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RESEARCH & PUBLIC EDUCATION CENTER

## 2007 TEXAS' CRIMINAL JUSTICE SOLUTIONS

A Policy Guide



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**January, 2007**

*The Texas Criminal Justice Coalition promotes criminal justice solutions that embody the principles of effective management, accountability, public safety, and human and civil rights.*



Dear Reader,

As the Executive Director of the Texas Criminal Justice Coalition (TCJC), I am thrilled to provide the public with our first policy guide, which promotes criminal justice solutions that embody the principles of effective management, accountability, public safety, and human and civil rights.

Right now Texas has the opportunity to be at the forefront in the nation by developing and implementing a plan that will decrease crime and yield a larger return of investment for taxpayers. This legislative session state lawmakers must work to improve three crucial areas: the ineffective supervisory practices that are overburdening our prisons; the inefficient police practices that are adversarial to those most in need of protection; and the unconstitutional court practices that are impeding fair treatment in our legal system.

Texas prisons are at a breaking point. Lawmakers can either attempt to mask the problem by continuing the status quo and building more prisons, or they can tackle the root causes of overcrowding head on by implementing crime reduction strategies that include stronger probation and parole structures and the delivery of effective treatment.

Employing more efficient police practices will benefit both law enforcement and the communities they serve. Texas has an obligation to safeguard its police officers; we must clearly define law enforcement duties to insulate them from liability while they carry out their responsibilities. This will allow them to focus on better protecting the public, rather than causing them to waste time second-guessing the legality of their actions.

Protecting the innocent and defending the constitutional rights of the accused promotes judicial efficiency by rendering more sound verdicts. Ensuring that all Texans have access to the courts and that innocent people are given the available tools to prove their innocence will restore faith in the system.

Texas is at a crossroads. This publication has been created to point those who are committed to meeting Texas' public safety needs in the right direction. We urge all policy-makers to join in this bipartisan and historic effort to deliver taxpayers a greater return of investment while promoting a safer Texas.

Sincerely,

Ana Yáñez-Correa

Executive Director, Texas Criminal Justice Coalition



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## Part 1: Prison Overcrowding

- Strengthen Probation to Stop the Flow into Prisons
- Implement Parole Guidelines to Make Room for Violent, Untreatable Offenders
- Establish a Recidivism Prevention Infrastructure
- Improve Personal Responsibility Tools
  - Create an Enhanced Employability and Employment Protection Policy
  - Broaden Access to Housing

***“We need to do something besides build more prisons.”***

- Marc Levin, Director of the Texas Public Policy Foundation’s Center for Effective Justice

Since the early 1990’s, Texas has tripled the capacity of its prisons, increasing the number of prisoners faster than any other state. In fact, Texas’ incarceration rate is 51% higher than the national average. However, in spite of the massive increase in prisoner incarceration, the crime rate has not declined in Texas as much as in other states: our state crime rate is 24% higher than the national average.<sup>1</sup>

Still, Texas’ state prison population continues to grow. And as long as Texas policies stay the same, we are expected to exceed current prison capacity by nearly 11,000 beds in just over three years. To accommodate for this, officials with the Texas Department of Criminal Justice have asked for three new prisons – which will cost taxpayers \$711.5 million in building expenses and \$72 million in annual operation expenses, for a total of \$2.151 billion over 20 years. This request is not only costly but unsustainable: there is not a sufficient amount of time to meet the projected prisoner influx (as construction of the prisons would take several years) and there are not enough prison guards to meet the current demand.

New and effective strategies must be implemented to solve Texas’ prison capacity and overcrowding problems. Both the Texas House and Senate must join in the current bipartisan effort to implement smarter and sustainable solutions that will save taxpayers dollars, reduce the risk of individuals re-offending, and provide those who are re-entering society with tools for personal responsibility. Probation must be strengthened, parole guidelines must be followed, and programs that focus on reducing risk (such as treatment and reintegration) must be fully funded and implemented.



## Strengthen Probation to Stop the Flow into Prisons

### Background:

***“We have to be smart on crime. I think a lot of members agree with that, both Republicans and Democrats, conservatives and liberals.”***

- Texas State Representative  
Jerry Madden, Chairman  
of the House Corrections  
Committee

Probation revocations contribute to as many as a third of prison admissions annually. The cause for these high levels of revocation lies in the often misdirected purpose of probation programs across the state: they are generally tailored to monitor compliance with court mandates rather than to promote rehabilitation and reduce recidivism. In fact, probation departments receive little resources, and current funding structures – which depend heavily on probationers’ fees as a means of income – create incentives to keep probationers on probation too long.

Another problem: inefficient supervision causes high levels of recidivism and revocation. Because risk-level diagnostics are used inconsistently, probationers are routinely given improper levels of supervision: those who should be supervised for shorter periods are supervised for longer periods, and those who should be supervised for longer periods abscond.<sup>ii</sup> But high rates of revocations also stem from bureaucratically-designed technical violations (non-criminal violations of probation rules), the penalties for which are extremely punitive and ultimately contribute to Texas’ over-incarceration crisis.

A final factor leading to high recidivism rates among probationers is the decentralized administration of probation statewide, which inhibits accountability and efficiency. No effective, verified measures have been set to ensure departments’ proper use of best practices. Likewise, scientifically-validated instruments are not routinely used, since judges set their own criteria in each district. This is just one more problem that causes low-risk offenders to consume prison beds badly needed for dangerous criminals, and necessitates the building of costly new prisons.

### Key Findings:

- Texas’ probation population consists of approximately 455,000 people, the largest in the nation. One in 20 Texans is currently in the criminal justice system.<sup>iii</sup>
- Probation terms in Texas are 66% longer than the nationwide average, and can extend up to 10 years.<sup>iv</sup>
- Probation departments receive 1/3 of their total budget dollars through the collection of fees from probationers, which creates a financial incentive for departments to maintain long probation terms<sup>v</sup>. However, longer terms are not necessarily cost-effective: 54% of revocations (termination of probation for new crimes or violations) occur during a probationer’s first 2 years on probation.<sup>iii</sup>
- Departments often incorrectly classify probationers, resulting in misappropriated resources. For example, in Travis County, approximately 25% of offenders were found to be supervised at higher levels than were required by risk assessment, according to a 2006 Travis County impact study on supervision.<sup>vi</sup>
- There is currently no standardized method for evaluation and accountability of probation department practices.<sup>vii</sup>



- Poor supervision has created a problem of probationers absconding (disappearing from supervision). As of 2005, there were 77,439 absconders in Texas, representing 18% of all probationers.<sup>vii</sup>
- Over half of probationers are revoked and sent to prison annually,<sup>viii</sup> comprising 33% of Texas prison intakes and 41% of state jail intakes.<sup>ix</sup>
- Technical violations (e.g. missing a payment, failing to attend a meeting with a probation officer) are a major cause of revocation. These non-criminal violations are responsible for 55% of probationer prison revocations.<sup>x</sup>
- In 2005, probation revocations created \$1.124 billion in added incarceration costs.<sup>vii</sup>
- Nearly 60% of revoked probationers never participate in a residential treatment program prior to their revocation.<sup>v</sup>

### **Solutions:**

Given that the cost of incarcerating an individual is \$44.01 per day (ie. the cost of 18 days of prison is equal to an entire year of probation) while the cost of maintaining him or her on probation is \$2.13 per day<sup>xi</sup>, the state should spend more money on effective, community-based treatment programs and other alternatives to incarceration:

- (1) **Adopt a risk-reduction strategy. Prisons only *contain* risk. Probation – if properly implemented – reduces risk.** As such, probation must be structured with an overriding risk-reduction strategy that aims to change the behavior of offenders to decrease their likelihood of re-offending; probation should not (as it currently does) operate only to oversee the judge-ordered requirements mandated to probationers. The risk-reduction strategy should be reflected in all areas of administration, including the design of supervision and sanctioning practices, choice of programs administered, and funding and management. Such a strategy will likely lead to a change in culture and in the attitudes of probation officers and administrators, which will better accomplish Texas' public safety needs.
  - **Implement shorter and stronger probation terms.** Instead of maintaining long, ineffective probation terms, departments should focus probation officer resources where they are needed most. Specifically, supervision should be heaviest during the early critical period (the first 6 months) of probation terms, with officer caseloads adjusted accordingly. In addition, terms should be limited to periods when supervision is most effective (5 years or less), and early release should be used as an incentive for good probationer performance.
  - **Implement a risk-reduction funding strategy.** Resources must be distributed to probation departments based on need (using a risk/need profile of each department's probationer population) and efficacy (using a results-oriented program evaluation). Departments should be monitored routinely to ensure that they do not over classify the risk level of probationer for the purpose of obtaining additional funding.
  - **Increase basic funding.** Each department's fiscal incentive for implementing long supervision periods should be eliminated by increasing basic budget funding to compensate for decreased probationer fees.



