Interim Report

TO THE EIGHTY-NINTH TEXAS LEGISLATURE

HOUSE COMMITTEE ON CRIMINAL JURISPRUDENCE

NOVEMBER 2024

HOUSE COMMITTEE ON CRIMINAL JURISPRUDENCE

TEXAS HOUSE OF REPRESENTATIVES

Interim Report 2024

Report & Recommendations for the 89th Texas Legislature

Rep. Joe Moody
Chair

Ellic Sahualla
Policy Director

Rachel Wetsel
Committee Clerk

COMMITTEE ON CRIMINAL JURISPRUDENCE

TEXAS HOUSE OF REPRESENTATIVES

JOE MOODY
Chair

DAVID COOK
Vice Chair

November 22, 2024

The Honorable Dade Phelan
Speaker, Texas House of Representatives
and
Honorable Members of the Texas House of Representatives
Texas Capitol, Rm. 2W.13 | Austin, TX 78701

re: Criminal Jurisprudence Interim Report 2024

Mr. Speaker & Members:

The House Committee on Criminal Jurisprudence for the 88th Texas Legislature is proud to submit this interim report for the 89th Texas Legislature's consideration.

Respectfully,

JOE MOODY
Chair

DAVID COOK**
Vice-Chair

DREW DARBY *

JEFF LEACH

RHETTA BOWERS

CHRISTINA MORALES

BRIAN HARRISON **

SALMAN BHOJANI

NATE SCHATZLINE

* Rep. Darby provided a statement in "Letters from Members" and now adds: "This letter was written before the Texas Supreme Court's decision in No. 24-0884. Still, my argument remains: the committee's work is unfinished, and no judgment should be made on Robert Roberson's guilt or innocence."

** Agreed to, in part; see "Letters from Members" from Reps. Cook & Harrison for clarification.

CLERK: RACHEL WETSEL
PO BOX: 2910 AUSTIN, TX 78768

Foreword

Committees only work because of the support the Committee Coordinator's Office provides, so we'd first like to thank Stacey Nicchio, Damian Duarte, and the rest of their team. We owe a lot to staff from the Speaker's Office as well, especially Shakira "Ky" Pumphery, Margo Cardwell, Jason Briggs, and Cait Wittman. And the committee is indebted to House Parliamentarians Sharon Carter and Hugh Brady and Assistant Parliamentarian Tom Samuels, the Texas Legislative Council (especially Brett Ferguson), our sergeants-at-arms under Kara Coffee, Chief Clerk Stephen Brown and his office, and the many dedicated public servants outside the House who assisted the committee when it reached out to them (particularly TDCJ Governmental Affairs Director Kate Blifford).

The interim work of the committee wouldn't have been possible without the staff who work so hard for each member. And several House staffers, both inside and outside the committee, went above and beyond to help us get things done—to Emily Fankell, Cassie Hoyer, Jeff Madden, Lauren Young, Cassidy Zgabay, Kelly Peterson, Cara Santucci, Jackie Curatola, Ann Jacobo, and everyone else who lent a hand, thank you.

We also offer our sincerest gratitude to the numerous agencies, experts, and (above all) members of the public who shared information and insights with us throughout the interim. The witnesses who generously donated their time to testify at our hearings are in a very real way the co-authors of this report.

Finally, for reasons that will become apparent as you read, we make this commitment to Robert Roberson and his dauntless attorney, Gretchen Sween: We won't quit until the legal roadblocks and blind spots you've experienced no longer stand in the way of justice for future Texans.

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Committee & Charges

House Speaker Dade Phelan appointed the following members to serve on the House Committee on Criminal Jurisprudence for the 88th Legislative Session:

Joe Moody—Chair
David Cook—Vice Chair
Drew Darby
Jeff Leach
Rhetta Bowers
Christina Morales
Brian Harrison
Salman Bhojani
Nate Schatzline[1]

House Rules gave the committee the following organization and jurisdiction:

> **Section 7. Criminal Jurisprudence**—The committee shall have nine members, with jurisdiction over all matters pertaining to:
>
> (1) criminal law, prohibitions, standards, and penalties;
>
> (2) probation and parole;
>
> (3) criminal procedure in the courts of Texas;
>
> (4) revision or amendment of the Penal Code; and
>
> (5) the following state agencies: the Office of State Prosecuting Attorney and the Texas State Council for Interstate Adult Offender Supervision.[2]

The committee was given the following interim charges:

1 **Monitoring**: Monitor the agencies and programs under the Committee's jurisdiction and oversee the implementation of relevant legislation passed by the 88th Legislature. Conduct active oversight of all associated rulemaking and other governmental actions taken to ensure the intended legislative outcome of all legislation, including the following: HB 17, relating to official misconduct by and removal of prosecuting attorneys.

2. **Protecting Survivors Against Crimes of Abusers**: Examine the shift in criminalization of children by human traffickers into other criminal enterprises, such as aggravated robbery, as well as the Texas Penal Code definition of "duress" as an affirmative defense for survivors of human trafficking and domestic violence. Make recommendations to prevent the criminalization of survivors of human trafficking and domestic violence for the crimes of their abusers.[3]

The committee studied these charges through testimony and written materials taken at hearings held in Austin on July 9th, September 16th, October 16th, and October 21st, 2024.

Charge 1—Monitoring

Monitor the agencies and programs under the Committee's jurisdiction and oversee the implementation of relevant legislation passed by the 88th Legislature. Conduct active oversight of all associated rulemaking and other governmental actions taken to ensure the intended legislative outcome of all legislation, including the following: HB 17, relating to official misconduct by and removal of prosecuting attorneys.

Hearing

The committee held hearings on July 9, 2024, in Capitol Extension room E2.030 and September 16, 2024, in Capitol Extension room E2.010 to consider charge one. This is the official witness list generated from electronic witness affirmation forms:

Implementation of HB 17
Edmonds, Shannon (Texas District and County Attorneys Association (TDCAA))
Petricek, Cleo (Self; Travis County Crime Victims Group)
Pressley, Nikki (Texas Public Policy Foundation)

Implementation of HB 6
Bruner, Sarah (Tarrant County Criminal District Attorney's Office)
Place, Allen (Texas Criminal Defense Lawyers Association)
Redwine, Shanna (Montgomery County District Attorney's Office)
Wilkerson, John (TMPA)

Implementation of HB 611
Flatt, Bryan (TMPA)
Voyles, Molly (Texas Council on Family Violence)

Implementation of HB 842
Holmes, Sylvia (Justice of the Peace & Constable Association)

Implementation of HB 1221
Henry, Patti (Self; County and district clerks association of texas)
Steffa, Ron (Tx Department of Criminal Justice)
Registering, but not testifying:
Clayton, Bryant (Texas Comptroller of Public Accounts)

Implementation of HB 1442
Gomez, Francisco (Houston Police Department)

Implementation of HB 1826
Bowen, Chris (Texas department of public safety)
Castillo, Korry (Comptroller of Public Accounts)

Implementation of HB 2897
Amps, Emily (Texas AFL-CIO)
Gharakhanian, Stephanie (Travis County District Attorney's Office)

Implementation of HB 3956
Henry, Patti (Self; County and District Clerks Association of Texas)
Mills, Brady (Texas Department of Public Safey - Crime Laboratory Division)

Implementation of HB 4906
Shepherd, Paul (University of Texas System)

The report and recommendations below are based on the testimony and materials these witnesses submitted to the committee as well as research conducted by committee staff.

House Bill 17—Rogue Prosecutors

The committee was specifically charged with monitoring and oversight of HB 17 by Rep. David Cook, which was captioned "relating to official misconduct by and removal of prosecuting attorneys."[4]

The bill was a response to "local prosecutors adopting internal policies and issuing public pronouncements that entire classes of crimes would not be prosecuted within their respective jurisdictions."[5] Under HB 17, a wholesale refusal to prosecute a specified offense is official misconduct, which can mean a prosecutor's removal through a petition filed by a resident in the prosecutor's jurisdiction.[6] The bill also created certain exceptions, such as pretrial diversion, and outlined procedures for handling and resolving these petitions.[7]

Four petitions have been filed across the state since HB 17 became law.[8] These have, in some instances, exposed the danger of the process being weaponized. In Hays County, for example, a petition was filed by the disgraced county clerk for relatively clear political purposes.[9] Another was filed in Travis County by a defendant who was then facing charges from the prosecutor's office.[10] On the other hand, each of these was quickly dismissed, so the protections built into the bill have been effective so far.

None of these petitions has resulted in removal of a prosecutor.[11] However, according to its author, the bill's primary goal has always been to unlink politics from prosecution and prohibit

blanket non-enforcement policies, which undermine the laws we pass.[12] In that sense, the new law has been a success because the policies that led to the filing of the bill in the first place have changed.[13] Prosecutors, for their part, have been satisfied with the exceptions within the bill, which have maintained the prosecutorial discretion necessary to do the job effectively.[14]

One witness expressed concern that implicit policies can still skirt the intent of the law.[15] Her solution would be an investigative body to oversee prosecutors, which could be more nuanced and responsive than a court applying rigid legal standards.[16] There was once a limited version of such an oversight body. The Prosecuting Attorneys Coordinating Council (PACC) lasted for eight years before being "disbanded in 1985 due to a lack of funding, inefficiencies, and redundant efforts."[17]

> Although we do believe in prosecutorial innovation, there's a difference between an innovative prosecutor and someone who's trying to erode the rule of law.
>
> NIKKI PRESLEY, TEXAS PUBLIC POLICY FOUNDATION

Other states have considered such oversight bodies, such as Georgia, where legislation to create an investigative commission has been proposed.[18] Others have alternative systems, such as removal by the governor in Florida or a petition to the state supreme court by the attorney general in Tennessee.[19] However, the Texas Constitution would have to be amended to implement any system that subjected a prosecutor to the authority of another entity or agency beyond the current removal petition structure.[20] As a result, any external oversight entity would be limited in scope, and as we saw firsthand with PACC, that might not be worth the results it could produce.

That issue—the cost of implementation and who bears it—has been a consideration in HB 17 from the beginning. There are undoubtedly some expenses borne by the parties involved, including the county in which removal is sought, the prosecutor appointed to pursue the petition, and the prosecutor the petition is meant to remove.

So far, in each real-world petition, costs have been absorbed within existing budgets, although that might not be feasible if a petition were taken all the way through trial.[21] The specter of personal responsibility for costs has also influenced removal petitions in the past,[22] although HB 17 does provide for possible attorney's fees to offset that.[23] Unfortunately, there's no similar deterrent for bad faith filings that are disposed of before the trial stage, which still impose some costs on local governments.

The committee also reviewed the implementation of several other bills. These were chosen for their suitability to being monitored so soon after being passed, either because of their technical nature or the quantifiable results we expect from them.

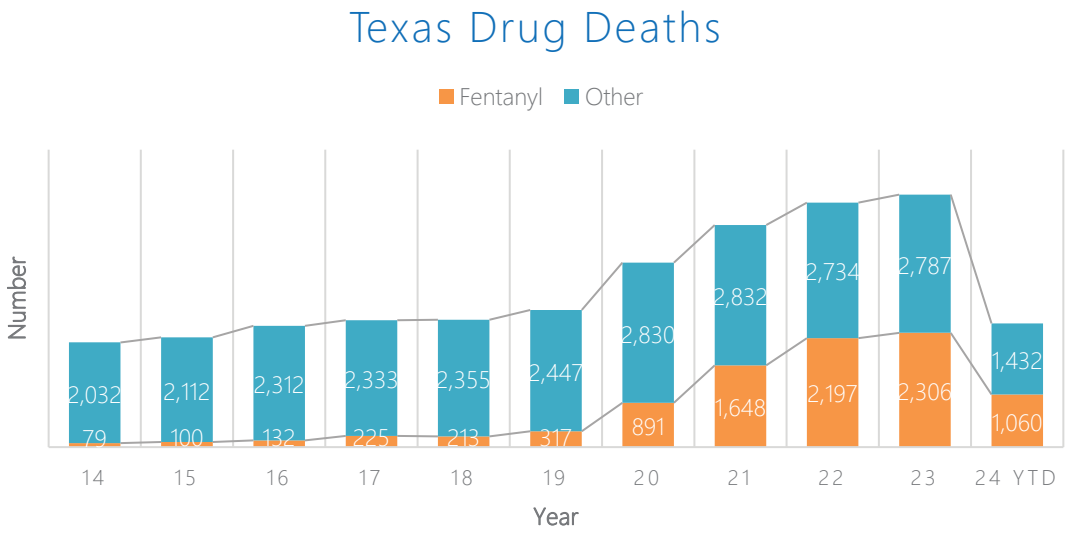
House Bill 6—Fentanyl

HB 6, by Rep. Craig Goldman, was captioned "relating to the designation of fentanyl poisoning or fentanyl toxicity for purposes of the death certificate and to the criminal penalties for certain controlled substance offenses; increasing a criminal penalty."[24]

Its bill analysis laid out the epidemic that prompted it:

> In recent years, overdoses in the United States have seen an alarming increase due to the increased production and smuggling of fentanyl, an incredibly potent synthetic opioid. According to the CDC, in the 12-month period ending in November 2022, more than 75,000 Americans died from an overdose of synthetic opioids, mainly from fentanyl. In Texas, the Department of Public Safety has seized over 353 million lethal doses of fentanyl since the beginning of Operation Lone Star in March 2021, according to the governor's office.[25]

HB 6 aimed to combat that crisis[26] through increased penalties for crimes involving fentanyl and the creation of new offenses that specifically cover manufacture or delivery of fentanyl that results in a death. The bill also imposed additional requirements for medical certification of fentanyl deaths and moved fentanyl into its own penalty group, with both measures intended to improve data collection about fentanyl crimes and deaths.[27]



More than 46 people have already been charged with fentanyl murder under HB 6—almost one per week at the time of the committee hearing.[28] HB 6 has actually shifted the lines

between federal and state prosecutions, with the federal government sometimes deferring to Texas in cases it would've once taken over.[29] This is a marked change from early in the fentanyl epidemic when police and prosecutors routinely reported difficulties in adequately charging these cases. Now, there's a greater sense among law enforcement professionals that the laws on the books meet the crimes being committed.[30]

The criminal defense bar has generally been supportive of the bill given the nature of the problem, with the exception of minimums that exceed 10 years. When a sentence is for more than 10 years, a jury can't recommend (and a judge can't give) community supervision, which limits the options available to finders of fact in favor of a one-size-fits-all approach and actually reduces the exposure a defendant faces when cases are pled down to probation.[31]

One remaining issue is uneven funding and resource distribution, with some smaller departments lacking access to tools like field test kits or naloxone.[32] The bill is also only part of the comprehensive approach needed, and educational programs in schools as well as other "demand side" efforts are essential in stemming the flow of fentanyl into our communities.[33] If anything, the need is even greater today because fentanyl is no longer purely an unexpected adulterant added to other substances—there's now a demand for fentanyl, and people are specifically seeking it out at levels that were previously uncommon.[34]

Still, fentanyl is pervasive and commonly seen mixed with other substances "that don't look like fentanyl, and so for our young people especially, it is something that can hide in plain sight, and that can catch folks who have no idea what they're taking off guard, and it can be something that can be so quickly fatal in such small amounts."[35] Many Texas leaders, including Governor Abbott,[36] have voiced support for decriminalizing fentanyl test strips, a harm reduction strategy designed to reduce the risk of overdose.[37] A bill to do so, HB 362 by Rep. Tom Oliverson, passed the House 143-2 but didn't receive a hearing in the Senate.[38]

House Bill 611—Doxing

HB 611, by Rep. Gio Capriglione, was captioned "relating to the creation of the criminal offense of unlawful disclosure of residence address or telephone number."[39]

The bill addressed "doxing," which "refers to the public posting of an individual's personal information without the individual's permission and with the intent to cause harm to the individual or a member of the individual's family or household."[40] Doxing has become a pervasive problem in recent years and is one of the most damaging and even dangerous forms of online harassment because it bleeds over into a victim's real life.[41] At the same time, any effort to curtail doxing must be carefully balanced against our First Amendment rights.[42]

Until HB 611, Texas had no general criminal prohibition against doxing.[43] Now, it's a class B misdemeanor to post someone's address or telephone number on a public website with the intent to harm or threaten. That's increased to class A if it results in bodily injury.[44]

> For those survivors [of family violence], when you are fleeing and seeking a new safe home, or you've gotten a new safe address, the idea that it could be made publicly available is terrifying.
>
> Molly Voyles, Texas Council on Family Violence

Doxing is often a significant and dangerous part of intimate partner abuse. It can be part of escalating psychological and emotional violence or coercive control for those still in abusive relationships, and it can also endanger survivors who've escaped them.[45] Advocates told the committee about the disheartening experience of having to tell survivors that there was no law against their personal information being exposed,[46] which is thankfully a thing of the past after HB 611.

