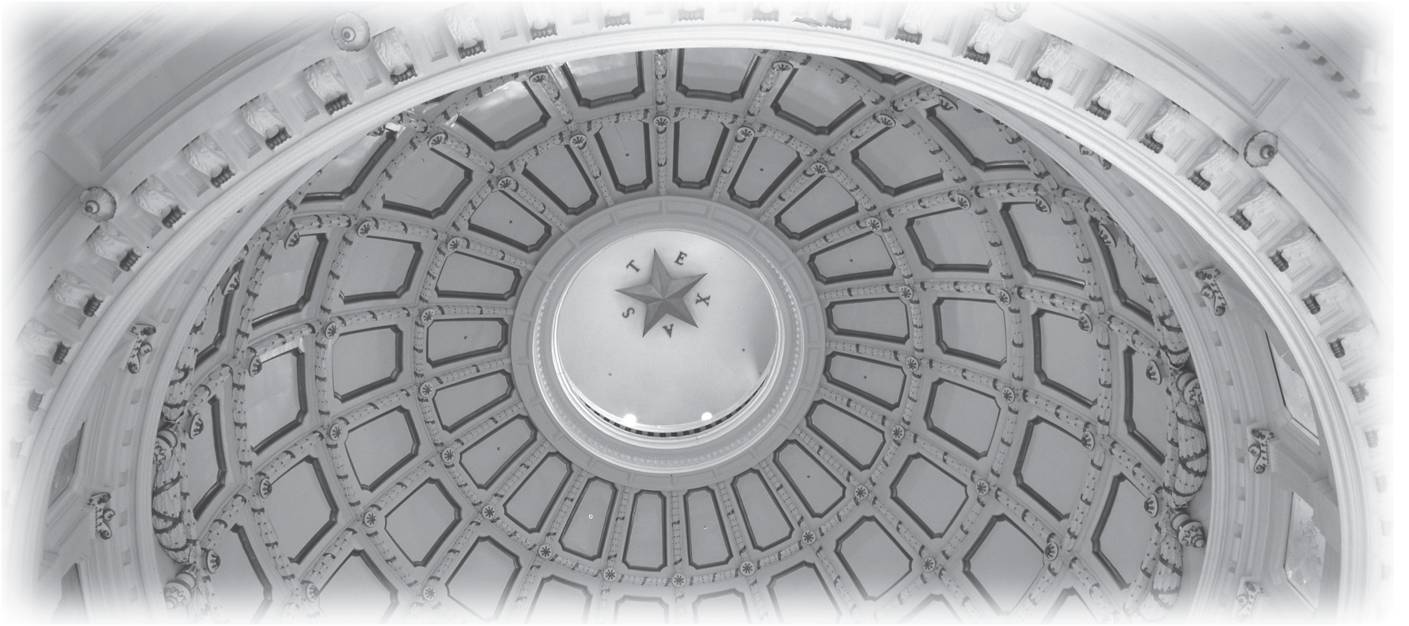


Interim Report

to the 84th Legislature

House Select Committee on Criminal Procedure Reform

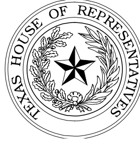
December 2014

HOUSE COMMITTEE ON CRIMINAL PROCEDURE REFORM, SELECT
TEXAS HOUSE OF REPRESENTATIVES
INTERIM REPORT 2014

A REPORT TO THE
HOUSE OF REPRESENTATIVES
84TH TEXAS LEGISLATURE

DEBBIE RIDDLE
CHAIR

COMMITTEE CLERK
GRADY DAHLBERG



Committee On
Criminal Procedure Reform, Select

December 1, 2014

Debbie Riddle
Chair

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

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

Dear Mr. Speaker and Fellow Members:

The Select Committee on Criminal Procedure Reform of the Eighty-third Legislature hereby submits its interim report including recommendations for consideration by the Eighty-fourth Legislature.

Respectfully submitted,

Debbie Riddle

Abel Herrero

Tan Parker

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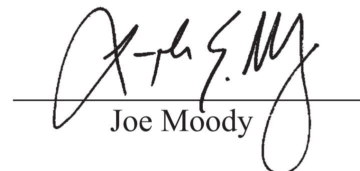
Joe Moody

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CRIMINAL PROCEDURE REFORM, SELECT

I. Introduction & Synopsis

Not since L.B.J. was President, John Connally was Governor, M.L.K. marched to Montgomery, the Astrodome opened, the Beatles played Shea Stadium, and *A Charlie Brown Christmas* debuted on CBS, has the Texas Code of Criminal Procedure (hereinafter CCP or "the Code") been revised in its entirety. The year was 1965. In the decades following, the CCP was amended numerous times, and it continues to be amended every legislative session. Interestingly, some provisions[1] have not been touched since 1965, while others have borne the weight of a dozen or more legislative tweaks.