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- (2) **Use evidence-based supervision and sanctions practices.** Departments should contract with licensed treatment providers and work with them to mitigate probationers' criminal tendencies and reduce the likelihood of them ending up in prison.
- **Adopt a standard diagnostic tool.** A state-validated instrument that determines each probationer's risk level and propensity for criminal behavior is a critical tool for departments that want to use resources efficiently. Individualized risk assessment and placement are key for probationer success, allowing officers to maintain a sufficient level of supervision without wasting resources.
  - **Implement progressive sanctions.** Departments should provide swift, certain, and proportionate punishments according to the severity and frequency of each probation violation. A statewide system should be adopted to define these practices in detail and provide recommended responses for each type of probationer in each situation.
  - **Eliminate prison terms for probationers who receive technical revocations.** Individuals revoked from probation for technical violations should be sent to intermediate sanction facilities; time served should be determined by a progressive sanction model. As an acceptable alternative, these individuals should be revoked to prison for terms no longer than one year and subject to mandatory release and returned to community supervision at the end of this period
  - **View probation and drug treatment separately to reduce drug-related technical violations.** Policies must change so that prison beds are not wasted on non-violent drug users. Oftentimes, addiction to drugs causes criminal activity (such as theft), because people require funds to feed their addiction. These individuals' problems should be addressed in one of two ways: (1) through drug treatment, or (2) through probation. Drug treatment will best get to the root of the criminal activity because it will address the physiological impact of the substance on the addict and help put an end to the need for criminal activity spurred by the addiction.

On the other hand, probation will help determine if the drug treatment program is truly working for that individual. For instance, if an offender fails a drug test, his or her probation officer will be able to verify that the offender's current treatment program is not working. This should not be a cause for probation revocation (as committing another crime, like theft, would be) – not all treatment programs work for every type of addiction and, on average, an addict relapses three times before successfully completing a treatment program. If an individual is punished with probation revocation for failing to control his or her illness, s/he will ultimately reenter society with the unmet need to make poor life decisions and engage in unlawful activity. Judges and probation officers must be given tools besides revocations to deal with probationers' poor decisions that fall short of new crimes, and they should invoke technical revocations and sanctions only according to the degree of risk that the violations represent to public safety and recidivism. Again, we must reserve our prison space for those who are a real threat to public safety.

- **Allow probation departments to provide treatment options to probationers with substance abuse problems.** Provide funds to probation department so they can contact with privately operated inpatient treatment providers. Those providers who choose to only treat criminal justice clients should not be required to meet DSHS rules concerning the specifications of their physical facilities (such as minimum square footage requirements) although they must comply with DSHS rules directly relating to the nature of treatment. Outpatient drug treatment for criminal justice clients administered by probation departments and private licensed contractors must comply with DSHS rules regarding treatment.
  - **Focus on victim restitution.** Probationer requirements should be directed towards restitution instead of towards community service or fine payment, in order to make those who were harmed at least financially whole.
- (3) **Mandate accountability to verify progress.** Supervision and oversight at the statewide level should be strengthened to ensure that local departments are adopting best practices and correctly implementing them, while still being given the flexibility to tailor their programs to their probationers' needs.
- **Provide technical assistance/accountability grants to all 121 probation departments to implement progressive sanctions.** To facilitate the adoption of best practices over time, technical assistance should be given to departments by providing them with expert consultants that can assist them in the implementation of new, proven programs. Local departments should be required to submit evidence-based program proposals to the Community Justice Assistance Division (CJAD) before being given program funding. Technical assistance and grants should be provided for (a) organizational change, (b) supervision strategies, (c) accountability and auditing of programs, and (d) program improvements supporting risk reduction. To secure renewed funding, programs should be subject to periodic review based on a cost-benefit analysis of outcome measures of risk reduction, including recidivism and probationer success rates.
  - **Monitor departments use of classification tools.** If funding is based on risk, departments should be monitored routinely to ensure that they do not over classify the risk level of probationer for the purpose of obtaining additional funding.
  - **Share what works.** CJAD should compile an annual report to be distributed to judges and probation directors that assesses the successes and failures of all programs using the outcome measures of (1) completion and (2) recidivism rates of program participants. Post-completion program evaluations should include an examination of rates of probationer recovery, employment and educational attainment.



## Implement Parole Guidelines to Make Room for Violent Untreatable Offenders

### Background:

*“If you [TDCJ] just followed your own [parole] guidelines, we wouldn’t have a [prison] capacity problem right now.”* - Senator John Whitmire (D-Houston), Chairman of the Senate Criminal Justice Committee

In addition to probation revocations (discussed in the previous section), limited parole release rates are another major cause of prison overcrowding. As of 2005, 25,688 low-risk, low-severity inmates (Level 5, 6, and 7 offenders) were considered eligible for parole according to standards set by the Texas Board of Pardons and Parole (TBPP), yet less than half were released.

Currently, the parole rate in Texas is approximately 27%. The parole guidelines set by TBPP call for a minimum parole rate of 31%. If TBPP adheres to its own guidelines and increases the release rate by 4%, the state will not have to waste \$2.151 billion over 20 years to build and maintain three new prisons. In addition, if the parole board adheres to its own guidelines, its caseloads will decrease, thus allowing TBPP to devote more time to evaluating difficult and high-risk cases, which would ultimately increase public safety.

### Key Findings:

- Of the 71,027 parole-eligible inmates reviewed by TBPP in 2005, 19,582 were released, representing 27.5% of total applicants. This rate is 12.5% lower than the level recommended by TBPP’s own guidelines.<sup>xiii</sup>
- In 2005, TBPP released 24% fewer Level 7 offenders (who are the lowest risk, non-violent offenders) and 10% fewer Level 6 offenders (also non-violent offenders) than minimum guideline levels. Following the guidelines would have resulted in a net gain of 2,252 available prison beds.<sup>xiv</sup>
- Granted parole rates vary greatly between the 6 state parole boards. In Gatesville, Level 7 inmates were 1/3 less likely to be released on parole than in Palestine, while in San Antonio, Level 1 inmates were nearly 30 times more likely to be released than in Palestine.<sup>xiv</sup>
- TBPP has the authority to grant parolees early release if they meet certain criteria and serve half their parole term. Currently, 5,812 offenders are eligible for early release, but TBPP has not granted a single one.<sup>xiii</sup>
- Problems with re-entry and treatment programs bottleneck parole releases: waiting lists for TDCJ’s rehabilitation programs each extend 6 months or longer,<sup>xiii</sup> while 462 inmates currently approved for release are still incarcerated solely because they cannot secure an address.<sup>xiv</sup>

**Solutions:****(1) Strengthen Parole Review**

- **Match the guideline-recommended parole levels to actual release rates.** TBPP must evaluate cases according to risk level and avoid releasing high-risk offenders too early or low-risk offenders too late. Effective use of the guidelines would provide parole panels more time to evaluate remaining cases where a decision might be tougher to reach. Furthermore, following the guidelines would allow prisons to retain more high-risk offenders (Levels 1-4) in custody, which would increase public safety while decreasing pressure for additional prison capacity. To best ensure TBPP increases release rates in accordance with their own guidelines, policy-makers should modify them to create a presumption for parole for Level 6 and 7 offenders.
- **Create and maintain a presumptive parole roster.** Policy-makers should instruct TBPP to create a range in the guidelines that is presumptive for parole, unless some salient factors specified in legislation are not met. In other words, although the Parole Board should still have the discretion to deny parole for offenders falling within the presumptive ranges of the guidelines, the general expectation should be that parole is granted for low-risk, low severity offenders.

