Committee On
Corrections

November 28, 2000

Patrick Haggerty
Chairman

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

The Honorable James E. "Pete" Laney
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 Corrections of the Seventy-Sixth Legislature hereby submits its interim report including recommendations and drafted legislation for consideration by the Seventy-Seventh Legislature.

Respectfully submitted,

Patrick Haggerty, Chairman

Todd Staples, Vice Chairman

Ray Allen

John Culberson

Dan Ellis

Jessica Farrar

Patricia Gray

David Lengefeld

John Longoria

Todd Staples
Vice-Chairman

Members: Ray Allen, John Culberson, Dan Ellis, Jessica Farrar, Patricia Gray, David Lengefeld, John Longoria

HOUSE COMMITTEE ON CORRECTIONS
TEXAS HOUSE OF REPRESENTATIVES
INTERIM REPORT 2000

A REPORT TO THE
HOUSE OF REPRESENTATIVES
77TH TEXAS LEGISLATURE

PATRICK HAGGERTY
CHAIRMAN

COMMITTEE CLERK
KATHERINE ARNOLD

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INTRODUCTION

At the beginning of the 76th Legislature, the Honorable James E. "Pete Laney, Speaker of the Texas House of Representatives, appointed nine members to the House Committee on Corrections. The committee membership included the following: Patrick Haggerty, Chair; Todd Staples, Vice-Chair; Ray Allen; John Culberson; Dan Ellis; Jessica Farrar; Patricia Gray; David Lengefeld; and John Longoria.

During the interim, the Corrections Committee was assigned three charges by the Speaker:

1. Study all aspects of special needs parole, including identification and eligibility criteria, cost-effectiveness and timeliness and efficiency of the referral process.

2. Assess the effectiveness of previous legislative and administrative initiatives relating to problems associated with parole violators (blue-warrant inmates) in county jails.

3. Conduct active oversight of the agencies under the committee's jurisdiction, including monitoring and developments related to the *Ruiz* litigation.

In order to undertake the charges efficiently and effectively, Chairman Haggerty appointed a subcommittee to study the charge relating to blue warrants while the full committee would study special needs parole and maintain oversight of all agencies under the Committee's jurisdiction.

The subcommittee and full committee have completed their hearings and investigations and have issued their respective reports. The full Corrections Committee has approved all reports, which are incorporated as the following final report for the entire committee. The members approved all sections of the report.

Finally, the committee wishes to express appreciation to the committee clerk, Katherine Arnold, for her work in preparing the reports; to the staff of the committee members; to the agencies that assisted the committee and supplied valuable information for the preparation of the report, in particular the Texas Department of Criminal Justice, TDCJ executive staff, TDCJ Office of General Counsel, Texas Board of Pardons and Paroles, State Auditor's Office, Criminal Justice Policy Council, Texas Council on Offenders with Mental Impairments, Texas Youth Commission, Texas Commission on Jail Standards; and the citizens who testified at the hearings for their time and efforts on behalf of the committee.

HOUSE COMMITTEE ON CORRECTIONS

INTERIM STUDY CHARGES AND SUBCOMMITTEE ASSIGNMENTS

SPECIAL NEEDS PAROLE

CHARGE Study all aspects of special needs parole, including identification and eligibility criteria, cost-effectiveness and timeliness and efficiency of the referral process.

Patrick Haggerty, Chair
Todd Staples, Vice-Chair
Ray Allen
John Culberson
Dan Ellis
Jessica Farrar
Patricia Gray
David Lengefeld
John Longoria

BLUE WARRANTS

CHARGE Assess the effectiveness of previous legislative and administrative initiatives relating to problems associated with parole violators (blue-warrant inmates) in county jails.

Ray Allen, Chair
Patrick Haggerty
John Longoria

OVERSIGHT

CHARGE Conduct active oversight of the agencies under the committee's jurisdiction, including monitoring and developments related to the *Ruiz* litigation.

Patrick Haggerty, Chair
Todd Staples, Vice-Chair
Ray Allen
John Culberson
Dan Ellis
Jessica Farrar
Patricia Gray
David Lengefeld

John Longoria

COMMITTEE STUDY OF SPECIAL NEEDS PAROLE

COMMITTEE STUDY OF SPECIAL NEEDS PAROLE

CHARGE: Study all aspects of special needs parole, including identification and eligibility criteria, cost-effectiveness and timeliness and efficiency of the referral process.

BACKGROUND

In 1991, a performance report completed by the State Comptroller's Office recommended the enactment of early release provisions for certain categories of offenders as a cost-saving measure to the State. This was based on an estimation by the Legislative Budget Board that the annual state cost for special needs offenders with significant medical needs, i.e. those requiring 24-hour skilled nursing care, is close to $34,000 compared to approximately $7,000 for nursing facility care.[1] The approximately $27,000 per year in cost-savings would be a direct result of the ability of offenders to qualify for and receive federal benefits for medical or other related care.

Following the Comptroller's recommendation, the 72nd Legislature passed HB 93, currently codified as Sec. 508.146 of the Government Code, which permits paroling an offender on a date earlier than his original computed eligibility date if "(1) the institutional division identifies the inmates as being elderly, physically handicapped, mentally ill, terminally ill, or mentally retarded; (2) the parole panel determines that, based on the inmate's condition and a medical evaluation, the inmate does not constitute a threat to public safety or a threat to commit an offense; and (3) the pardons and paroles division has prepared for the inmate a special needs parole plan that ensures appropriate supervision, service provision, and placement."[2] Such a release has been termed special needs parole. In addition, the 72nd Legislature increased the scope of responsibility of the Texas Council on Offenders with Mental Impairments to include the elderly, terminally ill and physically handicapped and TCOMI was appropriated additional funds to implement the community based programs for these new categories of offenders. Although the statute identifies the institutional division as the agency responsible for identifying the inmates that are medically eligible, in practice TCOMI has been designated as the agency responsible for administering the program.