One further step that can be taken is to raise public awareness about the new doxing law to discourage violations in the first place.[47] Both the format and the information covered by the law may also be worth broadening, and some states have added information such as bank accounts, private photographs, and digital signatures to doxing prohibitions.[48] And there are potential loopholes that still exist in publicly filed records, such as deeds and other documents maintained by county and district clerks, which may reveal the same information HB 611 sought to protect.[49]

House Bill 842—Driver's License Suspensions

HB 842, by Rep. Jared Patterson, was captioned "relating to prohibiting the suspension of a person's driver's license or extension of the period of a driver's license suspension for certain driving while license invalid convictions; authorizing a fee."[50]

Formerly, Texas law required that a person's driver's license be suspended on conviction for driving while license invalid (DWLI)—a new suspension for being suspended—creating a barrier to proper licensure and a disincentive to resolving DWLI cases.[51] HB 842 sought to remedy that by prohibiting the Department of Public Safety (DPS) from suspending a license or extending an existing suspension after conviction of a DWLI, with some exceptions.[52]

The bill has proven straightforward, leading to a drop in both suspensions and occupational license applications, which are unnecessary when licenses aren't resuspended in the first place. This has been especially impactful for young drivers, who were previously being hit with unexpected suspensions that made it harder for them to work, go to school, and even attend to the basic necessities of modern commuter life. HB 842 has proven popular with judges and

has had no significant implementation issues, leading to some asking that it be made broader and forward-looking rather than applying to only a specific retroactive time period.[53]

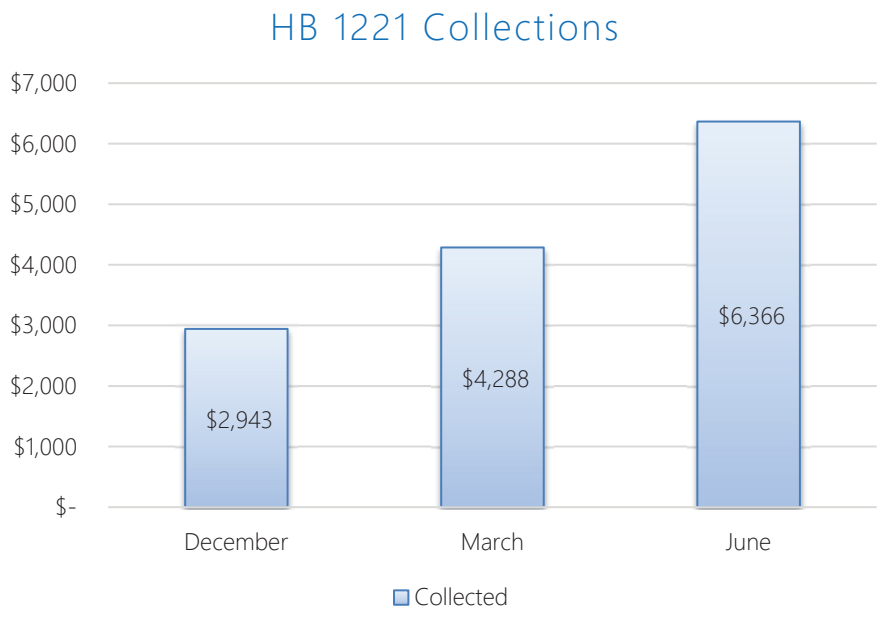
House Bill 1221—Crime Victim Compensation

HB 1221, by Rep. Will Metcalf, was captioned "relating to authorizing the comptroller to release a reported owner's unclaimed property to the owner's crime victim in certain circumstances and payment by the Texas Department of Criminal Justice of certain amounts owed by an inmate."[54]

Sometimes, prisoners who owe restitution to their victims have unclaimed property that could be used to satisfy their court-ordered obligations. However, only property owners themselves may submit a claim to the state's unclaimed property fund, so victims have had no way to access those monies.[55]

The bill closed that gap by requiring TDCJ to submit—and the comptroller to approve—a claim for property on behalf of a victim owed restitution based on a final conviction that put an offender in TDCJ custody. HB 1221 also provided procedures, rulemaking authority, and reporting requirements for these claims and collections.[56]

About 16% of inmates who owe court-ordered restitution have been found to have unclaimed property, and implementation has been simple from the perspectives of TDCJ and the comptroller.[57] While the amounts collected have been somewhat modest, each dollar recovered should go right into the pocket of a victim. However, getting it to them remains a stumbling block in many cases given the confidentiality of victim information, which may simply move



unclaimed funds from the comptroller to a clerk's office and no farther.[58] More work may be needed to capture victim contact information at the time of a restitution order so that money can be transferred to them when it's recovered.

House Bill 1442—Street Takeovers

HB 1442, by Rep. Ann Johnson, was captioned "relating to the prosecution of certain criminal conduct involving a reckless driving exhibition or racing on a highway and to the forfeiture of contraband as a result of a reckless driving exhibition."[59]

Organized street racing and the phenomenon of street takeovers have become serious problems throughout the state in recent years.[60] Despite the increased attention on these dangerous and disruptive illegal activities, law enforcement officers have been hampered by a lack of clarity in Texas law.[61]

The bill addressed those shortcomings by adding racing and related offenses to the offense of engaging in organized criminal activity, elevating the penalties for organized street races and street takeovers. It also made property—including vehicles—used in these events subject to criminal asset forfeiture.[62]

Law enforcement agencies responding to the rise in these crimes were previously hampered by an inability to both meaningfully intervene and properly penalize participants. Under HB 1442, however, task forces have made real headway into stopping these activities in urban areas such as Houston and San Antonio and have begun to assist smaller jurisdictions with similar issues. In Houston alone, 20 vehicles have been seized as a direct result of HB 1442, and local law enforcement has assured the committee that measures have been put in place to protect innocent owners such as parents whose teenage child borrowed their car.[63]

In response to HB 1442 and increased enforcement generally, many organizers once promoting takeovers and races have begun moving to events on private property. While these private activities aren't illegal per se, they often involve stolen vehicles, and their unstructured, amateur nature has resulted in life-threatening injuries of both participants and spectators,[64] which might warrant exploration of criminal or regulatory solutions that enforce existing laws.

House Bill 1826—Retail Theft Task Force

HB 1826, by Rep. Chris Turner, was captioned "relating to the establishment of an organized retail theft task force."[65]

The bill was the product of interim study by the Committee on Business & Industry, which found that organized retail theft was "a serious problem increasing in intensity in Texas and across the country and that retailers are looking for help combating it [because] when thieves

conduct organized retail crime across jurisdictions, it can be more difficult to apprehend and charge them due to a lack of coordination between jurisdictions."[66] HB 1826's solution was the creation of a statewide retail theft task force that would review laws and regulations in other jurisdictions, analyze the economic impact of organized retail theft, and make recommendations for outreach, prevention, and training to address it.[67]

As of the committee's meeting on July 9, 2024, the new task force had met three times and scheduled two more meetings, with a report to the Legislature due on or before December 1, 2024.[68] It had also conducted several site visits at brick-and-mortar retailers and had plans to interface with a fulfillment center to explore how the issue affects online retailers.[69] There's been no cost so far for the task force because it's staffed by existing and volunteer personnel.[70] Its work coincides with statewide efforts by DPS, which has seven full-time employees dedicated to organized retail theft—three in Houston, three in Dallas, and one in Austin, although they each work cases statewide.[71]

One issue that both the task force and law enforcement agencies like DPS have had to contend with is a lack of universal data across retailers since standards differ on when, how, or even if theft is reported.[72] There's also the matter of striking the right balance in both data gathering and enforcement that doesn't lump petty shoplifting in with the organized efforts targeted by HB 1826, which is part of what the task force's recommendations may assist with.[73]

House Bill 2897—Theft of Service

HB 2897, by Rep. Armando Walle, was captioned "relating to the prosecution of the offense of theft of service."[74]

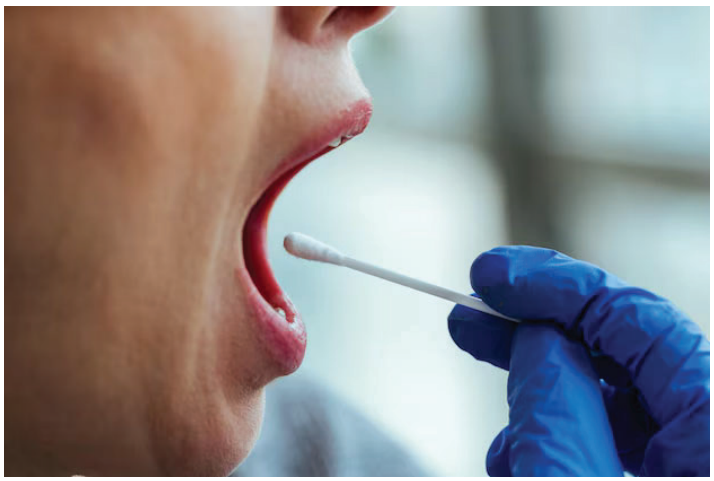
Theft of service prosecution involves notice requirements before criminal charges may be filed.[75] This process has traditionally been hampered by "conflicting provisions in state law regarding different types of theft by check," which can "not only create confusion for victims of crime, but can also frustrate attempts to prosecute these sorts of cases and recover restitution."[76] HB 2897 cleared up some of those conflicts by expanding acceptable notice addresses to include the address on a check used to secure service or in the records of the bank from which the check was drawn, or simply the address from the victim's own records, making it easier to meet statutory obligations before prosecution.[77]

The bill has already impacted the majority of all hot check cases, making it easier to resolve them without going to court and any prosecution more effective when it's needed.[78] It's also effectively improved an underused tool for battling wage theft, since theft of service is often a much faster avenue for recovering illegally withheld wages than filing through the Texas Workforce Commission.[79]

While HB 2897 has made finding the appropriate notice address easier, there are still cases where a victim can't locate any physical address to send notice to. Moreover, many victims still don't send notice to begin with, and many notices that are sent don't meet statutory guidelines. Expanding notice options to include email, text, or other modes of written communication and simplifying requirements for the actual contents of the notice itself (or simply promulgating a statewide form letter) would further expand access to restitution and justice.[80]

House Bill 3956—Felony DNA Records

HB 3956, by Rep. Reggie Smith, was captioned "relating to the creation of DNA records for a person arrested for a felony offense and the expunction of DNA records in certain circumstances."[81]



A buccal swab, the typical method of DNA sample collection

"DNA typing is now universally recognized as the standard against which many other forensic individualization techniques are judged."[82] Collecting DNA specimens from offenders serves a dual purpose: it can solve "cold cases" where DNA was collected but not matched, and it can sometimes exonerate the falsely accused.[83] Our existing program for DNA collection after certain felony arrests has already paid those kinds of dividends.[84]

HB 3956 built on that by expanding the program to cover all arrests.[85] It also changed the collecting entity from arresting agencies to booking agencies, and given privacy concerns around the DNA database, the bill provided extensive requirements for expunging DNA information after acquittal, dismissal of charges, or other relief.[86]

Since the bill's passage, there have been over 71,000 samples taken and more than 900 hits. Those have already solved a number of cold cases, including a 2022 Georgia murder.[87] As it so often does, knowledge has proven to be power.

Despite this early promise, not all agencies are in compliance, mostly due to a lack of resources and training (something that DPS and the Texas Sherrif's Association are working together to fix). There's also a persistent issue of duplicate samples being taken at a rate of around 15%, which wastes the cost of each sample kit (about $5) in addition to officer time, although DPS

is attempting to reduce that rate through training, and the program as a whole still remains within the original fiscal note at the state level.[88]

Sample record destruction is just as important as sample record collection, and some procedural hurdles remain there. The number one issue is the need for an effective, uniform method for clerks to be informed that a DNA sample exists in the first place, such as the law enforcement vendor capturing that information and transmitting it or the prosecutor's office sending notice along with any resolution of a case. And there's no clear statutory definition of "dismissal" in this context—does the term include a prosecutor declining to pursue charges or a grand jury entering a "no bill," as just two examples?—leading to uncertainty about if and when some samples should be removed from the database.[89]

House Bill 4906—Campus Electronic Evidence Warrants

HB 4906, by Rep. Cole Hefner, was captioned "relating to the installation and use of tracking equipment and access to certain communications by certain peace officers."[90]

Modern investigations routinely involve electronic evidence such as social media activity, direct messages, and text messages, and our statutes provide a process for peace officers to apply for search warrants for it. However, one type of officer was (probably inadvertently) excluded from the list of those who can apply: officers serving our schools.[91] HB 4906 corrected that oversight by simply adding peace officers employed by schools and universities to the list of potential applicants.[92]

The bill's intent was to level the playing field for all Texas peace officers and give those working for our schools the tools they need, which it's successfully done.[93] Although our largest state university system hasn't had to make use of the law yet, there have been past cases that could've otherwise been handled "in house" that had to be passed off to other law enforcement agencies so that electronic evidence could be secured. Under HB 4906, that shouldn't be necessary anymore, increasing the responsiveness and efficiency of investigations on our campuses that involve this kind of evidence.[94]

Recommendations

The committee makes the following recommendations to the 89th Texas Legislature:

Consider pretrial costs in rogue prosecutor petitions

HB 17 has worked well, and the prospect of having to pay attorney's fees has discouraged abuse of the removal petition process. However, petitions that are wholly without merit have so far been dismissed at the pretrial stage, which imposes a currently unrecoverable cost on

our counties and doesn't properly discourage bad faith filings. The Legislature should consider whether and how pretrial costs could be charged against a bad actor for filing such a pleading.

Decriminalize fentanyl testing strips

Fentanyl testing strips are an effective harm reduction strategy that saves lives. While the Legislature doesn't condone drug use, we're faced with an epidemic that can lead to deadly results for the unsuspecting—especially young people who might simply be experimenting. The Legislature should decriminalize fentanyl testing strips.

