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Reducing the Burden of Criminal Justice Involvement for Minor Offenses

Testimony before the Texas House of Representatives Committee on
Criminal Jurisprudence

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Response to the Committee's Formal Request for Information for:

Interim Charge #2: Study current practices and enforcement of criminal laws for nonviolent Class C Misdemeanors. Examine the benefits of citations in lieu of arrests and fine-only offenses, the nexus between recidivism and "debtors' prisons," and all programs within the criminal justice system that levy fines, fees, and related penalties.

Members of the Committee:

Thank you for the opportunity to provide information regarding enforcement practices for Class C misdemeanors, the implications of fine-only offenses for recidivism and justice system integrity, and the benefits of citations in lieu of arrests for certain offenses.

Arrests for low-level, nonviolent offenses contribute to jail overcrowding, create and perpetuate systemic racial disparities, and generate collateral consequences that increase recidivism, all while doing little to improve public safety. Fine-only penalties for minor offenses cause major consequences when inability to pay leads to arrest and incarceration, a burden placed almost entirely on people who are poor.

The social distancing necessary to contain the COVID-19 pandemic amplifies the necessity of reducing the jail population. The recent protests against police violence and in support of racial equality in Texas and across the U.S. make clear the need to restore public faith in the justice system through substantive reform.

The following sections discuss two ways in which the Texas legislature can improve policies and practices toward low-level, nonviolent offenses while also saving taxpayers money and maintaining public safety.

Reduce Penalties for Fine-Only Offenses

Class C misdemeanors are classified as fine-only offenses, not punishable by jail time. Yet they are one of the largest offense categories for which Texans are arrested and taken to jail.¹ Efforts last session to limit officer discretion to arrest individuals suspected of committing fine-only offenses failed, despite broad support.²

According to Office of Court Administration (OCA), in FY 2019, Texas justice and municipal courts issued over 1.66 million arrest warrants for Class C misdemeanors, and an additional 593,012 warrants for failure to pay fines.³ By comparison, 130,847 warrants were issued for felonies and Class A and B misdemeanors combined. This means that nearly 95% of arrest warrants issued last year were for the most minor of offenses, a confounding statistic that has remained constant over the last several years.⁴

S.B. 1913, which passed in 2017, requires judges to consider a defendant's ability to pay when levying fines as a part of sentencing, and to provide alternatives, such as payment plans or community service, or to waive fines for indigency.⁵ But fines and court costs were waived for indigency in just 71,308 cases in FY 2019, compared to 508,698 cases in which individuals satisfied fines and court costs with jail credit.⁶ Black Texans are disproportionately more likely to serve jail time for failure to pay fines, just as they are also more likely to be arrested for fine-only offenses.⁷

When people spend time in jail solely to pay off their debt, localities collect no money and have to foot the bill for those days spent in jail—by one estimate Texas taxpayers spent roughly \$63 million incarcerating people for failure to pay Class C tickets in 2018.⁸

Imposing jail time for failure to pay fines is fiscally unwise, socially unjust, and out of step with public opinion—an OCA poll found that 66% of the public disapproves of jailing people for inability to pay fines and fees.⁹

The 2021 Texas legislature should reconsider limiting arrests for fine-only offenses. This reform would save increasingly limited resources and reduce excessive and racially disparate incarceration. Limiting these arrests could also improve public safety, as data show that when law enforcement focuses on fine-only offenses it solves fewer serious crimes.¹⁰

The legislature should also consider limiting the use of jail time for failure to pay fines and fees, except in cases where individuals are serving time for other offenses; reducing fine amounts; placing limits on fee collections; and enforcing the requirements that courts consider indigency and provide alternatives when fines are part of sentencing. The legislature should also end the Department of Public Safety's Omnibase program, which suspends or denies driver's licenses for failure to pay fines or appear in court,¹¹ as this practice criminalizes poverty and increases the likelihood that an individual will have an encounter with law enforcement, thus increasing the odds of arrest and recidivism.

Removing the burdens associated with non-jailable and fine-only offenses is critical to improving the fairness and effectiveness of the Texas criminal justice system. But such measures alone are not sufficient to reduce the economic and social burdens of the overreliance on arrest and incarceration for nonviolent offenses.

The following section discusses how expanding the option to issue a citation in lieu of arrest can improve handling of low-level, nonviolent offenses.

Expand Offenses Eligible for Cite and Release

In 2007 the Texas legislature passed H.B. 2391 to provide localities the option of issuing citations in lieu of detaining individuals suspected of certain low-level law violations. It applies to just a handful of misdemeanors, including possession of less than four ounces of marijuana or synthetic cannabinoids, driving without a valid license, and minor theft, graffiti, and criminal mischief charges.¹² A major impetus for this reform was the need to reduce jail overcrowding and its associated costs.¹³

Localities were initially slow to take advantage of the provision, but support is growing. Cite and release has allowed Travis, Dallas, Bexar, and Harris Counties to create various forms of marijuana diversion programs. Nueces and Travis Counties have instituted a cite and release option for all eligible offenses, as did San Marcos in May of this year and Houston in September.¹⁴ These programs can have significant impact; Austin saw a 57% decline in arrests in the first three months of 2019 compared to 2018 after implementing cite and release for most eligible offenses.¹⁵ The increasing popularity of cite and release reflects efforts to respond to calls for criminal justice reform, as well as to address jail overcrowding, which continues to impact counties across the state.