TCOMI, as the state agency assigned to oversee programs for special needs offenders, pre-screens cases and refers those eligible to the Texas Board of Pardons and Paroles for review. Once received, the Board of Pardons and Paroles reviews the inmates medical status and criminal history information and makes a determination whether or not to approve special needs parole in light of all statutory criteria.

In 1995, to address the need to eliminate placement delays for inmates approved for special needs parole and to improve the overall monitoring of inmates on special needs parole, the Legislature included an appropriations rider that gave the Texas Department of Human Services the authority to establish a skilled nursing facility for offender populations. In December, 1997, Restful Acres, a 60 bed facility in Kennedy, Texas, after meeting all criteria for selection, accepted their first special needs parolee.

In order to more efficiently administer the special needs parole program, TCOMI has operationally clarified certain terms and conditions outlined in the statute, following recognized industry practices. Specifically,

TCOMI defines an offender with a terminal illness as one which has been given only 12 months left to live. Further, the special needs program is only approved for those offenders with conditions which require 24-hour skilled nursing care.

Those excluded from special needs parole are those who have committed an aggravated violent offense, commonly referred to as a "3g offense"[3] and those whom the Board of Pardons and Paroles feels constitutes a threat to public safety or a threat to commit an offense, as outlined in the statute. Historically, although the special needs parole statute includes mentally ill and mentally retarded offenders, these classes of offenders are not approved for special needs parole based on the inability of physicians to certify that they will not constitute a threat to public safety or a threat to commit an offense.

The special needs parole program has as its goals the reduction of incarceration costs, protection of the public and the provision of more humane treatment for those who are identified as special needs offenders. To ensure the program is being properly utilized and administered to meet these goals, the House Committee on Corrections, chaired by Representative Patrick Haggerty, convened in three public hearings to hear testimony relating to the special needs parole program, how it is being administered by both TCOMI and the Board of Pardons and Paroles, and recommendations for improvement. The hearings were all held in Austin on February 29, 2000, May 6, 2000, and August 29, 2000.

IDENTIFICATION OF SPECIAL NEEDS OFFENDERS

As the agency responsible for coordinating the special needs parole program, it is the responsibility of the Texas Council on Offenders with Mental Impairments (TCOMI) to coordinate efforts between the Texas Department of Criminal Justice, managed care, family members and potential special needs offenders to ensure all eligible people are identified and reviewed for special needs parole release.

Dr. Tony Fabelo, Executive Director of the Criminal Justice Policy Council testified in the May 16, 2000, hearing that the process from identification to release is in essence a three step process. The offender must be first referred to the program by a doctor, family member or other person, such as the offender himself. TCOMI then reviews the offender's information and determines whether the offender meets the statutory and medical eligibility requirements for release. That is, whether the offender has been convicted of a non-3g offense and whether he demonstrates a need for 24-hour skilled nursing care. Based on the offender's information, TCOMI confirms eligibility and an available plan, and then forwards the offender's information to the Board of Pardons and Paroles. The Board then reviews the offender's information in light of the statutory requirements for release and renders their decision. If approved for parole, the majority of offenders are then released to the Restful Acres nursing home in Karnes County, Texas.

Dee Kifowit, Director of the Texas Council on Offenders with Mental Impairments, testified on May 16, 2000, and later on August 29, 2000, and provided a clear picture as to the process TCOMI goes through in (1) identifying potential special needs parole candidates and (2) gathering the information to present to the Board of Pardons and Parole for parole consideration. Specifically, Ms. Kifowit testified to increased cooperation between TCOMI and UTMB in the early identification of special needs parole candidates and an expedited process within TCOMI and the Board of Pardons and Paroles which allows for a special

needs parole decision within two weeks.

TIMELINESS AND EFFICIENCY OF THE REFERRAL PROCESS

At the beginning of the interim session, Dr. Fabelo undertook a review of the special needs parole program. After reviewing the process utilized by TCOMI and the Board of Pardons and Paroles at the time of his testimony on May 16, 2000, Dr. Fabelo concluded that there was a problem in the first step of the process outlined previously, namely referrals. He indicated that there is no formal process for generating referrals which in turn may cause delays in the identification of special needs offenders. Dr. Fabelo further testified that due to the lack of a formal referral process to identify the eligible population, it is difficult to estimate the size of this population. Dr. Fabelo recommended the creation and institution of a computerized assessment system within the managed care system to identify inmates with special medical needs who may fit the criteria for special needs parole to insure timeliness and appropriateness of referrals.[4]

In testimony on August 29, 2000, Ms. Kifowit addressed the problems raised by Dr. Fabelo and outlined the changes that have been made. Ms. Kifowit testified that daily census reports are provided to TCOMI from the specialized medical units, such as Estelle and Stiles, which are under contract with the University of Texas Medical Branch (UTMB). These reports detail the inmates currently assigned and their conditions. Based on these daily census reports, candidates are identified and an immediate request for a medical summary is submitted and the response time for receiving the report is 24 hours. A representative from TCOMI then travels to the offender's physical location and conducts an interview, takes a photograph of the offender and gathers the medical records. Ms. Kifowit also testified that the day the paperwork is begun, so to is the process for qualifying the offender for Social Security benefits and medicaid. These applications are generally submitted within three days of the special needs parole interview. Once all the reports are conducted and the offender's information packet is prepared, the request is then forwarded to the Board of Pardons and Paroles' special needs parole panel and a decision is reached within ten days. With respect to the process undertaken by TCOMI and the Board, Ms. Kifowit testified that a case can be processed within two weeks from point of referral to final parole decision.

