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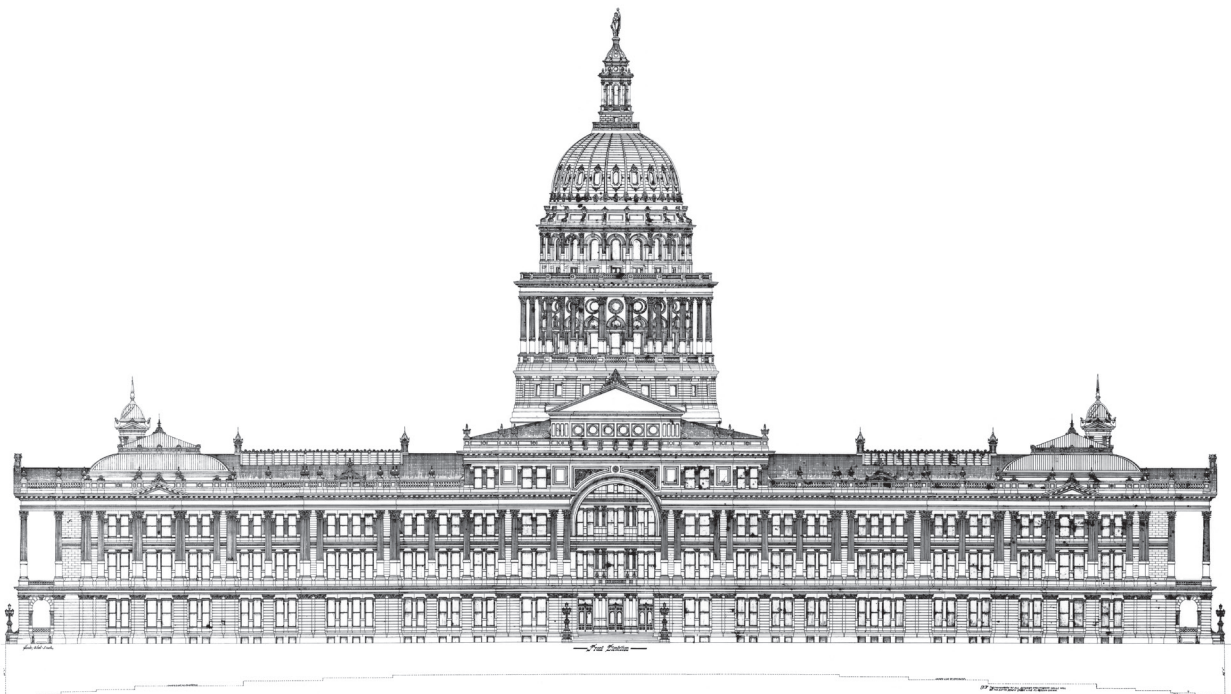
# INTERIM REPORT

TO THE

# 82ND TEXAS LEGISLATURE

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*House Committee on*  
CRIMINAL JURISPRUDENCE  
December 2010



**HOUSE COMMITTEE ON CRIMINAL JURISPRUDENCE  
TEXAS HOUSE OF REPRESENTATIVES  
INTERIM REPORT 2010**

**A REPORT TO THE  
HOUSE OF REPRESENTATIVES  
82ND TEXAS LEGISLATURE**

**REPRESENTATIVE PETE P. GALLEGO  
CHAIRMAN**

**COMMITTEE CLERK  
JOSÉ AGUAYO**



Committee On  
Criminal Jurisprudence

November 12, 2010

Representative Pete P. Gallego  
Chairman

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

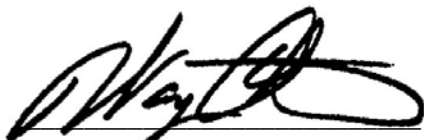
The Honorable Joe Straus  
Speaker, Texas House of Representatives  
Members of the Texas House of Representatives  
Texas State Capitol, Rm. 2W.13  
Austin, Texas 78701

Dear Mr. Speaker and Fellow Members:


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

Respectfully submitted,

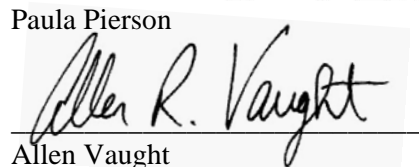
  
Pete P. Gallego


  
Wayne Christian, Vice Chairman


  
Eric Johnson

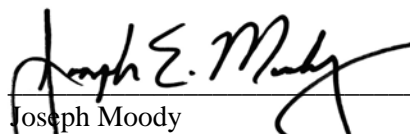
  
Robert Miklos


  
Paula Pierson


  
Allen Vaught

  
Allen Fletcher

  
Carol Kent

  
Joseph Moody

  
Debbie Riddle

  
Hubert Vo

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## **INTRODUCTION**

On the 16th day of the 81th Legislature (February 12th, 2009), House Speaker Joe Straus appointed eleven members to the Committee on Criminal Jurisprudence. The Committee membership includes the following members:

Representative Pete Gallego, Chair  
Representative Wayne Christian, Vice Chair  
Representative Allen Fletcher  
Representative Eric Johnson  
Representative Carol Kent  
Representative Robert Miklos  
Representative Joseph Moody  
Representative Paula Pierson  
Representative Debbie Riddle  
Representative Allen Vaught  
Representative Hubert Vo

Pursuant to House Rule 3, Section 8, the Committee on Criminal Jurisprudence has 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 Office of State Prosecuting Attorney and the Texas State Council for Interstate Adult Offender Supervision

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## **HOUSE COMMITTEE ON CRIMINAL JURISPRUDENCE**

### **INTERIM STUDY CHARGES AND SUBCOMMITTEE ASSIGNMENTS**

1. Examine the deferred adjudication system in Texas and recommend legislative changes.
2. Study how the state presently supports the establishment and maintenance of public defender offices.
3. Study the human and sex trafficking problem in Texas. Make recommendations on best practices in the areas of investigation, prosecution, and tracking of the victims of these crimes. Study whether victims of these crimes are allowed to adequately recover from their attackers in a civil cause of action. (Joint Interim Charge with House Committee on Judiciary and Civil Jurisprudence)
4. Monitor the implementation of SB 1940 (81R), which established veterans court programs in Texas, and examine the link between combat stress disorders of war veterans, including post-traumatic stress disorder and traumatic brain injury, and the onset of criminal behavior. (Joint Interim Charge with House Committee on Defense and Veterans' Affairs)
5. Monitor the agencies and programs under the committee's jurisdiction.

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## **DEFERRED ADJUDICATION**

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## **CHARGE**

*The Committee was charged with examining the deferred adjudication system in Texas and recommending legislative changes.*

## **BACKGROUND**

The term "deferred adjudication" refers to a "special type of probation"<sup>1</sup> program offered to defendants by a judge as an alternative to criminal conviction and incarceration. Once placed on a deferred adjudication program by a judge, a defendant must satisfy conditions of a community supervision period, which may include a combination of mandatory drug tests, meetings with probation officers, specific employment conditions, or community service. If the defendant successfully completes this period, the initial charges brought against him/her are dismissed by the court, and the defendant does not receive a final conviction.<sup>2</sup> However, if the defendant violates any of the community supervision conditions, the prosecution can submit a "motion to adjudicate" to the judge, enabling the court to convict the defendant and sentence him/her to applicable statutory punishments.<sup>3</sup>

A widespread misconception of deferred adjudication is that records of involvement in a deferred adjudication program are automatically removed from a defendant's criminal history upon successful conclusion of the community supervision period.<sup>4</sup> On the contrary, records of prosecution resulting in deferred adjudication are publicly available in archives maintained by the court which supervised the defendant during the community supervision period, as well as the state-wide Computerized Criminal History System database maintained by the Texas Department of Public Safety (DPS). State law does not provide for concealment of deferred adjudication records unless there is an additional court order directing those records to be expunged or non-disclosed.<sup>5</sup>

There are weighty statutory restrictions on the granting of orders of expunction and non-disclosure. While expunction is a stronger remedy than non-disclosure in that it entirely erases any records relating to arrests, incarceration, and interaction with a court, it is only available to people who have completed a court-ordered community supervision program for Class C misdemeanors, among other requirements.<sup>6</sup> For all other offenses, the only recourse is non-disclosure, which contains numerous exceptions based on the type and severity of the offense committed, whether the defendant has committed the same or similar offense either before or after completing the community supervision period, and whether the trial judge ultimately feels that granting non-disclosure is in the best interest of justice.<sup>7</sup> Orders of non-disclosure, unlike orders of expunction, only seal an instance of deferred adjudication on a person's criminal history record from being disclosed to the general public, but allow disclosure to certain entities with a sufficient interest in public safety such as criminal justice agencies, school districts, public hospitals, and state licensing boards.<sup>8</sup>

Notwithstanding the considerable attorney's fees typically required for assistance with petitions for non-expunction and disclosure, many private entities that purchase criminal history record information from DPS do not fully comply with these court orders, leaving incorrect, outdated, or legally protected criminal background information available to be searched on the internet by



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any user. This is often frustrating for an individual who has successfully completed deferred adjudication because records of the process will continue to appear on background checks, effectively serving as barriers to housing, education, employment, income support, and voting. Whether or not the exceptions, limitations, and procedures within the laws that currently constitute the deferred adjudication system of Texas can be legitimately questioned, they undoubtedly need additional reinforcement to prevent instances in which they are completely ignored to the detriment of Texans.