Since the Texas legislature created the cite and release option in 2007, the number of new misdemeanor cases in the state has decreased 33%, from 585,499 to 392,788 in FY 2019.¹⁶ Some of the offense categories for which cases have declined the most include those that are cite-and-release eligible, such as driving with a suspended/invalid license (31% decline in new cases over the last five years), theft (45% decline), and theft by check (78% decline).

Despite fewer misdemeanor cases, jail overcrowding persists. In Harris County, for example, the jail population is consistently above 8,000, with the vast majority (c.80%) awaiting trial. Jails continue to be one of the largest, if not the largest, expenses for local governments.¹⁷

There are several reasons Texas locks up so many citizens, one of which is its pursuit of drug cases. New felony drug possession cases have increased 27% over the last five years, to a record 62,463 in FY 2019.¹⁸ Drug possession offenses accounted for 33% of new felony cases filed in 2019, the single largest felony offense category.¹⁹

A 2017 analysis by Texas Appleseed that looked at 12 of the state's 25 most populous counties found that possession of a controlled substance was the third most common charge leading to a jail booking, after driving while intoxicated and possession of marijuana.²⁰ A separate analysis that focused on Harris County (which was not included in the Texas Appleseed study) found that for the years 2015-2018, possession of less than one gram of a controlled substance was the most common lead charge in jail bookings and accounted for more total nights in jail than any other offense.²¹ Further analysis revealed that Black people accounted for nearly 50% of the total nights spent in Harris County jail for low-level drug possession, despite being just 19% of the county's population and using drugs at similar rates as White people.²² This disparity is not an anomaly; Black people in Texas and across the U.S. are disproportionately more likely to be arrested, detained pre-trial, and convicted for drug possession and other low-level offenses than their White counterparts.²³

Confinement costs, racial disparities, and public health risks of jail overcrowding can be reduced if individuals suspected of committing low-level, nonviolent offenses are never booked into jail in the first place. The 2007 cite and release provision moved in this direction; expansion of eligible minor offenses can increase the legislation's effectiveness.

Nonviolent misdemeanor offenses should be eligible for cite and release. In particular, eligibility should be extended to offenses relating to drug possession for personal use and the offering or providing of prostitution services. Simple possession of less than 1 gram of a Penalty Group 1 substance and a charge of prostitution with three or more prior convictions, both classified as state jail felonies (SJF), should also be included. The SJF penalty category was created in 1993 in an attempt to implement a cost-effective and rehabilitation-based approach to nonviolent, often drug-related, offenses.²⁴ But the rehabilitation component was never funded, and the high costs and recidivism rates associated with the state jail system—and the burden this system places on local law enforcement and corrections systems—led the 86th House Committee on Criminal Jurisprudence to refer to the state jail system as a “complete failure.”²⁵ The recent increase in court-based diversion programs is largely a response to these systemic failures.

Expanding eligible offenses will complement diversion efforts and improve local responsiveness to fiscal and public safety challenges. It will enhance local freedom and control without imposing larger changes on state law. Expanded cite and release will also reduce the collateral consequences of incarceration for low-level offenses that affect all Texans and that disproportionately affect minority Texans.

Conclusion

In summary, the Texas justice system’s overreaction to fine-only and low-level offenses wastes taxpayer dollars and contributes to overcrowded jails that put community health at risk. The state’s punitive response to law violations that have little to no impact on public safety is a disservice to the public’s interest in a fair and equitable justice system.

Limiting arrests and penalties for fine-only offenses and restricting the use of jail time for failure to pay fines and fees will reduce law enforcement costs, improve justice system functioning, and help address the problem of “debtor’s prisons.” Expanding cite and release eligibility to include nonviolent misdemeanors and low-level drug possession and prostitution charges will provide localities with an opportunity to reduce the fiscal, public health, and racially disparate burdens of incarceration, all without compromising public safety.

¹ Scott Henson, 2019, “As jarring #DandraBland news arrives, Texas House will consider limiting arrests for fine-only traffic offenses,” *Grits for Breakfast*, <https://bit.ly/3jMj41v>.

² Arya Sundaram, 2019, “A measure to limit arrests for non-jailable offenses passed the House after a great struggle. It still died,” *Texas Tribune*, <https://bit.ly/327W4UJ>.