As stated previously, once TCOMI has completed their review and the offender's information, the records and recommendations are forwarded to the Board of Pardons and Paroles for a special needs parole decision. Gerald Garrett, Chairman of the Board of Pardons and Paroles, testifying at the May 16, 2000 hearing, advised the committee of the procedures undertaken by the Board. Chairman Garrett testified that due to the need for efficiency in the process of reviewing special needs parole candidates, a special needs parole panel, comprised of members of the Board of Pardons and Paroles and located in Huntsville, Texas, was created. The purpose of this panel was to streamline the review process of special needs parole and decrease the amount of time the Board spends on reviews. Prior to the special needs parole panel, as Dr. Fabelo testified, the process was bifurcated into two panels. The first panel determined whether or not the special needs parole candidate was a continuing threat to public safety or to commit another offense. If the determination was yes, there was no further consideration for parole. If the panel determined he was not a continuing threat, a second panel would consider whether he would be released. Ms. Kifowit testified on August 29, 2000 that under the new panel, reviews are conducted within a maximum of ten days of

receipt of the request. She further testified, that she has seen some reviews take place within 24 hours and that in the majority of the cases reviews take place within two to three days.

Based on this testimony, it is clear that positive changes have been made within TCOMI, UTMB and the Board which have streamlined and improved the referral process.

ELIGIBILITY CRITERIA

Once an offender is identified as a potential special needs offender, TCOMI reviews the inmates' medical and offense records to determine whether the offender meets all the medical and statutory eligibility requirements. Statutorily, the offender must be either elderly, physically handicapped, mentally ill, terminally ill, or mentally retarded, and medically he must require 24-hour skilled nursing care. This determination is made by the prison medical officials based on the medical condition of the offender and the ability to receive appropriate care at the nursing facility. The eligibility criteria for determining which offenders statutorily qualify for special needs parole consideration is laid out in Sec. 508.146 of the Government Code, which permits release of an offender on a date earlier than his original computed date if "(1) the institutional division identifies the inmates as being elderly, physically handicapped, mentally ill, terminally ill, or mentally retarded; (2) the parole panel determines that, based on he inmate's condition and a medical evaluation, the inmate does not constitute a threat to public safety or a threat to commit an offense; and (3) the pardons and paroles division has prepared for the inmate a special needs parole plan that ensures appropriate supervision, service provision, and placement."[5] Once an offender is identified as medically and statutorily eligible under Sec. 508.146 (1) of the Government Code, the case is then referred to the Board of Pardons and Paroles for a determination of whether the offender poses a continued threat to public safety or to commit another offense.

However, because the offender has officially been placed on parole, most often for treatment of a terminal disease, there are no provisions within the special needs parole statute to review the offender and determine whether a special needs parolee still requires special needs parole. Dr. Fabelo while presenting his report on May 16, 2000, presented testimony regarding a recommendation of Chairman Gerald Garrett which suggested adopting a reassessment phase for special needs parolees every six months after release. This recommendation is modeled after a provisions of the New York State's Compassionate Release program which would provide additional accountability in the special needs parole program and might lead to increased releases due to this additional safeguard. Chairman Garrett testified that there have been offenders released around 1996 under the auspices of special needs parole for a terminal illness who are still alive. Chairman Garrett recommends some degree of follow through to ensure that those offenders who are released on special needs parole are still eligible under the terms on which they were released.

After a review of the special needs parole program, Dr. Fabelo presented testimony on May 16, 2000, concerning the number of offenders who have been presented and considered for special needs parole. He indicated that the number of special needs parole cases referred to TCOMI for screening have declined by over half (53.6%) over the last 5 years from 1,685 in FY 1995 to 782 in FY 1999. In addition, the number of cases screened by TCOMI and referred to the Board of Pardons and Paroles has also declined

by over half (53.6%) over the last 5 years from 300 in FY 1995 to 139 in FY 1999. Finally, the percentage of cases screened by TCOMI and referred to the Board remained fairly stable at approximately 18% between FYs 1995 and 1999, Dr. Fabelo testified.[6]

There is evidence, however, that the numbers of medically and statutorily eligible offenders are shrinking. Ms. Kifowit attributed the decline in cases submitted to the shrinking pool of eligible candidates. On August 29, 2000, Ms. Kifowit stated that the current pool of statutorily eligible, or those classified as non 3(g) offenders, is shrinking. In essence, the numbers of aggravated violent offenders incarcerated in the Texas Department of Criminal Justice is increasing, making them automatically statutorily ineligible whether they are medically eligible or not. Expanding the special needs parole program to include select 3g offenders would greatly expand the pool of inmates eligible for special needs parole.

In contrast to the expansion of the program to 3(g) offenders, Chairman Garrett identified an additional program available to all offenders for potential release for medical reasons. Called a medical reprieve, Chairman Garrett testified that, while it is more complicated and more time consuming than the special needs parole process, it is available to all inmates. Specifically, a medical reprieve involves a review by all eighteen members of the Board and must be approved by the governor. He further testified that there is evidence that 3(g) offenders have been approved for medical reprieves.

Further, Ms. Kifowit testified that more advanced and effective treatment protocols for offenders with HIV or AIDS has significantly improved their medical conditions. Just as with the free world population, the prison population infected with HIV or AIDS is living longer with a better quality of life. Ms. Kifowit stated that when the special needs program first began, the majority of releases were for offenders afflicted with AIDS, while now such releases represent only approximately 1% of all special needs parole releases.