Eliminate all TXDL resuspensions

The retroactive provisions of HB 842 have been highly successful in getting suspended drivers properly licensed once again. The language should be made forward-looking—meaning no extension of a suspension simply because a person's license is already suspended—so that no Texan is caught in an endless loop of suspension and resuspension.

Collect victim info for restitution

Victims of crime should be at the center of our criminal justice process, and we must do everything we can to make them whole. The Legislature should explore options for better connecting victims with later restitution payments while also protecting their privacy rights.

Study the application of existing laws to private racing events

Although Texans should be free to take personal risks on private property, races and exhibitions that flout existing laws may endanger bystanders and facilitate illegal activity. The 89th Legislature should study enforcement gaps related to these events.

Implement further theft of service notice reform

Notice requirements in theft of service cases should make it easy for honest mistakes to be corrected and thievery to be punished, so modern communication methods like email and text message should be permitted, and the state should promulgate templates for these notices.

Clarify DNA database laws

Our DNA database should be operated with absolute clarity, including disposal of records when appropriate. The Legislature should develop a uniform method for informing clerks that a record exists when a dismissal or similar relief is granted, and our statute should thoroughly define the outcomes that entitle a person to the deletion of their record.

Charge 2—Protecting Survivors

Examine the shift in criminalization of children by human traffickers into other criminal enterprises, such as aggravated robbery, as well as the Texas Penal Code definition of "duress" as an affirmative defense for survivors of human trafficking and domestic violence. Make recommendations to prevent the criminalization of survivors of human trafficking and domestic violence for the crimes of their abusers.

Hearing

The committee held a hearing on September 16, 2024, in Capitol Extension room E2.010 to consider charge two. This is the official witness list generated from electronic witness affirmation forms:

Garvens, Lillian (Lone Star Justice Alliance)
Jackson, Ross (Texas Public Policy Foundation)
Place, Allen (Texas Criminal Defense Lawyers Association)
Sweeney, Michael (Self; Texas Association Against Sexual Assault)

The report and recommendations below are based on the testimony and materials these witnesses submitted to the committee as well as research conducted by committee staff.

Background

Human trafficking is slavery. It's "a crime that involves compelling or coercing a person to provide labor or services, or to engage in commercial sex acts. The coercion can be subtle or overt, physical or psychological."[95] "Although sometimes perceived as an issue affecting foreign-born individuals, data shows that many human trafficking victims are domestic."[96] Studies have revealed that as many as 17,500 people—mostly women and children—are trafficked in the United States every year.[97] In 2023, the National Human Trafficking Hotline received 2,379 substantive contacts in Texas alone.[98]

Profit is always the goal of trafficking, so traffickers often engage in other criminal activity and coerce their victims into participating as well. Doing so protects the trafficker by putting an additional layer between them and the crime, and these abusers are actually incentivized to

exploit minors for these criminal acts because young offenders are less likely to be harshly punished if caught.[99]

However, trafficking victims who commit crimes on behalf of their traffickers often have little in the way of legal defense. While Texas law does offer a defense specific to cases of prostitution,[100] the only protection available to trafficking victims who commit other crimes is the concept of "duress." Under current law, that defense is only available in very narrow circumstances: when the trafficking victim was "compelled to [commit the offense] by threat of imminent death or serious bodily injury to himself or another" that "would render a person of reasonable firmness incapable of resisting the pressure" and didn't "intentionally knowingly, or recklessly place[] himself in a situation in which it was probable that he would be subjected to compulsion."[101] Together, these requirements mean that duress can't be used as a defense for most trafficking-related crimes.[102]

Discussion

While the duress defense is an important backend protection for victims of trafficking, the best solution is to keep them from being trafficked in the first place. That's a complex effort that requires many kinds of interventions, and our state has already begun taking steps towards keeping our most vulnerable Texans from being exploited by these criminal enterprises.

Education & Intervention

Witnesses who testified before the committee all agreed that the first steps in protecting people from human trafficking are education and intervention, both at the earliest possible opportunity. Human trafficking often begins at a young age, with nearly half of all victims initially recruited by family members[103] and trafficking "relationships" being solidified by the time a child is in middle school.[104] As a consequence, victims often lack a reference point for what healthy relationships look like and may not even realize they've been trafficked.[105] There's also a mutual reinforcement between trafficking, abuse, and justice system involvement,[106] so by the time there's a law enforcement contact, it's that much more difficult to separate victims from the trafficking cycle.[107]

Both federal and state approaches have started to acknowledge how comprehensive the problem and its solutions are. The Department of Justice has described its anti-trafficking work as a "whole-of-government collaborative approach" that includes not just law enforcement, but also schools, workplaces, and healthcare providers.[108] Texas has similarly started to engage the issue broadly, beginning with the Texas Human Trafficking Coordinating Council in 2019. The council brings together designees from at least ten different bodies of state government for overall strategic responses to human trafficking.[109] Its first five-year plan,

released in 2020, included more than two dozen multifaceted strategies designed to systematically combat trafficking.[110]

Recent legislation has also taken an expansive view of anti-trafficking measures, such as the 87th session's HB 390, by Rep. Senfronia Thompson, which required specialized training for hospitality workers.[111] Similarly, a 2019 law that added signage requirements about human trafficking at transportation hubs has been expanded every session since and now includes locations ranging from tattoo studios to state parks.[112]

> It's not someone snatching you off the street. It's more often someone we know, we trusted, and even loved, that is pimping our boys and girls out onto the street. . . . It's a coercion that gets these individuals into the trafficking.
>
> MICHAEL SWEENEY, TEXAS ASSOC. AGAINST SEXUAL ASSAULT

Much work remains to be done. Although millions of dollars have been allocated to the issue, some funding gaps persist. Tellingly, as recently as 2022, the Health and Human Services Commission didn't have the resources to comply with even the legislatively mandated reporting requirement for its trafficked persons program account and grant program, which was designed to support housing and treatment for young trafficking victims.[113] There are also significant differences in resources between urban and rural areas.[114] Finally, the ongoing crisis in our foster system has had direct reverberations into the world of human trafficking: 1,164 children went missing and 386 children were confirmed or suspected to have been trafficked while in the state's conservatorship in 2023 alone.[115]

To be successful, both education and intervention must be comprehensive, well-funded, and as early as possible. For either to last, victims need ongoing protection and support—real-world alternatives to the awful situations they've found themselves in. Texas's work to end human trafficking has been strong, but it's only just beginning.

Duress

Understanding our duress statute in trafficking cases is easiest with a concrete example, such as this anecdote shared with the committee:

> "Sarah" was first trafficked at the age of 3 by her mother. She would exchange access to her daughter for pills. [Sarah] was also abused by her mother's boyfriends and her grandfather. She was in over 35 different foster care homes throughout her childhood, and at the age of 14, her mother introduced her to a man who would soon become her pimp. He would set her up in motel rooms with johns, and while they were engaging in sexual acts with a minor, he would rob them, under the theory that those crimes would go unreported because they had just bought sex from a child.
>
> One night, things escalated, and Sarah and her pimp were both arrested. She was convicted and sentenced to 20 years on a determinate sentence at the age of 15. So, she was considered a co-conspirator in a aggravated robbery when in that same night she was being sold as a child in a sex trafficking exchange. Clearly, she was being

> exploited—clearly, she was being trafficked—but not once in her entire court proceedings was it identified that she was a survivor of trafficking.[116]

Sadly, stories like these aren't uncommon.[117]

Worse, the duress defense wouldn't be available in a case like that. Although Sarah had been extensively traumatized, coerced, and may have had a general threat of violence hanging over her, she wasn't under "*imminent* threat of death or serious bodily injury" at the time of the robbery.[118] Sarah would also be judged against an imaginary "person of reasonable firmness"—not someone who had spent a lifetime being pimped. And even if those standards were met, a court might easily find that she put herself, even recklessly, in the position of being compelled to join in the robbery.

At least 37 states have more expansive duress standards that Texas could look to, many of which include coercive control factors such as psychological, emotional, and financial manipulation.[119] This is critical because the neurobiology of trauma responses to grooming is a relatively new field that's not widely understood—trauma bonding can make exploitation look like cooperation.[120] Ultimately, our duress statute should allow the judge or jury to hear all evidence related to trafficking in order to decide how a crime fits into it,[121] which would mirror recent statutory pushes to allow extraneous contextual evidence in the trials of sex crimes involving minors[122] and of family violence.[123]

Witnesses provided the committee with a number of suggestions. Specific tweaks might include removing "imminent" as a requirement, expanding threats of violence to more forms of coercion or simply to coercion generally, and removing the element of whether the person

placed themselves in the situation altogether.[124] The Legislature might also provide a trafficking-related defense to specific offenses associated with it (much in the same way that it did for prostitution, but for theft, burglary, robbery, and so forth) or even make the affirmative defense an outright exception as a policy statement, which would require the prosecution to prove a defendant wasn't being trafficked at the time of the offense.[125]

Another possible change would be to the "person of reasonable firmness" element, since a trafficking victim is in a very different position than most other people. Rep. Senfronia Thompson's HB 327, which would have changed it to "a reasonable person in the situation" of the trafficking victim, passed the House with a strong majority this session.[126] It didn't receive a hearing in the Senate.

But a robust duress defense only solves part of the problem. Even if a trafficking victim who was coerced into a crime avoids conviction, the arrest and related records can be just as devastating to opportunities for employment, housing, education, and so forth.[127] That's part of the reason why Governor Abbott created a clemency program for trafficking victims in 2021, which has provided relief in some cases.[128] Other states have provided more comprehensive models that include options for nondisclosure, expunction, and even resentencing.[129] A resentencing option, which has been used in states like Oklahoma, would provide an especially meaningful opportunity for relief to trafficking victims who were already caught up in the system before any legislative reforms.[130]

Recommendations

The committee makes the following recommendations to the 89th Texas Legislature:

Expand education & intervention efforts

Preventing trafficking in the first place isn't just the most effective approach to the problem—it also saves young, vulnerable victims untold human misery. The Legislature should prioritize education efforts and facilitate the earliest possible efforts to intervene in the lives of children who are at-risk.

Address funding issues

Our agencies and local partners need the resources to fight trafficking effectively. Funding for interventions and victim support is critical, and the way it's distributed should account for the existing gap between urban and rural resources.

Overhaul our foster care system

While our state is making many strides towards improving its foster care system, we must redouble those efforts. If we don't overhaul foster care here, what should be a system of compassion may become a pipeline to human trafficking.

Explore reforms to the duress defense

Human trafficking victims are being revictimized in many cases where common sense tells us that a duress defense should apply. The Legislature should explore amendments to the duress statute, which may include removing the "imminent" danger requirement, expanding threats of violence to include coercion generally, removing the "placed themselves in the situation" exception, and changing the "person of reasonable firmness" standard to "a reasonable person in the situation" of the human trafficking victim. The choice of approach should ensure that the duress defense is broad enough to be used by trafficking victims but narrow enough to prevent abuse by anyone else.

Expand post-conviction relief for trafficking victims

Using the governor's clemency program for trafficking victims as a guidepost, the Legislature should consider nondisclosure, expunction, or even resentencing options for trafficking victims who are already caught up in our justice system as a result of being trafficked.

Roberson & Writs

Robert Roberson's case came to dramatic national attention this interim. It highlighted not just an individual injustice, but the unfulfilled promise of what was intended to be a pioneering Texas law—"junk science" writs under Article 11.073, Code of Criminal Procedure—that hasn't worked as intended. It also exposed critical problems in both appellate procedure and how our system responds to people with neurodivergence. The importance and urgency of these issues led the committee to explore them in two groundbreaking hearings.

Hearing

The committee held hearings on October 16, 2024, in Capitol Extension room E2.016 and October 21, 2024, in Capitol Extension room E2.010 to consider "criminal procedure related to capital punishment and new science writs under Article 11.073, Code of Criminal Procedure."[131] This is the official witness list generated from electronic witness affirmation forms:

Alcala, Elsa (Self)
Auer, Roland (Self)
Compton, Terre (Self)
Findley, Keith (Self)
Green, Francis (Self)
Grisham, John (Self)
Hebron-Jones, Estelle (Texas Defender Service)
Judson, Katherine (The Center for Integrity in Forensic Sciences)
McGraw, Phillip (Self)
Mitchell, Allyson (Anderson County Criminal District Attorney Office)
Montfort, Natalie (Self)
Salzman, Donald (Self)
Singer, Jeffrey A. (Self)
Sween, Gretchen (Self)
Wharton, Brian (Self)

The report and recommendations below are based on the testimony and materials these witnesses submitted to the committee as well as research conducted by committee staff.

Background

Robert Roberson was convicted of the capital murder of his two-year-old daughter, Nikki Curtis, and sentenced to death in 2003. Since then, grave doubts have arisen about the science in the case, which Article 11.073, Code of Criminal Procedure, was created to address. Despite that, our junk science writ process hasn't had the impact this committee expected in Robert's case (or almost any other, for that matter), and he remains on death row.

Investigation

In January of 2002, a DNA test confirmed that Robert was Nikki's father, and he took custody of her from her maternal grandparents soon after.[132] Nikki was a chronically ill child who suffered from antibiotic resistant infections, breathing apnea (a dangerous condition not to be confused with common sleep apnea), and disseminated intravascular coagulation (DIC), a clotting disorder.[133] Her breathing issues had resulted in her suddenly losing consciousness to the point of turning blue several times in the two years before Robert was part of her life.[134]

On January 28, 2002, Nikki had been suffering from vomiting, coughing, and diarrhea for the last five days. Robert took her to the hospital, where she was prescribed Phenergan, an anti-nausea medication that's no longer prescribed to children and now carries a "black box" warning for potential "fatal respiratory depression." The next morning, Robert brought Nikki back with a 104.5-degree fever, and Nikki was sent home with a codeine prescription—also known carry the risk of "slowed or difficult breathing and death, which appear to be a greater risk in children younger than 12 years." (No signs of other trauma were noted in either visit.)

The very next morning, Robert again returned to the hospital with Nikki, but this time she was blue and unconscious. Robert told hospital staff that he and Nikki had fallen asleep in his bed watching a movie and that he woke up in the middle of the night to find that she'd fallen out of bed. She had a bit of blood on her mouth, which he wiped with a rag, but she seemed fine otherwise. He got her back to sleep, but when they woke up, she was unresponsive. After repeatedly trying to wake her, he "crawled up on the bed and grabbed her face and shook it to wake her up. Then when she didn't wake up, [he] slapped her face a couple of times."[135]

External impressions were consistent with that: A nurse described a minimal facial bruise that looked like a handprint, with no black eye, blood, fracture, or any sign that Nikki had been struck.[136] Dr. Janet Squires, who took charge of Nikki's care after she was rushed from Palestine to Dallas for further care, also noted "minimal bruising" and a "little chin abrasion"

but "no scars, no unusual bruising or anything."[137] A CT scan revealed a single small impact site consistent with a fall,[138] and these were the injuries investigators later observed as well.[139]

The situation shifted into a criminal investigation almost immediately. Nikki's condition wasn't explainable as the result of a fall, and she presented with the triad of symptoms—"subdural hemorrhages, the retinal hemorrhages, and the brain swelling," as Dr. Squires described them at trial[140]—that were then thought to exclusively signify shaken baby syndrome (SBS). Suspicions were also compounded by the fact that Robert is a person with autism, although it hadn't been diagnosed and wasn't well-understood at the time; his flat affect and unexpected reactions that day were instead taken as signs of deception and indifference.[141]

> We constructed an appeals system because we understood that we get things wrong. We wrote laws to work within those appeals systems because we understand that we get things wrong. It's all pointless if nobody will admit, "We got it wrong." . . . Don't make my mistake.
>
> BRIAN WHARTON, PALESTINE CHIEF OF DETECTIVES (RET.)