³ Texas Office of Court Administration, *FY 2019 Statistical Report*, Detail 52, <https://bit.ly/325nGtz>

⁴ See note 3, also see Texas Appleseed, 2017, *Pay or stay: The high cost of jailing Texans for fines and fees*, <https://bit.ly/2GkGVrw> and OCA. *FY 2015 Statistical Report*, Detail 48 <https://bit.ly/2TP16q0>

⁵ Senate Bill 1913 Bill Summary, <https://bit.ly/2TJGme3>

⁶ See note 3. Community service was used to fully or partially satisfy fines and court costs in 106,239 cases.

⁷ See note 4, Texas Appleseed, *Pay or stay*; also see Texas Criminal Justice Coalition, End arrests for non-jailable offenses, <https://bit.ly/386cml4>.

⁸ Scott Henson, 2019, “Texans incarcerated for thousands of years over traffic-ticket debt,” *Grits for Breakfast*, <https://bit.ly/34Nu4ro>

⁹ Texas Municipal Courts Education Center, 2018, *Recent studies provide insights into public perception of Texas courts*, <https://bit.ly/2HXmVvH>

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- ¹⁰ Rebecca Goldstein et al., 2018, Exploitative revenues, law enforcement, and the quality of government service, *Urban Affairs Review*, <https://bit.ly/3mPEahl>
- ¹¹ Texas Department of Public Safety, DPS' Failure to Appear/Failure to Pay Program, <https://bit.ly/3kUt5uU>
- ¹² Texas Code of Criminal Procedure, Ch. 14 Art. 14.06, <https://bit.ly/3oPeflu>
- ¹³ Senate Research Center, 2007, H.B. 2391 Bill Analysis, <https://bit.ly/374uNGi>
- ¹⁴ City of Houston Mayor's Office, September 28, 2020, Executive order: Cite and release program, <https://bit.ly/383uU5e>; Leif Reigstad, "How San Marcos went from 'zero tolerance' policing to requiring that officers release low-level offenders," *Texas Monthly*, <https://bit.ly/2TOt93r>; Eleanor Dearman, "Cite-and-release program in Nueces County lets officers choose," *Caller Times*, <https://bit.ly/3kSBVt4>.
- ¹⁵ Mark D. Wilson, 2019, "'Freedom City' policies yield drop in misdemeanor arrests, Austin police say," *Austin Statesman*, <https://bit.ly/2JpqgnL>.
- ¹⁶ See note 3.
- ¹⁷ Jails entail enormous operating costs; Harris County appropriated \$214.9 million for detention in FY 2019-20. This is not a partisan or large-county problem; the largest line-item expenditure in neighboring Montgomery County's FY2019 budget was the jail. See Harris County *General Funds Budget* <https://bit.ly/3iXp9YK> and Montgomery County *Fiscal Year 2019 Adopted Budget*, <https://bit.ly/33TjHgf>
- ¹⁸ Drug sale/manufacture cases only increased 2%, suggesting that the more minor cases do not lead to major ones.
- ¹⁹ See note 3.
- ²⁰ Texas Appleseed, 2019, *An analysis of Texas jail bookings*, <https://bit.ly/36cAKin>.
- ²¹ Texas Advocates for Justice, October 2019, *Care not cages*, Texas Grassroots Leadership.
- ²² For drug use demographic trends see *2019 National Survey on Drug Use and Health, Detailed Tables*, Table 1.23B, <https://bit.ly/329H6hc>
- ²³ In Harris County, for the years 2017-2019, nearly 54% of people arrested by the Houston Police Department for low-level drug possession were Black. In Travis County, Black people accounted for 25% of low-level drug possession arrests during the same period (they are 8% of Travis County population). Similar disparities exist for prostitution charges. In Harris and Dallas Counties, nearly 50% of people arrested for prostitution with three or more priors were Black for the 2017-2019 time period (23.4% of Dallas County residents are Black). Data retrieved on October 12, 2020, from Texas Criminal Justice Coalition, Criminal Court Data Dashboard, <https://tcjcdashboard.org/>. Also see Joseph Kennedy et al., 2018, "Sharks and minors in the war on drugs," *UC Davis Law Review*, <https://bit.ly/2HQvMzE> and ACLU, 2020, *A tale of two countries: Racially targeted arrests in the era of marijuana reform*, <https://bit.ly/3288YIE>. Pretrial detention increases chances of negative outcomes for defendants; see Paul Heaton et al., 2017, "The downstream consequences of misdemeanor pretrial detention," *Stanford Law Review*, <https://stanford.io/3iXC2So>
- ²⁴ Patrick Graves, 2019, Texas state jails, Fiscal Notes, Texas Comptroller, <https://bit.ly/3nNjhQM>.
- ²⁵ Catherin Marfin, 2019, "Built with rehabilitation in mind, Texas state jails are now viewed by lawmakers as a 'complete failure,'" *The Texas Tribune*, <https://bit.ly/3lInTz>.