With respect to elderly offenders, many of the current pool committed their offense as a senior citizen. The problem here is two fold: first, if they committed their offense as a senior citizen, the parole board would be hard pressed to make a determination that based on the candidates age alone he would not be a risk to public safety or at risk to commit a new offense; and, second, many of the elderly inmates are sex offenders, offenses with a high risk of recidivism, again presenting the Board with problems of certifying there would be no risk to the public upon their release.

Finally, with respect to the mentally ill and mentally retarded offenders, Ms. Kifowit testified that they are not likely candidates for release under the statutory language. Ms. Kifowit stated that medical doctors are unable to prepare a medical evaluation which states with a 100% assurance that an offender with mental illness does not constitute a continuing threat to public safety.

To address the diminishing pool of eligible candidates for the special needs parole program, Ms. Kifowit made suggestions to address this issue. First, Ms. Kifowit suggested expanding the eligible pool of offenders to include 3(g) as well as non-3(g) offenders. As stated earlier, due to the increase of 3(g) offenders in the prison population, this would expand the numbers of those eligible for the program. Second, Ms. Kifowit suggested an examination be made of the feasibility of the creation of a structured treatment facility for offenders with mental illnesses or mental retardation which would be secure but would

not compromise medicaid and Social Security eligibility. Due to the federal prohibitions on placing persons with mental illness and mental retardation with no qualifying medical condition in a nursing home, such offenders are not permitted to be placed in the Restful Acres facility. Ms. Kifowit testified that currently there are an estimated 15,000 offenders with mental illnesses and approximately 1,000 offenders with mental retardation. Creation of a structured facility other than a skilled nursing facility would open the eligible pool up to approximately 16,000 additional offenders.

The recommendation of the creation of such a facility is supported by the non-profit organization Creating Conscious Communities, also known as the C-Cubed Institute. Ms. Penny Rayfield, founder of the C-Cubed Institute, while applauding the efforts of the Committee, asked that the committee consider alternative options to just constructing more prison units, and suggested that consideration be given to treatment centers as well.

Finally, while not supporting the construction of treatment facilities to facilitate the release of mentally ill offenders, Mr. Joe Lovelace, Advocacy Chairman for the National Alliance for the Mentally Ill of Texas suggested that more treatment options be considered for the mentally ill offenders currently incarcerated in TDCJ. Mr. Lovelace testified that the new generation drug treatments to treat illnesses such as bi-polar disorder and schizophrenia, while considered to be highly effective in quelling the mental illness and increase compliance with taking the medications, are not being utilized within TDCJ. Further, Mr. Lovelace stated that not enough additional treatment in the form of counseling is being provided to mentally ill offenders. Mr. Lovelace believes the lack of sufficient counseling coupled with the lack of treatment with new generation medications leads to lower compliance with taking medications upon release and leads to higher hospitalization and recidivism rates. By treating with the new generation medications and offering additional counseling throughout a mentally ill offenders' incarceration, Mr. Lovelace feels such offenders would be more compliant upon release and would demonstrate lower rates for recidivism.

COST-EFFECTIVENESS

As stated earlier, one of the main goals of the special needs parole program at its inception was to provide cost-saving measures for the State. Specifically, to reduce the cost of incarcerating and caring for an inmate requiring 24-hour skilled nursing care from approximately $34,000 per year in a prison facility to approximately $7,000 in a skilled nursing facility. Such evidence of these cost savings measures were identified by Dr. Fabelo in his testimony on May 16, 2000. Dr. Fabelo testified that based on the number of offenders already approved for special needs parole in the first quarter of FY 2000, it may be possible to see as many as 68 cases approved for special needs parole in FY 2000, as opposed to 38 cases approved in FY 1999.[7] He believes this to be due in large part to the streamlining of the parole review process by the Board of Pardons and Paroles and the improved referral process instituted by TCOMI and further believes such improvements could lead to over $500,000 saved in incarceration costs. Even with such evidence of the cost-saving effectiveness of the special needs parole program, there are barriers which are preventing the program for reaching its full cost-saving potential.

In her testimony on August 29, 2000, Ms. Kifowit advised the committee that some offenders can and have

refused to apply for Social Security and medicaid benefits. Without qualifying for these benefits, the offender's treatment and residential cost will still continue to be incurred by the state.

Further, Ms. Kifowit testified that at this point the special needs parole candidate has the option of refusing to accept placement in the skilled nursing facility in Karnes County. In some cases, this occurs after TCOMI and the Board have expended time and monetary resources screening the candidate for medical and statutory eligibility, and reviewing the candidate for parole release. Ms. Kifowit testified that in FY 1999, 98 offenders refused to be processed for special needs parole release due largely to the location of the skilled nursing facility. As Dr. Fabelo testified, the location of the Restful Acres in Karnes County often discourages offenders from relocating. By amending the statutory language to make placement in the skilled nursing facility mandatory, the state would be saving approximately $27,000 per inmate per year in residential and medical care costs.

Ms. Kifowit went on to state that while the referral and review process undertaken by TCOMI and the Board may take two weeks, the process for obtaining Social Security and medicaid benefits may take anywhere from six weeks to six months. Further, during the time TCOMI is awaiting a decision from the Social Security Administration, the offender remains in prison, even though he has been approved for transfer to the skilled nursing facility. To address this problem, Ms. Kifowit recommended examining strategies for expediting the disability review process conducted by the federal disability determination office. In effect, make an attempt to coordinate efforts with the federal government to expedite the disability approval process. Ms. Kifowit went on to suggest that an examination be made to determine the actual cost to the state if the offender is released to the skilled nursing facility while awaiting approval for Social Security and medicaid benefits, thus attempting to satisfy one the cost-savings goal of the special needs parole program.