Specifically, for Level 6 and 7 offenders, parole officers should review each offender's case and flag those that may require further review by the entire parole board. Cases should be flagged if the offender has disciplinary problems, sex violations, gun involvement, or is a member of a gang; in addition, a case should be flagged if the offender physically injured a victim, if a victim or local official protests the parole, or if the offender will have housing or placement problems on release.

Unless a case is flagged for further scrutiny, the names of Level 6 and 7 offenders eligible for parole should be submitted to the parole board on a weekly or monthly basis with the presumption that these offenders will be released. These individuals should then be granted parole if any single board member votes in favor of release. Offenders whose cases were flagged should be further examined before parole is considered; later, those cases can also be approved with one vote from any board member.

- (2) Strengthen Parole Programs.** One factor that TBPP claims is contributing to low parole release rates is the insufficient number of treatment and reentry facilities that exist to place parolees, which forces TBPP to act as a bottleneck for prisoners who are qualified for release. As such, we must untie the hands of TBPP members who want to fulfill their responsibility to the state. The following programs should be implemented or expanded to provide the necessary resources for release:

- **Personal responsibility initiatives.** Texas must expand personal responsibility programs that facilitate successful reentry to reduce rates of recidivism and bolster parolee success. These include adult education programs, job placement programs, financial management programs, and housing assistance programs.



*“Parolees require supportive parolee housing so that they will not re-offend, and can successfully reintegrate into their communities. Communities require secure parolee housing, so that those who live near parolees will not suffer from increased crime and devaluation of their properties. State and local governments require efficient parolee housing so that they can easily and affordably keep track of parolees’ whereabouts.”* - Benjamin Singerman and Joan Petersilia, authors of “The Lynchpen to Parole Reform: A Case Study of Two Parolee Housing Proposals in Redlands, California”

- **DWI prevention programs.** Instead of building a new medium-security facility that would cost \$62.9 million, Texas should use the money to fully strengthen existing inpatient and outpatient treatment programs that focus on treating alcohol addictions that lead to DWIs. The state should also mandate the installation of ignition interlock devices in personal vehicles of habitual DWI offenders in order to prevent them from starting their cars when intoxicated. Note: ignition interlock has not been proven effective for first-time DWI offenders.

### (3) Require Efficiency and Accountability

- **Increase use of “Medical Special Needs” parole.** For parolees who are terminally ill and are no longer a threat to society, Texas should repeal the requirement that an offender must be within 6 months of death to be removed from prison, as well as use GPS tracking in conjunction with placement in a nursing facility or hospice to monitor the parolees’ whereabouts.
- **Improve communication strategies between juvenile, probation, and parole departments.** Some families have multiple members under the supervision of different authorities. (For example, a father can be on parole for substance abuse while his son or daughter is on juvenile probation.) However, as is often the case, these different authorities do not communicate with each other, due in part to the absence of uniform datasets across agencies. Departments must be given incentives and provided with resources to share information, making their supervision strategies more effective, and better assisting judges and treatment providers. Ultimately, creating gateways of communication between departments will allow supervisors to coordinate efforts with regards to families, in turn decreasing the likelihood that the individuals under supervision will re-offend. The goal of information sharing should be to provide a holistic service to increase the success rate of those under supervision.



## Establish a Recidivism Prevention Infrastructure

### Background:

*“For the addicted, the fight is an ongoing struggle for their own lives. The process of treatment and recovery is personal, and each individual’s treatment needs are different. And as a result, treatment programs must address a wide range of physical, mental, emotional, and spiritual needs. When properly tailored, alcohol and drug addiction treatment can be very effective.”* - President George W. Bush

Currently, thousands of individuals who suffer from drug addiction and/or mental illness are in Texas prisons. Meanwhile, Texas has an inadequate number of substance abuse treatment providers, both in and out of prison walls, to deal with their addictions and related crime.

In order to enhance public safety by decreasing drug-use related crime, Texas must curb drug abuse and drug dependence. Every crime reduction strategy should include a solid drug treatment plan in order to break the cycle of drug use, addiction, and crime as early as possible. Specifically, non-violent drug users entering the criminal justice system should be guaranteed access to effective, professionally supervised treatment and rehabilitation programs, as well as programs designed to enhance employability and personal responsibility (like education programs). Furthermore, in-prison treatment must be coupled with community-based aftercare to best ensure program and personal success.<sup>xvii</sup> Even the most expensive treatment program is less expensive – and far more effective – than the costs of building and maintaining three additional prisons which would only manage (not reduce) risk.

### Key Findings:

- **Every dollar spent on treatment will yield \$7 in future savings.**<sup>xviii</sup>
- Texas has the largest incarcerated population in the U.S., 80% of which reports a history of drug and alcohol abuse.<sup>xix</sup> Approximately 55% report using drugs or alcohol when committing the crime that resulted in their incarceration.<sup>xx</sup>
- Texas currently spends more to incarcerate people for drug possession (\$274 million) than the state invests in all forms of substance abuse treatment.<sup>xxvi</sup>
- Texas spends approximately 90% of criminal justice funds on prison beds or “hard incarceration.” Only 10% goes towards community-based programming, like substance abuse treatment and probation programs.<sup>xxi</sup>
- A 2002 survey of Texas’ state jail inmates found that 52% of women and 44% of men met the criteria for alcohol or drug dependence.<sup>lvi</sup>
- Statistics confirm that states with higher rates of incarceration for drug offenses experience higher—not lower—rates of drug use.<sup>liv</sup> Approximately 22% (32,550) of Texas prisoners are incarcerated for non-violent drug offenses.<sup>lv</sup>
- Approximately 90% of Texas prisoners have not received formal substance abuse treatment during incarceration.<sup>xxiii</sup>
- Research shows that evidence-based treatment programs are more likely to reduce crime than “tough on crime” penalties. After conducting an analysis of various criminal justice models, the Texas Criminal Justice



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Policy Council found that offenders who received appropriate treatment were 4 times less likely to go back to prison than those who did not receive treatment.

- Other studies have shown that severe punishments for low-level offenses can have the opposite effect of that intended. According to the National Institute of Corrections at the U.S. Department of Justice:
  - **Punishment produced a -0.07% change** in an individual's inclination towards criminal activity (meaning it increased criminal behavior).
  - **Treatment produced a 15% positive change** in an individual's inclination towards criminal activity (meaning it decreased criminal behavior).
  - **Cognitive skills programs produced a 29% decrease** in an individual's inclination towards **criminal activity** (meaning they were most effective at decreasing criminal behavior).

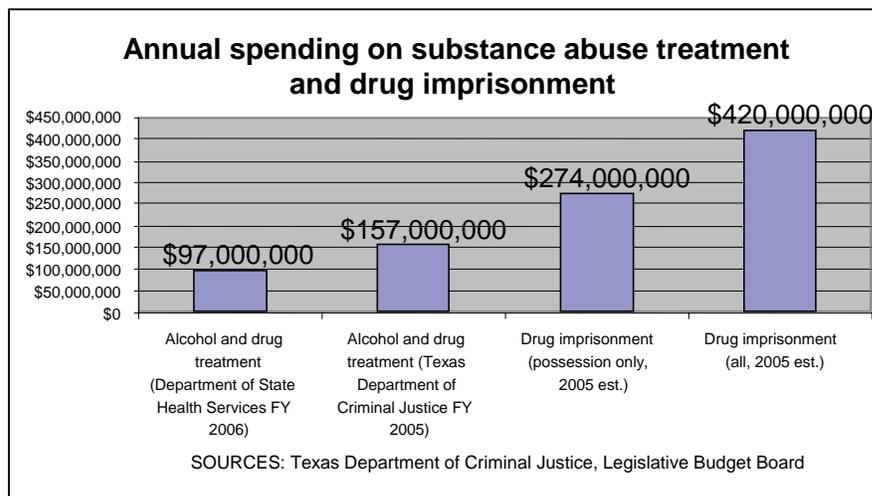
### Solutions:

- (1) **Create and make available tailored, coordinated, and effective community-based substance abuse treatment programs.** Texas must tackle the problem of drug abuse head on. We must halt the wasteful expenditure of millions of dollars each year on the incarceration and re-incarceration of non-violent drug users, who would be better managed through rehabilitation programs. We must also promote medical and public health responses to drug abusers and reject the policy of incarceration for non-violent defendants charged with drug possession or drug use. The state should ensure that drug testing is used as a treatment tool, with relapse understood to be a part of the process of recovery and not an occasion for punishment. In order to do so, the following should be accomplished:
  - **Implement a treatment diversion program for drug offenders who do not commit violent or sex-related crimes.** Individuals convicted up to three times for drug-possession offenses should be diverted by judges to treatment programs for substance abuse instead of incarceration. Judicial discretion may be exercised to redirect such offenders directly to incarceration if they commit a violent or sex-related crime, or if a preponderance of evidence indicates that they represent a threat to public safety or are not amenable to successful rehabilitation.
  - **Strengthen the current treatment infrastructure while maintaining service accountability.** Approximately 80% of those incarcerated in Texas prisons have a history of substance abuse problems.<sup>xxiii</sup> For those already within prison walls, a transition plan should be developed to include how each offender will most successfully reintegrate into society. For offenders who will be entering the system, front-end changes need to be made. Specifically, during each offender's intake process, his or her history should be assessed to determine severity and evaluated to create an individualized plan best suited to respond to his or her substance abuse problems (or other issues).
  - **Increase the allocation of funds for the treatment of substance abuse addiction and mental health illnesses.** Texas has substituted prisons for treatment centers. Meanwhile, federal and state funding for treatment programs outside prison walls has been declining since 2003 and is now insufficient to provide adequate services. Texas should utilize the \$8.2 billion



surplus in the state budget<sup>xxiv</sup> and divert the \$711.5 million that was to go towards new prison construction to fund new treatment programs – in turn helping to offset over-incarceration costs presently being shouldered by Texas taxpayers. Since every dollar spent on treatment yields \$7 in future savings, \$711.5 million allocated for treatment will translate to \$4.98 billion in savings.

Texas must also help to sustain existing treatment programs. Currently, there are 433 certified programs in Texas that deal with the broad range of substance abuse needs; only 10% serve criminal justice clients. Generally, these latter treatment providers have a limited amount of outpatient program availability. More problematic, they often choose to treat the clients who will pay higher rates because they must support their own program survival (as their funding comes from fees). These treatment providers often accept (1) federal clients who pay treatment fees of \$60/65 per day (or more), or (2) clients who fall under the Department of Health and Human Services who pay treatment fees of \$46 per day; they are less likely to serve probationers and parolees with judge-ordered drug treatment requirements or Substance Abuse Felony Punishment (SAFP) clients who must receive outpatient aftercare because there is no financial incentive: providers only receive \$33 per day in treatment fees for these clients.



Increasing this bracket's fee amount to at least \$46 per day will increase the likelihood of providers contracting with probation and parole departments (as well as the Department of Criminal Justice in general) to fulfill current treatment needs.

- **Increase the number of qualified treatment professionals that focus on criminal justice clients.** Through incentives, Texas must recruit, train, and retain quality professionals in the field of substance abuse treatment. The average salary of a drug treatment counselor (\$30,000) is not competitive enough to attract an adequate amount of qualified professionals. The state should adopt a loan forgiveness program for those entering the difficult field of substance abuse treatment. In addition, individuals who have already paid their student loans and who are considered well performing employees within this profession should be eligible to receive merit bonus incentives over the long term.
- **Increase funding for Transitional Treatment Centers as well as outpatient and aftercare programs, and ensure that Substance Abuse Felony Punishment (SAFP) facilities use evidence-based, effective treatment practices while following the necessary three step approach.** Of individuals



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with substance abuse problems, 85% can be treated in community based programs, but 15% will require programs like SAFFP. All SAFFP facilities must utilize a three step approach to be effective: First, substance abusers must stay in SAFFP for 9 months instead of the current 6-month stay. Second, after SAFFP, individuals need to be admitted to a Transitional Treatment Center for 90 days. Finally, individuals must spend 9-10 months in an outpatient program. As has been demonstrated by past attempts to use SAFFP to address drug addiction for those who cannot be treated in community-based programs, recidivism rates do not decrease without implementation of all three of these components.

- **Increase availability of drug courts.** Given drug courts' effective approach in dealing with addiction, the state should provide financial incentives to counties to create drug courts that are accessible to a greater number of people.
- **All funding made available for community-based chemical dependency and mental health treatment, intervention, prevention and support services must be provided to the Department of State Health Services (DSHS), Texas Correctional Office on Offenders with Medical or Mental Impairments (TCOOMMI), TDCJ Community Justice Assistance Division (CJAD), and the Parole Division.**

Services using this funding must be provided by DSHS licensed facilities and licensed professionals to ensure effective and quality services.

The amount of funding allocated to each one of these designated state agencies shall be determined by two main factors: (1) the number of clients that can be treated through the agency's existing infrastructure and (2) the performance measures that each entity adopts.

Furthermore, service rates paid for criminal justice clients must equal the Department of State Health Services and traditional Texas Medicaid rates in order to be competitive for the most effective and high-quality services. Privately operated inpatient treatment programs that only treat criminal justice clients are not required to meet DSHS rules concerning the specifications of their physical facilities, such as minimum square footage requirements, although they must comply with DSHS rules relating to the treatment provided.

Probation and parole departments may utilize these funds to create and run treatment programs within their respective agencies for the purposes outlined above, provided that they meet relevant standards for treatment equal to those mandated for contractual providers who comply with DSHS regulations.

Outpatient drug treatment for criminal justice clients administered by probation departments and private contractors must comply with DSHS rules regarding treatment.

All agencies receiving these funds must give highest priority to criminal justice clients and their families when using the aforementioned funds.



## Improve Personal Responsibility Tools: Create an Enhanced Employability and Employment Protection Policy

### Background:

***“People out of prison who want to take a different path deserve the chance.”***

- Christy Visher,  
investigator for the  
Urban Institute

Texas has over 100 state laws that forbid felons from obtaining jobs. Texas law also designates 1,941 individual offenses as felonies, which results in a huge felon population in Texas. In 2005 alone, the Texas Department of Criminal Justice released 64,512 felons from incarceration. These are people who must find jobs and housing or else risk turning to illegal activity to survive. But in addition to employment-prohibitive state laws, many parolees are released to society with few job skills, a low educational level, drug and alcohol problems, and a host of psychosocial adjustment issues – all of which lead to greater job instability and, on average, low income levels.<sup>xxv</sup>

A person’s contact with the criminal justice system also poses problems for potential employers: under the legal theory of negligent hiring, employers who know (or should have known) that an employee has a history of criminal activity may be liable for the employee’s criminal or tortious acts.<sup>xxv</sup> In order for these potential employees to pay their debt to society by living responsible, productive, and law-abiding lives, they must be given the tools to succeed.

### Key Findings:

- Approximately 1 in 11 Texas adults has a felony conviction on his or her record.<sup>xxvi</sup>
- Each year in the U.S., over 650,000 people leave prison unprepared for their return to society.<sup>xxvii</sup> Many have untreated substance abuse disorders, lack adequate education and job skills, and face homelessness.
- Many state and local governments exclude people with criminal records from public employment.<sup>xxviii</sup> Furthermore, many states do not have laws prohibiting discrimination by employers based on an individual’s criminal record.<sup>xxviii</sup>
- According to a survey conducted in 2002, approximately 87% of respondents leaving Texas prisons who did not already have a job to go to thought they would need *some help* or *a lot of help* in finding a job.<sup>xxix</sup>
- A 2004 survey found that approximately 80% of big companies in the U.S. reported conducting criminal background checks, up from 56% in 1996.<sup>xixviii</sup> Other research shows that 30-40% of all employers actually check the criminal history records of their most recently hired employees.<sup>xxv</sup>
- Approximately 65% of all employers would not knowingly hire an ex-offender, according to a 1996 survey.<sup>xxv</sup>
- Other studies show that ex-offenders are 1/2 - 1/3 as likely to be considered by employers.<sup>xxv</sup>



