



TEXAS JUDICIAL COUNCIL

2022

CRIMINAL JUSTICE COMMITTEE

REPORT
AND
RECOMMENDATIONS



In August 2021, the Texas Judicial Council charged the Criminal Justice Committee with:

- Monitoring remote proceedings within the state judiciary and recommending any necessary reforms (joint charge with the Civil Justice Committee).
- Continuing to evaluate and monitor Texas' pretrial bail system for improvement and recommend any further statutory and non-statutory changes. Working with individual jurisdictions and the Office of Court Administration to facilitate implementation of legislative reforms.
- Monitoring the Judiciary's role and work with Operation Lone Star.

Honorable Missy Medary, Chair

Mr. Kevin Bryant

Ms. Sonia Clayton

Honorable Bill Gravell

Honorable Sharon Keller

Honorable Kathleen Person

Honorable Maggie Sawyer

Representative Reggie Smith

Honorable Ed Spillane

Honorable Ken Wise

Members of the Committee are:

The Texas Judicial Council's Criminal Justice Committee met on March 3, 2022, August 22, 2022, and September 16, 2022.



Recommendations in Brief

Remote Proceedings

Recommendation: The Legislature, where appropriate, should remove statutory barriers to allow remote proceedings to continue to increase access to justice and enhance court efficiency.

Bail and Preventative Detention

Recommendation 1: The Legislature should amend the Texas Constitution and enact related statutes to provide that certain defendants charged with a violent crime and posing a high flight risk and/or high risk to community safety may be held in jail without bail pending trial after certain findings are made by a magistrate and a detention hearing is held.

Recommendation 2: The Legislature should provide funding to counties to allow local case management and jail systems to integrate with the Public Safety Report System.

Operation Lone Star

Recommendation: The Judicial Council should continue to monitor Operation Lone Star and study ways to improve reporting of OLS court activity.

Judicial Work Product Security

Recommendation: The Legislature should make it a criminal offense to publicly distribute draft judicial opinions and work product that details the decisional reasoning of or the holding of a justice or judge.

Class C Diversion

Recommendation: The Legislature should amend current law to allow for the diversion of youth charged with non-traffic Class C/fine-only offenses from the criminal justice system.

Juvenile NICS Reporting

Recommendation: The Legislature should clarify Juvenile NICS reporting requirements.

Mental Health

Recommendation: The Committee adopts the recommendations of the Texas Judicial Commission on Mental Health as listed in the Commission's 2022 Legislative Recommendations and Reports.



Recommendations in Detail

Remote Proceedings

Background

Courts are institutionally cautious creatures, unhurried in introducing new processes and technologies that may disrupt the business of courts.¹ By the end of 2019, court futurists envisioned a justice system that contained online courts while conceding that it might take years for widespread use of such courts to become a reality.² And prior to 2020, many – if not most – court users needed to enter the courthouse to carry out court business. The arrival of the COVID-19 pandemic abruptly changed all of this. No longer would court users merely be observers of remote proceedings; the pandemic would thrust court users into remote participation in court proceedings. The future became the present far ahead of schedule.

The pandemic required judges, court administrators, judicial branch agencies, and court users to think of courts not just as locations, but as services³ – services that could be, in the digital era, accessed inside of and away from the courthouse. In the pandemic, court services innovation arose out of necessity. In March 2020, less than one week after Texas Governor Greg Abbott issued a disaster declaration and a public health emergency declaration for Texas, District Judge Emily Miskel held the first fully remote hearing in Texas. Only a week later Judge Miskel conducted the first fully remote contested bench trial in Texas. Then, in early April 2020, the Texas Supreme Court held the first fully remote oral argument of any nine-member court in the country. On August 11, 2020, Justice Court Judge Nicholas Chu made history when he conducted the first fully remote criminal jury trial in the nation. And later that same month, District Judge

1 See TEX. R. CIV. P. 18c. Rule 18c, adopted in 1990, authorizes a trial court to permit the broadcasting, televising, recording, or photographing of courtroom proceedings in certain circumstances. Television, as live broadcast media, had existed for approximately 50 years before Rule 18c was adopted. See also *Interim Procedures Governing Video Recording and Webcasting of Proceedings Before the Supreme Court of Texas*, Misc. Docket No. 07-9033 (Feb. 27, 2007), available at https://www.txcourts.gov/All_Archived_Documents/SupremeCourt/AdministrativeOrders/miscdocket/07/07903300.pdf. Finally, see Lysette Romero Córdova, *Will SCOTUS Continue to Livestream Oral Arguments and are Cameras Next? Let's Hope So*. (August 24, 2021), available at: https://www.americanbar.org/groups/judicial/publications/appellate_issues/2021/summer/will-scotus-continue-to-livestream-oral-arguments-and-are-cameras-next/ (discussing the adoption of livestream audio, but not video, of oral arguments present to the Supreme Court of the United States).

2 Richard Susskind, *The Future of Courts*, THE PRACTICE, July–Aug. 2020, <https://thepractice.law.harvard.edu/article/the-future-of-courts/>.

3 Hon. Samuel A. Thumma, *A Virtual Step Forward: Remote Court Hearings in Response to the COVID-19 Pandemic*, State of Our State 2021, ARIZ. ST. UNIV. MORRISON INST. FOR PUB. POLY, <https://morrisoninstitute.asu.edu/sites/default/files/thumma-sparked-2021.pdf>.

Antonia Arteaga conducted the first fully remote jury selection in a civil case in Texas.⁴

Texas courts swiftly adapted to remote proceedings, and the use of remote proceedings continues to grow. Through the end of August 2022, 2,438 Texas judges have held 2,573,608 remote hearings, and a staggering 9,719,672 participants have been involved in a remote hearing since March 2020. Texas judges report that, although remote hearings tend to take longer than in-person hearings, remote hearings expand access to justice to many litigants. Court participant rates are up, schedules are less disrupted, travel is reduced, and default judgments are down. Remote participation also appears to benefit witnesses, victims, and others who fear for their safety when appearing in court, those who live in more remote locations, those with transportation constraints, and those with family care responsibilities. And public trust and confidence in the court are improved in part because court users perceive an improved court experience.⁵ Still, challenges remain. The “digital divide” hampers remote hearing participation for certain court users; technology challenges, whether at the court or with the user, slow down proceedings; not all court users are technologically savvy, which poses problems when trying to submit materials to the court during the proceeding; and remote proceedings need to become more efficient to preserve judicial officer time.⁶ Nonetheless, the future of remote proceedings is here. The Legislature should remove barriers to remote proceedings and enact necessary changes to ensure remote and hybrid hearings can continue in Texas.