## **TEXAS LAW**

The following description is taken from Interim Charge Seven of the Senate Committee on Criminal Justice Interim Report to the 81st Legislature, which tasked the committee with "study[ing] the system of deferred adjudication in Texas courts and making recommendations for resolving any problems and reducing the potential for the release of dangerous criminals."<sup>9</sup>

The Code of Criminal Procedure, Article 42.12., Section 5, defines deferred adjudication as a form of community supervision, which upon completion the judge may dismiss the proceedings against the defendant and discharge the person. Currently a person cannot receive deferred adjudication for driving while intoxicated (Penal Code 49.04 - 49.08), continuous sexual assault of a child (Penal Code 21.02), or super-aggravated assault of a child (Penal Code 22.021). In addition, a person cannot receive deferred adjudication if he or she has a previous conviction for a drug crime committed in a drug free zone (i.e. schools) or a previous conviction for a sex crime (regardless [of] the victim's age). Deferred adjudication can be offered during plea negotiations for all other offenses, but only if the judge makes a finding in open court that the sentence is in the best interest of the victim.

## **FEDERAL LAW**

Currently, federal courts only have the power to offer deferred adjudication to defendants in misdemeanor marijuana possession cases, which are rarely heard in federal court.<sup>10</sup> This option, which was created by the Federal First Offender Act,<sup>11</sup> contains features that are similar to Texas law:

- 1. To be eligible for "special probation and expungement procedures" a defendant must be found guilty of an offense described in section 404 of the Controlled Substances Act,<sup>12</sup> not have been previously been convicted of a violation of federal or state law relating to controlled substances, and not have previously received disposition under the Federal First Offender Act.**
- 2 If the defendant consents to the special probation, a judge may place him on a program not lasting more than one year. If the defendant does not violate any conditions of his probation, the court may dismiss the proceedings against the person and discharge him/her from probation without entering a judgment of conviction. If, however, the defendant violates any conditions of probation, the court can revoke the probationary sentence and resentence the defendant to a term of incarceration.**

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- 3 If the defendant successfully completes the conditions of probation and was less than 21 years old at the time of committing the offense for which he/she was found guilty under section 404 of the Controlled Substances Act, the court must enter an expungement order upon application of the defendant which erases from all official public records references to arrest for the offense, criminal proceedings brought against the defendant, and the results of those proceedings.**
  - 4 A "nonpublic record of disposition" will be retained by the Department of Justice strictly for use by federal courts in determining the eligibility of the defendant for subsequent dispositions under this law, should the defendant ever reappear in federal court for commission of an identical or similar offense.**

## **DISCUSSION**

On August 31st, 2010 the Committee held an interim hearing on deferred adjudication programs for prostitution and drunk driving related offenses. During this hearing, members heard testimony concerning the merits of allowing certain offenders the option of deferred adjudication, and the long-term impact that records of participation in a deferred adjudication program may entail for individuals' personal and professional lives. A broadcast of this hearing is available at (<http://www.house.state.tx.us/video-audio/committee-broadcasts/committee-archives/?committee=220&session=81>).

### *Bill Lewis - Public Policy Liaison, Mothers Against Drunk Driving (MADD)*

Mr Lewis began his testimony by stating that his principal goal, in conjunction with MADD, is to stop drunk driving. He is in favor of the current DWI system and does not believe it is unnecessarily harsh. Moreover, he supports the use of interlock devices in vehicles of first time DWI offenders and the creation of sobriety checkpoints as both have been proven effective. Mr. Lewis also offered qualified support for allowing deferred adjudication to DWI offenders, with exceptions in cases of property damage, injury, and theft as he fears the possibility of circumvention of genuine rehabilitation. Because society has a right to know about people's criminal history, it should be incumbent upon academic institutions, the military, and employers to alter their acceptance policies in order to avoid unfortunate instances where qualified candidates are rejected due to their past DWI convictions.

### *Richard Alpert - Assistant Criminal District Attorney, Tarrant County*

According to Mr. Alpert's testimony habitual DWI offenders tend to be under 21 and that one option for this group may be to give them a timeframe to consider deferred adjudication. This may motivate young offenders to plead guilty sooner, and perhaps reduce recidivism for this type of offense. He clarified that deferred adjudication refers to the judicial type of dismissal that shows there is no conviction for probation. This is a popular option, especially among those individuals that do not reoffend.

### *Susan Figgins - Public Testimony*

Ms. Figgins testified that people who commit certain Class C misdemeanors should have the ability to expunge the offense from their record. She presented an anecdote about her son who

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was precluded from enlisting in the military because of a prior Class C misdemeanor on his record that was not removed upon his completion of probation. To eliminate this problem, Ms. Figgins suggests drafting legislation that would clear the state databases of Class C misdemeanors of those who have successfully completed deferred adjudication.

*Steve McCraw - Director, Texas Department of Public Safety (DPS)*

Mr. McCraw informed the committee about the two DPS computer systems used for cataloguing Class C misdemeanors. He also discussed issues with databases and lists being updated and the nominal fines for failing to comply with these updates in a timely fashion. However, Mr. McCraw did not have any policy recommendations for the committee.

*Shannon Edmonds - Governmental Relations, Texas District and County Attorney's Association*

Mr. Edmonds discussed the costs and benefits of applying deferred adjudication in DWI cases. He claims that it accomplishes its intended benefit in that it is not a conviction. However, Mr. Edmonds urges caution in allowing DWIs to be expunged from a person's record after successful completion of deferred adjudication, as many prosecutors would be less willing to offer deferred adjudication if defendants could potentially avoid permanent consequences on their record after driving while intoxicated. Prosecutors generally feel that criminal records should permanently reflect certain types of serious offenses like DWI because this practice is more effective at deterring defendants from recidivating.

*Allen Place - Attorney, Texas Criminal Defense Lawyers Association*

According to Mr. Place's testimony, the internet has had an enormous impact on employee background checks by providing easy access to wealth of available information on most individuals. This rapid information dissemination has had a negative effect on those who have committed DWIs and other recorded offenses. He believes those who committed DWIs should not be forced to carry the burden forever. There should be a method to effectively remove the DWI charge from his or her record and the public domain, according to Mr. Place.

*Randy Watkins - Officer, Fort Worth Police Department*

Mr. Watkins offered insight to the committee regarding cases involving prostitution and said that, in his experience, prostitutes tended to choose jail sentences instead of probation. This outcome is different from drunk driving offenses because the individual usually wants to complete the punishment and continue in prostitution without having an interest in possible rehabilitation. These decisions may be influenced by drugs or because prostitutes do not believe they are victims in the first place.

*Peggy Hoffman - Judge, Dallas County Court*

Speaking about House Bill 724 concerning prostitution in school zones and other designated areas, Ms. Hoffman testified that changes need to be made to stop the revolving door between prostitution and rehabilitation. It is necessary to understand why these women become prostitutes and realize that these people are generally victims, not simply criminals. Jail time alone has not been effective in deterring people from this crime as many prostitutes would prefer this over rehabilitation because it offers them a refuge from their current situations.

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## RECOMMENDATIONS

The House Committee on Criminal Jurisprudence recommends to the 82nd Texas Legislature the following:

- 1. Create a stronger deterrent for third party database vendors to exchange outdated and/or protected criminal record information with entities outside the criminal justice system.**
  - Draft legislation imposing licensing requirements for vendors and monetary penalties for noncompliance with notification of orders of expunction and nondisclosure issued by the Texas Department of Public Safety pursuant to criminal history database agreements.
  
- 2. Consider revising judicial admonishment instructions to more clearly communicate to defendants the consequences of participation in a deferred adjudication program.**
  - Require that additional stipulations be read to defendants considering participation in a deferred adjudication program. Defendants should be informed that successful completion of a deferred adjudication program will only guarantee a dismissed conviction for the initial offense, however, it is not a guarantee that a) information concerning defendants' involvement with the court as it relates to the initial offense will be excluded from defendants' criminal records; or that b) defendants' successful completion of a deferred adjudication program will not be used to enhance penalties for the commission of subsequent, related offenses.
  
- 3. Explore the practice of offering deferred adjudication programs for DWI offenders.**
  - Introduce the opportunity of deferred adjudication for first time DWI offenders while withholding such programs from defendants who have committed DWI offenses more than once.

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**PUBLIC DEFENDERS**

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## CHARGE

*The Committee was charged with studying how the state presently supports the establishment and maintenance of public defender offices.*

## BACKGROUND

Prior to 1963, defense counsel was only constitutionally guaranteed to criminal defendants who could afford to hire lawyers. In 1963, however, the U.S. Supreme Court decided a case known as *Gideon v. Wainwright*, in which it declared that "in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."<sup>13</sup> This ruling elevated the sixth Amendment's right to counsel "[i]n all criminal prosecutions"<sup>14</sup> as obligatory to the states and the federal government, bringing indigent defense to the forefront of the criminal justice arena.

While *Gideon* and other subsequent cases<sup>15</sup> have made it clear that indigent defendants cannot be sentenced to jail or be denied an appeal if defense counsel was not made available to them, the Court left the specific mechanism(s) for providing counsel up to each individual state. Texas has chosen to place most of this burden on the counties, though the state does offer some forms of supplemental support.<sup>16</sup> Counties in Texas are free to use three models to represent indigent defendants either exclusively or in combination:

1. **Assigned Counsel** - Defendants are assigned to private attorneys on a neutral basis, such as a rotation wheel.
2. **Contract Model** - Defendants are assigned to private attorneys who are contracted with the county government to provide indigent defense representation.
3. **Public Defender Model** - Defendants are assigned to a standing, non-profit organization of salaried attorneys and support personnel which is granted jurisdiction by the county government to provide indigent defense representation. Public Defenders' work is often limited to specific quantities and types of cases.