Finally, Ms. Kifowit suggested examining the potential of expanding the special needs parole program to include placing offenders on conditional release while they are treated in medical or psychiatric facilities outside the confines of the institutional environment, thereby permitting the state to bill medicaid for the treatment. Temporarily transferring inmates to a free world hospital would offset the costs of medical care and increase the cost effectiveness of the special needs parole program.

In addition to the cost-saving recommendations made by Ms. Kifowit, Mr. Alden Brown, a representative of both the Hospice Enriched Living Center and most recently the Restful Acres facility in Karnes County, recommended increasing the amount of skilled nursing care facilities under contract with DHS. It is Mr. Brown's position that there is a significantly larger population of offenders who could benefit from the special needs parole program than are being referred to the Board for review, and that by making periodic site visits to prison units, the alleged undercounted population could be more readily identified and processed. Mr. Brown further testified that due to the geographical location of the facility in Karnes County, many of the offenders who would benefit from the program refuse. Mr. Brown stated that by increasing the number of locations of facilities under contract with DHS, offenders would accept placement at a higher rate, thus satisfying the cost-savings goal of the program.

RECOMMENDATIONS

Based on testimony received, the Corrections Committee found that while there may have been problems with the identification, timeliness and efficiency of the special needs parole program in the past, such problems have been addressed and sufficiently corrected, resulting in a time period of two weeks between point of referral to the Texas Council on Offenders with Mental Impairments and a parole decision by the Board of Pardons and Paroles. However, there is potential for statutory changes which would clarify the current state of the statute and improve the cost-effective goal of the program. Therefore, the Committee recommends the following:

1. Amend the statute to replace the institutional division with the Texas Council on Offenders with Mental Impairments as the agency responsible for identification of medically eligible offenders.

2. Examine amending the statute to **require** placement of a special needs parolee in a designated skilled nursing facility upon parole approval by the Board of Pardons and Paroles.

3. Examine amending the statute to include provisions for review of the status of the special needs parolee to ensure the offender still medically qualifies under special needs parole program.

4. Examine amending the statute to provide for a conditional medical release to allow for medicaid coverage while an offender is receiving treatment at a medical facility outside the auspices of the institutional setting.

ENDNOTES

1. Overview of Special Needs Parole Policy and Recommendations for Improvement, May 2000, CJPC.

2. V.T.C.A., Government Code, Sec. 508.146

3. V.T.C.A., Code of Criminal Procedure, Article 42.12, Sec. 3g.

4. Overview of Special Needs Parole Policy and Recommendations for Improvement, May 2000, CJPC.

5. V.T.C.A., Government Code, Sec. 508.146

6. Overview of Special Needs Parole Policy and Recommendations for Improvement, May 2000, CJPC.

7. Ibid.

OTHER REFERENCES

Dr. Tony Fabelo, Director of Criminal Justice Policy Council
Ms. Dee Kifowit, Director of Texas Council on Offenders with Mental Impairments
Mr. Gerald Garrett, Chairman of Board of Pardons and Paroles
Ms. Penny Rayfield, Founder of Creating Conscious Communities (C-Cubed Institute)
Mr. Joe Lovelace, Advocacy Chairman for National Alliance for the Mentally Ill of Texas
Mr. Alden Brown, Representative of Hospice Enriched Living Center and Restful Acres

SUBCOMMITTEE ON BLUE WARRANTS

SUBCOMMITTEE STUDY OF BLUE WARRANTS

CHARGE: Assess the effectiveness of previous legislative and administrative initiatives relating to problems associated with parole violators (blue-warrant inmates) in county jails.

BACKGROUND

At the time an offender is released on parole or mandatory supervision from the Texas Department of Criminal Justice, he agrees to terms and conditions by which he must abide while under the continued supervision of TDCJ. Until recently, violation of any of the terms or condition of release would have resulted in the issuance of a violation report by the releasee's parole officer and would have ultimately lead to the issuance of a pre-revocation warrant, commonly referred to as a "blue warrant." Additionally, today as previously, if a releasee is arrested for a new offense, the Parole Division is notified of the arrest and a blue warrant is issued. Prior to 1997, the time frame for processing a blue warrant was between 150 to 210 days. Previous legislation provided 120 days for a decision by the Board of Pardons and Paroles and 60 days for continuances of the revocation proceedings. Further, there was no definite starting point for calculating whether the Texas Department of Criminal Justice Parole Division and Board of Pardons and Paroles were in compliance with the legislation. This lengthy time frame for processing blue warrants led to a backlog of blue warrant detainees in county jails.

In response to this backlog in the county jails and the increasing financial burden on the counties, the Legislature in 1997 passed HB 1112, later codified as Secs. 508.2811 and 508.282 of the Government Code, which established time limits for the completion of proceedings surrounding the blue warrants and clearly laid out the responsibilities of all parties involved. Specifically, HB 1112 shortened the time allowed for a decision by the Board from 120 days to 60 days and shortened the continuances from 60 days to 30 days. Further, preliminary hearings were eliminated for certain cases and clearly defined start times were established to ensure the blue warrants were processed within the time frames.

To ensure the provisions and goals of HB 1112 are being properly carried out and adhered to, namely that the numbers of blue warrant detainees has been reduced and the blue warrant process has become more efficient, the Subcommittee on Blue Warrants, chaired by Representative Ray Allen, convened in one public hearing to hear testimony relating to the issuance and handling of blue warrants by the Texas Department of Criminal Justice Parole Division and Board of Pardons and Paroles, and, if necessary, to make recommendations for improvement. The hearing was held in Austin on July 11, 2000.