Simply stated, the Select Committee on Criminal Procedure Reform (hereinafter "the Committee") was charged with studying the CCP to recommend revisions. In light of the multi-generational gap between the last code-wide revision and this Report, the Committee's general recommendation for a full and complete rewrite will surprise only a few (maybe). Given that the process for making the 1965 changes were initiated in 1959, it's safe to say that such a task would require several years or more for the drafters at the Texas Legislative Council (TLC) to address the entire CCP for a complete non-substantive[2] revision. Indeed, the CCP is on TLC's "to do list," more (in)formally known as the "Code Update Project."[3] However, the CCP might be a better candidate for a more piecemeal approach, with non-substantive updates being performed on specific sections or chapters, rather than updating the Code in general.[4]

Under the circumstances, the Committee has attempted to take a manageable "bite" in hopes of identifying provisions in the Code that can be fixed more immediately and has employed a multi-faceted approach in carrying out its charge. Three distinct categories of proposed revisions have materialized: **Substantive**, **Non-substantive**, and **Modernization**. To be sure, some overlapping exists, but the category-based approach has allowed the Committee to approach the Code with some general sense of organization.

The committee has reached out to various stakeholders[5] regarding thoughts, concerns, and ideas for clean-up measures that would benefit the Code, always keeping in mind the practitioners and everyday Texans who will be affected by its workings. In general terms, the stakeholder groups include practitioners, administrators, and advocates who work primarily in and with the criminal justice system in Texas. Consensus among the stakeholders has been (and will continue to be) a key focus before pursuing or recommending revisions of any kind.

As for the tone of this report, the Committee does not intend to pit stakeholders against each other or to impose any formal judgment beyond studied recommendations that stem from informed sources. In keeping with the Committee's charge, this report aims to be informational and advisory in nature. When considering a body of statutory law as broad and multifaceted as the CCP, it becomes readily apparent that the most practical and helpful recommendation may simply be that more focused efforts are needed in the future.

II. Substantive[6]

Meetings with stakeholders prompted the exploration of several substantive matters. As a result, several substantive bills were drafted, while other matters were given more of a study-oriented treatment, with an eye toward future projects.

A. Draft Bills

Generally speaking, the draft bills address the elimination of duplicative provisions, the application of the Code Construction Act to reconcile conflicting provisions, and the removal of outmoded provisions. At a minimum, these substantive bills aim to eliminate confusion. To that end, the Committee submitted the bill drafts to TLC for finalization so that each bill can be ready for filing in the 84th Session.

In particular, the substantive bills affect the following CCP provisions:

- Article 4.12 - re: venue in misdemeanor cases before justice courts - The current language has resulted in confusion and disproportionate distribution of caseloads among precincts. The proposed bill broadens the language while maintaining safeguard principles already present, such that venue determination in justice court cases is more predictable and accountable. In brief, the proposed bill simplifies the criteria for determining venue, and allows for justices to maintain local control.

- Articles 15.08, 15.10, 15.11, 15.12, and 15.13 - re: use of telegraph to forward arrest warrants - Yes, you read that correctly. The proposed bill eliminates the use of the telegraph under the CCP (but still allows "secure facsimile transmission or other secure electronic means").

- Article 26.053 - re: public defender in Randall County - Currently, Randall County is the only county to have its own provision like this, which is actually the result of a clerical error made more than a decade ago. The proposed bill repeals Article 26.053 because it is unnecessary in light of subsequent and current law which applies to all Texas counties, including Randall County.

- Article 27.14(d) - re: who may file a complaint in certain misdemeanor cases - Current language is unspecific and causes confusion. The proposed bill clarifies ambiguity in existing law and eliminates confusion by explicitly stating who may file complaints.

- Article 46B.0095 - re: maximum period of commitment or outpatient treatment program participation - Currently, there are two conflicting versions of Article 46B.0095 on the books. The proposed bill eliminates duplicative provisions by reenacting the controlling version of Article 46B.0095 in accordance with the Code Construction Act.

- Article 46B.010 - re: mandatory dismissal of misdemeanor charges - Currently, there are two conflicting versions of Article 46B.010 on the books. The proposed bill eliminates duplicative provisions by reenacting the controlling version of Article 46B.010 in accordance with the Code Construction Act.