The vast majority of Texas counties use the assigned counsel model. Even counties which utilize Public Defenders must complement them with another model due to caseload capacities and cases involving conflicts of interest. To date, there are only 16 Public Defender Offices (PDO) serving regional or local jurisdictions in 91 of Texas' 254 counties.<sup>17</sup> While this leaves many counties unaccounted for, there were only seven PDOs in Texas prior to the passage of the Texas Fair Defense Act of 2001 (TFDA),<sup>18</sup> which set basic indigent defense standards for criminal courts, defined and authorized local and regional Public Defenders, and established the Task Force on Indigent Defense (the Task Force). The TFDA is generally credited for making major improvements to the provision of indigent defense throughout the state. However, it is also blamed for increased costs at the county level. After implementation of the TFDA in 2002, county indigent defense costs have risen from approximately \$91 million in fiscal year 2001<sup>19</sup> to \$186 million in fiscal year 2009.<sup>20</sup>

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As a result of these rising costs, as well as the many demands of providing sufficient indigent defense services, many believe that more counties should invest in PDOs due to their long-term cost effectiveness, quality, and accountability. Notwithstanding these benefits, PDOs can require significant start-up investment, complex contractual arrangements, and a minimum caseload volume that not every a county can manage. Given these factors, the current level of state support received by counties for the establishment and operation of PDOs may need to be reevaluated.

## **TEXAS LAW**

### *Texas Fair Defense Act*

Prior to 2001, Texas had no organized indigent defense system, and instead relied on a multitude of different approaches taken by each individual criminal court. The passage of the TFDA brought much-needed uniformity to these approaches by requiring all criminal courts of the same jurisdiction within a particular county to adopt consistent procedures for the provision of indigent defense services.<sup>21</sup> These procedures have to accomplish six minimum statewide standards<sup>22</sup>:

- 1. Conduct prompt magistration proceedings.**
- 2. Determine indigence according to standard in local indigent defense plan.**
- 3. Establish minimum attorney qualifications.**
- 4. Appoint counsel promptly.**
- 5. Institute a fair, neutral, and non-discriminatory attorney selection process.**
- 6. Promulgate standard attorney fee schedule and payment process.**

In addition to minimum standards, the TFDA created a standing committee of the Texas Judicial Council known as the Task Force on Indigent Defense.<sup>23</sup> The Task Force, which has administrative support from the Office of Court Administration, was charged with three primary duties:<sup>24</sup>

- 1. Develop and submit policies and standards for providing legal representation and other defense services to indigent defendants during adversarial proceedings.**
- 2. Develop a plan that establishes statewide requirements for counties relating to reporting indigent defense information, use the information reported by the counties to monitor the effectiveness of the counties' indigent defense policies, and ensure compliance by the counties with the requirements of state law relating to indigent defense.**
- 3. Provide technical support to assist counties in improving their indigent defense system, direct the comptroller to distribute funds, including grants, to counties to provide indigent defense services, and monitor each county that receives a grant to enforce compliance by the county with the conditions of the grant.**

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### H.B. 1178

H.B. 1178 was a product of the 80th Regular Legislative session and became effective in September 2007. Crafted as a response to problems with waivers of the right to counsel made by indigent defendants, the law implements prohibitions within the Code of Criminal Procedure designed to check certain behavior by judges and prosecutors. The most notable of these prohibitions are:<sup>25</sup>

- 1. State prosecutors may not encourage indigent defendants to waive their right to counsel, or communicate with them after they have requested counsel be assigned to them until a reasonable time thereafter, in any adversarial proceeding that can result in punishment by confinement.**
- 2. Judges and court personnel may not encourage indigent defendants to waive their right to counsel...**

### **DISCUSSION**

On May 13th, 2010 the Committee held an interim hearing on the state of Public Defenders in Texas. During this hearing, members heard testimony concerning successes, setbacks, and other developments concerning Public Defender Offices in multiple counties, as well general recommendations for increasing both the quantity and quality of Public Defenders throughout the state. A broadcast of this hearing is available at (<http://www.house.state.tx.us/video-audio/committee-broadcasts/committee-archives/?committee=220&session=81>).

*Barbara Hervey - Judge, Texas Court of Criminal Appeals, Chair, Criminal Justice Integrity Unit*

Judge Hervey testified that, in general, Public Defenders (PDs) need additional funding. Moreover, trial attorneys and judges make careless mistakes, which creates inefficiency within the indigent defense system (such as remanding a lot of writs of appeals because they weren't done correctly or failing to investigate or subpoena relevant individuals). Additionally, prosecutors don't seem to fully understand the precedent of *Brady v. Maryland*, and judges don't typically have a lot of writ training. Judge Keller ended her testimony by reminding the committee that the Criminal Justice Integrity Unit is scheduled to put on an informational seminar to address these issues in Austin during Fall 2010, before moving on to host similar events in other states.

*Sharon Keller - Judge, Texas Court of Criminal Appeals, Chair, Task Force on Indigent Defense*

Judge Keller testified that currently there is a proposal to expand the jurisdictions covered by the West Texas Regional Public Defender Office (PDO) from 70-240 counties. She also praised the Travis County Mental Health PDO for its performance thus far. Judge Keller ended her testimony by noting that expanding PDOs will create new benefits as well as new challenges for indigent defense in Texas; namely, how counties will be able to maintain PDOs once state funding is completely phased out according to the terms of the state-county contracts that most counties enter in order to afford the initial establishment of PDOs.



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*Tony Fabelo - Director of Research, Council of State Governments*

Dr. Fabelo prefaced his testimony with the observation that a lot of national attention is currently being paid to indigent defense, therefore it is important to make improvements right now, if possible. The passage of the Fair Defense Act (FDA) established the Task Force on Indigent Defense (the Task Force) which has greatly improved Texas over the past 10 years from the "laughing stock" it once was in this area, in comparison with other states. However, he clarified that \$28 million still does not cover the full cost of indigent defense per year, so the big issue that warrants attention is how to get more government funding for these costs.

*Jim Bethke - Executive Director, Task Force on Indigent Defense*

Mr. Bethke began his testimony by recommending that the committee members revisit S.B. 625 introduced in the 81st Legislative session by Representatives Gallego and Wentworth and consider reintroducing something similar in the upcoming session. He explained that Texas is primarily an assigned counsel state, which is not necessarily bad. Tarrant County, for example, doesn't need a PD because their assigned counsel system is good. According to Mr. Bethke, the committee should also consider the local and county idiosyncrasies before implementing changes to their indigent defense systems. Private PD systems try to avoid the "buddy system" problem that develops between judges and assigned council, but in reality no county in the state relies solely on PDs because each jurisdiction must supplement its amount of PD caseloads and appointments to varying extents. Tarrant county has a good system partly due to its open filing policies, which Mr. Bethke suggested might be useful policies to apply in other counties. Unfortunately, Tarrant county has also been experimenting with its indigent defense system, which resulted in a lawsuit against the county. As a result, the county is reluctant to move to a privately assigned counsel system. Mr. Bethke concluded his remarks by further recommending that the committee revisit S.B. 1710 as well, for the same reasons as S.B. 625 - it would be helpful to the committee in terms of crafting legislative improvements.

*Jim Allison - General Counsel, County Judges & Comm. Association of Texas*

Mr. Allison's testimony was primarily dedicated to exploring various funding problems for PDOs, and possible solutions to those problems. He stated that the cost of indigent defense in Texas has gone up 100% over the past 9 years, and \$0 of state revenue is going towards it. Texas currently funds indigent defense arrangements entirely through property tax, which is troubling in light of these substantially increased costs. Mr. Allison believes that the future of indigent defense in Texas will require utilization of regional PDOs, and he predicted that for the first time in 20 years there is going to be a decrease in property tax revenues, particularly in rural counties. Consequently, the legislature needs to use "carrots" to encourage the most efficient system(s) rather than simply creating a lot of "sticks" towards the counties. Finally, Mr. Allison suggested a collaborative effort to create resources reserved for very economically depressed counties where providing indigent defense is the most problematic.

*Keith Hampton - 1st Vice President, Texas Criminal Defense Lawyers Assn.*

Mr. Hampton gave brief testimony on how to increase the efficiency of PDOs. He stated that after passage of the FDA, many people were worried about all the unqualified attorneys who sought to get a job as a PD. His recommendation was to "get the biggest bang for your buck" by hiring more support staff for fewer PDs, as opposed to hiring more PDs and fewer support staff. Doing this, he asserted, increases caseload maxima for PDOs.

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*Clara Hernandez - El Paso County Public Defender*

Ms. Hernandez explained that El Paso was prompted to set up its indigent defense system as a result of a lawsuit, because inmates were being held for too long before their adjudication proceedings were taking place. She also posed the idea of exploring a statewide PD arrangement for Texas since there are so many different jurisdictions that may need the uniformity offered by such a system. Ms. Hernandez stated that requiring 6 hours of criminal law continuing legal education (CLE) for assigned counsel attorneys has become a problem because judges are often letting these attorneys simply follow PDs around court for 6 hours as a means of satisfying the requirement, which burdens PDs. According to Ms. Hernandez, the Task Force needs to be given "teeth" by the legislature to enforce state guidelines, and also stressed the need for independence between judges and defense lawyers. Ms. Hernandez emphasized the defense function should be treated as co-equal with the judiciary and prosecution. She reminded the committee that U.S. Attorney General Eric Holder has made improving indigent defense a priority for his term in office and is considering prosecuting counties for violations of civil rights who have vast imbalances of power in their indigent defense systems. Furthermore, the constitutional mandate of indigent defense falls on the states, not the counties. If assignment criteria are just about which attorneys will be cheaper, then the PD is induced to compete against the private bar at the expense of clients' representation in court. Ms. Hernandez echoed Keith Hampton's hiring practices proposal, and urged the committee to evaluate PDOs on their effectiveness rather than their costs. Ms. Hernandez ended her testimony by claiming that the state should require counties to produce criminal justice impact statements when making new courts, which would disclose the effects of the added costs upon the county's budget and programs.