REPORT BY THE CRIMINAL JUSTICE POLICY COUNCIL

Dr. Tony Fabelo, Director of the Criminal Justice Policy Council, in response to the interim charge, prepared a report examining and evaluating the blue warrant system currently utilized by the TDCJ Parole Division and Board of Pardons and Paroles, and recommended issues for this subcommittee to review.[1]

As stated by Dr. Fabelo, there are two avenues for issuing a pre-revocation or blue warrant. The first would be if a releasee violated one or more of the terms and conditions of his release. If this occurs, the parole office would then issue a violation report which would lead to the issuance of a blue warrant. The warrant is then executed by a law enforcement official and the releasee is arrested and taken to a county jail facility. Once in the county jail, the releasee awaits an interview by a representative of the Parole Division and the possible initiation of the revocation hearing process. The second avenue for issuing a blue warrant is if the releasee is arrested on allegations of a new misdemeanor, state jail or felony offense. Once the releasee is arrested, the Parole Division is notified and a blue warrant is issued. If the releasee is arrested for a misdemeanor or state jail felony offense, the Parole Division will wait until the releasee has no further county jail obligations, has been found not guilty or has his case dismissed. If the releasee is arrested for a felony case, the Parole Division will delay in conducting revocation proceedings until the felony case is concluded.

Dr. Fabelo went on to delineate the responsibilities of the TDCJ Parole Division and the Board of Pardons and Paroles, the two agencies responsible for the blue warrant process. The Parole Division, headed by Victor Rodriguez, employs the parole officers and supervisors and is responsible for the drafting of policies concerning the issuance and evaluation of violation reports. Additionally, the Parole Division administers the blue warrant section, interviews releasees after they have been arrested on a blue warrant and schedules a revocation hearing date. Finally, the Parole Division has the authority to withdraw warrants up to the scheduled revocation hearing date. In contrast, the Board of Pardons and Paroles is responsible for all actions which take place at the revocation hearing and after. The Board employs the hearing officers who conduct the revocation hearings. The hearing officer considers all evidence presented at the hearing and then issues a report with a recommendation for or against revocation of parole. This report is then forwarded to the Board for review and vote by a three-member panel. The parole board panel can decide to either continue the offender under supervision, modify the conditions of parole, including requiring the releasee to serve time in an intermediate sanction facility, or may revoke the parole.

As stated earlier, prior to 1997 there was a tremendous backlog of offenders and lack of precise time limits. Dr. Fabelo testified that HB 1112 established specific time limits and penalties for failure to follow such limits. Specifically, for releasees who violate the terms of their parole, commonly referred to as technical violators, the 60-day clock starts when the Parole Division is notified that an arrest has been made and the offender is custody. For releasees who have been arrested on new criminal charges, the 60-day clock begins when the county notifies the Board of the disposition of all (i.e. the charges have been dismissed, all county jail time has been served, releasee was found guilty/not guilty of a felony charge, etc.).

Dr. Fabelo found evidence that under the new guidelines established by HB 1112, the blue warrant process is becoming more efficient and the 60 day time frame for completion is being met. Specifically, the average elapsed time for completion of the blue warrant process where preliminary and revocation hearings are conducted is 45 days and where only a revocation hearing is conducted the completion time is approximately 37 days.

Further evidence of the success of HB 1112 can be found in the decreasing numbers of offenders with blue

warrants detained in county jails. Dr. Fabelo stated that at the effective date of HB 1112, January, 1998, there were 3,637 offenders with blue warrants in county jails statewide. As of May, 2000, the blue warrant population had been reduced to 2,625, a reduction of over 1000 offenders.[2] While there was an increase of offenders in the last half of 1999, Dr. Fabelo attributed this increase to a reorganization of the warrant section of the Parole Division and a streamlining of the process. Once the reorganization took place, the numbers again began to decline.

While the numbers of offenders held in county jails on blue warrants has declined, there is also evidence that a large number of the offenders arrested on parole violations and detained in county jails were for purely technical violations. Dr. Fabelo found that for FY 1999, of the 6,849 releasees who were returned to supervision with no revocation, 2,965 (43.3%) were technical violators. Further, of the 8,559 who were not revoked, but were assigned to an intermediate sanction, 4,703 (54.9%) were technical violators. Finally, of the 11,830 who were revoked by the Board, 2,352 (19.9%) were purely technical.[3] Of further importance is the large percentage (25%) of those arrested and detained in county jails on blue warrants who were returned to supervision with no revocation, but possibly with alterations, of their parole. This was after approximately 40 days confinement which may have led to loss of employment. Dr. Fabelo testified that improvements taking place within the TDCJ Parole Division are aimed at reducing this number considerably, thereby reducing the number of blue warrants issued and revocation hearings which do not result in actual sanctions or revocations.

Dr. Fabelo further summarized the new policies put in place by the Parole Division which are aimed at increasing the discretion of the parole officers in issuing violation reports which lead to blue warrants, thus resulting in a reduction of revocation hearings and blue warrant populations in county jails. Basically, instead of issuing a violation report for a technical violation, the parole officer has the discretion of conducting an intervention, or performing a corrective measure designed to increase the control of the offenders and to direct them towards future compliance with the rules and conditions of release. The results of this would be short or no waiting in county jails and the removal of the necessity of Board involvement for certain parole modifications. Such modified sanctions may include an increase in the amount of contact with the parole officer or increased alcohol or drug testing. More progressive sanctions such as electronic monitoring or transfer to an intermediate sanction facility, while still not requiring issuance of a blue warrant, do require Board approval.

Concluding, Dr. Fabelo recommended the subcommittee consider the impact the revised Parole Division policies will have on the current ISF population and capacity of TDCJ. Dr. Fabelo testified the question remains whether the new policies will have an impact in diverting people from prison or if it will expand the net by creating so much discretion at the Parole Division level that offenders would now be sanctioned that would not have been sanctioned in the past.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE PAROLE DIVISION

As Director of the agency responsible for the blue warrant process, Victor Rodriguez offered testimony not only to the current state of the blue warrant process, but also as to the implementation of the new policies for processing violation of the rules and conditions of release.