The above-noted draft bills were well-received by the stakeholders and will be ready for filing in the 84th Legislative Session. Naturally, proposals for other bills may arise between Fall 2014 and Spring 2015, but any such bills would require a strong consensus.

After numerous discussions with stakeholders, it is very apparent that substantive changes to the CCP are necessarily complicated, primarily due to the adversarial nature of the criminal justice

system. Indeed, this unavoidable characteristic likely makes even non-substantive issues more difficult to navigate from a code-revision standpoint.[7]

B. Future Projects

Of course, some ideas were brought forth which the Committee did not distill into draft bills, usually due to lack of strong consensus but also because the idea may have entailed such a large or nuanced revision that a more systematic approach (e.g., through a separate select committee) would be needed in order to thoroughly explore the idea and the potential solutions. This is not to say that the Committee is unreservedly recommending the creation of new select committees for any or all of the following ideas, but the Committee notes that the following ideas merit some forward action, or at a minimum, future study.

The future projects include the following:

1. Article 42.12 - Community Supervision

2. Regional Public Defender Program

3. Article 46.05 - Competency to be Executed

4. Chapter 55 - Expunction

5. *Clay v. State*

6. Article 46B.022 and Article 46C.102 - Competency and Insanity - Qualifications for Experts

7. *Cates v. State*

Each of the above-listed matters will be discussed in turn.

1. Art. 42.12 - Community Supervision

Indeed, a number of entire chapters of the Code were identified by various stakeholders as problematic.[8] However, none garnered the overwhelming disapproval of stakeholders as did Chapter 42, and particularly, Article 42.12 - Community Supervision. Not only were complaints made regarding the operative policy of Article 42.12, but even the very form of the statute itself, its organization and structure, has been lamented by stakeholders across the spectrum.[9]

With that said, it should be noted that "community supervision" and "probation" are basically equivalent. Indeed, many practitioners use the terms interchangeably without confusion. Article 42.12 was "Probation" until 1993, when it changed to "Community Supervision" (and that was certainly not the only change that year). By way of an extremely brief history, the 1990s visited an overhaul of sorts upon Article 42.12 with impositions of various mandatory measures and limitations on judges. One fascinating bit of pseudo-trivia is that Article 42.12, as originally implemented back in 1965 took up about 12 pages in the Vernon's Texas Statutes black book - today it takes up about 36 pages. Judge Gist[10] has described Article 42.12 as a woodpile of sorts for a cozy campfire, but that over the years, every legislator with a wayward brother-in-law has thrown an extra log on the pile, and now that it's lit, it’s become a bonfire in need of emergency attention.

Amongst stakeholder groups, a palpable sense of "this ain't working" is evident. But what "ain't" working, exactly? As is often the case, the answer is an amalgamation of multiple factors. Without being hyper-technical, the key substantive factors at play are:

a. Limitation of judicial discretion

b. Offense-driven sentencing
c. Outcome-driven and Evidence-based Practices

Taken all together, the above factors create a problematic Community Supervision system that most will concede to be inefficient, at a minimum. Some will go further and state that the system is broken, problematic, ineffective, et cetera., particularly with regard to achieving any long-term solutions or goals as pertain to administering the system, itself, or to curbing undesirable behavior amongst offenders (i.e., reducing recidivism).

a. Limitation of Judicial Discretion

Article 42.12 contains certain "mandatory" provisions that some stakeholders characterize as problematic and/or useless. Anything mandatory can be functionally viewed as a limitation of judicial discretion to determine an appropriate sentence for any given offender. Resistance to such mandatory provisions likely finds its metaphysical root in traditional Texan mistrust of government and is most readily expressed by members of the judiciary because their discretion is being limited by said mandatory provisions.

b. Offense-driven Sentencing v. Offender-driven Sentencing

In its present form, Article 42.12 forces judges to determine an offender's sentence based on the particular offense rather than on an assessment of the particular offender. Before dismissing this idea, think of it in terms of a non-criminal setting where discipline is tailored to fit the individual, rather than the bad act. Most Texans have witnessed instances where a proverbial "slap on the wrist" hasn't had a lasting effect on the person being punished. Many have seen the punished party "put on a show" of sorts in hopes of convincing everyone else that a "lesson has been learned." At some point, probably every Texan has felt that a particular punishment did not fit the crime. But is this the best way to look at the issue? Should the time fit the crime? Or, would it be better if the time fit the crime in light of the criminal?