Recommendations

Recommendation: The Legislature, where appropriate, should remove statutory barriers to allow remote proceedings to continue to increase access to justice and enhance court efficiency.

4 TEX. OFFICE OF CT. ADMIN., JURY TRIALS DURING THE PANDEMIC: OBSERVATIONS AND RECOMMENDATIONS 5, 7, 12 (Aug. 28, 2020), <https://www.txcourts.gov/media/1449660/jury-report-to-scotx-final.pdf>.

5 NAT'L CNT. FOR ST. CTS, THE USE OF REMOTE HEARINGS IN TEXAS STATE COURTS: THE IMPACT ON JUDICIAL WORKLOAD (FINAL REPORT) ii-iii, 15-16 (Dec. 2021), https://www.ncsc.org/_media/ncsc/files/pdf/newsroom/TX-Remote-Hearing-Assessment-Report.pdf.

6 *Id.* at 12.

Bail and Preventative Detention

Background

The Texas Judicial Council has long recommended reforms to modernize Texas' pretrial and bail systems. Recommendations for change were included in the Criminal Justice Committee's 2016, 2018, and 2020 Reports.⁷ The Council's past recommendations are boosted by the comparative pretrial release study *Liberty and Justice: Pretrial Practices in Texas*, authored by the Public Policy Research Institute at Texas A&M University, the Texas Indigent Defense Commission and the Office of Court Administration.⁸ The study and the Council's recommendations continue to be cited and used by advocates promoting bail reform in Texas.

Efforts to change pretrial practices during the 87th Legislative Session produced Senate Bill 6, enacted during the 87th Legislature's Second Called Session. Among SB 6's wide-ranging provisions, the bill amended procedures for setting the amount of bail, the release of certain defendants on monetary or personal bond, the duties of certain officers taking bail bonds and of magistrates in criminal cases, and to the reporting of information pertaining to bail bonds. At the bill's direction, OCA developed for statewide use a Public Safety Report System (PSRS), which produces a public safety report required for use in the setting of bail for defendants charged with a Class B misdemeanor or higher category offense.

A bill containing the Judicial Council's preventative detention recommendations passed the Senate but fell short in the House. As stated in the 2020 report and repeated here, the Committee firmly believes pretrial detention decisions should be made upon risk of flight and to the public safety and the Committee recommends reform to the state's pretrial detention procedures.

Recommendations

Recommendation 1: The Legislature should amend the Texas Constitution and enact related statutes to provide that certain defendants charged with a violent crime and posing a high flight risk and/or high

⁷ TEX. OFFICE OF CT. ADMIN., CRIMINAL JUSTICE COMMITTEE REPORT & RECOMMENDATIONS (OCT. 2016), <https://www.txcourts.gov/media/1436204/criminal-justice-committee-pretrial-recommendations-final.pdf>; CRIMINAL JUSTICE COMMITTEE REPORT & RECOMMENDATIONS (JUNE 2018), <https://www.txcourts.gov/media/1441877/criminal-justice-committee-report.pdf>; TEX. OFFICE OF CT. ADMIN., CRIMINAL JUSTICE COMMITTEE REPORT & RECOMMENDATIONS (SEPT. 2020), https://www.txcourts.gov/media/1449778/criminal-justice-committee-2020_0923_final.pdf.

⁸ PUB. POLY RESEARCH INST., *LIBERTY AND JUSTICE: PRETRIAL PRACTICES IN TEXAS* (MAR. 2017), available at: <https://ppri.tamu.edu/portfolio-items/liberty-and-justice/>.

risk to community safety may be held in jail without bail pending trial after certain findings are made by a magistrate and a detention hearing is held.

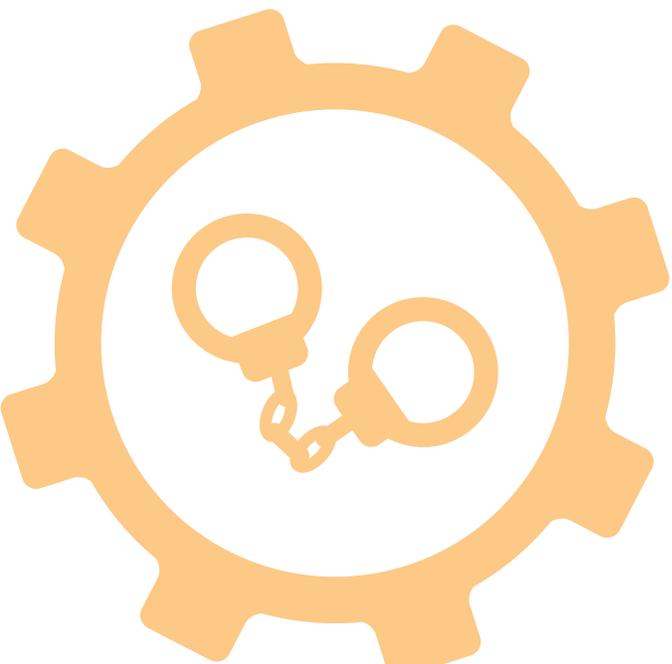
At least 27 states and the District of Columbia, as well as the federal system, have statutes or constitutional provisions that authorize detention without bail in non-capital cases. These preventive detention provisions are in recognition that there are some defendants for which there are no conditions of release which would reasonably assure the defendant's appearance at court and the safety of the community. Except for very limited circumstances, the current Texas Constitution and statutory framework does not provide magistrates with this preventive detention authority, even when the defendant before the magistrate poses the highest risk of flight or to public safety. Reaffirming its belief that pretrial detention decisions should be made based upon risk of flight and to public safety, the committee believes that the Texas Constitution and related statutes should be amended to provide magistrates with the authority to use preventive detention to hold defendants charged with a violent crime and that pose a high flight risk and/or high risk to community safety. The committee recommends using crimes listed under Section 42A.054 of the Code of Criminal procedure as a threshold for considering preventative detention.