*Lynn Richardson - Dallas County Public Defender*

Ms. Richardson began by explaining that in Dallas county there are partnership committees where prosecutors, sheriffs, and other actors are brought into collaboration with each other. However, the jail population is still "out of control" in Dallas despite the alleviation that specialty courts have provided. Ms. Richardson identified an aggressive internship program in her PDO that has helped them become more efficient as well. She warned that patronage still takes place in Dallas, and that judges are giving out more private appointments around election time in hopes of garnering political support. Ms. Richardson claimed that the Dallas PDO's resources are the same now as they were back when it was formed in the 1980s, and all of the issues that she is currently facing have to do with funding. She recommended that other urban PDs mirror their District Attorneys in terms of clerical support; one type of support staff per every 6-8 attorneys. Ms. Richardson stated that, on average, her attorneys handle about 190 cases a month and that her office is appointed to handle about 54% of the indigent defense case assignments in the county.

*David Hall - Executive Director, Texas RioGrande Legal Aid, Inc.*

Mr. Hall started off by talking about the inception of Texas RioGrande Legal Aid (TRLA), and noted that it used to be centered primarily around servicing rural jurisdictions. Its employee ratio is 1 secretary and 2 investigators for every 4 attorneys, and it sees a conflict of interest happen in about 5% of cases. TRLA handles about 80% of indigent defense cases in Val Verde county. Mr. Hall further explained that the border counties are very poor and rural, adding that constitutional requirements are largely ignored in those areas. TRLA sends investigators to the jail daily in order to cut down on the jail population and its corresponding costs. One county sheriff even

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praised TRLA for saving him \$1.1 million a year through this practice. Mr. Hall stated that TRLA must pull attorneys on its civil side to address defendants with mental health issues since it can't afford its own unit. Mr. Hall claimed that TRLA can be as efficient and effective as private counsel while offering additional advantages. He claimed that although Val Verde's county commissioner's court decided they could no longer afford their indigent defense system, he doesn't think there will be a similar problem in Willacy county. Mr. Hall ended his testimony by agreeing with the other witnesses that county funding isn't capable of expansion, so more state funding is needed. Specifically he suggested that 50% of the costs be covered by the state.

*Amanda Marzullo - Texas Fair Defense Project*

Ms. Marzullo stated that current statutory requirements for judges to assign counsel and approve costs for expert trial witnesses are conducive to patronage, and modifying this in order to increase independence would be a good idea. She referenced SB 1710, previously introduced by Senator Duncan, which tried to amend Art. 2604. Ms. Marzullo also recommended the implementation of oversight boards to help with PD independence in problematic counties.

*Ana Correa - Executive Director, Texas Criminal Justice Coalition*

Ms. Correa's only recommendation to the committee was that defense attorneys should be required of keeping a record of all their activities, such as number of cases tried, plead, won, lost, compensation per case, etc. Ms. Correa said that this information would enable legislators and oversight organizations to better identify problem areas in indigent defense systems, thus creating a disincentive for typical bad practices

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## RECOMMENDATIONS

The House Committee on Criminal Jurisprudence recommends to the 82nd Texas Legislature the following:

- 1. Allot more funds for PDO legal training/education per year.**
  - Appropriate more funds for Judge Barbara Hervey's Grant Committee and/or Criminal Justice Integrity Unit.
- 2. Consider a form of permanent indigent defense state funding.**
  - Currently the state only funds \$28 million of indigent defense costs, which is about 15% of the total costs of indigent defense in the state. All of this is generated through fees, as opposed to general state revenue. The state should consider allotting at least some state revenue to indigent defense costs in addition to the current fee revenues. Chairman Gallego has suggested changing the indigent defense funding formula in order to maximize state funding. The state could also change the contractual conditions between the Task Force on Indigent Defense and counties such that the Task Force will cover more of the costs incurred when counties create and maintain PDOs. This could entail a certain minimum percentage that the Task Force will pay on a permanent basis. The state could also partially fund the Task Force on Indigent Defense's annual discretionary funds to incentivize the implementation of indigent defense pilot programs.
- 3. Provide statutory clarification to the Task Force on Indigent Defense on their authority to promote and establish PDOs in one or more jurisdictions.**
  - Amend the Texas Fair Defense Act's section that deals with the Task Force on Indigent Defense's powers/duties
- 4. Give the Task Force on Indigent Defense more statutory power to enforce indigent defense standards and best practices within the counties.**
  - Amend the Texas Fair Defense Act's section that deals with the Task Force on Indigent Defense's powers/duties
- 5. Provide statutory clarification to counties on the procedure(s) to make local and inter-local/regional PDOs.**
  - Revisit the measures proposed in SB 625 from last session. These measures would have streamlined the procedure counties must follow in setting up PDOs by amending Art. 26044 of the Code of Criminal Procedure.
- 6. Encourage the hiring of more PD support staff as opposed to more PD lawyers (in order to increase performance and cost effectiveness).**
  - Appropriate a portion of funds allocated by the Task Force on Indigent Defense to the hiring of support staff (i.e. translators, investigators, paralegals, etc.) in various PDOs around the state.
  - Advise PDOs around the state to consider hiring qualified interns (such as law students) in support roles.

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**7. Ensure independence of the defense function from the judiciary.**

- Other states hire PD's via boards, and the PD's serve for defined terms of office. PD's can't be fired unless there is "cause." Judges should not be signing off on vouchers submitted by lawyers, appointing lawyers to cases, and determining whether a lawyer needs an expert witness or an investigator.
- Revisit the measures proposed in SB 1710 from last session, which offered counties the alternative of an independent assigned counsel system instead of a normal assigned counsel system by modifying Art. 2604.

**8. Ensure that defense functions are treated as an equal partner to the prosecution functions.**

- State should take over the funding of PDOs and get supplemental funding from the counties (based on their population, budgets, and economic wealth).

**9. Require counties to produce a criminal justice impact statement whenever new law enforcement initiatives are implemented that effectively tax the local/state criminal justice system.**

- These impact statements should a requirement whenever county commissioners courts move to support initiatives proposed by the DA, the council of judges, etc.

**10. Require attorneys to complete simple information forms that detail data about each case they handle.**

- Using the form prepared by the Texas Criminal Justice Coalition as an example.

**11. Consider the implementation of a state-wide PD system**

- This would entail more uniformity in policies and standards among PDOs, as well as more state funding for PDOs in more counties.

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## **HUMAN TRAFFICKING**

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## **CHARGE**

*The Committee was charged with studying the human and sex trafficking problem in Texas; making recommendations on best practices in the areas of investigation, prosecution, and tracking of the victims of these crimes; and studying whether victims of these crimes are allowed to adequately recover from their attackers in a civil cause of action.*

## **BACKGROUND**

Human trafficking is the "the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion."<sup>26</sup> This multifaceted crime includes largely commercial sex acts with minors, debt bondage and involuntary servitude. It simultaneously dehumanizes a vast population of people, exacerbates global health risks, increases networks of organized crime, and espouses poverty across the world. What's more, the victims themselves suffer great physical and emotional distress. The harrowing effects of this calamity have touched Texas profoundly.

The International Labor Organization (ILO), the United Nations agency responsible for addressing social protection issues, estimates there are at minimum 12.3 million adults and children in forced labor and sexual servitude at present.<sup>27</sup> The U.S. Department of State estimates that each year there are between 600,000 and 800,000<sup>28</sup> victims trafficked across international borders. Moreover, 300,000 of these human trafficking victims are children. Shockingly, between 14,500 and 17,500 of these children are trafficked into the U.S.<sup>29</sup> Given Texas' proximity to many centers of human trafficking, Texas is often the gateway for these illicit activities in the United States. In fact, many reports estimate that a quarter of all trafficked individuals end up in Texas. This report provides an overview of human trafficking in Texas, the effectiveness of the state's response to the needs of human trafficking victims through the use of federally funded social service programs, and recommendations for changes to existing legislation and services available to victims of human trafficking.

## **FEDERAL LAW**

The Trafficking Victims Protection Act of 2000 (TVPA)<sup>30</sup> establishes human trafficking as a federal crime as of October of 2000. This act aims to prevent human trafficking by:

- 1. Increasing aid to foreign countries.**
- 2. Establishing a broader definition of human trafficking crimes.**
- 3. Increasing the penalties of existing human trafficking crimes.**
- 4. Creating an interagency task force to monitor and combat trafficking.**
- 5. Making victims eligible for federally funded and administered health and social services.**

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The TVPA maintains a victim centered approach and attempts to achieve two objectives: the ability of the state to punish offenders and the ability of society to care for the victim. Once these victims of human trafficking become certified by the Department of Health and Human Services, they are then eligible for benefits and services under federal and/or state programs.