## PRISON OVERCROWDING

### Solutions:

- (1) **Provide a reintegration plan.** Upon release, each prisoner should be provided verification of his or her work history during incarceration as well as certification of educational and/or treatment programs completed. They should also be provided a driver's license, identification card, social security card, and birth certificate. This information will facilitate the ability of offender to obtain employment, housing and other benefits.
- (2) **Provide parole and probation officers with tools necessary to help those they supervise obtain jobs.**
  - **Parole and probation officers should maintain an updated reference list of employers throughout the state or region who are willing to hire ex-offenders.**
  - **Parole and probation officers should have authority similar to Project RIO to bestow tax credits** already provided by the federal government to employers willing to hire ex-offenders who are under the supervision of parole or probation officers.
  - **Parole departments should offer incentives for officers to assist offenders find jobs.** For each probationer under the supervision of a department are found to be employed and kept employed, the state will provide additional funding to parole and probation departments to be used as financial reward for parole and probation officers directly working with those offenders. **This will create an incentive for parole and probation officers to actively seek new employers willing to participate in the program and assist in expanding the updated list.**
- (3) **Give legal protection to employers willing to give ex-offenders a second chance.** Prevent employers from being liable for lawsuits prompted by the criminal or tortuous acts of a non-3G ex-offender employee, with the exception of gross negligence and liability regulated under Labor Code Title 5, Workers' Compensation. This initiative would encourage employers to give ex-offenders an opportunity to reintegrate into the workforce.
- (4) **Seal the records of non-3G, non-habitual ex-offenders.** Individuals with public criminal records face obstacles in finding employment. A person's sealed record should not be able to be considered by a private or public entity in employment matters except for by a licensed professional certification processes. This employability enhancement would improve public safety by drastically decreasing recidivism and allowing ex-offenders –who might otherwise be forced to resort to criminal activity to find an income –to take personal responsibility and become tax-paying Texans. *(Notes: This policy would exclude 3G offenses which include murder, capital murder, indecency with a child, aggravated kidnapping, aggravated sexual assault, sexual assault, aggravated robbery, and certain serious drug and deadly weapon offenses. Nondisclosure will not apply to law enforcement agencies, the Department of Corrections, State Attorneys, other prosecutors, and certain professional licensing boards.)*



## Improve Personal Responsibility Tools: Broaden Access to Housing

### **Background:**

In 2005, TDCJ released nearly 6 times the number of felons it released in 1980.<sup>xxx</sup> For tens of thousands of these former inmates, the question of where they will live upon re-entry to society is immediate and critical. It also has important consequences for society at large: current evidence indicates that ex-prisoners are more likely to re-offend if they do not find accommodation on release.

*“Why can’t I get a chance to prove myself a decent person, and show I’ve changed?” - ex-offender looking for housing*

### **Key Findings:**

- Federal laws passed in 1996 and 1998 permit public housing agencies to deny housing to anyone who has ever engaged in “any drug-related” activity. Since these laws have been implemented, the number of applicants denied public housing because of “criminal backgrounds” has doubled, from 9,835 to 19,405.<sup>xxxi</sup>
- Under federal and state statutes in all 50 states, rental property owners may screen for and refuse to rent to people with criminal backgrounds.<sup>xxxii</sup>
- According to a 1997 study, approximately 12% of Texas state prisoners reported that they did not have housing at the time of their arrest, which increases the likelihood that an ex-offender will have difficulty finding housing when released. Likewise, the likelihood of homelessness increases for those with mental health and substance abuse problems.<sup>xxxiii</sup>
- Women with minor children find securing housing particularly challenging given their limited economic resources.<sup>xxxiv</sup>
- Programs that match offender needs with offered services are estimated to reduce recidivism risk by as much as 50%.<sup>xxxv</sup>
- A study of the District of Columbia found that crime was no more prevalent around halfway houses for ex-offenders than in areas where there were no such facilities.<sup>xxxvi</sup>
- Only 1/3 of homeless ex-offenders have their needs met through supported accommodation.<sup>xxxvii</sup>

### **Solutions:**

- (1) **Prevent Texas counties from using zoning laws to bar churches and other direct service providers from assisting ex-offenders, and create financial incentives for those counties that facilitate the reintegration of ex-offenders into their communities.** Counties committed to the reintegration process will receive full financial assistance from the state to operate and construct re-entry facilities.



## PRISON OVERCROWDING

Counties are creating an unfunded mandate to the state by failing to provide housing infrastructure to former resident ex-offenders, unduly burdening the state. Therefore, counties must accept back those who must be re-integrated into society, and if they are not willing to allow placement into housing facilities in existing neighborhoods or communities from which the individuals came, then they should have to pay a reentry infrastructure fee to create comparable facilities to meet Texas' public safety needs.

Additionally, county and state governments should encourage public education efforts that inform residents about the importance of religious and non-profit activities geared toward ex-offender reintegration.

- (2) **Require the state to provide contact information regarding social services and job opportunities in the various communities to paroled and discharged prisoners upon release.** Paroled and discharged prisoners are often under stress caused by the transition of leaving incarceration and are unable to find pertinent information relating to social services, housing, and employment. Therefore, TDCJ should provide an information packet to ex-inmates at the time of their release which includes the addresses and telephone numbers of workforce offices throughout the state; viable housing options (both private and public); and contact information for support groups including churches, peer-to-peer counseling groups, and other charitable institutions.
- (3) **Fund additional supportive units for ex-offenders.** Most public housing laws and regulations stipulate a "one-strike" rule that automatically bars anyone with a criminal record (however minor the offense) from eligibility for public housing. Additional housing units would help keep ex-offenders off the street and in sustainable homes where they are less likely to re-offend.
- (4) **Offer tax incentives to landlords who provide housing to ex-offenders.** Tax breaks should reward landlords who give ex-offenders a second chance to successfully reintegrate into society.

Within the limitations of federal law, the housing commission should be directed to maximize the availability of low cost housing options for ex-offenders and those currently under community supervision.

- (5) **Create a pilot program with a family mentoring reintegration plan.** This program will provide a small payment to allow qualified caring families and individuals throughout the state to house low-risk, low-severity ex-offenders eligible for parole but lacking housing in their homes. This will allow ex-offenders to experience the family support they may never have had and also receive transitional housing for up to 12 months while seeking employment. Eligibility to become a host is contingent upon a clean criminal record. Families should be allowed prior review and approval of the individuals they take in.

## Part 2: Effective Policing

- Enhance Consent Search Policies
- Improve Data Collection
- Protect State and Local Police from Wrongful Arrest Liability

Positive community relationships are a necessary and vital ingredient of effective policing. Without strong ties to the communities they serve, law enforcement officers are not able to understand, inform, and protect those who are most vulnerable to crime. Furthermore, when law enforcement practices are perceived to be biased or unfair, the general public, and especially minority communities, are less willing to trust and confide in officers, report crimes, be witnesses at trials, or serve on juries. Building community trust must therefore be the cornerstone of police actions. This can be accomplished by reducing the unproductive practice of consent searches, creating a data repository that can help to identify ineffective police practices, and clearly defining public safety officers' roles in interactions with vulnerable communities. Effective community policing is a mutually beneficial goal that will allow both officers and civilians to assist each other in encouraging communication and protecting public safety.



## Enhance Consent Search Policies

### **Background:**

Although the law requires a minimum standard of probable cause for police to justify a search, officers that have no reason to suspect criminal activity may still ask for “consent” to search at a traffic stop. In fact, many law enforcement officers rely on the use of consent searches in the absence of an existing legal basis for a search. Because most people do not realize they have the right to say “no” to a consent search, many Texans are subjected to them.

The problem: consent searches rarely result in the discovery of contraband or other wrongdoing. As such, the practice of conducting consent searches diminishes public safety by diverting critical resources (officer time and energy) away from more productive crime-fighting tasks. Furthermore, because most consent searches are conducted without written and verifiable permission for the search, defendants have the opportunity to contest the search in court – which poses the risk that even a fruitful search which does produce contraband may not result in a prosecutable case.

### **Key Findings:**

- The Fourth Amendment guarantees the public freedom from unreasonable searches. Law enforcement should not rely on trickery or intimidation to coerce people into giving up their Fourth Amendment right at traffic stops.
- In 2004, consent searches comprised 30% of all searches conducted at Texas traffic stops.<sup>xxxvii</sup>
- According to useable data provided by Texas law enforcement agencies, officers do not find contraband in approximately 88% of consent searches.<sup>xxxviii</sup>
- In 2004, approximately 2/3 of Texas law enforcement agencies reported consent searching Blacks and Latinos more frequently than Anglos.<sup>xxxviii</sup>
- After the Austin Police Department implemented a policy requiring written consent at traffic stops, the number of consent searches during traffic stops declined to from 15,785 in 2003 to 11,250 in 2004. Furthermore, 63% fewer Austinites consented to police searches of their vehicles when they knew they had the right to refuse.<sup>xxxviii</sup> There was no decline in public safety.
- New Jersey, Minnesota, Rhode Island, and the California Highway Patrol require a “legal basis” for all searches.