Some may find that the concept of preventive detention is concerning and apt to potential abuse by magistrates. Therefore, the committee recommends that magistrates who determine to hold a defendant in jail pending trial be required to make written findings regarding their reasons for the preventive detention. Such findings may include information on the risk of flight and/or risk to public safety of the defendant. In addition, the committee believes that the defendant should be afforded a detention hearing within ten days where the preventive detention could be reviewed. As an additional safeguard, the defendant should continue to have the ability to seek appellate review of the bail determination through an expedited review procedure.

Recommendation 2: The Legislature should provide funding to counties to allow local case management and jail systems to integrate with the Public Safety Report System.

The Public Safety Report System (PSRS) is used by magistrates in setting bail for all Class B misdemeanor and higher offenses. The PSRS produces a Public Safety Report that summarizes the defendant's criminal history if available and alerts magistrates if the individual is ineligible for a personal bond. The PSRS also produces a bail form that is reported to the Office of Court Administration that contains information on the

defendant, offense charged, bail type and amount, and the name of the magistrate who set bail. Jurisdictions have raised concerns that data entry into the PSRS is burdensome. Integration between the PSRS and local case management and jail systems would eliminate duplication of data entry. OCA has made a tool available for integration to occur, but local systems will charge jurisdictions to configure the tool. The Legislature should provide funding to counties to assist with integration.



Operation Lone Star

Background

At the direction of Governor Greg Abbott, the Department of Public Safety launched “Operation Lone Star” (OLS) in March 2021 to respond to border safety issues and illegal border crossings at the Texas-Mexico border.⁹ Then, in late May 2021, Governor Abbott issued a proclamation certifying a state of emergency at the Texas-Mexico border related to unlawful crossings.¹⁰ Not long after issuing the disaster declaration, the Governor announced OLS would expand into a broader border security initiative to address criminal activity in border and disaster-declaration communities.¹¹ Although the initiative stretched across the state, OLS activities were initially focused on Val Verde County and neighboring border counties. The Operation would rely upon a centralized, temporary processing center to book and process OLS arrestees and then present them before a magistrate for “magistration”¹² via remote technology. Concerned that a high volume of arrests might overwhelm local magistrates and court systems, Chief Justice Nathan Hecht assigned¹³ visiting judges to serve as needed in magistration proceedings held at the temporary processing center. At the same time, the Office of Court Administration (OCA) and the Texas Indigent Defense Commission (TIDC) dedicated (and later hired additional) staff to facilitate the proceedings and to assist with indigent defense matters.

In late July 2021, DPS officers began presenting persons arrested under OLS in or near Val Verde County at the temporary booking facility. As centralized OLS operations have further expanded, OCA and TIDC have likewise expanded their support services to OLS-engaged judicial systems, which presently includes administrative support and facilitation of central magistration across multiple counties; court liaison and court interpretation services; OLS-specific indigent defense funding and technical assistance;

⁹ Letter from Greg Abbott, Governor of Texas, to Texas State Agencies Regarding Border Task Force (June 10, 2021), available at: <https://www.borderwall.texas.gov/uploads/files/press/O-BorderTaskForce202106091273.pdf>.

¹⁰ Proclamation Certifying a State of Disaster Along the Texas-Mexico Border (May 31, 2021), available at: https://gov.texas.gov/uploads/files/press/DISASTER_border_security_IMAGE_05-31-2021.pdf.

¹¹ Press Release, Greg Abbott, Governor of Texas, *Governor Abbott Hosts Border Security Summit, Announces Comprehensive Border Security Plan to Crack Down on Unlawful Border Crossings* (June 10, 2021), available at: <https://gov.texas.gov/news/post/governor-abbott-hosts-border-security-summit-announces-comprehensive-border-security-plan-to-crack-down-on-unlawful-border-crossings>.

¹² See TEX. CODE CRIM. PROC. ART. 15.17. “Magistration” is a pretrial admonishment proceeding. At its core, magistration consists of: a probable cause determination on whether the law was broken; admonishment of various constitutional and statutory warnings; appointment of counsel for indigent defendants; and, if appropriate, the setting of bond.

¹³ *Judicial Assignments for Proceedings under Article 15.17, Code of Criminal Procedure*, Mis. Docket No. 21-9080 (July 20, 2021), <https://www.txcourts.gov/media/1452518/219080.pdf>.

and court training and consulting services for counties and courts. A pool of nearly 20 visiting judges covers central magistrations proceedings 7 days a week, supported by 7 OCA administrative assistants and 7 OCA interpreters. Through funds appropriated to TIDC for OLS indigent defense, the Lubbock Private Defenders Office serves as the indigent defense hub responsible for overseeing assignment of counsel and defense support in OLS cases arising out of four counties. OCA coordinates with the regional presiding judges of the administrative regions to ensure that there are visiting judges available to assist local judges with docket volume if needed.

A few statistics convey the size of OLS's judicial front end. Between July 2021 and the end of August 2022:

- OLS magistrates conducted 714 magistrations sessions;
- OLS magistrates admonished 6,038 arrestees;
- 4,992 arrestees used a Spanish translator; and
- 5,568 OLS defendants received appointed attorneys.

As seen here, OLS drove a wave of arrests, magistrations, and indigent attorney requests and appointments – events that in turn triggered various constitutional and statutory obligations and deadlines for the local court system. Meeting these obligations and deadlines required sums of money not readily available to either the counties or the judicial branch agencies assisting them. The Texas Legislature addressed OLS funding needs through House Bill 9 of the second special session of the 87th Legislature. Under House Bill 9, OCA and TIDC received \$32.9 million in funding: \$1.8 million to OCA for court interpreters and court staff, \$29.7 million for OLS indigent defense, and \$905,000 for OLS visiting judge pay. OCA's House Bill 9 funding did not include local court support dollars, and OLS counties in need of court support funds must seek those dollars through the Office of the Governor grant programs.

Although OCA staff collect OLS data during the frontend (magistration) portion of OLS caseflow, OCA case data do not fully capture OLS court activity, case age, or case disposition. This opacity flows in part because court data are not reported to OCA on a case-level basis and, because of this, OCA cannot distinguish between regular court cases and OLS cases reported in monthly court reports. And while OCA does receive some post-magistration data from OLS courts, the data are not uniform. The result is that OCA cannot cleanly highlight post-magistration court activity, which in turn makes it difficult to give an empirical edge to certain OLS policy questions.

Recommendations

Recommendation: The Judicial Council should continue to monitor Operation Lone Star and study ways to improve reporting of OLS court activity.