## **TEXAS LAW**

After the passage of the TVPA in 2000, the Department Of Justice began encouraging individual states to create and enact human trafficking legislation that would supplement federal law. The DOJ recognized that local law enforcement, as opposed to federal officials, are best positioned to identify human trafficking violations because of their knowledge of the communities that they serve and thus instituted training programs that would enable them to investigate and prosecute potential violations

In 2003, the 78th Legislature passed H.B. 2096<sup>31</sup>, a state human trafficking law, which created section 20A of the Penal Code. Section 20A.01 defines "forced labor or services" and "traffic" and outlines the respective offenses and penalties. Texas and Washington State were the first two states to enact laws criminalizing human trafficking.

In 2007, the 80th Legislature passed H.B. 1121<sup>32</sup>, S.B. 11<sup>33</sup>, and S.C.R. 90<sup>34</sup> in an effort to strengthen the state's ability to end human trafficking and to encourage prosecution at the state level. This legislative session also passed several bills that required institutions and businesses to post informational notices directed at potential human trafficking victims. SB11 and HB 1121 required that the national human trafficking hotline phone number be posted in overnight lodging establishments where violations have been prevalent. There is hope that this will incentivize victims to aid the prosecution upon finding this as they will be less fearful about retaliation from a trafficker. SB 11 allows a judge to issue an interception of wire, electronic, or oral communications if a prosecutor can effectively show probable cause that the wire tap will provide evidence of human trafficking

These laws have put Texas in a better position to combat the efforts of those who aim to exploit innocent men, women and children through the heinous practices of human trafficking.

## **DISCUSSION**

On June 3rd, 2010 the Committee held a joint interim hearing with the Committee on Judiciary & Civil Jurisprudence on the human trafficking situation in Texas. Members heard testimony that focused on the current extent of human trafficking activity and the dynamics of the commercial sex trade, lessons learned from efforts to combat traffickers and rehabilitate victims, and recommendations targeted to further reduce the occurrence of this phenomenon within the state. A broadcast of this hearing is available at (<http://www.house.state.tx.us/video-audio/committee-broadcasts/committee-archives/?committee=220&session=81>).



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*Susan Reed - District Attorney, Bexar County, Member, Human Trafficking Prevention Task Force*

Ms. Reed began her testimony by observing that human trafficking cases often involve young girls in prostitution who are addicted to drugs. Law enforcement often doesn't find out that human trafficking (hereinafter HT) is taking place until a probation officer sits down with the victims and gets the deeper story after victims have been apprehended for some other offense. Because HT cases take a long time to handle, Ms. Reed recommended prolonging the statute of limitations (which is currently 3 years) for the HT offense. Ms. Reed also clarified that if adults and guardians benefit from a person's trafficking, then they can be considered as complicit in the crime and be subject to punishment. Texas doesn't have a very good way of dealing with the victims of HT after they are discovered, such as shelters and rehabilitation programs. Ms. Reed concluded her remarks by asserting that coordination with federal entities is crucial, adding that gang activity is very much at the root of HT.

*David Boatright - Chief, Criminal Investigations Divisions, Office of the Attorney General*

Mr. Boatright stated that the Attorney General encounters both international and domestic HT victims in Texas. Cases are most successfully handled when there is cooperation with police, prosecutors, and Non-Governmental Organizations (NGOs). Many police officers aren't trained to recognize HT indicators, and new officers are now required to take 4-hour courses on this matter. However, Mr. Boatright clarified that such services and training are more available in urban areas than in rural areas. In court, state prosecutors are more likely to prosecute familiar, lesser crimes in lieu of HT offenses. Mr. Boatright also noted that the Office of the Attorney General is currently working with Northeastern University to establish better data systems for HT information in Texas. Sheriff's around the state and the Department of Public Safety are going through training on how to recognize HT indicators as well. Mr. Boatright recommended that if the Legislature wants to increase HT penalties, it can make HT a non-probative crime. Mr. Boatright ended his testimony by reminding the members that international HT cases will be prosecuted by U.S. attorneys' offices, since they are federal offenses.

*Rick Cruz - Captain, Texas Alcohol and Beverage Commission*

Mr. Cruz spent the first portion of his testimony reflecting on a major HT case that involved hundreds of victims and years of investigation by the Texas Alcohol and Beverage Commission (TABC) and the Federal Bureau of Investigation task force in Houston. He described how the traffickers first lured their victims from South America into the commercial sex trade, and later utilized licensed business venues to attract clients. Once TABC was able to trace these activities back to the businesses, their alcoholic beverage licenses were revoked and they went out of business. Additionally, the business owners of these venues were prosecuted individually by the local District Attorney's Office. Mr. Cruz described how during the case some of the victims were granted temporary residency by the Immigration and Naturalization Service (INS) in exchange for testimony in court against perpetrators of HT, while others who refused to cooperate were deported by INS back to their respective home countries. Mr. Cruz also noted that during and after the case, the victims were taken to non-profit safe houses in the Houston area. His main recommendation to the committee was to encourage other cities to adopt Houston's collaborative approach to combating HT, which requires monthly or quarterly meetings with state and federal agencies as well as relevant NGOs. Doing this maximizes important information sharing and allows for the organized execution of law enforcement initiatives against HT criminals. Mr. Cruz also stated that state police officers need more than 4

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hours of training on field indicators of HT. Finally, he believed the national HT hotline takes too long to receive incident information and relay it to the proper authorities within Texas.

*Thon Overstreet - Lieutenant, Vice Unit, Strategic Deployment Bureau, Dallas Police Department*

Mr. Overstreet demonstrated how he uses administrative subpoenas and covert surveillance equipment to combat HT. His Vice Unit recently took down one major HT organization, but there are still at least 4 others in the Dallas area. Mr. Overstreet stated that all of these organizations are tied to drug trafficking and/or gangs, and that more funding is needed for surveillance technology. Mr. Overstreet also claimed that all of these organizations use the internet and cell phones, and estimated that law enforcement technology is 15-20 years behind these organizations. On a scale of 1 to 10, he believes that Texas is at a 2 or 3 with respect to handling HT. Mr. Overstreet ended his testimony by warning that while street level prostitution is relatively easy to stop, the internet side of it is not. It's very possible that as old methods of prostitution decline, newer online methods will simply replace them, resulting in little overall progress.

*Rueben Fuentes & Billy Sifuentes - Human Trafficking Unit, Austin Police Department*

Mr. Fuentes and Sifuentes described to the committee why local law enforcement is more likely to detect HT activity than law enforcement at higher levels, and explained that a large portion of HT occurs in Texas due to the large border with Mexico and easy east-west transit via I-10. In addition, Mr. Fuentes and Sifuentes pointed to migrant labor camps as locations where HT tends to take a strong hold. They went on to discuss the common misconception that smuggling and trafficking are the same thing, and agreed with Mr. Overstreet's opinion that state law enforcement is 15-20 years behind traffickers. Mr. Fuentes and Sifuentes praised recent HT legislation for allowing easier prosecution because HT offenses are generally harder to prosecute than other lesser offenses. Unfortunately, police departments don't seem to have sufficient resources to pursue the users/consumers of HT because of their large numbers. Mr. Fuentes and Sifuentes concluded by noting that several NGOs teach medical providers how to identify victims of HT as well as others who are likely to come into routine contact with victims like apartment managers and mailmen. This training, they asserted, is vital for early detection, and should be encouraged as much as possible when considering innovative countermeasures to HT.

*Chris Burchell - Texas Anti-Trafficking in Persons and Child Sexual Exploitation Coalition*

Mr. Burchell began with an overview of HT prosecution, claiming that the state of Florida and the Houston area are the most prosecuted HT regions out of all the 42 different federal task force jurisdictions currently in existence. Other Latin American countries and states ask to see the Texas HT statutes when they are considering crafting/improving their own because our state's HT laws are held in such high regard. Nonetheless, Mr. Burchell felt that Texas needs to allocate more funding for fighting HT because HT cases are extremely labor-intensive and local governments aren't doing enough to service victims. He also observed that current laws preclude youths from receiving HT victim services after they've been arrested for a different offense, which is not very conducive to rehabilitation. Mr. Burchell further recommended the adoption of statutory terminology that allows Child Protective Services to investigate pimps who may be involved with minors, and enhancing certain aspects of the current aiding and abetting statutes to more effectively impede complicit actors of HT.

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*Mandi Kimball - Director, Public Policy & Government Affairs, Children at Risk*

Ms. Kimball spent her time critiquing paradoxical laws which allow the criminalization of minors for prostitution despite the fact that minors cannot legally consent to sex, commercial or otherwise. As a result, minors are criminalized before they can begin recovering from their exposure to HT, which is not a good approach to fully restoring them as productive members of society. However, Ms. Kimball did admit that there are considerable challenges in finding ways to take minors into custody in order separate them from traffickers without bringing any charges against the minors. Ms. Kimball concluded with the recommendation that the Legislature align Texas law with federal definitions of HT for purposes of consistency in prosecution.

## **RECOMMENDATIONS**

The House Committee on Criminal Jurisprudence recommends to the 82nd Texas Legislature the following:

- 1. Reform various aspects of the human trafficking offense.**
  - Extend or do away with the current statute of limitations of three years for human trafficking offenses
  - Make human trafficking a non-probative crime
  - Make the "aiding and abetting" offenses concerning human trafficking tantamount to human trafficking in order to give law enforcement officials a greater deterrent.
  - Pass a statute that aligns Texas with federal definitions of commercial sex acts involving children, and explicitly separate sex trafficking from general labor to ensure that child victims do not have to prove the force, fraud, and coercion elements that are currently required. For statutory provisions dealing with human trafficking, the 78th Regular Legislature in 2003 enacted H.B. 2096 which created section 20A.01 of the Texas Penal Code, establishing definitions for forced labor or services and trafficking, and section 20A.02 which lays out offenses and penalties. In the 80th session, S.B. 1287 and H.B. 1121 strengthened these provisions.
  