**Solutions:**

- (1) **Prohibit consent searches.** Consent searches rarely result in findings of wrongdoing and thus waste officers' valuable time. Limiting searches to those based on probable cause rather than speculation would better direct an officer's energy towards productive, crime-reducing police practices that increase public safety. Furthermore, ending consent searches protects the public's right to freedom from unreasonable searches, as all searches would have a legal basis. Ensuring such an equal standard for searches builds community trust in law enforcement.
  
- (2) **Require written or recorded consent prior to a search as an acceptable alternative to a complete prohibition.** Written or recorded consent provides a more solid basis for successful prosecution: it decreases the likelihood that the hard work of police officers is lost on technicalities, because motorists are less likely to be able to contest a vehicle search when an officer can prove written permission for that search. Even the Texas District and County Attorneys Association advises that "Although oral consent is sufficient, written consent is definitely preferred to oral consent because it reduces the likelihood of a swearing match in court later."<sup>xxxix</sup> In addition, written consent forms that require police to inform individuals of their rights prior to a search help to build a better relationship between police and community members, many of whom feel they are unfairly targeted through the use of consent searches.



## Improve Data Collection

### **Background:**

Although Texas' racial profiling law (S.B. 1074, effective 2001) mandates that law enforcement agencies must annually collect and report racial profiling data, there are few measures in place to ensure the accurate collection and consistent reporting of this data. Currently, each agency is required to report its annual data only to its own local governing body. The Texas Criminal Justice Coalition (TCJC) is the sole source of cross-agency monitoring; we use the Texas Public Information Act to request a copy of each agency's data and analyze it for compliance and trends.

Since 2001, we have determined that the means by which agencies collect and report their data differs greatly from agency to agency, due in large part to the fact that S.B. 1074 did not create uniform reporting standards. In addition, we continue to find that some agencies are not collecting the data required by law, while others are not reporting the data to their governing bodies. Ultimately, this lack of compliance with the law prevents agencies and community members from knowing the effects of local stop and search practices. Only with uniform data – reported annually by every law enforcement agency in Texas – can we have apples to apples comparisons, which enable police supervisors to identify stop or search disparities within their own departments and make internal policy changes that improve the way they protect the public.

### **Key Findings:**

- Of agencies that responded to TCJC's open records request for a copy of their data in 2005, 16% of agencies did not report all basic stop and search data elements required by S.B. 1074.<sup>xxxviii</sup> Approximately 21% of agencies did not report on required *racial* data for each required data element.<sup>xxxviii</sup>
- Also in 2005, more than 20% of all agencies did not report using any data auditing procedures or audio-video review to ensure against human or technical errors or data tampering.<sup>xxxviii</sup>
- Throughout each year of coalition data collection, several departments have failed to respond to initial or follow-up open records requests for data.<sup>xxxviii</sup>
- Law enforcement agencies have begun to recognize that data collection, analysis, and findings can be valuable. Some supervisors have expressed that, had they understood the positive impact of proper data collection and use sooner, they would have changed internal policies earlier to mirror those already implemented by other agencies for the sake of efficiency and productivity.

**Solutions:**

- (1) **Adopt uniform reporting standards.** Policy-makers should confront the problems posed by inadequate reporting procedures and provide departments with a framework for consistent data submission that will produce usable and cost-effective data analysis. Law enforcement agencies and taxpayers invest significant resources in data collection and deserve accurate data comparisons and analysis.
- (2) **Establish an independent statewide repository for the reports.** Agencies should not only submit their annual reports to their local governing bodies (to best maintain local oversight), but they should also submit their reports to an independent, neutral, centralized agency authorized to implement the above-mentioned standardized reporting format. This independent statewide repository would be in the best position to monitor compliance with S.B. 1074, collect and maintain data on a statewide level, and produce an annual statewide analysis of the data. Furthermore, it would effectively enable law enforcement agencies to compare their data to determine best practices. Finally, the repository would aid law enforcement agencies, policy-makers, and the public in accessing racial profiling data and addressing racial profiling issues. *TCJC is willing to serve as a technical advisor in the implementation of a new statewide repository and will continue to assist law enforcement with technical questions.*
- (3) **Require departments to collect a handful of additional explanatory data elements.** Currently, Texas law enforcement agencies do not collect information on stops that do not result in a citation or arrest; as such, the race of motorists who are stopped (and possibly searched) but not issued a citation or arrested is not tracked under the law. Likewise, agencies are not required to collect contraband data; therefore, though it can be determined how many searches are being conducted by most departments, it cannot always be determined if those searches are actually productive. Finally, agencies are not required to differentiate resident from non-resident motorists; this prevents comparisons of stopped motorists (many of whom may be commuters or out-of-towners) with local Census data to determine racial disparities in traffic stops. Texas agencies should separately collect, analyze, and audit non-citation data (including warning and release data), jurisdiction data, and contraband data, which would provide the state access to a more useful, concrete, and detailed set of state racial profiling data for a given year – a dataset that would allow for more serious efforts at achieving departmental accountability and transparency for the public.



## Protect State and Local Police from Wrongful Arrest Liability

### Background:

***“For immigrant victims [of domestic violence] ... abusers use control over their immigration status as a tool and threaten to turn them in to INS. When a woman hears ... that her sister was turned into INS when she called for police to help her on a domestic violence case, it is the ultimate barrier. Women won’t call for help. Women won’t cooperate in getting abusers prosecuted. And so it has an incredible chilling effect.”*** -

Leslye Orloff, Associate Vice President and Director of the Immigrant Women Program, NOW Legal Defense and Education Fund

Currently, state and local law enforcement officers cannot arrest a person solely for the civil violation of unlawful presence in this country.<sup>xi</sup> The enforcement of civil provisions, which include the detention and deportation of undocumented immigrants, is exclusively a federal responsibility. As such, when state and local law enforcement agencies choose to enforce immigration laws, their authority has traditionally been limited to enforcing criminal provisions of federal law, such as the misdemeanor criminal offense of entering the United States illegally.

In Texas, law enforcement officers are generally not authorized to make arrests for misdemeanors committed outside their presence.<sup>xl</sup> Instead, police authority to arrest and detain a person is strictly defined to ensure that police remain focused on protecting public safety. Turning police officers into immigration enforcers who have the ability to enforce criminal and civil provisions of federal law will reduce public safety by discouraging witnesses and victims to cooperate with police, and will increase departmental liability for an officer’s enforcement mistakes.

### Key Findings:

- Local police do not have the training or expertise to enforce immigration laws.
- Liability concerns have arisen over police enforcement of immigration laws. In a 1994 incident, police in Katy, Texas, conducted raids in search of illegal immigrants. More than 80 of the individuals temporarily detained were Hispanics who were either U.S. citizens or foreign nationals in the country legally. The Katy Police Department faced numerous lawsuits alleging civil rights violations.<sup>xli</sup>
- Peaceable migrants assist police officers in the investigation and prevention of crime – and thus help to increase public safety – if they are not afraid to communicate what they know.
- A 2003 study showed that first-generation immigrants to the U.S. were 45% less likely to commit violence than third-generation U.S. citizens.<sup>xlii</sup>
- Should local police begin enforcing immigration laws, more women and children struggling with domestic violence will avoid police intervention and help.<sup>xli</sup> U.S.-born domestic violence victims report their abusers in 1 out of 2 instances; immigrant victims report in 1 out of 4 instances; and undocumented immigrant victims report in just 1 out of 7 instances.<sup>xliii</sup>

**Solutions:**

- (1) **Increase public safety by preventing state and local law enforcement authorities from enforcing immigration violations.** Local police agencies depend on the cooperation of immigrants, legal and illegal, to prevent and solve crime. Without assurances that they, or their families, will not become targets of an immigration investigation and possible deportation, many immigrants with critical information will not come forward.<sup>xliv</sup> Furthermore, adding enforcement responsibilities to officers' duties will overburden police resources and decrease the amount of time available for officers to engage in their primary responsibility: preserving community safety and arresting criminals.<sup>xliv</sup> Officers must continue their efforts to maintain a trusting relationship with community members by avoiding the racial discrimination inherent in attempting to identify undocumented immigrants.<sup>xl</sup>



### Part 3: Access to Justice

- Ensure Valid Waivers of the Right to Counsel
- Maintain Funding for Effective Indigent Defense Delivery Models
- Improve Access to Bond Options
- Amend the Post-Conviction DNA Statute
- Create an Innocence Advisory Council

Both the Texas Constitution and the United States Constitution ensure that an individual is entitled to legal representation regardless of whether he or she can afford it. Additionally, any individual wrongfully convicted of a crime is entitled to the available tools to prove his or her innocence. However, there are many obstacles to truth and justice in Texas' criminal justice system, especially for individuals with limited resources.