Judicial Work Product Security

Background

On the evening of May 2, 2021, the political news website Politico published a leaked draft of US Supreme Court Justice Samuel Alito’s majority opinion in *Dobbs v. Jackson Women’s Health Organization*. The opinion, which overturned *Roe v. Wade*, sent shockwaves through the news cycle. Though much media coverage focused on the opinion’s holding, the act of the leak itself drew considerable attention as well. The day after the *Dobbs* opinion leaked, Chief Justice John Roberts confirmed the leaked document’s authenticity, declared the leak “a singular and egregious breach of [the Court’s] trust,” and directed the Marshal of the Supreme Court to launch an investigation into the source of the leak.¹⁴

In comments provided shortly after the leak, Professor Douglas Laycock of the University of Virginia School of Law expounded on why the leak was extraordinary: “Leaks are rare because confidentiality is important to the court’s work[.] . . . And any leak disrupts the court’s internal deliberations. Votes can and do change as drafts are circulated. Leaking a draft obviously puts pressure on that process.”¹⁵ Beyond institutional integrity concerns, the leak played a role¹⁶ in the attempted-but-thwarted assassination of Supreme Court Justice Brett Kavanaugh,¹⁷ who had signed onto Justice Alito’s majority opinion in the *Dobbs* decision.

At present, the source of the *Dobbs* leak remains unidentified. And even if the source is found, there is an open question as to whether that person could be subject to criminal prosecution for the leak – in part because there is no federal statute directly criminalizing the act of leaking a court opinion.¹⁸ Because court opinion leaks undermine the internal operation of the courts, weaken judicial independence by subjecting judges to political pressure and intimidation over undecided cases, and threaten public trust

¹⁴ Press Release, Chief Justice John G. Roberts Jr., Supreme Court of the United States (May 3, 2022), available at: https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_05-03-22.

¹⁵ Mary Wood, *Unpacking the Supreme Court Leak* (May 3, 2022), available at: <https://www.law.virginia.edu/news/202205/unpacking-supreme-court-leak>.

¹⁶ Brad Dress, *Kavanaugh Suspect Said He Wanted to Kill More Supreme Court Justices, Officials Say* (July 28, 2022), <https://thehill.com/blogs/blog-briefing-room/3578275-kavanaugh-suspect-said-he-wanted-to-kill-more-supreme-court-justices-officials-say/>.

¹⁷ Press Release, Department of Justice, U.S. Attorney’s Office, District of Maryland, *California Man Facing Federal Indictment in Maryland for the Attempted Murder of a Supreme Court Justice* (June 15, 2022), available at: <https://www.justice.gov/usao-md/pr/california-man-facing-federal-indictment-maryland-attempted-murder-supreme-court-justice>.

¹⁸ Zack Smith and John Malcolm, *Could Supreme Court Leaker Be Criminally Prosecuted? Maybe*. (May 4, 2022), THE HERITAGE FOUNDATION, <https://www.heritage.org/courts/commentary/could-supreme-court-leaker-be-criminally-prosecuted-maybe>.

and confidence in the courts, the Committee recommends legislative changes be made to address these issues.

Recommendations

Recommendation: The Legislature should make it a criminal offense to publicly distribute draft judicial opinions and work product that details the decisional reasoning of or the holding of a justice or judge.



Class C Diversion

Background

Over several legislative cycles, Texas lawmakers have debated how to curb youth penetration into the adult criminal justice system and the ways to limit the negative effects of that penetration when it happens. Recent reform efforts largely targeted Class C misdemeanor law showcased by changes to school-ticketing laws in the 83rd Legislative Session and truancy laws in the 84th Legislative Session.

Under Family Code sections 51.03 and 51.04, misdemeanor charges filed against children generally qualify as “conduct indicating need for supervision” (CINS) and are heard originally and exclusively in juvenile court. This is not the case with most juvenile Class C misdemeanor (fine-only/non traffic) charges. Due in part to judicial efficiency and resource concerns,¹⁹ and because of the interplay between Family Code provisions dealing with what constitutes an offense committed by a juvenile and the conditions under which cases can be transferred among courts,²⁰ Class C charges brought against juveniles exist in a fluid jurisdictional context: they begin in criminal court as criminal charges and do not become a CINS matter for juvenile courts unless transferred. As a result, most fine-only Class C cases brought against juveniles are adjudicated under the criminal jurisdiction of justice and municipal courts.

Despite the decline in filings resulting from the Legislature’s reforms in 2013 and 2015, the volume of Class C charges filed against juveniles in the adult criminal court system remains high. Even after adjusting case filings numbers to remove truancy and Education Code violations from consideration, Office of Court Administration data shows that over 36,300 non-traffic Class C cases were filed against juveniles in justice and municipal courts in FY22.

¹⁹ See ROBERT DAWSON, TEXAS JUVENILE LAW 589 (7th ed. 2008). Professor Dawson’s guide suggests that Class C juvenile case jurisdiction initially sits in adult criminal court because Class C charges lack “sufficient seriousness to warrant using the specialized resources of the juvenile justice system” and because criminal courts can more quickly dispose of the cases.

²⁰ See TEX. FAM. CODE §§51.03, 51.08.

Recommendations

Recommendation: The Legislature should amend current law to allow for the diversion of youth charged with non-traffic Class C/fine-only offenses from the criminal justice system.

The Council's Juvenile Justice Committee recommended in its 2018 and 2020 reports that the Legislature amend current law to allow for the handling of youth charged with Class C/fine-only offenses as a civil matter in the state's justice and municipal courts. The Criminal Justice Committee makes this recommendation again. Diverting juvenile Class C offenders from the criminal justice system would advance a stated purpose of the Juvenile Justice Code – "to remove, where appropriate, the taint of criminality from children committing certain unlawful acts" while simultaneously holding youth accountable for their actions.



Juvenile NICS Reporting

Background

As required by law, the National Instant Criminal Background Check System (NICS) conducts background checks on people who want to own a firearm or explosive. When a person tries to buy a firearm, the seller, known as a Federal Firearms Licensee (FFL), contacts NICS electronically or by phone. The prospective buyer fills out a Bureau of Alcohol, Tobacco, Firearms and Explosives form, and the FFL relays that information to the NICS. The NICS staff performs a background check on the buyer. That background check verifies the buyer does not have a criminal record or is not otherwise ineligible to purchase or own a firearm under state or federal law. NICS has three business days to determine whether a gun transfer is prohibited. If a definitive determination within that timeframe is not accomplished, the FFL may lawfully transfer the firearm.