- 2. Provide more education of law enforcement to recognize indicators of human trafficking.**
  - Implement a state-funded arrangement and/or collaborate with willing Nonprofits.
  - Assist the OAG and the Human Trafficking Prevention Task Force in developing new human trafficking curricula to incorporate into law enforcement training.
  - Revisit HB 4009, which required all new law enforcement officers in Texas to receive a 4-hour basic course on human trafficking
  
- 3. Encourage police, prosecutors, and NGOs to work collaboratively.**
  - Inform counties about federal grants for collaborative efforts such as the creation of regional task forces through the Office of Violence Against Women.
  - Include this kind of collaboration as part of a best practices approach.

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**4. Conduct an aggressive public relations campaign on human trafficking to better inform the public about how to respond most effectively to manifestations of this crime.**

- Implement a state-funded arrangement and/or collaborate with willing non-profit organizations.
- Coordinate with local law enforcement (e.g. chiefs of police) around major holidays and events since those tend to constitute spikes in human trafficking.

**5. Develop a system that will better obtain and disperse information on human trafficking to the legislature.**

Executive leadership in the legislature should schedule and attend regular mini-conferences where experts would be available to brief legislators on new information, trends, and features of potential legislation, and recommendations

**6. Allot more funding for sophisticated law enforcement technology to keep up with that of today's traffickers.**

- Target specific products and applications that have consistently demonstrated their usefulness, such as "Fusion" technology which is currently being used in Dallas.

**7. Reform laws governing juveniles' eligibility for HT relief services.**

- Remove statutory preclusions of potential victims of human trafficking from qualifying for readily available relief services simply because they were initially tried for some other related, but different, offense.

**8. Expand current civil law such that pimps and traffickers incur civil liability, rendering them subject to the authority of Child Protective Services investigations as a result of retaining minors in their possession.**

- Obtain examples of the statutory language that other states have used to do this from the Texas Anti-Trafficking in Persons and Child Exploitation Coalition.

**9. Reform various aspects of the Prostitution offense.**

- Explicitly harmonize current law concerning the age at which people can knowingly consent to sex with the Texas Supreme Court's decision *In re B.W.*<sup>35</sup>

**10. Replace prosecution of child victims with social services**

- Implement programs similar or identical to Dallas County's "Pride" (Prostitution) Court, which is a specialized court for perpetrators of prostitution much like drug and mental health courts.
- Consider Children at Risk research that other states have reviewed and implemented through legislation regarding safe houses and relief.
- Provide funding for more relief services to victims of human trafficking by amending multiple articles in chapter 59 of the Texas Code of Criminal Procedure to allow for forfeiture of assets belonging to convicted defendants of human trafficking offences to a victim assistance fund, which will be appropriated to non-profit entities and other programs devoted to victim rehabilitation.

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**VETERANS COURT PROGRAMS**

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## CHARGE

*The Committee was charged with monitoring the implementation of SB 1940 (81R), which established veterans court programs in Texas, and examining the link between combat stress disorders of war veterans, including post-traumatic stress disorder and traumatic brain injury, and the onset of criminal behavior.*

## BACKGROUND

This generation of United States soldiers is facing a sacrifice that does not end on the battleground, but one that continues on American soil upon their return. The struggle to return to civilian life has led many veterans to an unwanted path in the criminal justice system, oftentimes due to the trauma sustained at war.

In January 2008, New York Judge Robert Russell formed the first veterans court in the country.<sup>36</sup> The court, which was erected in Buffalo, NY, takes a holistic approach similar to other specialized drug and mental health courts by disciplining veteran offenders through active monitoring by the court, progressive sanctions, and rehabilitative treatment programs rather than conventional prosecution. The need for veterans courts arose in response to a host of concerns, namely the significant number of veterans entering and reentering the criminal justice system, as well as the rates at which veterans are acquiring mental ailments as a result of military duty, such as post traumatic stress disorder (PTSD) and traumatic brain injury (TBI). These ailments are often precursors to substance abuse and criminal behavior among veterans, thereby increasing the risk that they will harm themselves or others after returning to civilian life.<sup>37 38</sup> Because of this relationship, as well as a reciprocal respect for the service members of the military provide for our nation, veterans court programs offer veteran offenders a therapeutic alternative to incarceration and a debilitating criminal record.

Since the formation of the Buffalo court, other states have followed in New York's footsteps by creating their own veterans court programs. The state of Texas, in particular, was a prime candidate for the expansion of veterans court jurisdictions due to its numerous military installations and relatively large veteran population. On December 9th, 2009, the first veterans court program in Texas commenced in the courtroom of Judge Marc Carter in Houston. Standing before him were two gentlemen who took the first steps in re-establishing a life they once knew before their deployments. Since that day, Dallas, Tarrant, and Bexar counties have started a veterans court program with many other counties expressing their desire to embark on the same path, including Denton, El Paso, Fannin, Hidalgo, Orange, and Travis counties.<sup>39</sup>

Implementing veterans court programs pursuant to S.B. 1940 is not without significant obstacles. Counties have struggled to obtain sufficient resources to create their own veterans court programs.<sup>40</sup> However, even counties that have enough financial support and staff to arrange for veterans court programs can be impeded by reluctant district attorneys or judges.<sup>41</sup> Additionally, some members of the community believe that veterans who commit violent or severe crimes should be precluded from participation in a veterans court program in the interest of justice and public safety.<sup>42</sup> While veterans court defendants are theoretically eligible by law for participation after committing any misdemeanor or felony, District Attorneys must approve of any person

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allowed into veterans court programs. In order for a veterans court to be successful and for soldier's mental health to improve, he or she must seek help, which is still something that many soldiers do not find easy to do. It appears that the war itself is not what many soldiers continue to struggle with, but rather the war between knowing and doing what is right for them as individuals, as opposed to what is deemed appropriate for a "real" soldier to do. Finally, as a result of veterans court programs still being a relatively new addition to the criminal justice system - both in Texas and in the United States - there is little data available regarding their long-term effectiveness at reducing costs or decreasing recidivism.<sup>43</sup> For these reasons, the Texas legislature has made it a priority to closely monitor the formation and operation of veterans courts around the state in the coming years.

## **TEXAS LAW**

While veterans court programs were first established in New York, Texas is one of the few states to have a state law which explicitly allows counties to implement these programs.<sup>44</sup> Understanding that veterans deserve and could benefit from rehabilitation instead of incarceration, the Legislature enacted legislation to enable counties to establish their own VC jurisdictions. On September 1, 2009, S.B. 1940 went into effect due largely to the efforts of judges, prosecutors, and defense lawyers from Harris County.<sup>45</sup>

The veterans court programs in Texas offer both current members and veterans of the armed forces -- who have suffered a mental illness, traumatic brain injury (TBI), or who have been diagnosed with post-traumatic stress disorder (PTSD) due to combat -- an alternative path through the Texas criminal justice system when charged with a criminal offense. Veterans who qualify for these courts under terms agreed to by the district attorney, judges, and the defense bar will be eligible to receive the treatment and services that specifically target their needs. If completed successfully, the defendants can have their indictments dismissed and expunged with the consent of the prosecutor.

For a more detailed description of the major provisions of S.B. 1940, the committee refers readers to the enrolled bill analysis<sup>46</sup> available at <http://www.legis.state.tx.us/BillLookup/Text.aspx?LegSess=81R&Bill=SB1940>

## **DISCUSSION**

On July 13th, 2010 the Committee held a joint interim hearing with the Committee on Defense & Veterans Affairs Subcommittee to review the status of various veterans court programs in operation around the state. Witnesses' testimony covered a broad range of issues having to do with securing adequate resources to fund veterans courts, the impact of combat stress disorders on veterans' ability to successfully function in society, and the controversial aspects of diversionary treatment and expunction. A broadcast of this hearing is available at <http://www.house.state.tx.us/video-audio/committee-broadcasts/committee-archives/?committee=220&session=81>).

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*Craig Erickson - Bexar County Community Resources*

From the Bexar County Community Resources office, Craig Erickson testified that the difficulty in setting up a veterans court program for their county came specifically from within the office of their district attorney, Susan D. Reed, and her concerns about pretrial diversion programs, particularly those cases that involved victims of family violence. Mr. Erickson said that while DA Reed did in fact change her mind regarding non-violent misdemeanors, the DA hired a veterans court program coordinator as a liaison and Bexar county plans to consider every case on a case-by-case basis. He stated that in the weeks following the July 13th hearing, officials from Bexar county would be traveling to Houston to observe their veterans court program first hand. With the cost of setting up a veterans court program in Bexar County at \$200,000 (which does not include mental health treatment costs), Mr. Erickson stated that they applied for three grants from the Texas Veterans' Commission, the Governor's Office, as well as from the federal government. At the time of hearing, approval for these grants was still pending.