With respect to the new Parole Division administrative directive regarding processing violations of the rules and conditions of release, Mr. Rodriguez testified that the goal is to bring down the number of revocation hearings and bring the revocation rates up. The result of this would be a better revocation rate of a smaller number of offenders. Past numbers reflected a revocation rate of 38% and approximately 30,000 Board decisions (which includes waivers of hearings as well as actual hearings where evidence is presented and testimony is taken) per year, which is unacceptable, testified Mr. Rodriguez. To achieve a better revocation rate, the Parole Division has instituted a new policy, described in Dr. Fabelo's testimony, which gives greater discretion to parole officers in the area technical violations of parole. [4] Rather than being required to automatically issue a violation report for a violation such as failing to report to a parole officer timely, the Parole Division now has the leeway to institute a range of interventions, such as issuing a warning or requiring increased reporting. By doing so, the releasee will be given a second chance rather than be arrested and placed in a county jail pending an interview or revocation hearing.

Evidence of the effectiveness of the revised policies can be demonstrated in the amount of hearings conducted from April, 2000 to May, 2000, stated Mr. Rodriguez. In April, 2000, there were 2,861 cumulative decisions whereas in May, 2000, there were 2,434 decisions; a difference of over 400 hearings.[5] The decline in hearings demonstrates that the parole officers are being smarter about what they take to a revocation hearing and are exercising all the options they can, including intermediate sanctions, short of sending a releasee to a revocation hearing.

Further, with respect to the ability of the Parole Division and the Board of Pardons and Paroles, Mr. Rodriguez stated that approximately 98% percent of the time they are complying with the 60 day time requirements of HB 1112 for completing the revocation hearing process.[6] He further testified that the average for completion is approximately 40 days from the date of notification to the date of decision. With respect to the Parole Division's responsibility in the revocation review and hearing process, Mr. Rodriguez testified that it is the responsibility of the Parole Division to interview the releasee regarding the revocation and set a hearing date with the Board's hearing section. Once the hearing date has been set and the case assigned to a Board hearing officer, the case is then under the jurisdiction of the Board and the Parole Division's responsibility ends. When questioned about the time frame for interviewing the releasee and setting a hearing date, Mr. Rodriguez testified that the Parole Division, in a majority of the cases, is interviewing the releasee within 7 days of arrest of the releasee.

BOARD OF PARDONS AND PAROLES

As testified by Dr. Fabelo and Mr. Rodriguez, while the Texas Department of Criminal Justice Parole Division bears the responsibility for issuing the blue warrants and interviewing the releasee once the warrant is executed, the hearing officers of the Board of Pardons and Paroles are responsible for conducting revocation hearings and presenting a recommendations on revocations to a three-member panel of the Board. Of specific interest to the members of the subcommittee was the amount of time it takes for the Board to reach its decision on revocation. Gerald Garrett, Chairman of the Board of Pardons and Paroles, testified that once the hearing date is set, it takes approximately 30 days for the entire revocation process to take place. As explained by Chairman Garrett, this process includes notification to the Board of which witnesses the Parole Division wishes to present, notification and subpoenaing of witnesses, and securing

a hearing room. When asked why the process doesn't take shorter than 30 days, Chairman Garrett stated that under the United States Supreme Court case *Morrissey v. Brewer*, 408 U.S. 471, 33 L. Ed 2nd 484, 92 S.Ct. 2593 (1972), the releasee has to have the opportunity for a full blown hearing to satisfy the detainee's constitutional due process rights to confront the allegations that are being made against him. Under *Morrissey*, it is improper to simply make a decision based on the interview conducted by the Parole Division. There has to be an opportunity given to the releasee to confront and cross-examine adverse witnesses.

Finally, with respect to technical violations, Chairman Garrett attempted to allay any rumors that the Board would not be recommending revocations for such violations. Chairman Garrett assured the subcommittee that both he and the Board take technical violations very seriously; however, he stated that there has been recent evidence that the continuously noncompliant person is not the most likely person to commit new criminal activity. Some individuals on parole simply do not want to follow the rules and conditions of their parole, and the Parole Division and the Board are still working towards alternatives for dealing with those persons. In contrast, with respect to those offenders who are under super intensive supervision parole (SISP), those considered to be the highest risk releasees, technical violations of their release are highly scrutinized and repeated violations will not be tolerated. Even still, Chairman Garrett stated, the revocation rate for these individuals is approximately 44%, so there are some super intensive supervision releasees who are returned to supervision after technical violations. In short, Chairman Garrett expressed to the subcommittee his fervent commitment to take all violations of the rules and conditions of parole seriously, technicals included, but also he acknowledged the need to create alternate ways of dealing with chronic technical violators.

ADDITIONAL TESTIMONY

In addition to testimony from the agencies responsible for administering and reviewing blue warrants, the subcommittee heard testimony from representatives from county associations across the state. The testimony centered primarily on educating the subcommittee about the impact detaining blue warrant prisoners has on the individual county jails and what they believe should be done to alleviate the problem.

Mr. Tim Brown, County Commissioner from Bell County and representative for the Conference on Urban Counties, an association of the 33 most populous counties in the state, testified that while he was satisfied the subcommittee was keenly aware of the recent problems surrounding blue warrants and interested in a solution, he wanted to advise the members that the cost of housing blue warrant detainees falls squarely on the shoulders of the counties. As an example, Mr. Brown stated that Dallas County was currently holding approximately 330 blue warrant detainees in its jail and the cost of housing these offenders is approximately $4.5 to $5 million dollars per year. With regard to the monetary costs to the county, additional testimony was offered by Dr. Mark Kellar with the Harris County Sheriff's Department. Dr. Kellar testified that currently Harris County is holding approximately 400 blue warrant inmates at a cost of $6 million dollars per year. While neither Mr. Brown or Dr. Kellar make recommendations for change, they did testify that at this point the situation is manageable, but could potentially become a serious problem.