The Bipartisan Safer Communities Act of 2022 (Public Law 117-159) was signed into law on June 25, 2022 and requires additional steps for NICS background checks on persons under the age of 21 seeking to possess a firearm. NICS is required to immediately contact the criminal history repository or juvenile justice information system, as well as the appropriate State custodian of mental health adjudication records, for the state in which the person resides. The additional check required by NICS Examiners under this law is meant to determine if the person has a possibly disqualifying juvenile record, including adjudication “as a mental defective” and commitment to “any mental institution at 16 years of age or older,” under 18 U.S.C. 922(d). If so, NICS is allotted additional time to complete the review of that information and to complete the eligibility determination.

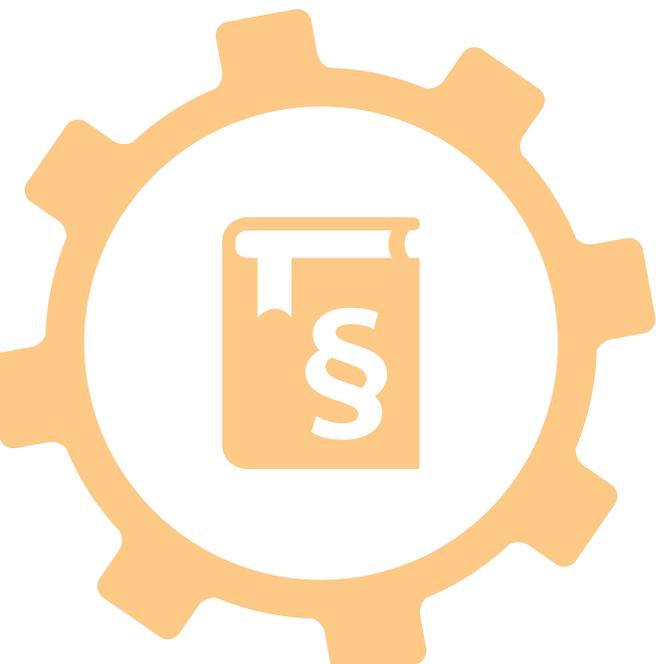
Texas does not have a centralized source for statewide mental health adjudication information in juvenile cases. To perform a thorough search, NICS would need to contact each of the more than 450 district clerks and county clerks in the state. Clerks currently report involuntary inpatient mental health and intellectual disability commitments of minors and adults, adult guardianships, and certain mental health adjudications in adult criminal cases through the Texas Department of Public Safety’s NICS Indices Entry portal in the Criminal Justice Information System (CJIS).

To address recent confusion about the need to report mental health or intellectual disability commitments

in cases involving delinquent conduct or conduct indicating a need for supervision (juvenile cases), the NICS Reporting Manual has been updated to clarify that commitments for involuntary inpatient mental health services or long-term residential treatment under Chapter 55 of the Family Code should be included in the reporting of commitments to the NICS Indices Entry portal. Although commitment proceedings may be held under Chapter 55 of the Family Code, they must be done according to the requirements of Chapter 574 or 593 of the Health and Safety Code. Mental health adjudications in juvenile cases that are equivalent to those reported in criminal cases could potentially be reported to NICS. However, Texas law defines "federal prohibited person information" as acquittal by reason of insanity, lack of mental responsibility, and incompetence to stand trial in terms of criminal cases and not juvenile cases. Government Code §§ 411.052 and 411.0521 govern reporting to NICS.

Recommendations

Recommendation: The Legislature should clarify Juvenile NICS reporting requirements.



Mental Health

Background

The Council has a long history of recommending and advocating for necessary reforms to improve mental health systems and processes in Texas. One of the Council's recommendations in 2016 was the creation of a Judicial Commission on Mental Health (JCMH). The Commission was created jointly in a historic hearing and joint order by the Texas Supreme Court and Texas Court of Criminal Appeals in January of 2018. On October 1, 2019, the high courts created the Legislative Research Committee (LRC) to make recommendations to the Council. The LRC now represents two task forces appointed in 2019; the work of the two task forces was submitted to TJC in 2020. In the 2021 legislative session, 10 of JCMH's 16 proposals were enacted into law.

The JCMH's recommendations for the 88th Legislative Session follow, which flow from the JCMH's 2022 Legislative Recommendations and Reports located in the appendix of this report. JCMH-proposed statutory language for these recommendations can be found in the JCHM 2022 Legislative Recommendation and Reports.

Recommendations

Criminal Law Recommendations

Recommendation 1: Amend Texas Code of Criminal Procedure Chapter 46B to limit inpatient competency restoration for nonviolent misdemeanors to extraordinary circumstances

Currently the State Hospital Waiting List for inpatient competency restoration services lists more than 2,400 people, and the wait for services can be more than two years. As a result, the wait for inpatient services may be double the maximum sentence for misdemeanor offenses. The amendments create outpatient treatment alternatives in nonviolent misdemeanor cases for some defendants charged with nonviolent misdemeanor offenses.

This recommendation proposes that, when a defendant found to be mentally incompetent to stand trial is charged with a with a class B misdemeanor or a nonviolent misdemeanor and has not been convicted in the previous two years of an offense that resulted in bodily injury to another person, then the default

procedure would be to order outpatient competency restoration (OCR) services. If there is no OCR available, either because the community does not have OCR or the defendant cannot be placed in an OCR program within 14 days of the Judge's order, then the matter would be set for a referral to civil commitment under Code of Criminal Procedure 46B subchapter F—*Civil Commitment Charges Dismissed*.

Within this bill are other clarifying provisions, for example, to provide a functional definition of what it means for someone to be restorable in the “foreseeable future.” The definition asks whether this person is capable of being restored to competency within the statutory period allowed under subchapter D—60 days for misdemeanors and 120 days for felonies along with a possible 60-day extension.

The other provisions clarify procedures in situations when the defendant is not restorable or has not been restored within the statutory time limits.

Recommendation 2: Amend Texas Code of Criminal Procedure article 46B.084 to address deteriorating mental condition

Currently, Texas Code of Criminal Procedure article 46B.084 does not address what happens when individuals who have been restored to competency but then deteriorate between competency restoration and the resumption of adjudicative proceedings. This amendment to 46B.084 clarifies the process to identify and reevaluate those individuals whose mental health has deteriorated while in custody.