*Brent Carr - Judge, Tarrant County*

Also testifying before the two committees was Judge Brent Carr, who presides over the local veterans court in Tarrant County while keeping the principle of "public safety" in mind. A true advocate for the veterans court programs, Judge Carr testified that Tarrant County had ten to twelve enrollees in their veterans court program, involving both low-level felonies and misdemeanors. The startup budget for Tarrant County's program was set at \$200,000, but Judge Carr said that they would be returning some of the money because it was not being used or needed. Nevertheless, Judge Carr is still aware that the Governor's Office grant will decrease over time, and their Veterans' Diversion Program will eventually be solely responsible for operating costs. He noted that there are no problems with the district attorneys acting as a gatekeeper to the process, and to date no defendants had been removed from the program. Judge Carr also informed the committee members that the VFW and Purple Heart associations are local support resources for the veterans court program itself as well as the individuals that go through the program.

*Michael Snipes - Judge, Dallas County*

As the presiding judge in the Dallas County veterans court program which began on May 10, 2010, Judge Snipes testified that their main concern for effective operation was funding. With the staff essentially volunteering their time in order to sustain the operation of the veterans court, Judge Snipes was hoping that, in addition to the \$15,000 grant they received from the Texas Bar Foundation, that they would also receive a \$130,000 grant from the Governor's office. After being asked specific questions pertaining to spouses of veterans who commit criminal acts, he explained that since spouses currently do not have VA benefits, the spouses would not be eligible for veterans court programs if they commit offenses in response to problems caused by their spouse who suffers from PTSD or TBI. It was suggested that this might be something the Legislature would want to look into. Judge Snipes also spoke specifically to the concern of soldiers, both those actively serving as well as veterans who have been taught or trained to keep silent on the suffering they are enduring. This in turn hinders any recovery from PTSD and can also be a contributing factor in the mental state of a soldier. The Judge also testified that while the Dallas County veterans court program is aimed at serving up to fifty clients at any given time, they currently have seven potential clients, with several of those still pending final assessment by the VA to be admitted.



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*Pat McCann - Criminal Defense Attorney, Harris County*

Mr. McCann testified that the Harris County veterans court program was initially staffed by volunteers but has since received funding in the amount of over \$400,000, with grants coming from the Governor's Office as well as the Task Force on Indigent Defense. Due to this, he is skeptical about claims of prohibitive costs regarding veterans court programs in other counties. Mr. McCann did testify that if the program had more resources, it would be able to help hundreds more who live in Harris County. At the time of his testimony, the veterans court in Houston had participants whose ages ranged from 22 to 64, with one female Navy veteran; of those, 25% have been diagnosed with TBI. He stated that while the military offers many things for soldiers, simply diagnosing soldiers before and/or during their trip back home with PTSD is far from acceptable. While working with the veterans court program, Mr. McCann has experienced some veterans who became enraged when asked if they would like to participate in the program, with some even reacting in fear due to the stigma that would result from being a soldier with mental health problems. Mr. McCann assured the legislators that the participants do not go a week without some interaction with the veterans court staff. he also requested a legislative fix to clarify the judge's authority to supervise misdemeanors and felonies in veterans court programs.

*Mary Covington - Special Programs Manager, Harris County Veterans Court Program*

As a member of the Texas Association of Drug Court Professionals who works with the Harris County veterans court program, Ms. Covington was called in response to a committee member's concern that the variances among different veterans court program jurisdictions are problematic. As the legislation is written, each county is allowed to determine and adopt its own rules. She stated that while she is more than willing to work with future potential legislative mandates regarding this matter, it is her belief that looking at each individual jurisdiction and adapting to their idiosyncrasies is the ideal approach to running a veterans court program.

*Tina Carnes - General Counsel, Texas Veterans' Commission*

Ms. Carnes was called to testify in order to specifically address the concern that those veterans court programs who were applying for funding from the Texas Veterans Commission's Fund for Veterans' Assistance were not being taken into consideration for the grants. She testified that while no veterans court program to date has been awarded a grant, the TVC has specifically set aside \$200,000 in veterans court grants that will be spread across Harris, Dallas, Tarrant and Bexar counties after September 1, 2010.

*Alan Peterson - Director, STRONG STAR Multidisciplinary PTSD Research Consortium*

STRONG STAR is a multidisciplinary and multi-institutional research consortium funded by the United States Department of Defense to develop and evaluate the most effective early interventions possible for the detection, prevention and treatment of combat-related PTSD in active-duty military personnel and recently discharged veterans. While Dr. Peterson's primary expertise is in both TBI and PTSD, he made it clear that not all trauma causes PTSD and that there are many soldiers who do not suffer from PTSD. Those who do suffer from it do so because of the high level of exposure to the worst traumas of war, with the primary cause being proximity to explosive devices. He testified that the estimates of risk of PTSD for returning soldiers range from 5% to 17%, resulting in approximately 300,000 veterans at risk. With the high rate of unemployment, early retirement, etc, among veterans from Vietnam, that number

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rises to 500,000. Reiterating Judge Snipes' testimony, Dr. Peterson stated that the stigma attached to mental health issues is one factor that contributes to the low numbers of veterans seeking and receiving care. In addition to combat, Dr. Peterson testified that rape is also a common cause for PTSD, with male soldiers who are raped suffering from it more so than female soldiers. He also testified that the biggest factor in recovery is a solid social support structure, whether it is family, friends or fellow soldiers who can relate to the turmoil found upon returning home. Dr. Peterson said that those soldiers in the National Guard and Reserves who suffer from PTSD are unfortunately more isolated and spread across various regions of the world, making it increasingly harder for them to address their PTSD. As a result, these soldiers commit offenses at a higher rate as well. According to Dr. Peterson, veterans suffering from PTSD are three to four times more likely to commit a violent act over those soldiers who do not suffer from PTSD. He also testified that substance abuse and PTSD have to be treated at the same time as they are mutually re-enforcing.

*Gloria Terry - President, Texas Council on Family Violence*

Guiding one of the largest domestic violence coalitions in the country, Ms. Terri stated her support of carefully implemented, community-based veterans court programs. She said that in crimes where there is a victim, particularly violent crimes, offender accountability in the criminal justice system should be treated in a conventional manner, regardless of whether or not the offenders suffer from PTSD.

*Erica Surprenant - Special Projects Director, Texas Criminal Justice Coalition*

Ms. Surprenant's testimony revolved around the following recommendations that reflect her and the Texas Criminal Justice Coalition's concerns about the high rate at which service members are entering the criminal justice system:

- Increase and enhance veterans court programs throughout the state;
- Encourage access to veterans court programs for other veterans who were perhaps dishonorably discharged;
- Promote the use of mentoring and funding to get more mentors;
- Allow judges to consider combat experience as a mitigation factor;
  - California and Minnesota allow this.
- Centralize veteran reentry programs/system (post incarceration); and
- Provide counseling to veterans during incarceration.

*Marty Gonzales - Veteran*

As a veteran, Mr. Gonzales offers free counseling and services to family members of veterans, while also working with the Houston Police Department to learn how to recognize and approach rehabilitation with veterans who have PTSD.

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*Shannon Edmonds - Director of Governmental Relations, Texas District & County Attorneys Association*

During his testimony, Mr. Edmonds acknowledged that while most of the larger counties are moving towards establishing veterans court programs, the issue of funding is still prevalent. As written, current law on veterans court programs does not preclude any type of offender from entering a veterans court despite the severity of their offense, but Mr. Edmonds admits that prior to the establishment of veterans court program, many veteran offenders already received mitigated punishments due to prosecutorial convention. Mr. Edmonds further believes that the availability of expunctions for graduates of all pretrial diversion programs, not just veterans court program graduates - as written in S.B. 1940 - is problematic if the individual happens to become a repeat offender.

## **RECOMMENDATIONS**

The House Committee on Criminal Jurisprudence recommends to the 82nd Texas Legislature the following:

- 1 Clarify/further delineate judges' authority to supervise misdemeanants and/or felons in VC programs.**
  - Modify the provisions in S.B. 1940 that detail veterans court judges' authority over defendants.
  
- 2 Increase and enhance veterans' courts throughout the state.**
  - Provide more money to veterans courts via grants from the Texas Veterans' Commission, the Governor's Office, or additional programs.
  - Promote the use of mentoring
  - Encourage effective collaboration between the Texas Veterans Commission, the Veterans Administration, the veterans court programs, law enforcement agencies, and not-for-profit entities that provide veteran services.
  - Increase offender accountability in instances of more serious and violent crimes by amending S.B. 1940 Sec. 617.002 (a) to preclude violent and/or heinous offenders from eligibility in a veterans court program in order to attract more hesitant judges, DAs, and members of the community to the idea of setting up a veterans court.
  
- 3 Encourage access for other veterans who were perhaps dishonorably discharged.**
  - Amend the eligibility requirements for veterans court defendants in S.B. 1940 Sec. 617.002 (a)(1).
  
- 4 Explicitly allow judges to consider combat experience as a mitigation factor**
  - Refer to practices in California and Minnesota which permit this.
  
- 5 Set up centralized veteran reentry programs after they return from incarceration**
  - Implement a state-funded arrangement and/or collaborate with willing Nonprofits.

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**6 Provide counseling to veterans during incarceration to improve the reentry process ahead of time.**

- Implement a state-funded arrangement and/or collaborate with willing Nonprofits.

**7 Provide counseling to family members of troubled veterans since there is a spillover effect**

- Implement a state-funded arrangement and/or collaborate with willing Nonprofits.
- Make family counseling services available as part of veterans court programs.

**8 Educate law enforcement to recognize and deal with veterans who have PTSD.**

- Mandate and/or increase education programs in conjunction with Nonprofits and graduates of veterans court programs.