Mr. Brown also addressed a different issue, that of blue warrant detainees who are arrested on new

charges. Once the new offense is adjudicated in a court of law, Mr. Brown believes that the process of reviewing these offenders should take less time than those detainees who have only violated the conditions of their parole and not committed a new offense. He suggests that the process should take 30 days instead of the 60 days currently used.

In further testimony, Mr. Rider Scott, a representative of Denton County, suggested viewing blue warrants as a sanction. As such, Mr. Scott suggested it be included in a graduated ladder of sanctions, that being confinement in a jail facility, graduated to an intermediate sanction facility, graduated to confinement in the Texas Department of Criminal Justice. It is Mr. Scott's theory that TDCJ can save approximately 2,000 to 3,000 beds and save TDCJ from having to construct a new prison facility to meet possible shortfalls in prison capacity.

Finally, the subcommittee heard testimony from Mr. Gary Cohen, representative of the Criminal Defense Lawyers Association. Mr. Cohen stated that in his view, the new provisions put in place by HB 1112 are working. Further, with respect to shortening the amount of time from notification of the execution of the blue warrant to decision by the Board, he testified that due to the amount of due process required there is little room to cut the process down. This applies both to situations where there are new criminal charges as well as violations of the conditions of parole.

Mr. Cohen made two suggestions for changes to the blue warrant system. First, Mr. Cohen suggested researching situations where a blue warrant detainee can be released on bond pending a revocation decision. While he does not advocate issuing bonds for all blue warrant detainees, Mr. Cohen did suggested that in certain circumstances where detainment may have an adverse effect on the detainees family or business, it may be advisable to permit release on bond pending the outcome of the revocation process. Second, Mr. Cohen suggested changing the burden of proof required to revoke parole from a preponderance of evidence to beyond a reasonable doubt, the standard used in criminal proceedings. While Mr. Cohen did testify that the standard currently in use was set by the United States Supreme Court in *Morrissey* and is followed by most states in the revocation process, he did suggested that in cases where you have charges dismissed or the offender is found not guilty after a jury trial you could significantly impact the revocation rate by requiring the same burden of proof to revoke as is required to convict in the original offense.

RECOMMENDATION

Based on testimony received, the Subcommittee on Blue Warrants found that the agencies involved in the blue warrant process, namely the Texas Department of Criminal Justice Parole Division and the Board of Pardons and Paroles, have taken steps to ensure not only compliance with the provisions of HB 1112, but also to ensure the efficient and fair use of blue warrants. Evidence of this can be found in the 98% compliance rate with the 60 day requirement for processing a blue warrant, the steady decline in numbers of blue warrant detainees in county jails and in the new administrative directive by the Parole Division giving parole officers more discretion in handling releasees who violate the conditions of their parole. Therefore, the Subcommittee recommends that the Legislature continue to monitor the implementation of HB 1112 and the blue warrant process as a whole.

ENDNOTES

1. Parole Blue Warrant Process and Issues for Review, July 11, 2000, Criminal Justice Policy Council.

2. Ibid.

3. Parole Blue Warrant Process and Issues for Review, July 11, 2000, Criminal Justice Policy Council.

4. Texas Department of Criminal Justice Parole Division Administrative Directive PD/AD-4.1.1, June 1, 2000.

5. Parole Violators in County Jails, July 11, 2000, Texas Department of Criminal Justice Parole Division.

6. Ibid.

OTHER REFERENCES

Public Testimony of:

Dr. Tony Fabelo, Director of Criminal Justice Policy Council
Mr. Victor Rodriguez, Director of Texas Department of Criminal Justice Parole Division
Mr. Gerald Garrett, Chairman of Board of Pardons and Parole
Mr. Tim Brown, Representative for Conference on Urban Counties
Dr. Mark Kellar, Harris County Sheriff's Office
Mr. Rider Scott, Representative of Denton County, Texas
Mr. Gary Cohen, Representative of Criminal Defense Lawyers Association

COMMITTEE OVERSIGHT OF AGENCIES

COMMITTEE OVERSIGHT OF AGENCIES

CHARGE Conduct active oversight of the agencies under the committee's jurisdiction, including monitoring and developments related to the *Ruiz* litigation.

The following state agencies are under the Committee on Corrections jurisdiction: the Texas Department of Criminal Justice, the Board of Pardons and Paroles, the Texas Youth Commission, the Council on Sex Offender Treatment, the Texas Council on Offenders with Mental Impairments, and the Criminal Justice Policy Council.

The Committee Counsel has attended the Board meetings of the agencies and has monitored the actions of the agencies. The staff has briefed the Chairman and has worked with the Chairman and the agencies' personnel in the resolution of any problems that have developed during the interim. In addition, Committee staff maintains active files on all agencies containing their Annual reports, Legislative Appropriations Requests, Board or Commission meeting minutes and other information.

With respect to the *Ruiz* litigation, the State petitioned the Court to have federal oversight of the Texas Department of Criminal Justice removed. After testimony was taken and received, United States District Judge William Wayne Justice relinquished federal oversight over the medical care of inmates; however, he denied the State's request for removal of federal oversight from all areas. This decision has been appealed by all parties to the Fifth Circuit Court of Appeals, briefs have been prepared and submitted, and oral arguments will take place in early November, 2000.