A lack of any other explanation for Nikki's condition and Robert's behavior defined the entire investigation. And with medical personnel believing (and law enforcement officers trusting) that the science made it an open-and-shut case, everything tunneled towards proving the predetermined answer: SBS, with Robert as the culprit. Under that cloud of predetermined guilt, Nikki was taken off life support without consulting Robert two days after he brought her to the hospital.[142]

Trial

That singular focus was even more pronounced at trial. Several witnesses with staggering credibility problems offered testimony that defied verifiable facts but fit the narrative that Robert was a killer.[143] Perhaps the worst was a nurse who described a litany of injuries not seen by any other witness[144] and evidence she claimed pointed to Nikki having been sexually assaulted. (She also perjured herself by falsely saying she was a certified sexual assault nurse examiner.[145]) This theory—completely undermined by the evidence and rejected by the prosecution's own experts—actually led to a dubious effort to secure a jailhouse confession through a snitch. What followed was a story so obviously untrue that the prosecution, to its credit, didn't use it at trial.[146] Still, the sexual assault allegation was only abandoned at the end of the trial when no evidence supported it, *after* it had already inflamed the jury.[147]

There were also discrepancies in the medical theories that should've substantially muddied the waters. Dr. Squires testified that her "medical findings" were "a picture of shaken impact syndrome," also known as "shaken baby syndrome," caused by "very forcefully shaking the

head back and forth," with "no other indication of traumatic injuries," including "no bruising," "no fractures," and "no old fractures."[148] She further indicated that shaking was the mechanism of death—"the actual brain injury, we do not feel is explained by [the] single impact" she identified; "[t]here had to have been something more than just impact."[149] That single impact was not just identified visually, but through a CT scan "done soon after admission."[150]

Dr. Jill Urban performed an autopsy after Nikki passed away. Although she admitted that it was "very difficult to elucidate exactly [*sic*] much blows there were," she still suspected "multiple blows to different points on the head" due to the distribution of hemorrhages.[151] Unlike Dr. Squires, who saw Nikki promptly and reviewed CT scans, Urban simply reported what she saw after days of emergency care—medical efforts she conceded could've explained some of what she saw[152]—without reference to any other information, including the scans or Nikki's medical history (which would've revealed the DIC diagnosis that explained the new bruising, among other things).[153] Ultimately, though, her conclusion was that Nikki's death was caused by "blunt force trauma," which she explained this way:

> Typically in a—Especially in a child this age, blunt force can be caused both by—well, by an impact to the head, so being struck with something or being struck against something. *Shaking also falls into this definition of blunt force* and when enough—And although it doesn't seem like, you know, shaking is not necessarily striking a child, when you are-- When a child is say, shaken hard enough, the brain is actually moving back and forth within, again, within the skull, impacting the skull itself and that motion is enough to actually damage the brain.[154]

In her opinion, there was no way to separate injuries caused by blows and injuries caused by shaking as a cause of death—it was all one and the same.[155]

These issues were largely unrevealed until later habeas proceedings, and trial cross-examination focused almost exclusively on intent.[156] Lead investigator Brian Wharton described Robert's representation by saying that his attorneys "didn't do much" to the point that it "felt wrong"—they were "not vigorous," he was "not impressed," and while he could remember the times he testified in other cases where he "got his feelings hurt" by blistering cross-examination, that didn't happen at Robert's trial.[157]

In fact, Robert's counsel conceded it was "unfortunately a shaken baby case" from the start, telling the jury that the "evidence will show that Nikki did suffer injuries that are totally consistent with those applied by rotational forces more commonly known as shaken baby syndrome."[158] This exact scenario was addressed by the Supreme Court in 2018 when it held it unconstitutional for an attorney to admit guilt for strategic reasons when a defendant is determined to maintain innocence,[159] as Robert consistently did.

What that did make clear, though, was that the trial was over SBS. The prosecution agreed, saying in its opening statement that the evidence would show "the picture of what they call shaken impact syndrome."[160] That continued in closing, where the prosecution even began by saying that the case was "simpler than [the prosecutor] anticipated" because both sides agreed "this is a shaken baby case."[161] As both the lead investigator in the case and an actual juror in the trial told the committee, SBS was *the* theory of the case at trial, and that's what Robert was sent to death row for.[162]

Post-conviction

In a capital case, where the ultimate penalty is on the table, the trial "has to be as perfect as we can make it."[163] Robert certainly didn't get that. In theory, a robust appellate system, including the Article 11.073 junk science writ the Texas Legislature created, is a backstop. Unfortunately, Robert's case has revealed its deficiencies.

There are essentially two kinds of appeals. One is a direct appeal, which is usually the first step in challenging a conviction or sentence. Direct appeals raise issues that are apparent from the record, like whether there was enough evidence or whether the judge made the right rulings. The other is an application for a writ of habeas corpus, which is usually the last resort on appeal. Habeas proceedings are about structural problems with the entire conviction, like violations of constitutional rights or actual innocence.[164]

Robert's direct appeal hit two barriers. The first appears, as at trial, to have been weak representation. The opinion by the Court of Criminal Appeals reveals that the scattershot appellate pleadings were almost all disposed of as raising "no new arguments to merit reconsideration of" well-settled law or as simply "obviously . . . contrary to a plain reading of the [applicable] statutes."[165] This issue of poor representation ran so deep that Robert wrote from jail that he felt his attorney was working for the prosecution, not for him.[166]

The second issue was the way our system gives almost total deference to the trial court. Without getting too into the weeds on criminal appellate law, it's fair to say that its default setting is that if a verdict can be supported in any way, it will be. In Robert's 2007 appeal, the guilt issue of intent and the special issues on punishment that led to his death sentence were upheld in that way.[167]

Robert found himself in similar trouble in his habeas corpus efforts. At the outset, things had improved for him. The Court of Criminal Appeals remanded his case back to the trial court to develop the record on a "junk science" claim, among others. He also had a new attorney who was capable and diligent, so the extensive hearings that followed over several *years* to

create that record were thorough. Including the hundreds of exhibits, the records from these proceedings number in the thousands of pages. In (very) brief, the evidence was:

> Dr. Francis Green, a 46-year expert in lung pathology, provided a detailed report showing that Nikki's lungs were infected with both viral and bacterial pneumonia, which caused brain damage by oxygen starvation.
>
> Dr. Keenan Bora, an expert in medical toxicology and emergency room medicine, concluded that the toxicology report showed dangerously high levels of promethazine in Nikki's body, a drug now known to be potentially fatal to children because it impairs breathing.
>
> Dr. Julie Mack, an expert in pediatric radiology, reviewed the CT scans rediscovered in the courthouse basement in 2018 and determined they showed a single minor impact site consistent with Robert's explanation of a fall off of a bed along with chest x-rays (some produced to Robert's counsel as late as this year) that supported Dr. Green's diagnosis of fatal lung infection.
>
> Dr. Janet Ophoven, who is board certified in forensic pathology and anatomic pathology with special training in pediatrics and pediatric pathology, held that Nikki's death could not be ruled a homicide and was consistent with irreversible damage from oxygen deprivation. She was confident that Nikki's condition was caused by neither shaking or impacts and that the autopsy was flawed and misleading.
>
> Dr. Ken Monson, biomechanical engineer who studies head injuries and directs the "Head Injury and Vessel Biomechanics Laboratory," explained that shaken baby syndrome assumptions about how shaking would cause internal head injuries but no neck injuries have been falsified and that the demonstratives used in Nikki's trial misled the jury.
>
> Dr. Carl Wigren, a forensic pathologist and member of the American Academy of Forensic Sciences with over 2,000 autopsies, concluded that Nikki's death was not a homicide based on the CT scan showing a single impact site consistent with a short fall, the toxicology report and prescriptions in use, and the pneumonia, which came together in an "unfortunate accident" that was "absolutely not" a homicide and didn't involve abusive head trauma.
>
> Dr. Roland Auer, a neuropathologist board certified in the United States and Canada, who is both a medical doctor and a Ph.D. scientist, the author of a leading neuropathology treatise and over 130 scientific articles in peer-reviewed journals, and a researcher with extensive experience with head trauma, hypoxia, hypoxic ischemia, and pediatric pneumonia, reviewed Nikki's records and drew the same conclusions. He found it impossible for her internal damage to have been caused by external impacts because they would have left external markers on the skin and likely corresponding skull fractures and found "no support for multiple impact sites neither on the brain nor in the skull nor in the scalp," and "no evidence for multiple impact sites whatsoever."[168]

Drs. Auer, Green, and Singer reiterated their testimony live before the committee.[169]

To summarize, new medical evidence not only debunked SBS here but also explained what happened: Nikki died from oxygen deprivation. She had a combination of bacterial and viral pneumonia plus dangerously high levels of drugs known to suppress breathing. When her brain was starved for oxygen, it suffered irreversible damage and hemorrhaging. None of these top-of-their-field experts saw evidence of multiple impacts; just like the prosecution's own Dr. Squires, they saw a single small impact consistent with a short fall. (To be clear, the committee

isn't a court and isn't taking the position that these medical experts definitively prove anything, merely that it's compelling scientific evidence that no court appears to have meaningfully engaged with, contrary to Article 11.073's intent.)

Meanwhile, the state produced only Dr. Urban to reiterate her autopsy claims, which were greatly undermined during the proceedings, and Dr. James Downs—a member of the "Shaken Baby Alliance," which is dedicated to defending the diagnosis—who claimed that Nikki had "normal little kid lungs" with "no pneumonia."[170] Dr. Downs was recently found to have missed pneumonia in a child autopsy, leading to a new trial for a man sentenced to death who'd been convicted based on Downs's testimony.[171]

After those proceedings, both sides were asked to provide the habeas court with proposed findings. The thoroughly documented proposal provided by Robert's attorney was 304 pages long, while the prosecution's was just 18.[172] The state's proposal was adopted almost verbatim (down to matching typos and drafting choices[173]), all calculated to deny relief. It relied almost exclusively on the trial evidence and hardly referred to the copious new medical evidence offered at the habeas proceedings. Incredibly, it both insisted on the continued validity of SBS but also that the trial was not really about SBS after all, and that "even if any evidence [about SBS] was false, it was not material to the verdict of the jury."[174]

When Terre Compton, an actual juror in Robert's 2003 trial, heard the revisionist argument that "shaken baby syndrome just doesn't play a role in this case; it's just not the central feature of this case," she said that, "Me being at the trial and in the jury . . . that is all that this case was based on was shaken baby syndrome." When she was told that government officials have since represented the case as something else, her assessment was clear: "It has pissed me off very much," she told the committee.[175]

Robert's attorney responded to those findings with objections and motions calling for the Court of Criminal Appeals to reject them. Those were denied, as was any habeas relief (including under Article 11.073), all without substantive written opinion.

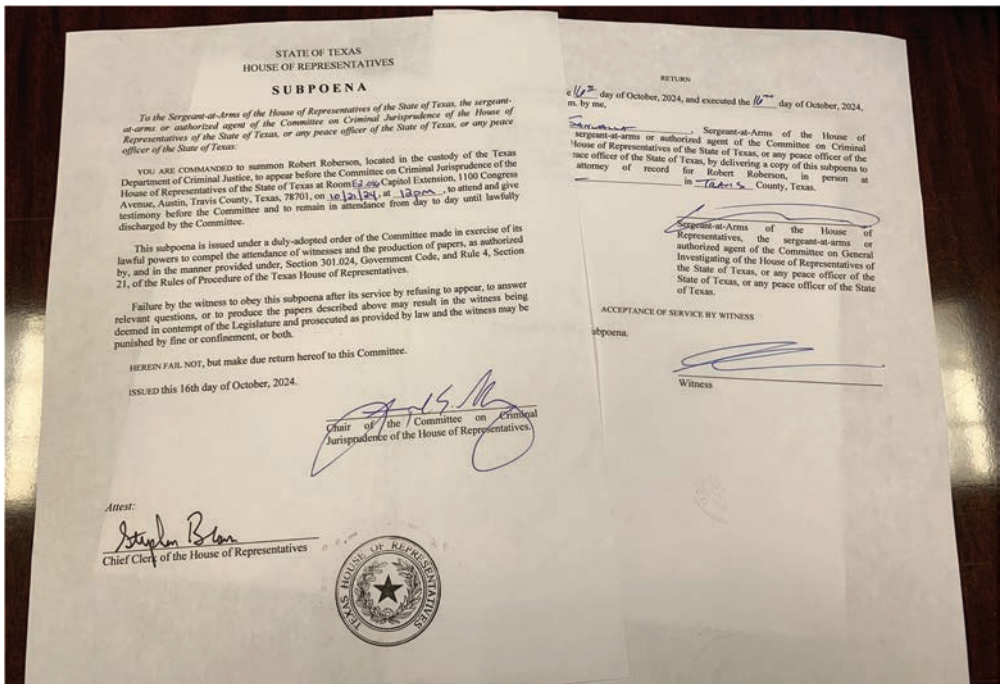
Lawmaker Involvement

During this interim, Robert's case received significant national attention. Traditional sources such as the Innocence Project amplified Robert's story, but he also found champions in celebrities like Dr. Phil and John Grisham as well as widespread exposure through social media. Closer to home, the case eventually attracted the eye of the House's Criminal Justice Reform Caucus. After meetings with attorneys involved in the case and independent research into the claims being made, the caucus led an effort to urge clemency for Robert, which was joined by 86 members of the House.

In early October, relief under Article 11.073 seemed imminent when the Court of Criminal Appeals ruled in another case that "scientific knowledge has evolved" to "undermine the State's theory of a case involving SBS," citing scientific experts, the *Journal of Neurosurgery* and *Journal for the British Academy for Forensic Science*, and other state and federal courts.[176] That case was not just similar to Robert's—it featured nearly identical testimony *from the same person*, Dr. Squires, about SBS. Shockingly, the court denied relief to Robert the very next day, with a concurring opinion continuing to hold (presumably based on the habeas court's findings of fact) that it was "not just a 'shaken baby' case."[177]

These developments led the committee to hold hearings about the issues raised by the case, especially the failure of our junk science writ law to provide any relief. At the close of its first hearing, committee members decided that it was crucial to hear from Robert himself. His perspective was unique as a person with autism who'd been through trial, appeal, and the writ process in what would be the first SBS-based execution in Texas. Some members also felt that, given the dispute about some of the facts of the case, they needed to look him in the eye and judge his credibility themselves.

