## **Appendix H: State Jail Felonies Witness List**

The following individuals testified on the issue:

Corpus Christi hearing:

Kyle Hoelscher, President of Criminal Law Section of C.C. Bar Association  
Bryan Collier, Texas Department of Criminal Justice  
Patricia Cummings, Texas Criminal Defense Lawyers Association  
Carlos Garcia, 79th Judicial District Attorney's Office  
Vikrant Reddy, Texas Public Policy Foundation  
Mark Skurka, Nueces County District Attorney's Office  
Javed Syed, Texas Probation Association  
Sandra Watts, Judge Nueces County 117<sup>th</sup> District

Texas Capitol hearing:

Shannon Edmonds, Texas District and County Attorneys Association  
Marc Levin, Texas Public Policy Foundation Center for Effective Justice  
Sarah Pahl, Texas Criminal Justice Coalition

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## ENDNOTES

- <sup>1</sup> Office of Juvenile Justice and Delinquency Prevention (OJJDP) table (accurate as of July 2013): [http://www.ojjdp.gov/ojstatbb/structure\\_process/qa04101.asp?qaDate=2013&text=](http://www.ojjdp.gov/ojstatbb/structure_process/qa04101.asp?qaDate=2013&text=)
- <sup>2</sup> Tex. Fam. Code Ann § 51.02(2)(A)-(B).
- <sup>3</sup> Texas Department of Public Safety, “Crime in Texas 2013.” *Texas Department of Public Safety*, 2014. Of the 26,274 17-year-olds arrested, 5,350 for arrested for larceny, 3,843 were arrested for marijuana possession, 1,296 for violating liquor laws and 1,097 for drunkenness.
- <sup>4</sup> *Ibid.*
- <sup>5</sup> Deitch, “Seventeen, Going on Eighteen,” p. 40.
- <sup>6</sup> *Ibid.* pp. 32-33.
- <sup>7</sup> Data provided by CJAD (2014); Jennie L. Shufelt, & Joseph J. Cocozza. “Youth With Mental Health Disorders in the Juvenile Justice System: Results From the Multi-state Prevalence Study, Research and Program Brief.” National Center for Mental Health and Juvenile Justice (NCMHJJ) (June 2006), Retrieved from: [http://www.unicef.org/tdad/usmentalhealthprevalence06\(3\).pdf](http://www.unicef.org/tdad/usmentalhealthprevalence06(3).pdf).
- <sup>8</sup> Texas Department of Public Safety. (2013). Chapter 9: 2012 Texas Arrest Data. *Crime in Texas*. Online at: [http://www.dps.texas.gov/administration/crime\\_records/pages/crimestatistics.htm](http://www.dps.texas.gov/administration/crime_records/pages/crimestatistics.htm)
- <sup>9</sup> Deitch, Michele, Anna Lipton Galbraith, and Jordan Pollock, *Conditions for Certified Juveniles in Texas County Jails*, Special Project Report, Lyndon B. Johnson School of Public Affairs, University of Texas (2012), pp. 11-15, available at <https://www.utexas.edu/lbj/sites/default/files/file/news/Conditions%20for%20Certified%20Juveniles%20in%20Texas%20County%20Jails-FINAL-3.pdf>.
- <sup>10</sup> Campaign for Youth Justice, *Jailing Juveniles; The dangers of incarcerating youth in adult jails in America*, p. 10 (2007) available at [http://www.campaignforyouthjustice.org/documents/CFYJNR\\_JailingJuveniles.pdf](http://www.campaignforyouthjustice.org/documents/CFYJNR_JailingJuveniles.pdf).
- <sup>11</sup> Prison Rape Elimination Act of 2003, Public Law 108-79, 108<sup>th</sup> Cong. Available at <http://www.gpo.gov/fdsys/pkg/PLAW-108publ79/pdf/PLAW-108publ79.pdf>
- <sup>12</sup> National Standards to Prevent, Detect, and Respond to Prison Rape, US Department of Justice, 28 CFR Part 115, May 16 2012. Sec 115.14, p. 197.
- <sup>13</sup> Deitch, Michele, Rebecca Breeden, and Ross Weingarten, “Seventeen, Going on Eighteen: An Operational and Fiscal Analysis of a Proposal to Raise the Age of Juvenile Jurisdiction in Texas,” 40 *Amer. J. Crim. L.* 1, p. 15; Deitch, *Conditions for Certified Juveniles in Texas County Jails*, pp. 11-15.
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<sup>208</sup> Ibid.

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