Texas must make improvements to the provision of indigent defense services. Policy-makers should ensure that every defendant's waiver of the right to counsel is valid; continue to allocate funds for effective indigent defense delivery models; and give defendants more opportunities to contribute financially to their own defense.

Furthermore, in light of recent advances in DNA forensic technology, Texas should create an entity to identify and publicize the common causes of wrongful convictions. Policy-makers should also amend the post-conviction DNA statute to more easily allow judges to grant DNA tests to prove a defendant's innocence and more easily allow defendants to collect compensation after exoneration.



## Ensure Valid Waivers of the Right to Counsel

### Background:

***“A defendant cannot knowingly and intelligently waive what he does not know.”*** - 4th Circuit Federal Court Opinion, *Hoffman v. Leeke*

Every individual accused of a criminal offense has a right to waive counsel and represent him or herself. However, that right can only be asserted freely if the defendant has a full understanding of it. At local, county, and state levels, defendants often make uninformed decisions because they are confused about the court process. Defendants often do not realize that if they cannot afford to hire a lawyer, they are entitled to a court-appointed lawyer for any offense punishable by confinement in jail or prison — even if the charge is a misdemeanor. Defendants also make uninformed decisions because, in some counties, court officials pressure defendants to waive their right to counsel and speak directly to prosecutors. Finally, some court

officials penalize poor defendants who request court-appointed lawyers by setting high bond rates.

Defendants who waive their right to a lawyer as a result of being subjected to pressure from court officials are exposed to a greater risk of unjust convictions and sentences. Unrepresented defendants often do not understand the charges against them, the possible defenses, and the best way to advocate for a fair and appropriate sentence. Furthermore, unlawful practices that encourage defendants to waive the right to counsel harm families, undermine public confidence in the criminal justice system, and cost taxpayers money when the state incarcerates innocent low-risk offenders or people who would have received a more appropriate sentence had they been represented by counsel.

### Key Findings:

- The right to counsel is guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution, as well as by the Texas Constitution.
- The 77<sup>th</sup> Texas State Legislature passed the Fair Defense Act of 2001 (S.B. 7) to improve the provision of indigent defense services.
- In more than half of Texas counties, less than 10% of defendants facing possible imprisonment for misdemeanor offenses receive appointed counsel, compared to a rate of 56% nationally.<sup>xlv</sup>
- People who are accused of criminal offenses and deprived of the right to a lawyer are less likely than defendants represented by defense counsel to understand sentencing alternatives; in turn, the former are more likely to receive longer prison sentences or harsher probation terms, ultimately contributing to Texas’s prison overcrowding crisis.
- Defendants who are wrongfully denied the right to a lawyer face the risk of being convicted of crimes they did not commit, leaving the public at continued risk from the true perpetrators of those offenses.
- Convictions for jailable misdemeanors that do not actually result in confinement in jail or prison may result in a number of serious consequences, including loss of employment, housing, and the right to operate a motor vehicle, according to federal and state law.
- Prosecutors have no obligation to explain all of the terms of probation to a defendant who has waived the right to a lawyer, creating a much higher risk of probation revocation for defendants who are untrained in the

law and who are forced to face the system alone.

- Practices that wrongfully deny defendants the right to counsel create the risk that factually warranted convictions may nonetheless be overturned because they are illegally obtained.

### **Solutions:**

- (1) **Clarify the Code of Criminal Procedure to strengthen requirements for waiver of the right to counsel.** A person accused of a crime may waive the right to counsel and elect to proceed to trial or enter a plea without the assistance of a lawyer, but waiver of the right to counsel should be valid only if it is an informed and voluntary decision. Waiver of the right to counsel should not be valid if it is coerced or obtained (1) without an adequate and accurate explanation of the right to counsel and of the dangers of proceeding without a lawyer, and (2) without providing a reasonable opportunity to request the assistance of counsel, appointed or retained. The Code of Criminal Procedure should be amended to assist Texas judges – some of whom may not be familiar with binding federal law requirements for counsel waivers – in eliciting valid waivers of the right to a lawyer.
- (2) **Make court procedures more transparent for unrepresented defendants.** Prosecutors and judges should not suggest counsel waivers to or otherwise initiate counsel waivers with defendants who are accused of a jailable offense until each defendant has been informed of his or her right to a lawyer and has made a decision about whether s/he wants to waive that right. Furthermore, under no circumstances should prosecutors and judges be allowed to elicit or encourage a waiver once a defendant has indicated that s/he wants a lawyer.



## Maintain Funding for Effective Indigent Defense Delivery Models

### Background:

***“When we do state-wide or county-wide planning on criminal justice, we have to ensure that we provide the same level of support and oversight for indigent defense services that we provide for other agencies and functions, or our criminal justice system will not be a system and it won’t work.”*** - Former Attorney General Janet Reno, Remarks at the National Symposium on Indigent Defense, June 29, 2000

The 78th Texas State Legislature amended Section 81.054 of the Government Code to require attorneys to pay the previously voluntary \$65 annual Legal Services Fee to fund effective indigent defense delivery models. The funding generated by the Legal Services Fee has allowed Texas to improve the quality of indigent defense services by establishing new indigent defense delivery models. In fact, these new resources have enabled the Task Force on Indigent Defense to approve funding for adult public defender offices in Kaufman, Willacy, and Hidalgo Counties. In addition, the Task Force has approved funding to establish several model programs that target special populations; for example, the regional public defender office centered in Val Verde County will allow indigent defendants in Edwards, Terrell, and Kinney Counties (small, rural counties) to access their right to a lawyer, despite the lack of qualified defense lawyers in their communities. Additionally, Travis County will be able to establish the nation’s first stand-alone public defender office exclusively representing defendants who are mentally ill. Each new public defender office created through resources made available by the Legal Services Fee represents a model that county leaders can look to as they consider solutions to meet the demand for improved indigent defense systems in their own areas.

While performance data produced by the state’s long-standing public defender programs demonstrate cost and quality benefits for counties that use public defenders, these newest public defender offices will need continued support in order to ensure long-term success. The availability of Legal Services Fee resources is a significant factor for these counties and others that may be considering a public defender office. Unless the Legislature removes the sunset provision for the Legal Services Fee, it will expire on September 1, 2007. Depriving the state of this vital funding source will curtail recent advancements to establish effective indigent defense delivery models.

### Key Findings:

- In 2002, Texas ranked 44th in the nation for state spending on indigent defense, contributing less than 9 cents for every dollar needed.
- Individual counties shoulder over 90% of the costs related to meeting the constitutional requirement to provide indigent defense services. In 2005 alone, individual Texas counties spent over \$140 million on indigent defense, while the State of Texas provided less than \$13 million to defray the cost to counties.
- In contrast, 25 other states provide 100% of funding for indigent defense.<sup>xlviii</sup>
- Before the 78th Legislature mandated that the Legal Services Fee subsidize effective delivery models, Texas only had 5 adult public defender offices. Following the mandate, Texas has established adult public defender offices in 5 additional counties.



- A recent Task Force on Indigent Defense study demonstrates that Texas' public defender offices provide a more cost-effective model than the assigned counsel delivery model still used by most Texas counties, projecting a cost savings of \$13.7 million if mature public defender offices were available in all Texas counties.  
xlvi
- The Task Force study also shows that public defender offices in Texas have demonstrated a higher degree of control over case quality to ensure the effective and efficient delivery of legal services to indigent clients.