On October 16, 2024, the committee unanimously voted to subpoena Robert to testify at a hearing on October 21st, the next possible date under House Rules. That meant interrupting Robert's execution, then scheduled for October 17th, which led to a stunning series of legal battles in district court, the Court of Criminal Appeals, and the Texas Supreme Court.[178] It also prompted a very public back-and-forth with the Texas Office of Attorney General.[179] At



STATE OF TEXAS
HOUSE OF REPRESENTATIVES

SUBPOENA

To the Sergeant-at-Arms of the House of Representatives of the State of Texas, the sergeant-at-arms or authorized agent of the Committee on Criminal Jurisprudence of the House of Representatives of the State of Texas, or any peace officer of the State of Texas, or any peace officer of the State of Texas:

YOU ARE COMMANDED to summon Robert Roberson, located in the custody of the Texas Department of Criminal Justice, to appear before the Committee on Criminal Jurisprudence of the House of Representatives of the State of Texas at Room E2.026 Capitol Extension, 1100 Congress Avenue, Austin, Travis County, Texas, 78701, on 10/21/24 at 10am, to attend and give testimony before the Committee and to remain in attendance from day to day until lawfully discharged by the Committee.

This subpoena is issued under a duly-adopted order of the Committee made in exercise of its lawful powers to compel the attendance of witnesses and the production of papers, as authorized by, and in the manner provided under, Section 301.024, Government Code, and Rule 4, Section 21, of the Rules of Procedure of the Texas House of Representatives.

Failure by the witness to obey this subpoena after its service by refusing to appear, to answer relevant questions, or to produce the papers described above may result in the witness being deemed in contempt of the Legislature and prosecuted as provided by law and the witness may be punished by fine or confinement, or both.

HEREIN FAIL NOT, but make due return hereof to this Committee.

ISSUED this 16th day of October, 2024.

Chair of the Committee on Criminal Jurisprudence of the House of Representatives

Attest:

Chief Clerk of the House of Representatives

RETURN

Received this 16th day of October, 2024, and executed the 16th day of October, 2024, a.m. by me,

Sergeant-at-Arms of the House of Representatives, the sergeant-at-arms or authorized agent of the Committee on Criminal Investigating of the House of Representatives of the State of Texas, or any peace officer of the State of Texas, by delivering a copy of this subpoena to attorney of record for Robert Roberson, in person at [illegible] in Travis County, Texas.

Sergeant-at-Arms of the House of Representatives, the sergeant-at-arms or authorized agent of the Committee on General Investigating of the House of Representatives of the State of Texas, or any peace officer of the State of Texas, or any peace officer of the State of Texas.

ACCEPTANCE OF SERVICE BY WITNESS

I accept service of the above subpoena.

Witness

The committee's unanimously approved subpoena for Robert Roberson

the time of this report, the Texas Supreme Court has just validated the committee's general power to subpoena an inmate, so the committee may still take Robert's testimony. What remains clear, however, is the committee's absolute conviction that the law didn't function as intended here.

Discussion

We often champion small government in Texas, but government is never bigger than when it takes a life. The members of this committee hold a wide range of views on capital punishment, but they're united in an expectation of certainty and procedural rigor when there's a death sentence.[180] Our laws are meant to ensure strong due process, but Robert's case demonstrates how spectacularly short those laws can occasionally fall. And while it's not the place of legislators to decide on guilt or innocence, it's absolutely the job of the legislature to make sure out laws work—and fix them when they don't.

Why Did Robert's Case Go the Way It Did?

There's always been some difficulty fitting science, which by nature is always evolving, into criminal law, which by nature seeks certainty and finality. Balancing those needs means gatekeeping at the frontend and a willingness to adjust for scientific advancements on the backend. SBS as it played out for Robert was a case study in how both can go wrong.[181]

SBS wasn't developed for forensic purposes. It first appeared "in the *British Medical Journal* in 1971" in a paper by Dr. Norman Guthkelch that "was just two pages long . . . called 'Infantile Subdural Hematoma and its Relationship to Whiplash Injuries.'" The hypothesis was rooted in simple caution, since in northern England at the time, Guthkelch regularly saw parents who disciplined their small children by shaking them, which he believed could be dangerous.[182] He came to regret how it had been transformed into a diagnosis for criminal prosecution—one he believed was overused and frequently misapplied—saying in 2012 that, "I am frankly quite disturbed that what I intended as a friendly suggestion for avoiding injury to children has become an excuse for imprisoning innocent parents."[183]

Science is never more powerful (and dangerous) than when it's a wholesale substitute for investigation. With something like SBS, the science supplies both the *actus reus* and the *mens rea* while designating the victim and the offender. It's essentially a diagnosis of murder.[184]

Even when there are pieces for investigators to fill in, forensic science can immediately narrow their work—sometimes down to a universe of one, meaning that all other theories and potential evidence are discarded when they clash with what's believed to be scientific fact.[185]

Confirmation bias is a persistent problem in criminal justice and can be strongly exacerbated by the apparent certainty of science.[186]

That applies to trial as well, where the record that bounds every later review is created. While a defendant has no burden of proof in theory, jurors are always looking for an explanation in practice. When science provides only one story that makes sense, jurors usually follow that to a verdict.[187] And where science has turned out to be wrong, so too have many of the convictions based on it, as in cases involving things like bite mark analysis, hair sample analysis, and many former tenants of arson investigation—all now known to be junk science.[188]

We now know that SBS as it was understood at the time of Nikki's death falls into the same category; it's just not good science anymore.[189] In fact, SBS isn't even used as a term of art these days, having been replaced by "abusive head trauma," which has new standards associated with it. That reflects a multi-decade process of evolution and revision within the American Academy of Pediatrics, with major shifts in its position as recently as 2020.[190]

> If one is trying to get at the truth, why has it become about who can win and score points? We want to know what the truth is from the scientists. And if there were a way to do that, I think our judicial system would be greatly enhanced.
>
> Gretchen Sween, Attorney for Robert Roberson

That process was slow and difficult here. Part of that is an apparent reluctance among the medical establishment (as among lawmakers and lawyers at times, no doubt) to publicly admit to such a mistake. SBS is also complicated by an emotional element because it purports to protect children and explain (with a villain to punish) why the unthinkable sometimes happens to them.[191] In the meantime, though, there have been more than 100 SBS convictions overturned nationwide, with almost three dozen of them resulting in complete exoneration.[192]

Article 11.073 Writs

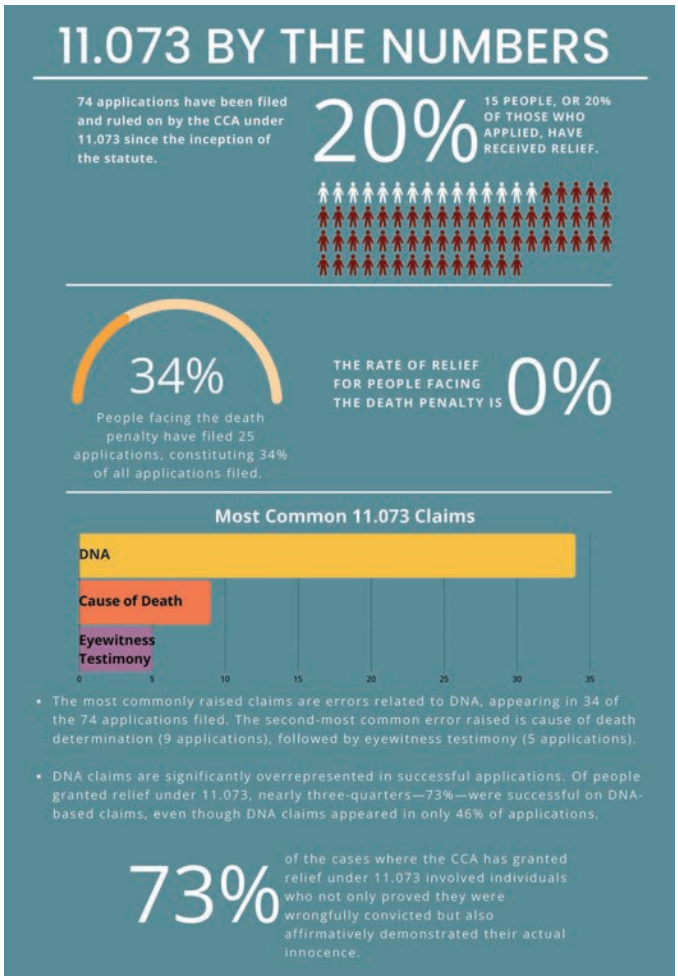
It might seem easier to acknowledge changed science (and thus, prior mistakes) in law than in medicine, but our whole appellate system is designed for finality—to uphold convictions, not upset them. For example, sufficiency of the evidence is decided merely by asking whether, viewing the evidence in the light most favorable to the verdict, any rational jury could have found each element of the offense beyond a reasonable doubt.[193] That means the jury is given almost complete deference and all conflicts in evidence are resolved in favor of the verdict.[194] Similarly, even a wholly incorrect and illegal ruling on evidence or procedure can usually be ignored as "harmless error" if it "had but a slight effect" on the verdict.[195] While TV thrillers spin the idea that technicalities undo sentences all the time, relief is actually rare. In fact, in a

nationwide study, the Bureau of Justice Statistics found that "appellate courts reversed, remanded, or modified *a component* of the trial court decision" in only 12% of all appeals.[196]

Deference makes some sense—our courts of appeals weren't made to second-guess the live impressions juries had of evidence, and we don't have the resources to try every case twice. But that also provides a path for a courtroom lie to become an unchallengeable truth, even when the jury plainly didn't get the whole story. That can also happen with habeas proceedings.

Earlier this year, the Texas Defender Service (TDS) released a comprehensive report about Texas junk science writs, and the title neatly summarized its findings: "An Unfulfilled Promise."[197] According to its analysis, in practice, our Court of Criminal Appeals seems to have employed a burden of proof much higher than the statute commands. Article 11.073 merely requires a preponderance for "not guilty," meaning more likely than not that *any* reasonable doubt would've existed. In practice, though, the court is effectively requiring affirmative proof of actual innocence, with the overwhelming majority of relief granted for irrefutable DNA exonerations.[198]

The report also highlighted the large number (38% of all writ applications) refused on procedural grounds, that only one has ever been granted to an applicant without a lawyer, and that relief has *never* been granted in a death penalty case.[199] It closed, coincidentally enough, with a review of Robert's case.[200] In exploring these findings with the committee, TDS was quick to laud the intent of Article 11.073 and called attention to the fact that it was created with child trauma cases in mind.[201] Its promise is still there; there's just work needed to fully realize it.



Infographic by Texas Defender Service

The interpretation the Court of Criminal Appeals has made of Article 11.073 isn't surprising. By

nature, it views legislation through a highly technical lens, not in a holistic or commonsense way. The standard itself is also a bad fit for an appeals court—speculating on what a jury might have done with evidence it didn't have (without any input from that jury) is little better than looking into a crystal ball.[202] And because that sits over a system meant to affirm convictions by design, that's what the crystal ball usually shows.[203]

These issues, plus deference to findings by a habeas court that didn't engage with the new science in any meaningful way, may have been why Article 11.073 didn't work for Robert. "May" is all we have—another crystal ball—because the court routinely denies relief with boilerplate language rather than any real explanation.[204] The only insight we have throughout Robert's case is Justice Yeary's recent concurring opinion, which does seem to be rooted in the dubious "fact" findings that have long haunted this case.[205] The only thing we can be certain of is that many paths are statutorily foreclosed—new developments that may have affected only punishment, like Robert's autism diagnosis, can't even be addressed by Article 11.073.[206]

Fortunately, the experts the committee consulted with presented a variety of solutions. The TDS report itself suggested:

1. Revise the Standard for Granting Relief to Consider the Overall Impact of Flawed Scientific Evidence
2. Amend 11.073 to Include Penalty Phase Relief
3. Expand Access to Counsel for Indigent People Seeking Relief from their Wrongful Convictions
4. Implement Discretionary Review by the CCA
5. Mandate the CCA to Explain Why It Has Denied or Dismissed an 11.073 Claim[207]

Each of these would have directly touched Robert's case and others like it. The burden of proof change would've been particularly impactful, and other states have recognized as much in their writ laws. Maryland, for example, looks for new evidence that "creates a substantial or significant possibility that the result may have been different"[208]—more than a mere chance, but far less than a preponderance. Other alternatives might be "probable cause" for an acquittal or a focus on whether the new science would've "materially altered" theory of the case for the state or the defense.[209] Any of these would help turn the court's focus to ensuring the full and fair presentation of all the evidence to a jury rather than protecting a verdict based on the limited or flawed evidence it may have originally heard.[210]

The fact that Article 11.073 only covers evidence impacting decisions on guilt, not punishment, has long been acknowledged as a flaw in the law but remains uncorrected.[211] As mentioned, it would include Robert's then-unknown autism diagnosis, but it's relevant to many cases—especially capital trials where punishment is often the sole question.

The remaining recommendations also have wide application. The fact that only one pro se application has ever been granted speaks loudly to the need for access to appointed counsel (Robert's case was taken on pro bono). Judicial economy urges the suggested shift to discretionary review, since in many instances, there's agreement between the state and the defense about relief with no need for the Court of Criminal Appeals to intervene, as it must under current law. Freeing up those resources would allow it more bandwidth for writing the substantive written opinions TDS has called for, the lack of which has been a serious issue in Robert's case and many others.

The committee was also fortunate enough to hear from Elsa Alcala, a former justice who sat on the Court of Criminal Appeals when Article 11.073 was first created and later amended. She echoed TDS's sentiments and added several more.[212] Her most dramatic suggestion was simply to eliminate the Court of Criminal Appeals. While it might seem extraordinary, Texas is actually one of only two states (the other being Oklahoma) that have separate high courts for criminal and civil matters, and Justice Alcala lodged a number of criticisms based on her firsthand knowledge suggesting that we may be better off with a single court of last resort for all cases. Nonetheless, that would require a constitutional amendment[213] and wouldn't directly address the issues with Article 11.073.

One that would have changed the course of Robert's case and many other death penalty matters would be to lower the threshold for a stay of execution when new science issues are being developed. In Robert's case, the vote was 5-4 against—hardly the commanding certainty most Texans would expect before an execution. And eliminating something that has impeded nearly two out of every five claims—procedural bars, such as the notion that the claim *could* have been raised earlier than it was—would ensure that we're elevating truth above finality.

Finally, coming back to that basic tension between science and law, the very structure of junk science proceedings is problematic. Criminal law is adversarial. Science is factual. When we bring it into court on a matter of innocence, legal maneuvering shouldn't determine how it's received—only a frank, expert-informed assessment of the science should.[214]

Anderson County District Attorney Allyson Mitchell told the committee that she "trusted the process," although she admitted that the process sometimes makes mistakes.[215] Yet the state lodged a running objection to all new scientific evidence during the habeas hearings, intending to undermine the entire purpose of the proceedings.[216] And prior each of the hundreds of DNA exonerations throughout the country, which proved a convicted person's absolute innocence, our adversarial system saw the state fighting for a theory of guilt.[217] When we turn

to science for answers in a habeas proceeding, our system must be set up to listen to it (whatever the answer) instead of defaulting to a battle about it.

Neurodivergence

"We found [Robert]—his affect was very flat, he was unemotional, he was answering our questions, he was cooperative, but it just, it didn't feel right," Brian Wharton told the committee. "Robert's unusual response[s] kind of put the light on him" from the start.[218] Years later, Robert was diagnosed as being on the autism spectrum, someone who has a very flat affect, isn't cognitively agile in expression or well developed in a social-emotion sense, and reacts atypically, especially in a crisis.[219] But no one—not the investigators, not the jury, not the attorneys for the prosecution or even the defense—ever learned of or accounted for Robert's autism. Instead, he was taken as deceptive and detached, which played a large role in steering the investigation.