Recommendation 3: Credit for Participation in Outpatient Competency Restoration Programs

This amendment to article 46B.009 of the Texas Code of Criminal Procedure would credit a defendant with good time for full participation and compliance with a court-ordered outpatient competency restoration program. Currently, such credit is given for periods of inpatient or jail-based competency restoration

Outpatient restoration services are required in lieu of inpatient or jail-based services when they are appropriate, and this provision would encourage their use when the circumstances indicate that outpatient treatment is appropriate. This proposal also alleviates over-reliance on inpatient competency restoration when less-restrictive means are appropriate.

Recommendation 4: Use of Article 16.22 procedures for Class C Misdemeanors

Currently, Texas Code of Criminal Procedure art. 16.22 excludes individuals charged with Class C misdemeanors. Article 16.22 is intended to identify a person suspected of having a mental illness or

disability. The court system often first sees people with severe mental illness in the justice and municipal courts, before their mental health deteriorates to a point where the individual is arrested on a higher-level misdemeanor or felony offense. This proposal gives the judge the discretion to order a 16.22 interview and report on persons charged with Class C misdemeanors. The aim is to give the judges who frequently interact with this population of defendants the tools to identify the issue and connect them to mental health services.

Recommendation 5: Permit Class C Misdemeanor dismissal when the defendant is found not competent

Subject to procedural requirements, Section 8.08 of the Texas Penal Code allows justices of the peace and municipal judges to dismiss complaints alleging Class C misdemeanors in juvenile cases when the justice or judge finds probable cause exists to believe the child is unfit to proceed. Currently, there is no corollary to Section 8.08 for adults charged with Class C misdemeanors. The JCMH recommends amending Texas Code of Criminal Procedure Chapter 45 by adding article 45.0214, a corollary to section 8.08. On a motion by the state, the defendant, or person standing in parental relation, or on the court's own motion, a justice or judge is authorized to determine if probable cause exists to believe that the defendant, including a defendant with a mental illness or developmental disability, lacks the capacity to understand criminal proceedings or to assist in the defendant's own defense and is unfit to proceed and, if so, dismiss the class C misdemeanor charge.

Recommendation 6: Harmonize Mental Health Personal Bonds with Recent Amendments

The passage of S.B. 6 (87th Leg., Second Called Session, (2021)) created a conflict between the offenses that permit release on personal bond under Texas Code of Criminal Procedure art. 17.03, and offenses that permit a mental health personal bond pursuant to Texas Code of Criminal Procedure art. 17.032. The JCMH proposes an amendment to Texas Code of Criminal Procedure art. 17.03 that reconciles the conflict.

Recommendation 7: Emergency Mental Health or Intellectual Disability Services Arrest Deferral for Nonviolent Offenses

This proposal adds new article 14.036 to Texas Code of Criminal Procedure Chapter 14. It would allow law enforcement to defer the arrest of a nonviolent person who is undergoing emergency mental health or intellectual disability health care. It would permit delay of the arrest of a patient with mental illness or intellectual disability until the patient's condition stabilizes to avoid jailing of that person when that person

is actively undergoing emergency treatment for a mental health crisis.

Civil Law Recommendations

Recommendation 1: Electronic Application for Emergency Detention Warrants by Qualified Professionals at Hospitals and Mental Health Facilities

This proposal expands Texas Health and Safety Code Section 573.012 to include employees of a local mental health authority as persons authorized to make electronic application for an emergency detention warrant. Current law permits only physicians to do so.

Under current law, physicians may electronically request a warrant from a judge for an emergency mental health detention. In less populated areas, a physician may not be available to electronically request a detention when an emergency detention warrant is needed. The amendment would permit licensed professionals versed in mental health with advanced training and education to electronically make the request. Such applications for emergency detention warrants by those other than physicians would be limited to situations where the subject of the application is currently receiving care at a hospital or facility operated by a local mental health authority.

Recommendation 2: Security of Firearms Found in Possession of Persons in Emergency Detention Under a Warrant

The proposed amendment to section 573.012 of the Texas Health and Safety Code, Issuance of Warrant, adds a new subsection (d-1). This amendment authorizes a peace officer to seize a firearm found in possession of a person who is apprehended under the authority of a judge's warrant for an emergency detention.

The comparable existing provision is found in section 573.001(h), Apprehension by Peace Officer Without Warrant, which allows a peace officer to seize a firearm from a person apprehended by an officer without a warrant. This amendment will grant the peace officer the same authority in both situations. The amendment allows for an orderly disposition of a secured firearm under article 18.191 of the Texas Code of Criminal Procedure, Disposition of a Firearm from Certain Persons with Mental Illness.

Recommendation 3: Authorization for Blood Draws for Patients Receiving Court-Ordered Medication

The proposed amendment to of the Texas Health and Safety Code Section 574.106 would permit mandatory blood draws for patients admitted to the state hospitals for involuntary psychoactive medication

administration purposes. Such care is medically necessary to monitor medication levels to determine whether the medications need adjustment.

Recommendation 4: Clarification of a Law Enforcement Officer’s Duties upon Presenting an Individual for Mental Health Services

The proposed amendment to of the Texas Health and Safety Code Section 573.012 clarifies that a peace officer has no duty to remain at a facility or an emergency room once the officer delivers a person for emergency mental health services, together with the proper completed documentation.

Chapter 55 Advisory Committee Recommendations

Recommendation 1: Revisions to Subchapter A. General Provisions

The Chapter 55 Advisory Committee (the Committee) submits these proposed revisions as a single legislative package and not as individual amendments. Details of the revisions made to each subchapter are described below.

A. Terminology Update

Texas Family Code section 51.20 contains the outdated term “mental retardation.” In 2015, Senate Bill 219 (84th Reg. Sess. 2015)) amended many sections of the Texas Family Code to substitute “intellectual disability” for “mental retardation.” The Committee proposes similar updates to Section 51.20 that were not made under Senate Bill 219. The Committee also recommends moving the requirements for fitness examinations and reports from this section, adopting requirements that are better suited to children and youth, and adding them to section 55.31, as discussed below.

B. Rename Section 55.01 as a Definitions Section

Texas Family Code section 55.01 currently contains a reference to the Texas Health & Safety Code definition of a mental illness. The Committee proposes renaming this section as a Definitions Section and including the full text of relevant definitions from the Texas Health & Safety Code and other sections of the Texas Family Code.