**Solutions:**

- (1) **Enact legislation to make the Legal Services Fee permanent** by amending Section 81.054, Government Code. Making the Legal Services Fee permanent is vital to ensure continued Task Force funding for effective indigent defense delivery models, particularly public defender offices, which represent a cost-effective solution for the state even with initial start-up expenses.



## Improve Access to Bond Options

### Background:

*“Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”* -U.S Supreme Court Opinion, *Stack v. Boyle*

Counties that provide criminal defendants with early and repeated opportunities to post bond realize several system-wide benefits. However, many counties find that they do not have the full range of bond options that would enable them to manage their jail population. Restrictive bond policies for low-level, non-violent offenders in county jails create increased costs – resulting from book-in and longer detentions – and exacerbate jail overcrowding. Additionally, bonds that are disproportionately high increase a county’s expenditures on indigent defense: when non-violent indigent defendants use all their assets to obtain release on an excessively high bond, they may be less likely to pay for their own private attorney.

### Key Findings:

- Increasing the opportunities for defendants to be released from custody has several cost advantages, including shorter jail stays and decreased jail costs.<sup>i</sup>
- In 1995, 30% of jail inmates were incarcerated awaiting trials. <sup>ii</sup> Today, that number has reached 48%.<sup>iii</sup>
- Under existing state law (Article 17.02, Code of Criminal Procedure), counties are not authorized to accept partial cash bonds from defendants who are too poor to pay the full amount. As a consequence, defendants who cannot afford to post a full cash bond often post surety bonds, typically paying 10-20% of the full bond amount to a bail bond agent. The funds defendants pay to a surety are never returned, even if the defendant complies with all conditions of the bond.

### Solutions:

- (1) **Authorize the use of bond schedules to increase uniformity of bonds.** By using bond schedules that serve as a standardized guide for bond-setting authorities (like magistrates), counties could reduce unjustified disparities in bond amounts and reduce the likelihood that local magistrates will set unreasonably high bonds for non-violent offenders who have a very low flight risk. Note: recommended bond schedules should be established on a county basis and should be permissive.
- (2) **Set parameters and guidance for the use of Personal Recognizance (PR) Bonds.** When a bonding authority has determined that a defendant will appear for trial without additional precautions, the accused is released on his or her own recognizance (with a PR Bond) instead of imprisoned or requiring a surety bond. PR Bonds are typically utilized if the crime charged is not violent, and if the accused is not considered a threat to the community or a flight risk. Many counties that make use of PR Bonds on a regular basis find that they are able to use this system as a way to manage their jail population. Bonding authorities should have a clear statutory authority to issue PR Bonds, and they should have a clear set of factors to use in determining when a defendant is eligible for a PR bond.



- (3) **Amend the Code of Criminal Procedure to allow counties to accept partial cash bonds.** The Code of Criminal Procedure must be amended to allow counties to accept partial cash bonds. Counties who choose to utilize a partial cash bond option should deposit bond payments into an interest-bearing account that can serve as a funding source to offset the administrative costs of operating a pre-trial screening program. Defendants who are allowed to submit partial cash bonds will have a greater ability to pay for their own private representation, saving the county additional indigent defense expenses.



## Amend the Post-Conviction DNA Statute

### Background:

*“When used properly and appropriately, DNA analysis can permit us to address the skepticism and doubt that are intrinsic to our system of justice.”* - Matt L. Rodriguez, former Superintendent of Police, Chicago Police Department

Today, many innocent and wrongfully convicted people who are serving time in Texas prisons could be exonerated through DNA testing. However, there are barriers that prevent these people from having their cases re-examined. Specifically, a court may only order post-conviction forensic DNA testing if two tests are met: (1) the results of a DNA test alone will be sufficient in proving a defendant’s innocence of a crime, and (2) identity was or is the deciding issue leading to incrimination in the case. These prerequisites often work to deny a defendant the right to DNA testing if someone at trial has testified categorically that the defendant was the perpetrator.

### Key Findings:

- Since DNA testing has become available, it has been used to exonerate over 175 people throughout the nation.
- Of the first 70 exonerations achieved by the Innocence Project, 61 cases involved mistaken identification.
- Dallas County alone has seen 10 recent DNA-based exonerations.

### Solutions:

- (1) **Amend Texas’ post-conviction DNA statute to untie judges’ hands in granting DNA tests.** In capital cases, forensic testing should be permitted where it has the scientific potential to produce new, non-cumulative evidence relevant to the defendant’s assertion of actual innocence, even if the results alone may not completely exonerate the defendant.
- (2) **Texas’ post-conviction statute should remove barriers to collecting compensation after exoneration.** In order to bring Texas into line with other states, Texas should remove the \$500,000 cap for payments to the wrongfully convicted to aid them in restoring their lives (shelter, employment, medical care) post-exoneration. In addition, the law should clarify that in order to receive payment, a wrongfully convicted individual should not first be required to obtain a certification of actual innocence from the District Attorney in the county of conviction (usually, the prosecutor that convicted him or her).



## Create an Innocence Advisory Council

### Background:

***“When unvalidated forensic science and palpably false testimony from a jailhouse snitch converge in a courtroom, justice is dead on arrival. It takes DNA to bring it back to life.”*** – Peter J. Neufeld, Co-Director of the Innocence Project, which is affiliated with Benjamin N. Cardozo School of Law at Yeshiva University in New York

The latest scientific breakthroughs in DNA testing have demonstrated that even with a strong justice system the potential exists to convict individuals of crimes they did not commit. These wrongful convictions destroy public trust and confidence in the justice system. Texas has already sentenced to death at least 14 people who were wrongfully convicted. However, thus far, the state has no entity or set of procedures to identify the common causes of wrongful conviction. Texas should invest in an Innocence Advisory Council that would help to decrease the possibility of conviction of the innocent and, in turn, increase conviction of the guilty.

### Key Findings:

- DNA testing has played a major role in changing the criminal justice system by providing scientific proof that our state convicts and sentences innocent people – and that wrongful convictions are not isolated or rare events. Most importantly, DNA testing has shed light on wrongful convictions, giving experts the opportunity to study causes and propose remedies that may minimize the chances that more innocent people are convicted.
- Overturning a wrongful conviction means that an innocent person is set free. It also means that an investigation can be reopened in order to determine the actual guilty culprit, which protects communities and assures that justice is served to victims.
- No preemptive measures are being taken in Texas to prevent future wrongful convictions: no formal entity currently exists to conduct inquiries into the prosecutorial mistakes that led to a wrongful conviction and subsequent exoneration. Because this entity does not exist – and because prosecutors do not have a vehicle through which they can learn lessons from previous exoneration inquiries – prosecutors will continue to make mistakes that could have been avoided. In fact, past wrongful convictions have demonstrated this in Texas and throughout the nation.<sup>liii</sup>



Solutions:

- (1) **Texas needs to create an Innocence Advisory Council** that should, as a state entity, conduct investigations of all post-conviction exonerations in order to identify errors and defects in the criminal procedure used to prosecute the exonerated individuals' cases. The Texas Innocence Advisory Council should then produce publicly-available annual reports – based on findings and other input provided by prosecutors, defense attorneys, judges, law enforcement personnel, legal scholars, legislative representatives, and victim advocates – that would identify errors and defects in Texas' criminal justice process, as well as offer solutions and methods to correct the identified errors and defects while also identifying procedures and programs to prevent future wrongful convictions. This annual report could include any proposed legislation to implement procedures and programs to prevent future wrongful convictions or executions.

Through its work, the Council would raise awareness of the issues surrounding wrongful convictions, which would increase the conviction of the guilty, positively impact public trust and confidence in Texas' justice system, and decrease the overall cost of the prosecution, trial, and appeal processes.



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- <sup>xvii</sup> "Substance Abuse Treatment Policy Statement 12: Provide effective substance abuse treatment to anyone in prison or jail who is chemically dependant." Re-entry Policy. 2005.
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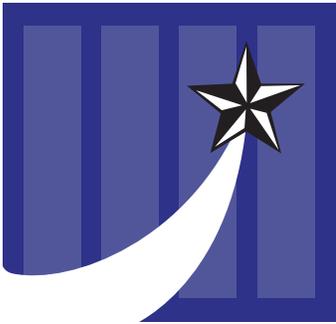
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