These themes also recurred throughout the trial, with Robert being described as odd, cold, callous, and remorseless. Behaviors like dressing Nikki before taking her to the hospital and making a sandwich while speaking with investigators at his home seemed so abnormal they were signs of guilt.[220] Terre Compton, a juror in the case, told the committee that the jury found Robert's demeanor strange and that it probably influenced her decision because she had no other explanation for his behavior.[221]

Unfortunately, Robert's experience wasn't unique. Neurodivergent people and those with intellectual and developmental disabilities are more likely to be victims than perpetrators, yet people on the autism spectrum are seven times more likely than neurotypical people to find themselves in legal trouble for some of the same reasons Robert was viewed negatively.[222] Once in the justice system, neurodivergence can significantly impair a person's ability to communicate in the courtroom and assist in their own defense.[223] These are issues that are well-understood when providing access to justice for victims of crime,[224] but less often a focus when dealing with someone accused of a crime.

This isn't just an issue in Texas or even the United States; international studies have noted the need for, among other efforts, "mandatory autism training for police officers and the judiciary, with a focus on identifying autism and understanding the needs of autistic people so that reasonable adjustments are offered in all cases."[225] Texas has taken some initial steps, like allowing vehicle registrants to indicate "a health condition or disability that may impede effective communication with a peace officer," which may then be placed in a database to alert officers to potential communication issues during a traffic stop.[226] At the state level, law enforcement training on autism is basic at best,[227] but some law enforcement agencies have

begun to pursue more robust training on their own.[228] During our hearings, witnesses recommended further legislative work that included a mandate (and ideally, funding) for additional law enforcement training on interacting with people on the autism spectrum. Last session's HB 568, by Rep. Rhetta Bowers, which covered education and training for peace officers about Alzheimer's disease and dementia, was suggested as a useful template.[229]

Courtroom accommodation is just as important, but perhaps even more neglected. While Texas has long made efforts to break communication barriers related to sight, hearing, and language in our courts, neurodivergence is largely unaccounted for.[230] The challenges in legal participation can be at least as profound as a difference in language, though, because they affect everything about how someone understands and is understood by others.[231] There are also still significant unsettled issues about how evidence of autism is handled in legal proceedings, which (as was true for Robert) can affect both whether someone is found guilty and what punishment they receive.[232]

Deciding how to address these considerations is complicated, but also necessary. The prevalence of autism is only increasing, with one in 36 U.S. children diagnosed with it as of 2020.[233] To ignore it today is to leave an access-to-justice time bomb ticking away for tomorrow.

A group of lawmakers meet with Robert Roberson at the Polunsky Unit in Livingston, TX

What Awaits Robert Roberson?

This committee's thorough review of the record confirms that Robert was convicted based on SBS, and to twist matters to claim otherwise is disingenuous, especially when the state's own lead investigator and a juror who heard that evidence at trial see it that way. And to

continue to hold that the new scientific developments since trial wouldn't have made a difference when a juror has explicitly told this committee that she wouldn't have convicted if she knew then what she knows now is beyond the pale.

Those facts should matter with a properly functioning Article 11.073, but what happens to him now is in the hands of other branches of our government. What's in the Legislature's hands is whether our junk science writ works for future Texans. The 89th Legislature must act to make sure it does.

Recommendations

The committee makes the following recommendations to the 89th Texas Legislature:

Change the burden of proof for junk science writs

The burden of proof in an Article 11.073, Code of Criminal Procedure, junk science writ application—now a preponderance of the evidence that new science would've meant an acquittal—must be changed to fulfill the law's original purpose. It should either require a showing only of a significant chance of a different outcome or simply that new science would have materially altered the state or defense theory of the case.

Apply junk science writs to punishment issues

Junk science writs should also apply to punishment issues to correct a longstanding drafting oversight in the law.

Alter junk science writ procedures

There are several procedural changes the Legislature should study and consider. Structurally, proceedings under Article 11.073 don't have to be adversarial; legal duties for both the state and defense and the rules of evidence that apply to these matters can instead empower courts to inquire into the science with expert guidance and the goal of scientific truth, not legal victory or defeat. By that same token, procedural bars should be reviewed and limited so that truth, not finality, is prioritized. And it may not be efficient for the Court of Criminal Appeals to handle all junk science claims—judicial economy might be better served by allowing trial courts to handle these applications and our high court to exercise its traditional discretionary review function when appropriate.

Improve access to & understanding of junk science justice

Only one junk science writ application has ever been granted for someone without an attorney. When scientific evidence plays a significant role in convicting or sentencing someone, they

should be given an appointed attorney to challenge it. Our law should also ensure that all attorneys handling these cases have a meaningful chance to challenge faulty findings of fact that may undermine future proceedings, and they should have the benefit of a written opinion explaining a court's decision when relief is denied.

Increase training & accommodation around neurodivergence

Whether they're defendants, victims, or other participants, people on the autism spectrum deserve due process in our justice system, from law enforcement encounters to our courtrooms. The 89th Legislature should consider making greater training and resources on neurodivergence available to law enforcement, and our courts should ensure they're adequately addressing autism-related barriers during proceedings. We should also study and begin defining appropriate lanes for evidence of autism and how our courts and juries consider it.

Letters from Members

Some members chose to submit letters providing further perspective on the report and the committee's interim work, which follow.

TEXAS HOUSE OF REPRESENTATIVES
DAVID L. COOK
DISTRICT 96

November 16, 2024

The Honorable Joe Moody
Chair, House Committee on Criminal Jurisprudence
Room E2.112, P.O. Box 2910
Austin, Texas 78768

RE: House Committee on Criminal Jurisprudence 88th Legislative Interim Report

Dear Chairman Moody,

First of all, thank you for your service as Chairman of the House Committee on Criminal Jurisprudence for the 88th Legislative Session.

The purpose of this Addendum is to clarify my position on the Committee's Interim Report. On the face of the cover letter to the report, I have visibly limited my signature with an "**" to indicate my agreement to certain portions of the Committee's report. I am in agreement with Charge 1 and Charge 2 of the Committee's report, but I am not in a position to agree to the full contents of the section entitled "Roberson & Writs."

I firmly believe that the power of our government to exercise capital punishment necessitates that we treat each instance of its employ with the highest level of scrutiny. In cases where life and liberty will be deprived of a fellow human being, we must get it right. After nearly twenty hours of committee testimony across two interim hearings and in light of the fact that no defendant facing the death penalty has been granted relief, it is clear that Article 11.073 of the Texas Code of Criminal Procedure, also known as the "Junk Science" law, is wanting of additional consideration in the 89th Legislative Session.

While the Legislature certainly is not charged with executing or enforcing laws, the Legislature does have a duty to ensure that the laws it passes are implemented correctly by exercising its legislative and oversight functions. However, this legislative function shall not be misconstrued to give the Legislature the right or responsibility to determine guilt, innocence, execution, etc. We must respect and maintain the separate roles of each branch of government.

I am thankful to those who have reached out to me during this process on both sides of the matter. Many have expressed ideas regarding improving our process of appeals to uphold the best interest of justice for victims, as well as preserving the rights of the accused. I look forward to working with my colleagues next Session to pass any necessary changes to Article 11.073.

Respectfully submitted,

David L. Cook
House District 96

P.O. BOX 2910 · AUSTIN, TEXAS 78768-2910 · PHONE (512) 463-0374
Capitol Office: Room E1.402

TEXAS HOUSE of REPRESENTATIVES

CAPITOL OFFICE:
P.O. BOX 2910
AUSTIN, TEXAS 78768-2910
PHONE (512) 463-0331

DISTRICT OFFICE:
136 W. TWOHIG AVE., STE. E
SAN ANGELO, TEXAS 76903
PHONE (325) 658-7313

Drew Darby
DISTRICT 72
COKE • COLEMAN • CONCHO • GLASSCOCK • HOWARD • IRION • REAGAN • RUNNELS • STERLING • TOM GREEN

November 12, 2024

The Honorable Joe Moody
Chair, House Committee on Criminal Jurisprudence
Room E2.112
P.O. Box 2910
Austin, TX 78768

Re: House Committee on Criminal Jurisprudence Interim Report to the 89th Legislature

Dear Chairman Moody,

Thank you for your leadership of the House Committee on Criminal Jurisprudence (Committee) during the 88th Legislature.

The purpose of my letter is to give notice of my intent not to sign the final interim report and provide a clear, concise, and complete rationale of my decision for the record.

I agree with the Committee's findings in Charges 1 and 2. However, I have concerns about further opining on Robert Roberson's *specific* case in the attached report, as it relates to his guilt or innocence.

Let me be clear: my intention not to sign the final interim report should not be used by unscrupulous actors for political purposes to negatively reflect on the members of the Committee or misconstrue my position on capital punishment, which I strongly believe in.

Chairman Leach and you have provided exceptional leadership, and our fellow members have acted with the utmost care and diligence in this historic matter. They have acted without regard for their ego or political standing and have only sought, as we all do in the Texas House, to seek the truth and the right course of action.

The same cannot be said for the partisan and political agitators outside the Texas Legislature (Legislature), who have become vocal and unwelcome distractions in this process. Without cause or reason, they have unfairly maligned the work being conducted by this Committee and opined brazenly on this issue without regard for the sensitive and delicate nature of the subject at hand.

There are also those who will cry foul that certain filings by the Office of Attorney General (OAG) and other members of the Texas House who believe Mr. Roberson is guilty were not included in the final report. Let the record show I believe those claims lack any tangible merit and did not factor into my decision not to sign the attached report.

The purpose of this portion of the report, in my eyes, is not to provide a comprehensive summary on the interpretations of the evidence for or against Mr. Roberson, but to use Mr. Roberson as a case study to better understand the applications of a legislative process that affects the lives of millions of Texas.

When we began the examination into Mr. Roberson's case, I stated on the dais that I believed the purpose of the Committee process was not to determine the guilt or innocence of the accused but to review the "junk science" writs under Article 11.073, Code of Criminal Procedure, and to see if the Texas Court of Criminal Appeals (TCCA) is correctly interpreting the law as the Legislature intended, or instead setting a personal, higher burden of proof to the detriment of Texans.

I cannot, and will not, enumerate on the testimony or evidence directly connected with Mr. Roberson's verdict; rather, I concern myself only with the process and procedures of Article 11.073, insofar as the Legislature should make necessary adjustments.

For context, the Legislature first approved Article 11.073 writs under Senate Bill 344 in the 83rd Legislative Session to allow for a writ of habeas corpus in the event that *scientific knowledge* had changed since the accused's trial.

In 2015, the 84th Legislature passed House Bill 3724 to revise the statue to allow for such a writ if the *field of scientific knowledge* had changed, including a testifying expert's scientific knowledge. This change by the Legislature was to codify a legal TCCA opinion that held that a change in the scientific knowledge of a testifying expert would be a basis for habeas relief under the original law passed in 2013.

It is important to note that Subsection (b)(2) of Article 11.073 states that a court may grant a convicted person relief on an application for a writ of habeas corpus if:

"[T]he court makes the findings described by Subdivisions (1)(A) and (B) [the findings of relevant scientific evidence and facts] and also finds that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted."

As a result, deliberations on the legitimacy, or lack thereof, of any specific writ under Article 11.073 are, in many ways, connected, explicitly or implicitly, with conversations of guilt or innocence. Thus, my following observations and determinations regarding the matter are rooted *solely* in my earlier, essential question regarding the Article 11.073 process.

As a member of the Texas House who voted for both Senate Bill 344 in 2013 and House Bill 3724 in 2015, I will state that, after numerous hours of testimony, I believe the TCCA incorrectly applied the "junk science" writs to Mr. Roberson's case based on the Legislature's intent of the statue. The Committee is also in lockstep on this matter.

While I will not state what outcome a jury should determine in regards to Mr. Roberson, firsthand witnesses, including a former member of the jury, stated under oath that, had at least some of the materials in contention been presented at the trial, they, personally, would not have found Mr. Roberson, or someone in his situation, guilty.

This meets the criteria set by the Legislature under Article 11.073, regardless of any other personal opinions by others on the matter.

Subsequently, the Legislature should swiftly revisit the Article 11.073 statute to ensure clarity. Revisiting this statute and making necessary corrections is of the utmost importance. If the government is going to take a life, it should meet the highest standards possible and leave no doubts.

For the pending Roberson case, I voted for the historic subpoena compelling Mr. Roberson to come before the Committee; I agree with the OAG that the subpoena is *valid*. Mr. Roberson's inability to testify came down to a political decision, but that decision is still currently pending before the Texas Supreme Court.

The Supreme Court could uphold the subpoena and deliver Mr. Roberson back to the Committee for additional testimony. At the same time, the TCCA could reverse its decision and grant an appeal on Mr. Roberson's case, and/or the Texas Board of Pardons and Paroles could conduct an additional review.

I believe it is unwise, regardless of reason, to close the book on this agenda item until there is a finality to **all** the proceedings.

The decision to withhold my signature is not one I have made lightly or quickly, but it is rooted in the fact that my original stated position has not changed: I do not believe that the Committee's role is to prove Mr. Roberson's guilt or innocence, and I will not make any statement or implication in my official capacity that can be seen as endorsing either outcome.

Of course, my opinion is not, and should not be, the final word on this matter, nor reflective of the opinion of the Committee or any other person participating in the process.

For those on the outside looking in, there should be no additional assumptions or false intents attributed to my decision not to sign the report outside of what is specifically stated in this letter.

Chairman Leach and you know that many good people can have many different assessments regarding this situation, as well as regarding my decision and my interpretation of the facts as I understand them. I welcome all disagreements where they may arise, and I have nothing but the utmost respect for every member of the Committee.

I look forward to working with my fellow members to make any necessary adjustments to Article 11.073 in the upcoming 89th Legislative Session.

Thank you for the opportunity to provide this letter.

Sincerely,

Drew Darby

TEXAS HOUSE OF REPRESENTATIVES
BRIAN HARRISON
DISTRICT 10

November 13, 2024

Fellow Texans,

I am grateful for all of the work that every single one of my colleagues on the Criminal Jurisprudence Committee have done during the interim, and, in particular, I have the greatest appreciation for the work related to the Robert Roberson case.

I have been proud of the unprecedented and historic efforts of the Committee, whose members put aside partisanship and the things that typically divide us to unite in the pursuit of justice for Mr. Roberson - and for all Texans - and to protect due process, separation of powers, and the integrity of our criminal justice system.

We have joined together to ensure that our children and the next generation do not inherit a state where potentially innocent people may have their lives deprived from them by the government. I want the state of Texas to lead the nation in almost everything, but executing potentially innocent people is not one of them.

This interim report is a quality document that has been the result of a lengthy, collaborative effort. While I agree in broad strokes with the discussions in the report, not every aspect of the report should be construed as necessarily being indicative of my exact policy preferences.

Any Texan should feel free to contact my office with any questions they may have regarding this report.

For liberty,

Brian Harrison

Endnotes

[1] H.J. of Tex., 88th Leg., R.S. 241 (2023).

[2] Tex. H. Rule 3, § 7, H. Res. 4, 88th Leg., R.S. 63 (2023).

[3] Speaker Dade Phelan, *Interim Committee Charges, Texas House of Representatives, 88th Legislature*, at 5, *available at* https://www.house.texas.gov/pdfs/committees/reports/interim/88interim/interim-charges-88thLeg.pdf.