C. Replace “Commitment” with “Court-Ordered Mental Health Services” in Section 55.02 and Throughout

Both the Texas Health and Safety Code and the Texas Family Code use the word “commitment” for court-ordered mental health services. “Commitment” carries another meaning in Title 3 of the Texas Family Code: confinement in the Texas Juvenile Justice Department. The Committee recommends replacing “commitment” and “committed” in Chapter 55 with, as applicable, “court-ordered mental health services,” “court-ordered residential intellectual disability services,” “ordered,” “inpatient mental health services criteria,” and “residential disability services criteria.”

D. Include Outpatient Services in Section 55.03

Texas Family Code section 55.03 refers to the standards of care for children ordered to participate in inpatient mental health services. With the expanding use of outpatient mental health and intellectual disability services in the state, the Committee recommends adding outpatient services to the standards of care.

E. Define Criteria for Court-Ordered Examination

The Committee recommends adding Texas Family Code Section 55.04 to define a forensic mental examination, when a judge must order one for a child, and to include examiner qualifications outlined in Texas Code of Criminal Procedure article 46B.022.

F. Add Section 55.05 to Incorporate Court-Ordered Mental Health Services

The Texas Family Code refers to Texas Health & Safety Code criteria for court-ordered mental health services but does not include the full text. The Committee proposes adding section 55.05 to incorporate the criteria into the Texas Family Code.

G. Add Section 55.06 to Incorporate Criteria for Court-Ordered Intellectual Disability Services

The Texas Family Code refers to Texas Health & Safety Code criteria for court-ordered intellectual disability services but does not include the full text. The Committee proposes adding section 55.05 to incorporate the commitment criteria into the Texas Family Code.

Recommendation 2: Revisions to Subchapter B. Child with Mental Illness**A. Rename Chapter 55 Subchapter B**

The Committee proposes renaming Texas Family Code Chapter 55 Subchapter B as “Court-Ordered Mental Health Services for Child with Mental Illness,” to clarify the purpose of Subchapter B. This proposal also refers to new sections 55.04 and 55.05 in section 55.11 and requires an examiner to determine whether the child meets the criteria for temporary or extended inpatient or outpatient mental health services.

B. Update References to Renumbered Sections in Section 55.12

Texas Family Code section 55.12 references three other sections of the Texas Family Code that the Committee proposes be renumbered. The Committee recommends updating those references in section 55.12.

C. Repeal Existing Sections 55.13 and 55.14

The Committee proposes repealing sections 55.13 and 55.14, moving them to new Subchapter E, and renumbering them as new sections 55.65 and 55.68. This change and others below will move all proceedings for court-ordered mental health or intellectual disability services to Subchapter E.

D. Add Emphasis on Least Restrictive Appropriate Setting in Section 55.15

With the expansion of outpatient services in the state, the Committee recommends adding an emphasis on treating the child in the least restrictive appropriate setting.

E. Remove “Inpatient” from Sections 55.16 and 55.17

With the expansion of outpatient services in the state, the Committee proposes removing the word “inpatient” from these sections. This change allows a judge to order either inpatient or outpatient mental health services.

F. Clarify Section 55.18

To clarify that the court should dissolve any previously imposed before beginning additional proceedings, the Committee recommends adding the phrase “dissolve the stay and,” to this section. The Committee also recommends adding “outpatient services” in this section to include children who receive either inpatient or outpatient treatment.

G. Amend Existing Section 55.19 to Expand Judicial Discretion

Texas Family Code section 55.19 currently requires the judge to transfer to adult criminal court the cases that meet the criteria delineated in section 55.19. The Committee proposes that the judge have discretion to make the transfer after holding a hearing under the same standard as a certification hearing under sections 54.02(j), (k), and (l) and making similar findings.

This change prevents the mandatory transfer to adult criminal court of the cases of persons who are alleged to have engaged in delinquent conduct prior to the age of 18 that are still pending after the person was ordered to engage in inpatient mental health services without achieving discharge or furlough.

Recommendation 3: Revisions to Subchapter C. Child Unfit to Proceed as a Result of Mental Illness or Intellectual Disability

A. Add Requirements to Examination and Report in Section 55.31

Currently, the Family Code Section 51.20 requirements for fitness to proceed examinations are the same requirements as used to determine competency to stand trial in adult criminal cases under Texas Code of Criminal Procedure article 46B.024. Coinciding with the removal of fitness examination and report requirements from section 51.20, the Committee proposes adding developmentally appropriate requirements for children and youth to Section 55.31 to improve the quality and value of fitness examinations and reports.

B. Clarify Ambiguity in Section 55.33 Concerning a Child Found Unfit to Proceed but Does Not Meet Criteria for Court-Ordered Services

Currently, there is an ambiguity in section 55.33 in which a child may be found unfit to proceed but does not meet the criteria for court-ordered services. This change allows the judge to order appropriate and available treatment or services for the child in this situation, in consultation with the local juvenile probation department, where previously no order for treatment or services would have been permissible. Further, it contains authority for juvenile probation departments to provide restoration classes for certain children.

C. Add Requirements to Report to the Court in Section 55.35

The Committee proposes adding requirements to Section 55.35 to improve the quality and value of reports that inpatient and outpatient service providers submit to the court upon a child's temporary commitment, as well as updating the term "outpatient center" to "alternative setting," in this section and throughout, to track the language in section 55.33.

D. Update Code References in Section 55.37

The Committee recommends updating references to renumbered Texas Family Code sections in section 55.35, as well as replacing the term "civil commitment" with "court-ordered mental health services," which tracks the language in the referenced statutes, proposed Texas Family Code section 55.05 and Subchapter A, Chapter 574, Texas Health and Safety Code.

E. Repeal Sections 55.38, 55.39, 55.41, and 55.42

The Committee recommends repealing sections 55.38, 55.39, 55.41, and 55.42 and moving them to new Subchapter E. This change and others move all proceedings for court-ordered mental health or intellectual disability services to Subchapter E.

F. Juvenile Transfers Under Section 55.44

Parallel to Subchapter B, Texas Family Code Section 55.44 currently requires the judge to transfer to adult criminal court the cases that meet the criteria delineated in section 55.44. The Committee proposes that the judge have discretion to make the transfer after holding a hearing under the same standard as a certification hearing under sections 54.02(j), (k), and (l).