People are people, including criminal offenders. But everyone knows that some folks learn quickly while others do not. Most Texans can tell you when they see an "accident waiting to happen" and can recognize a "recipe for disaster." And often these scenarios arise because certain expectations are placed on certain individuals who may or may not be able to handle certain situations. Texans understand that some people are more or less likely to make certain choices, and some offenders are more or less likely to be repeat offenders (i.e., high-risk v. low-risk offenders). But Texans also understand that sometimes it makes sense to "cut [someone] a little slack." These kinds of evaluations happen in the day-to-day lives of virtually every Texan, and they also happen in the criminal justice system, particularly when it comes to managing and administering offenders under community supervision.

During a discussion concerning how to properly handle high-risk misdemeanants, the Judicial Advisory Council (JAC)[11] considered the following hypothetical scenario for first-time DWI sentencing:

Offender 1 (low-risk)

- first-time DWI
- no criminal history
- social status suggests recidivism is unlikely

Offender 2 (high-risk)

- first-time DWI
- criminal history

- social status is compromised and suggests recidivism is likely

Under current law, it is possible for Offender 1 and Offender 2 to receive a sentence placing them under the same level of supervision. This is offense-driven sentencing, rather than offender-driven sentencing. Because sentencing in Texas functions in an offense-driven manner (simply because of the Code), there exists somewhat of a codified-default-tendency to over-supervise low-risk offenders.

c. Outcome-driven and Evidence-based Practices

To really bring the issue home for a lot of folks, it is helpful to elucidate the fiscal aspect of the matter. According to the Legislative Budget Board's 2012 statistics, the systemwide average cost of supervising an offender on adult probation (community supervision) was under $3.00 per day, while the systemwide average cost to incarcerate an offender was over $50.00 per day.[12] But could the average supervision costs decrease even further? And could recidivism also decrease along with cost (which only adds to the savings)? Evidence-based practices and outcome-oriented approaches to community supervision may help towards realizing these goals.

Research on evidence-based practices demonstrates that not all rehabilitative efforts are equal, and that interventions can maximize their effectiveness by adhering to the principles based on assessments of risk, need, and responsivity in correctional treatment.[13] The risk principle focuses on matching the level of service to the offender's level of risk.[14] It focuses on "the who" aspect of the matter and aims to concentrate efforts on identifying the intensity of services, with more intensive services allocated to higher-risk offenders and minimal services to lower-risk offenders.[15] The need principle focuses on the specific criminogenic needs of the offender which are functionally related to criminal behavior with the goal of achieving change in harmful attitudes, habits, or behaviors.[16] The responsivity principle focuses on matching the style and mode of intervention to the abilities, motivation, and learning style of the offender.[17] This principle concerns "the how" aspect of delivering services.[18] Research consistently bears out the importance of employing cognitive-behavioral interventions and techniques to reduce reoffending.[19]

For the fiscal years 2014-2015 biennium, local Community Supervision & Corrections Department (CSCD) offices will receive over 1/3 of their funding from offender-paid fees, [20] thus, there is little incentive to make sure offenders successfully comply with the terms of their supervision. And numerous hoops through which to jump do not necessarily encourage offenders to make better choices in general, especially if they are already low-risk. But even for high-risk offenders, it would be worth exploring the potential for incentivizing the system in the opposite direction, i.e., provide incentives that would prompt beneficial changes in offender behavior, which might also implicate changes in CSCD officers interact with offenders. Multiple studies over four decades indicate that low recidivism rates tend to occur (at statistically significant levels) among offenders who were supervised by skilled officers that employed prosocial modeling and reinforcement, problem solving, and cognitive techniques in carrying out the supervision.[21]

By nature, evidence-based sentencing practices are essentially outcome-driven philosophies put into action. At a minimum, the two ideas complement each other. No doubt, implementation of evidence-based methodologies would take considerable time

and energy, and as usually occurs with most changes, the new approach may meet with considerable resistance. If the social goodwill aspect of helping offenders succeed in overcoming criminal behavior tendencies isn't motivating, then the financial impact of doing so should be. The most constructive option is to help offenders shake bad habits and turn away from harmful behaviors, while at the same time, equipping them with skills and attitudes that will benefit them and their communities as they move forward in their lives. And, it's also the fiscally responsible thing to do, given the considerable savings in supervision and incarceration costs. Significant policy discussions need to take place on this matter.

As a whole, Article 42.12 needs to be addressed in detail, substantively and non-substantively (more on the latter below). Pragmatic and economic considerations have prompted stakeholders to speak up. Given its broad applicability and specialized nature, potential policy changes would need to withstand robust debate. Indeed, Article 42.12 policy issues should be addressed by a select committee specifically charged with examining Article 42.12 policy reform, its ultimate goal being the generation of a stakeholder-backed policy reform bill.