[4] Tex. H.B. 17, 88th Leg., R.S. (2023).

[5] House committee bill analysis, Tex. H.B. 17, 88th Leg., R.S. (2023).

[6] Tex. H.B. 17, 88th Leg., R.S. (2023).

[7] *Id.*

[8] *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 88th Leg. Interim (July 9, 2024)(statement of Shannon Edmonds)(recording available from the House Video/Audio Services Office).

[9] *See* Sneha Dey, *Amid Personal Conflict, Hays County Clerk Turned to Republican's "rogue" prosecutor law to oust fellow Democrat*, The Texas Tribune, Sept. 22, 2023, *available at* https://www.texastribune.org/2023/09/22/hays-county-higgins-rogue-prosecutors-removal/ (describing personal animosity as basis for petition).

[10] Serena Lin, *Lawsuit to Remove Travis County District Attorney Joeé Garza Faces Legal Hurdles*, Austin American-Statesman, Dec. 11, 2023, *available at* https://www.statesman.com/story/news/local/2023/12/11/lawsuit-to-remove-travis-county-district-attorney-jos-garza-faces-legal-hurdles/71850802007/.

[11] Shannon Edmonds, *supra* note 8.

[12] *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 88th Leg. Interim (July 9, 2024)(statement of Rep. David Cook)(recording available from the House Video/Audio Services Office).

[13] *Id.*; *see, e.g.*, Erika Hernandez & Misael Gomez, *Bexar County DA to Change Some Policies Ahead of New 'Rogue' Prosecutor Bill Taking Effect*, KSAT, June 13, 2023, *available at* https://www.ksat.com/news/local/2023/06/13/bexar-county-da-to-change-some-policies-ahead-of-new-rogue-prosecutor-bill-taking-effect/ (reporting preemptive DA policy change in response to HB 17).

[14] Shannon Edmonds, *supra* note 8.

[15] *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 88th Leg. Interim (July 9, 2024)(statement of Chloe Petricek)(recording available from the House Video/Audio Services Office). However, policies covered by the bill are not limited to formal written policies. H.J. of Tex., 88th Leg., R.S. 2261 (2023).

[16] Chloe Petricek, *supra* note 15.

[17] House committee bill analysis, Tex. H.B. 200, 88th Leg., R.S. (2023).

[18] *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 88th Leg. Interim (July 9, 2024)(statement of Nikki Pressley)(recording available from the House Video/Audio Services Office).

[19] *Id.*

[20] Shannon Edmonds, *supra* note 8; *see* Tex. Const. art. V, §§ 21 & 30 (specifying terms of county, district, and criminal district attorneys).

[21] Shannon Edmonds, *supra* note 8.

[22] El Paso County District Attorney Yvonne Rosales, who was facing a removal petition in 2022, asked the county to pay for her legal defense, which it declined to do. Jamel Valencia & Jhovani Carrillo, *El Paso County denies paying for legal fees in DA Yvonne Rosales' removal case*, KFOX14, Sept. 26, 2022, *available at https://kfoxtv.com/news/local/yvonne-rosales*. She then resigned prior to trial. Molly Smith & Robert Moore, *El Paso DA Yvonne Rosales resigns, ending troubled 2-year tenure*, El Paso Matters, Nov. 28, 2022, *available at* https://elpasomatters.org/2022/11/28/el-paso-texas-da-yvonne-rosales-resigns.

[23] Tex. H.B. 17, 88th Leg., R.S. (2023).

[24] Tex. H.B. 6, 88th Leg., R.S. (2023).

[25] House committee bill analysis, Tex. H.B. 6, 88th Leg., R.S. (2023).

[26] The chart below, based on data found at https://healthdata.dshs.texas.gov/dashboard/drugs-and-alcohol/fentanyl-trends, gives a sense of the scale of it in Texas.

[27] Tex. H.B. 6, 88th Leg., R.S. (2023).

[28] *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Sept. 16, 2024)(statement of Rep. Craig Goldman)(recording available from the House Video/Audio Services Office).

[29] *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Sept. 16, 2024)(statement of Allen Place)(recording available from the House Video/Audio Services Office)

[30] *See Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Sept. 16, 2024)(statement of Shanna Redwine)(recording available from the House Video/Audio Services Office)(commenting positively on utility of HB 6 compared to previous law); *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Sept. 16, 2024)(statement of John Wilkerson)(recording available from the House Video/Audio Services Office)(same).

[31] Allen Place, *supra* note 29; *see* TEX. CODE CRIM. PROC. arts. 42A.053 & 42A.056 (limiting underlying sentence for community supervision).

[32] John Wilkerson, *supra* note 30.

[33] Allen Place, *supra* note 29; Shanna Redwine, *supra* note 30. HB 3908, by Representative Terri Wilson, is one step in that direction. *See* Tex. H.B. 3908, 88th Leg., R.S. (2023)(fentanyl abuse and poisoning awareness in public schools).

[34] *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Sept. 16, 2024)(statement of Sarah Bruner)(recording available from the House Video/Audio Services Office)

[35] Shanna Redwine, *supra* note 30.

[36] James Barragán, *To combat opioid overdoses, Gov. Greg Abbott says he supports decriminalizing fentanyl testing strips*, The Texas Tribune, Dec. 1, 2022, *available at* https://www.texastribune.org/2022/12/01/greg-abbott-fentanyl-strips-opioid-overdose.

[37] *See generally* U.S. Centers for Disease Control and Prevention, *What You Can Do to Test for Fentanyl*, *accessed on* Oct. 12, 2024*, available at* https://www.cdc.gov/stop-overdose/safety/index.html.

[38] H.J. of Tex., 88th Leg., R.S. 1321 (2023).

[39] Tex. H.B. 611, 88th Leg., R.S. (2023).

[40] House committee bill analysis, Tex. H.B. 611, 88th Leg., R.S. (2023).

[41] See, e.g., Hannah Mery, The Dangers of Doxing and Swatting: Why Texas Should Criminalize These Malicious Forms of Cyberharrasment, 52 ST. MARY'S L.J. 905 (2021)(discussing physical dangers posed by doxing).

[42] *See* Emma Betuel, *Should Doxing Be Illegal?*, The Markup, Aug. 17, 2021, *available at* https://themarkup.org/the-breakdown/2021/08/17/should-doxxing-be-illegal (discussing objections to and potential abuses of anti-doxxing laws).

[43] The personal identifying information of numerous categories of public servants is confidential. TEX. GOV'T CODE § 552.1175.

[44] Tex. H.B. 611, 88th Leg., R.S. (2023).

[45] *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Sept. 16, 2024)(statement of Molly Voyles)(recording available from the House Video/Audio Services Office).

[46] *Id.*

[47] *Id.*

[48] *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Sept. 16, 2024)(statement of Rep. Gio Capriglione)(recording available from the House Video/Audio Services Office).

[49] *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Sept. 16, 2024)(statement of Bryan Flatt)(recording available from the House Video/Audio Services Office).

[50] Tex. H.B. 842, 88th Leg., R.S. (2023).

[51] House committee bill analysis, Tex. H.B. 842, 88th Leg., R.S. (2023).

[52] Tex. H.B. 842, 88th Leg., R.S. (2023).

[53] *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 88th Leg. Interim (July 9, 2024)(statement of Sylvia Holmes)(recording available from the House Video/Audio Services Office).

[54] Tex. H.B. 1221, 88th Leg., R.S. (2023).

[55] House committee bill analysis, Tex. H.B. 1221, 88th Leg., R.S. (2023).

[56] Tex. H.B. 1221, 88th Leg., R.S. (2023).

[57] *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Sept. 16, 2024)(statement of Ron Steffa)(recording available from the House Video/Audio Services Office).

[58] *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Sept. 16, 2024)(statement of Patti Henry)(recording available from the House Video/Audio Services Office).

[59] Tex. H.B. 1442, 88th Leg., R.S. (2023).

[60] *E.g.*, Brianna Hollis, *52 arrests made statewide since Texas 'street takeover' task force began*, KXAN, Aug. 16, 2023, *available at* https://www.kxan.com/news/crime/52-arrests-made-statewide-since-texas-street-takeover-task-force-began (describing prevalence and dangers of street takeovers).

[61] House committee bill analysis, Tex. H.B. 1442, 88th Leg., R.S. (2023).

[62] Tex. H.B. 1442, 88th Leg., R.S. (2023).

[63] *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Sept. 16, 2024)(statement of Frank Gomez)(recording available from the House Video/Audio Services Office).

[64] *Id.*

[65] Tex. H.B. 1826, 88th Leg., R.S. (2023).

[66] House committee bill analysis, Tex. H.B. 1826, 88th Leg., R.S. (2023).

[67] Tex. H.B. 1826, 88th Leg., R.S. (2023).

[68] *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 88th Leg. Interim (July 9, 2024)(statement of Rep. Chris Turner)(recording available from the House Video/Audio Services Office).

[69] *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 88th Leg. Interim (July 9, 2024)(statement of Cory Castillo)(recording available from the House Video/Audio Services Office).

[70] *Id.*

[71] *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 88th Leg. Interim (July 9, 2024)(statement of Chris Bowen)(recording available from the House Video/Audio Services Office).

[72] Cory Castillo, *supra* note 69.

[73] Chris Bowen, *supra* note 71.

[74] Tex. H.B. 2897, 88th Leg., R.S. (2023).

[75] Tex. Pen. Code § 31.04.

[76] House committee bill analysis, Tex. H.B. 2897, 88th Leg., R.S. (2023).

[77] Tex. H.B. 2897, 88th Leg., R.S. (2023).

[78] *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 88th Leg. Interim (July 9, 2024)(statement of Stephanie Gharakhanian)(recording available from the House Video/Audio Services Office).

[79] *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 88th Leg. Interim (July 9, 2024)(statement of Emily Amps)(recording available from the House Video/Audio Services Office).

[80] Stephanie Gharakhanian, *supra* note 78.

[81] Tex. H.B. 3956, 88th Leg., R.S. (2023).

[82] National Research Council, Strengthening Forensic Science in the United States: A Path Forward (1st ed. 2009) 130.

[83] *See, e.g.*, The Innocence Project, *DNA Exonerations in the United States (1989–2020)*, *accessed on* Oct. 14, 2024, *available at* https://innocenceproject.org/dna-exonerations-in-the-united-states (listing uses of DNA to solve cold cases and exonerate innocent people).

[84] *See* Billy Gates, *Texas DPS: DNA collection law helped solve hundreds of crimes in its first year*, KXAN, Nov. 13, 2020, *available at* https://www.kxan.com/news/crime/texas-dps-dna-collection-law-helped-solve-hundreds-of-crimes-in-its-first-year (reporting more than 250 cases solved in first year of DNA collection law).

[85] House committee bill analysis, Tex. H.B. 3956, 88th Leg., R.S. (2023).; *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 88th Leg. Interim (July 9, 2024)(statement of Rep. Reggie Smith)(recording available from the House Video/Audio Services Office).

[86] Tex. H.B. 3956, 88th Leg., R.S. (2023).

[87] *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 88th Leg. Interim (July 9, 2024)(statement of Brady Mills)(recording available from the House Video/Audio Services Office).

[88] *Id.*

[89] *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 88th Leg. Interim (July 9, 2024)(statement of Patti Henry)(recording available from the House Video/Audio Services Office).

[90] Tex. H.B. 4906, 88th Leg., R.S. (2023).

[91] House committee bill analysis, Tex. H.B. 4906, 88th Leg., R.S. (2023).

[92] Tex. H.B. 4906, 88th Leg., R.S. (2023).

[93] *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 88th Leg. Interim (July 9, 2024)(statement of Rep. Cole Hefner)(recording available from the House Video/Audio Services Office).

[94] *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 88th Leg. Interim (July 9, 2024)(statement of Paul Shepherd)(recording available from the House Video/Audio Services Office).

[95] U.S. Dep't of Justice, *What is Human Trafficking*, *accessed on* Oct. 13, 2024, *available at* https://www.justice.gov/humantrafficking/what-is-human-trafficking#:~:text=Human%20trafficking%2C%20also%20known%20as,or%20overt%2C%20physical%20or%20psychological.

[96] Ross Jackson & Nikki Pressley, *Protecting Trafficking Victims From Prosecution: Redefining Duress*, Right on Crime, July 2024, at 4, *available at* https://rightoncrime.com/wp-content/uploads/2024/07/Protecting-Trafficking-Victims-from-Prosecution-Redefining-Duress.pdf.

[97] Theodore R. Sangalis, Elusive Empowerment: Compensating the Sex Trafficked Person Under the Trafficking Victims Protection Act, 80 FORDHAM L.R. 403, 407 (2011).

[98] National Human Trafficking Hotline, *National Statistics*, *accessed on* Oct. 13, 2024, *available at* https://humantraffickinghotline.org/en/statistics.

[99] *Hearing on Interim Charge 2* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Sept. 16, 2024)(statement of Michael Sweeney)(recording available from the House Video/Audio Services Office).

[100] "It is a defense to prosecution [for prostitution] that the actor was engaged in the conduct that constitutes the offense because the actor was the victim of conduct that constitutes" human trafficking or compelling prostitution. TEX. PEN. CODE § 43.02(d).

[101] *Id.* § 8.05(a)–(c).

[102] Jackson & Pressley, *supra* note 96, at 5–8.

[103] *Hearing on Interim Charge 2* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Sept. 16, 2024)(statement of Lillian Garvens)(recording available from the House Video/Audio Services Office).

[104] *Hearing on Interim Charge 2* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Sept. 16, 2024)(statement of Michael Sweeney)(recording available from the House Video/Audio Services Office).

[105] *Id.*

[106] Jackson & Pressley, *supra* note 96, at 5.

[107] Unfortunately, trafficking often goes unidentified until an arrest for something like aggravated robbery, which only reinforces the need for earlier intercepts of justice-involved youths who may be victims of trafficking. Lillian Garvens, *supra* note 103.

[108] U.S. Dep't of Justice, *A Whole-of-government Approach*, *accessed on* Oct. 13, 2024, *available at* https://www.justice.gov/humantrafficking/whole-government-approach.

[109] TEX. GOV'T CODE § 402.034. A similar entity housed in the Office of the Attorney General, the Human Trafficking Prevention Task Force, works to coordinate law enforcement responses statewide. *Id.* § 402.035 It has been extraordinarily successful in securing the tools we need legislatively, with 76 of the 84 recommendations it's made since 2010 becoming law. Attorney General of Texas, *Task Force Legislative Recommendations*, *accessed on* Oct. 13, 2024, *available at* https://www.texasattorneygeneral.gov/human-trafficking-section/texas-human-trafficking-prevention-task-force/task-force-legislative-recommendations.

[110] *See generally* Texas Human Trafficking Prevention Coordinating Council, *Strategic Plan: Charting an End to Human Trafficking in Texas*, May 2020, *accessed on* Oct. 13, 2024, *available at* https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/human-trafficking/TXHTPCC-StrategicPlan2020.pdf (providing 26-strategy statewide plan to combat human trafficking).

[111] Tex. Bus. & Comm. Code ch. 114.

[112] TEX. GOV'T CODE § 402.0351; *cf.* Tex. S.B. 1219, 86th Leg., R.S. (2019)(original language limited to transportation hubs).