This change prevents the automatic transfer to adult criminal court of the cases of persons who are alleged to have engaged in delinquent conduct prior to the age of 18, have been found unfit to proceed, and are still pending after the person was ordered to engage in inpatient mental health services without achieving discharge or furlough.

Recommendation 4: Revisions to Subchapter D. Lack of Responsibility for Conduct as a Result of Mental Illness or Intellectual Disability

A. Add Requirements to Examination and Report in Section 55.51

The Committee proposes adding requirements to section 55.51 to improve the quality and value of examinations and reports evaluating lack of responsibility. These additions also direct the examiner

to determine whether the child meets the criteria for temporary or extended inpatient or outpatient court-ordered services.

B. Clarify Ambiguity in Section 55.52 Concerning a Child Found Not Responsible but Does Not Meet Criteria for Court-Ordered Services

A current ambiguity exists in section 55.52 wherein a child is found to lack responsibility for their conduct but does not meet criteria for court-ordered services. This change allows the judge to order appropriate and available treatment or services for the child in this situation, in consultation with the local juvenile probation department, where previously no order for treatment or services would have been permissible.

The Committee also recommends that placement in a private psychiatric inpatient facility or residential care facility be available to children who are found to lack responsibility, regardless of whether it is due to mental illness or to intellectual disability.

C. Add Requirements to Report to the Court in Section 55.54

The Committee proposes adding requirements to section 55.54 to improve the quality and value of reports that inpatient and alternative setting service providers submit to the court following a court-ordered temporary services.

D. Update Code References in Section 55.55

The Committee recommends updating references to renumbered Texas Family Code sections in section 55.55, as well as replacing the term “civil commitment” with “court-ordered mental health services,” which tracks the language in the referenced statutes, proposed Texas Family Code sections 55.05 and 55.06 and Subchapter A, Chapter 574, Texas Health and Safety Code.

E. Update Code References in Section 55.56

Certificates of Medical Examination (CMEs) are described in Subchapter A, Chapter 574, Texas Health and Safety Code. The Committee proposes updating the reference to CMEs found in Texas Family Code section 55.56, as well as updating references to renumbered Texas Family Code sections.

F. Repeal Sections 55.57, 55.58, 55.60, and 55.61

The Committee recommends repealing sections 55.57, 55.58, 55.60, and 55.61 and moving them to new Subchapter E. This change and others move all proceedings for court-ordered mental health or

intellectual disability services to Subchapter E.

G. Update Terminology and Code References in Section 55.59

In keeping with updates of terminology in above sections, the Committee proposes substituting “court-ordered residential intellectual disability services,” for “commitment” and “civil commitment,” in section 55.59.

Recommendation 5: Addition of New Subchapter E. Proceedings for Court-Ordered Mental Health or Residential Intellectual Disability Services

A. Renumber Section 55.13 as New Section 55.65 Regarding Proceedings for Child with Mental Illness

The Committee proposes new Subchapter E for all procedures related to temporary or extended court-ordered mental health and intellectual disability services. New section 55.65 is similar to current section 55.13, with the additional requirements that the local mental health authority file a recommendation for the child’s proposed treatment, that the court identify the provider of court-ordered outpatient mental health services at least three days prior to the hearing, and that upon receipt of the court’s order for inpatient mental health services, the Health and Human Services Commission must identify a facility and seek to admit the child to that facility. If services are court-ordered, then the court must hold a detention hearing to determine whether a child should be detained or released before beginning court-ordered services.

B. Add New Section 55.66 Regarding Proceedings for Child Found Unfit to Proceed or Lacking Responsibility Due to Mental Illness

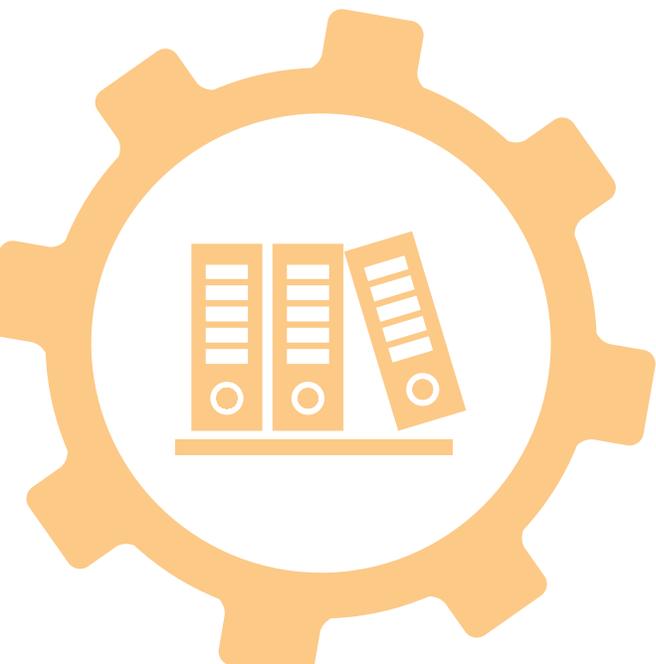
New section 55.66 is similar to current sections 55.38 and 55.57, with the added requirements that the local mental health authority file a recommendation for the child’s proposed treatment, that the court identify the provider of court-ordered outpatient mental health services at least three days prior to the hearing, and that upon receipt of the court’s order for inpatient mental health services, the Health and Human Services Commission must identify a facility and seek to admit the child to that facility. If mental health services are court-ordered, then the court must hold a detention hearing to determine whether the child should be detained or released before beginning court-ordered services.

C. Add New Section 55.67 Regarding Proceedings for Child Found Unfit to Proceed or Lacking Responsibility Due to Intellectual Disability

New section 55.67 is like current sections 55.41 and 55.60, with the requirements that, upon receipt of the court's order for long-term placement in a residential care facility, the Health and Human Services Commission must identify a facility and seek to admit the child to that facility. If intellectual disability services are court-ordered, the court must hold a detention hearing to determine whether the child should be detained or released before admission to the facility.

D. Add New Section 55.68 Regarding Referrals for Court-Ordered Services Proceedings

New section 55.68 is like current sections 55.14, 55.39, 55.42, 55.58, and 55.61, covering juvenile cases referred by the court to an appropriate court for the initiation of court-ordered services proceedings, with an expansion of the required documents to be transferred.





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Texas Judicial Council 512-463-1625
P.O. Box 12066 Megan.LaVoie@txcourts.gov
Austin, TX 78711-2066