**9 Address the problems/ambiguities of the current statutory language in SB 1940 related to expunction**

- Amend Section 76.011 of the Government Code so that eligibility for expunction is not strictly limited to programs run by community corrections and supervision departments, as not all veterans court programs involve community corrections and/or supervision departments.

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## ENDNOTES

- <sup>1</sup> "Clearing Criminal Records in Texas," Fred Dahr, 258 Texas Bar Journal, March 2006, ([www.texasbar.com](http://www.texasbar.com))
- <sup>2</sup> Id.
- <sup>3</sup> Id.
- <sup>4</sup> "FAQ - Deferred Adjudication," Texas Medical & Dental Schools Application Service, (<http://www.utsystem.edu/tmdsas/frwqAskedQ/17-DeferredAdjudication.html>)
- <sup>5</sup> Id.
- <sup>6</sup> Texas Code of Criminal Procedure, Chapter 55, Article 55.01 (a)(2)(B), (<http://www.statutes.legis.state.tx.us/Docs/CR/htm/CR.55.htm#55.01>)
- <sup>7</sup> Texas Government Code, Chapter 411, Subchapter F, Section 411.081, (<http://www.statutes.legis.state.tx.us/Docs/GV/htm/GV.411.htm#411.081>)
- <sup>8</sup> Id.
- <sup>9</sup> "Interim Report to the 81st Legislature," Senate Committee On Criminal Justice, December 2008, (<http://www.lrl.state.tx.us/scanned/interim/80/C868.pdf>)
- <sup>10</sup> "Replacing Incarceration: The Need for Dramatic Change," Nora V. Demleitner, Dean, Hofstra University School of Law; Federal Sentencing Reporter, Vol. 22, No. 1, October 2009, (<http://caliber.ucpress.net/doi/abs/10.1525/fsr.2009.22.1.1>)
- <sup>11</sup> 18 United States Code, Section 3607, ([http://www.law.cornell.edu/uscode/18/uscode\\_sec\\_18\\_00003607----000-.html](http://www.law.cornell.edu/uscode/18/uscode_sec_18_00003607----000-.html))
- <sup>12</sup> 21 United States Code, Section 844, ([http://www.law.cornell.edu/uscode/21/uscode\\_sec\\_21\\_00000844----000-.html](http://www.law.cornell.edu/uscode/21/uscode_sec_21_00000844----000-.html))
- <sup>13</sup> *Gideon v. Wainwright*, 372 U.S. 335, 344 (U.S. 1963)
- <sup>14</sup> *USCS Const. Amend. 6*.
- <sup>15</sup> *Douglas v. California*, 372 U.S. 353 (U.S. 1963); *Miranda v. Ariz.*, 384 U.S. 436 (U.S. 1966); *In re Gault*, 387 U.S. 1 (U.S. 1967); *Coleman v. Alabama*, 399 U.S. 1 (U.S. 1970); *Argersinger v. Hamlin*, 407 U.S. 25 (U.S. 1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (U.S. 1973); *Alabama v. Shelton*, 535 U.S. 654 (U.S. 2002).
- <sup>16</sup> The state pays for representation in capital post-conviction proceedings and the Task Force on Indigent Defense distributes state money to counties that qualify for formula and discretionary grants. The Task Force also publishes indigent defense data on its website to promote best practices and proficient planning, funds research projects regarding indigent defense policies, and organizes workshops for providers of indigent defense services.
- <sup>17</sup> "Texas Needs Public Defenders," Sen. Rodney Ellis, Houston Chronicle, 5-29-10, (<http://www.chron.com/dispatch/story.mpl/editorial/outlook/7028346.html>).
- <sup>18</sup> Public Defender Offices in Texas," Task Force on Indigent Defense, 6-17-10, (<http://www.courts.state.tx.us/tfid/pdoffices.asp>).
- <sup>19</sup> "Blueprint for Creating a Public Defender Office in Texas," Task Force on Indigent Defense and the Spangenberg Group, Second Edition, June 2008.
- <sup>20</sup> "Texas Task Force on Indigent Defense 2009 Annual and Expenditure Report," Task Force on Indigent Defense, 1-11-10.
- <sup>21</sup> "Indigent Defense in Texas and the Texas Fair Defense Act," Texas Fair Defense Project, ([http://www.texasfairdefenseproject.org/info/right\\_to\\_counsel/texas\\_fair\\_defense\\_act.php](http://www.texasfairdefenseproject.org/info/right_to_counsel/texas_fair_defense_act.php))
- <sup>22</sup> "Blueprint for Creating a Public Defender Office in Texas," Task Force on Indigent Defense and the Spangenberg Group, Second Edition, June 2008.
- <sup>23</sup> S.B. No. 7, 77th Regular Session, 06-14-01, (<http://www.legis.state.tx.us/BillLookup/Text.aspx?LegSess=77R&Bill=SB7>)
- <sup>24</sup> Id.
- <sup>25</sup> H.B. No. 1178, 80th Regular Session, 09-01-10, (<http://tllis/BillLookup/History.aspx?LegSess=80R&Bill=HB1178>)
- <sup>26</sup> Labor Trafficking Fact Sheet  
[http://www.acf.hhs.gov/trafficking/about/fact\\_labor.pdf](http://www.acf.hhs.gov/trafficking/about/fact_labor.pdf)
- <sup>27</sup> U.S. Department of State, 2008 Trafficking in Persons Report, p. 8
- <sup>28</sup> U.S. Department of State, 2008 Trafficking in Persons Report
- <sup>29</sup> 2008 Department of Justice Report on Human Trafficking
- <sup>30</sup> Trafficking Victims Protection Act of 2000 (TVPA)<sup>30</sup> Pub. L. No. 106-386, Division A, 114 Stat. 1464 (200)
- <sup>31</sup> <http://www.capitol.state.tx.us/tlodocs/78R/billtext/pdf/HB02096F.pdf#navpanes=0>
- <sup>32</sup> <http://www.legis.state.tx.us/tlodocs/80R/billtext/pdf/HB01121F.pdf#navpanes=0>

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- <sup>33</sup> <http://www.capitol.state.tx.us/tlodocs/80R/billtext/pdf/SB00011F.pdf#navpanes=0>
- <sup>34</sup> Senate Concurrent Resolution 90, 80th Legislature, Regular Session. 2007. Retrieved July 14, 2008, from <http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=80R&Bill=SCR90>
- <sup>35</sup> [In re B.W., 313 S.W.3d 818 \(Tex. 2010\)](#)
- <sup>36</sup> "Veterans Courts Offer Hope and Treatment," Katherine Mikkelson, The Public Lawyer, American Bar Association, Winter 2010.
- <sup>37</sup> "Criminal Behavior and PTSD: An Analysis," U.S. Department of Veterans Affairs, 06-01-2010, (<http://www.ptsd.va.gov/professional/pages/criminal-behavior-ptsd.asp>).
- <sup>38</sup> "Information And Recommendations For Services Provided By VHA Facilities To Veterans In The Criminal Justice System," Michael J. Kussman, Under Secretary for Health, 4-30-09, ([http://www1.va.gov/vhapublications/ViewPublication.asp?pub\\_ID=2019](http://www1.va.gov/vhapublications/ViewPublication.asp?pub_ID=2019)).
- <sup>39</sup> "Courts for Accused Veterans Prioritize Treatment," Bobby Cervantes, May 17, 2010, (<http://www.texastribune.org/texas-newspaper/texas-news/courts-for-accused-veterans-prioritize-treatment/>).
- <sup>40</sup> "State Leaders Host Veterans Courts Forum," Jeff Williford, Texas Veterans Commission, 5-14-10, (<http://www.tvc.state.tx.us/latest-news/entry/state-leaders-host-veterans-courts-forum/>). / Joint Hearing: Criminal Jurisprudence and Defense and Veterans' Affairs Subcommittee on Veterans' Courts, Witness Testimony, 7-13-10, Interim Broadcasts, (<http://www.house.state.tx.us/committees/broadcasts.php?session=81&committeeCode=220>)
- <sup>41</sup> "Courts for Accused Veterans Prioritize Treatment," Bobby Cervantes, May 17, 2010, (<http://www.texastribune.org/texas-newspaper/texas-news/courts-for-accused-veterans-prioritize-treatment/>).
- <sup>42</sup> Joint Hearing: Criminal Jurisprudence and Defense and Veterans' Affairs Subcommittee on Veterans' Courts, Witness Testimony, 7-13-10, Interim Broadcasts, (<http://www.house.state.tx.us/committees/broadcasts.php?session=81&committeeCode=220>).
- <sup>43</sup> "Dallas Launching Latest TX Veterans Court," Scott Henson, Grits For Breakfast, (<http://gritsforbreakfast.blogspot.com/2010/03/dallas-launching-latest-tx-veterans.html>). / "Veterans Courts Offer Hope and Treatment," Katherine Mikkelson, The Public Lawyer, American Bar Association, Winter 2010.
- <sup>44</sup> "Veterans Courts Offer Hope and Treatment," Katherine Mikkelson, The Public Lawyer, American Bar Association, Winter 2010.
- <sup>45</sup> S.B. No. 1940, 81st Regular Session, 06-19-09, (<http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=81R&Bill=SB1940>).
- <sup>46</sup> S.B. 1940 Bill Analysis, Senate Research Center, Texas Legislature Online, 9/2/2009, (<http://www.legis.state.tx.us/BillLookup/Text.aspx?LegSess=81R&Bill=SB1940>)