[113] Tex. Health and Human Servs., *Report on HHSC Human Trafficking Grant Program Initiatives*, Dec. 2022, at 3, *available at* https://www.hhs.texas.gov/sites/default/files/documents/human-trafficking-grant-program-initiatives-report-dec-2022.pdf. The program raised a mere $20,232.20 after paying its expenses. *Id.* at 5.

[114] Michael Sweeney, *supra* note 104.

[115] Texas Dep't of Fam. And Prot. Servs., *Children and Youth Missing from DFPS Conservatorship & Human Trafficking Data; Fiscal Year 2023 Report*, May 2024, at 4 & 10, *accessed on* Oct. 13, 2024, *available at* https://www.dfps.texas.gov/About_DFPS/Reports_and_Presentations/Agencywide/documents/2024/2024-05-31_Children_Youth_Missing_DFPS_Conservatorship_Human_Trafficking_Data_FY2023_Report.pdf.

[116] Lilian Garvens, *supra* note 103.

[117] *See, e.g.*, Jackson & Pressley, *supra* note 96, at 4–6 (providing examples of trafficking victim prosecutions).

[118] The Texas Court of Criminal Appeals has defined "imminent" as "ready to take place, near at hand, impending, hanging threateningly over one's head, menacingly near." *Devine v. State*, 786 S.W.2d 268, 270 (Tex. Crim. App. 1989).

[119] *Hearing on Interim Charge 2* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Sept. 16, 2024)(statement of Ross Jackson)(recording available from the House Video/Audio Services Office).

[120] Michael Sweeney, *supra* note 104. There's a large overlap in some of the behavior common in cases of domestic violence, in which victims often return to their abusers many times before being able to break away, and that seen in trafficking relationships. *Id*; *accord* Lilian Garvens, *supra* note 103.

[121] Lilian Garvens, *supra* note 103.

[122] Tex. Code Crim. Proc. art. 38.37.

[123] *Id.* art. 38.371.

[124] *Hearing on Interim Charge 2* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Sept. 16, 2024)(statement of Allen Place)(recording available from the House Video/Audio Services Office).

[125] *Id.*

[126] H.J. of Tex., 88th Leg., R.S. 3759 (2023).

[127] Allen Place, *supra* note 124.

[128] Ross Jackson, *supra* note 119.

[129] Lilian Garvens, *supra* note 103.

[130] *Id.*

[131] The October 21st hearing remained "at ease" until October 22nd, but no substantive matters were taken up that day—the committee was simply adjourned.

[132] On October 17, 2024, the U.S. Supreme Court denied a stay of execution to Robert as a state question with no federal issue on which to intervene. Justice Sotomayor's statement respecting that denial succinctly and (as committee research has confirmed) accurately summarized much of the background in the case, so most of this section will be drawn from that without repetitive citation. It's scheduled for publication in the 604th U.S. Reporter and can be found at https://www.supremecourt.gov/opinions/24pdf/24a349_8m58.pdf in the meantime. Other citations in this section may refer to the reporter's record from the original trial ("R.R." by volume and page) and from the habeas proceedings ("E.H.R.R." by volume and page).

[133] 9 E.H.R.R. at 186.

[134] 42 R.R. at 9.

[135] 41 R.R. at 170.

[136] E.H.R.R. at 62–65.

[137] 42 R.R. at 96.

[138] 42 R.R. at 102–05.

[139] *Hearing on 11.073 Writs* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Oct. 16, 2024)(statement of Brian Wharton)(recording available from the House Video/Audio Services Office).

[140] 42 R.R. at 106.

[141] Brian Wharton, *supra* note 139.

[142] *Hearing on 11.073 Writs* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Oct. 21, 2024)(statement of Donald Salzman)(recording available from the House Video/Audio Services Office).

[143] Joe Moody, Jeff Leach, Rhetta Bowers, & Lacey Hull, *Response to OAG's Release About Robert Roberson Case*, Oct. 24, 2024, *available at* https://static.texastribune.org/media/files/a142510564e03b916d77bef52bc651c4/Roberson%20Rebuttal.pdf, at 3–5 & 10.

[144] *Compare* 3 E.H.R.R. at 77 & ex. 6 (Sims's description of injuries), *with* 42 R.R. at 123 (Dr. Squires failing to find such injuries), *and* 2 E.H.R.R. at 62–65 (Nurse Gurganus failing to find such injuries); *cf.* 43 R.R. at 89 (Dr. Urban being asked to explain a lack of external injuries).

[145] 41 R.R. at 144.

[146] Joe Moody et al., *supra* note 143, at 12–14.

[147] References to sexual assault were still made in the prosecution's closing argument—without objection—even though they had already been revealed to be baseless at that point. 46 R.R. at 21.

[148] 42 R.R. at 105–07.

[149] 42 R.R. at 107–08.

[150] 42 R.R. at 109.

[151] 43 R.R. at 74.

[152] 43 R.R. at 72.

[153] *See generally* Joe Moody et al., *supra* note 143, at 6–8 (explaining deficiencies in detail)

[154] 43 R.R. at 78–79.

[155] 43 R.R. at 85–86.

[156] *Hearing on 11.073 Writs* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Oct. 16, 2024)(statement of Gretchen Sween)(recording available from the House Video/Audio Services Office).

[157] Brian Wharton, *supra* note 139.

[158] 41 R.R. at 57–58.

[159] *McCoy v. Louisiana*, 584 U.S. 414 (2018).

[160] 41 R.R. at 55.

[161] 46 R.R. at 15.

[162] Brian Wharton, *supra* note 139; *Hearing on 11.073 Writs* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Oct. 21, 2024)(statement of Terre Compton)(recording available from the House Video/Audio Services Office).

[163] Brian Wharton, *supra* note 139.

[164] *Compare* TEX. CODE CRIM. PROC. ch. 44 (appeal and writ of error), *with id.* ch. 11 (habeas corpus).

[165] *Roberson v. State*, No. AP-74,671, 2002 WL 34217382 (Tex. Crim. App. June 20, 2007).

[166] Gretchen Sween, *supra* note 156.

[167] Roberson, supra note 165.

[168] See generally E.H.R.R.

[169] *Hearing on 11.073 Writs* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Oct. 16, 2024)(statement of Roland Auer)(recording available from the House Video/Audio Services Office); *Hearing on 11.073 Writs* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Oct. 16, 2024)(statement of Francis Green)(recording available from the House Video/Audio Services Office); *Hearing on 11.073 Writs* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Oct. 16, 2024)(statement of Jeffrey Singer)(recording available from the House Video/Audio Services Office).

[170] 10 E.H.R.R. at 74, 76, 212, 220, & 242.

[171] *Ward v. State*, No. CR-18-0316, 2020 WL 4726486, at *4 (Ala. Crim. App. Aug. 14, 2020).

[172] These proposals are found in the habeas record under WR-63,081-03.

[173] For example, the first footnote on the first page in both the state's proposed findings and the court's own is inexplicably in a sans serif font (Arial or similar) not used elsewhere in the rest of the document, which is in a standard serif font (Times New Roman or similar). The text is also the same, word-for-word.

[174] *Supra* note 172.

[175] Terre Compton, *supra* note 162.

[176] *Ex parte Roark*, No. WR-56,380-03, 2024 WL 4446858, at *51–54 (Tex. Crim. App. Oct. 9, 2024).

[177] *Ex parte Roberson*, Nos. WR-63,081-03, 04, at *2 (Tex. Crim. App. Oct. 10, 2024)(Yeary, J., concurring)(not designated for publication).

[178] Pleadings and orders can be found at https://search.txcourts.gov/Case.aspx?cn=24-0884&coa=cossup.

[179] See generally Office of the Attorney General Sets the Record Straight About Nikki Curtis's Death, Rebutting Jeff Leach's and Joe Moody's Lies About Convicted Child Murderer, Ken Paxton, Attorney General of Texas, Oct. 23, 2023, available at https://www.texasattorneygeneral.gov/news/releases/office-attorney-generalsets-record-straight-about-nikki-curtiss-death-rebutting-jeff-leachs-and-joe (OAG statements); Joe Moody et al., supra note 149 (response from four House members).

[180] There have been 3,604 verified U.S. exonerations since 1989—484 of them in Texas The National Registry of Exonerations, *Texas*, *accessed on* Oct. 24, 2024, *available at* https://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View=%7BB8342AE7-6520-4A32-8A06-4B326208BAF8%7D&FilterField1=State&FilterValue1=Texas; *see* The Innocence Project, *DNA Exonerations in the United States (1989–2020)*, *accessed on* Oct. 24, 2024, *available at* https://innocenceproject.org/dna-exonerations-in-the-united-states (providing exoneration statistics nationwide based on DNA evidence).

[181] *Supra* note 132.

[182] Joseph Shapiro, *Rethinking Shaken Baby Syndrome*, NPR, Jun. 29, 2011, *available at https:*//www.npr.org/2011/06/29/137471992/rethinking-shaken-baby-syndrome.

[183] Sue Luttner, *Dr. A. Norman Guthkelch fought injustice to the end*, Center for Health Journalism, Aug. 3, 2016, *available at* https://centerforhealthjournalism.org/our-work/insights/dr-norman-guthkelch-fought-injustice-end.

[184] *Hearing on 11.073 Writs* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Oct. 16, 2024)(statement of Keith Findley)(recording available from the House Video/Audio Services Office).

[185] Brian Wharton, *supra* note 139.

[186] *Hearing on 11.073 Writs* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Oct. 21, 2024)(statement of Phillip McGraw)(recording available from the House Video/Audio Services Office).

[187] *Id.*

[188] *Hearing on 11.073 Writs* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Oct. 21, 2024)(statement of Kate Judson)(recording available from the House Video/Audio Services Office); *see generally* National Research Council, *supra* note 82.

[189] Look no further than *Roark*, which explains many of the issues succinctly and cites other cases nationwide that have done the same. *Roark*, *supra* note 176.

[190] Jeffrey Singer, *supra* note 169.

[191] *Id.*

[192] Kate Judson, *supra* note 188.

[193] *Brooks v. State*, 323 S.W.3d 893, 896 (Tex. Crim. App. 2010)(applying standard announced in *Jackson v. Virginia*, 443 U.S. 307 (1979).

[194] *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979).

[195] *Gonzalez v. State*, 544 S.W.3d 363, 373 (Tex. Crim. App. 2018); *see* TEX. R. APP. PROC. 44.2(b) (harmless error rule).

[196] Nicole L. Waters, Anne Gallegos, James Green, and Martha Rozsi, *Criminal Appeals in State Courts*, Bureau of Justice Statistics, Sept. 2015, *available at* https://bjs.ojp.gov/content/pub/pdf/casc.pdf.

[197] Texas Defender Service, *An Unfulfilled Promise: Assessing the Efficacy of Article 11.073*, July 2024, *available at* https://www.texasdefender.org/wp-content/uploads/2024/10/TDS-11.073-Report_web.pdf.

[198] *Id.* at 1–2 & 11–14.

[199] *Id.* at 2 & 15–21.

[200] *Id.* at 22–24.

[201] *Hearing on 11.073 Writs* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Oct. 16, 2024)(statement of Estelle Hebron-Jones)(recording available from the House Video/Audio Services Office).

[202] *Hearing on 11.073 Writs* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Oct. 21, 2024)(statement of Elsa Alcala)(recording available from the House Video/Audio Services Office).

[203] *See id.* (describing court as "leaning far" to affirm convictions).

[204] Texas Defender Service, *supra* note 1973. In fact, this was a complaint lodged by Robert's attorney in the United States Supreme Court as a due process issue. Gretchen Sween, *supra* note 156.

[205] *Roberson*, *supra* note 177.

[206] *Ex parte White*, 506 S.W.3d 39, 42–46 (Tex. Crim. App. 2016).

[207] Texas Defender Service, *supra* note 197, at 25–27.

[208] MD. CRIM. PROC. CODE § 8-301(a)(1)(i).

[209] Elsa Alcala, *supra* note 202.

[210] Donald Salzman, *supra* note 142.

[211] *White*, *supra* note 206.

[212] Elsa Alcala, *supra* note 202.

[213] The CCA was created by TEX. CONST., art. V, § 1.

[214] Gretchen Sween, *supra* note 156.

[215] *Hearing on 11.073 Writs* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Oct. 16, 2024)(statement of Allyson Mitchell)(recording available from the House Video/Audio Services Office).

[216] Gretchen Sween, *supra* note 156.

[217] *Hearing on 11.073 Writs* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Oct. 21, 2024)(statement of John Grisham)(recording available from the House Video/Audio Services Office).

[218] Brian Wharton, *supra* note 139.

[219] Phillip McGraw, *supra* note 186. Robert also has a below-average IQ that compounds these issues. *Hearing on 11.073 Writs* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Oct. 21, 2024)(statement of Gretchen Sween)(recording available from the House Video/Audio Services Office).

[220] *Hearing on 11.073 Writs* Before the House Comm. on Crim. Jur., 88th Leg. Interim (Oct. 21, 2024)(statement of Natalie Montford)(recording available from the House Video/Audio Services Office).

[221] Terre Compton, *supra* note 162.

[222] Natalie Montford, *supra* note 220.

[223] Phillip McGraw, *supra* note 186.

[224] *E.g.*, Janna Oswald, *Autism in the Courtroom*, Texas District & County Attorneys Association, May–June 2022, *available at* https://www.tdcaa.com/journal/autism-in-the-courtroom (discussing best courtroom practices learned in case with victim on autism spectrum).

[225] Rachel Slavny-Cross et al., *Autism and the Criminal Justice System: An Analysis of 93 Cases*, Autism Research, Mar. 14, 2022, *available at* https://pmc.ncbi.nlm.nih.gov/articles/PMC9314022/#aur2690-sec-0012.

[226] Tex. Transp. Code § 502.061.

[227] The Department of Health and Human Services, for example, offers a short online training for first responders, which can be found at https://www.hhs.texas.gov/services/disability/autism/autism-training-opportunities/autism-spectrum-disorders-training-program-first-responders.

[228] *E.g.*, Dawn White, *North Texas law enforcement train to recognize and respond to people with autism*, CBS News, Apr. 4, 2024, *available at* https://www.cbsnews.com/texas/news/north-texas-law-enforcement-train-to-recognize-and-respond-to-people-with-autism (describing multiday training by Rockwall County officers).

[229] Tex. H.B. 568, 88th Leg., R.S. (2023).

[230] *See generally* State Bar of Texas, *Courtroom Accessibility Guide*, 2023, *available at* https://www.texasbar.com/AM/Template.cfm?Section=Consider_a_State_Bar_Committee&Template=/CM/ContentDisplay.cfm&ContentID=56464.

[231] *See* Natalie Montford, *supra* note 220 (discussing autism's array of communication and participation challenges).

[232] *E.g.*, L.P. Phillips, *Collin County case could force courts to rethink how to handle autism*, KRLD Newsradio 1080, Aug. 26, 2024, *available at* https://www.audacy.com/krld/news/local/collin-county-case-could-force-courts-to-rethink-autism (describing courtroom controversy over autism evidence affecting *mens rea* for offense).

[233] Matthew J. Maenner et al., Prevalence and Characteristics of Autism Spectrum Disorder Among Children Aged 8 Years — Autism and Developmental Disabilities Monitoring Network, 11 Sites, United States, 2020, Centers for Disease Control, Mar. 24, 2023, available at https://www.cdc.gov/mmwr/volumes/72/ss/ss7202a1.htm?s_cid=ss7202a1_w%E2%80%94the.