2. *Regional Public Defender Program*

Nearly fifteen years ago, the Fair Defense Act made changes to the Code of Criminal Procedure, as well as to the Family Code and the Government Code.[22] The law was meant to improve indigent defense systems in all Texas counties, which at the time were viewed as lacking uniformity in standards and quality of representation.[23] Generally speaking, the ultimate aim of the law was to provide for added order, accountability, and quality control of the State's provisions relating to indigent defense.[24]

The Fair Defense Act has had its most pronounced impact in more urban counties, as opposed to rural counties.[25] Compared to urban areas, the difficulty with implementation in rural Texas communities stems from lack of funding (especially in the way of property tax revenues[26]) and the lack of qualified lawyers who are willing to take court appointments in rural communities.[27] Data from the Texas Indigent Defense Commission (TIDC)[28] illustrates generally higher percentages of pro se defendants in rural areas.[29]

Public defender programs bring administrative benefits to their local court systems by helping to keep dockets moving efficiently. With experienced attorneys handling cases instead of unrepresented defendants, judicial resources are better utilized. Plus, the public defenders' energies are essentially dedicated to the local communities in which they operate. Competent representation also has the effect of reducing jail costs, which would benefit local government economics. Because of the inherent difficulties in "going it alone," a regional approach should be explored for willing counties in need of a public defender program or who would like a better program than the one they currently have.[30]

Currently, rural counties without means must execute interlocal agreements[31] between themselves to either operate as a group of sorts for purposes of providing public defender services, or to enlist the services of non-profit organizations to provide those services. A potentially better option would involve modifying the current interlocal agreement scheme such that it permits local courts (i.e., judges) more control over appointing counsel. To accomplish such, Article 26.04 would need to be amended with language that permits local judges the necessary authority.[32]

The TIDC provides financial and technical support to counties to develop and maintain quality, cost-effective indigent defense systems that meet the needs of local communities and the requirements of the Constitution and State law.[33] However, no statutory authority currently permits the TIDC to contract directly with non-profits. Allowing the TIDC to enter into contracts with non-profits for rural defender services would avoid the current and continuing management difficulties[34] resulting from interlocal agreements among participating counties.

According to the 2010 Census, Texas had the second highest urban population (21,298,039) and the highest rural population (3,847,522) in the nation.[35] However, in Texas, 82 counties are designated as Metropolitan and 172 are designated as Non-Metropolitan.[36] And so, while the rural population of Texas makes up only about 15-20% of the total, rural counties make up almost 70% of all counties. And while these numbers will change, the most recent studies suggest a trend of rural population decrease coupled with urban increase (usually described as a population shift from rural to urban).[37] Regardless, the numbers indicate that a regional program should be explored as a likely solution for rural criminal justice systems in Texas. Planning now for regional public defender programs can serve Texas two ways: (1) If, and while, the population shift from rural to urban continues, then program funding should decrease in the future; and (2) if, and when, the population shift reverses, then there will be infrastructure in place to handle the criminal justice needs of those communities.

3. Art. 46.05 - Competency to be Executed

The Code provides, specifically, that a person found incompetent to be executed shall not be executed.[38] And the elements for finding a defendant incompetent are two-fold: (1) the defendant does not understand that he/she will be executed and that such is imminent, and (2) the defendant does not understand the reason for execution.[39] A defendant files a motion with supporting evidence, essentially asking to be evaluated for purposes of competency to be executed, and if the defendant makes a substantial showing of incompetency, then the court appoints at least two mental health experts to evaluate the defendant in light of the two-fold elemental standard.[40] Seemingly straight-forward and simple, the matter becomes more complicated when issues are appealed. Appellate courts (and practitioners) look to the language of the statute for guidance in forming their opinions and arguments, respectively. And statutory clarity ought to be of primary concern when it comes to executions.

Article 46.05 is by no means a "long" statute, but neither is it brief, relatively speaking. A list of the sub-sections in need of legislative attention includes:

- 46.05(c)
- 46.05(g)
- 46.05(k)
- 46.05(l)
- 46.05(l-1)

Indeed, the interplay of the various sections of Article 46.05 can cause confusion, and not necessarily one individual sub-section.

Generally, it is easier to understand the murkiness of procedural statutes (like the CCP) by operating off of a fact pattern that illustrates the problem. Thus, the above-listed problematic provisions will be delved into using brief statements of applicable facts to "set the stage," all in efforts to better illustrate the need for legislative attention.

FACTS #1: Defendant is sentenced to

death. Under Article 46.05, Defendant pleads he is not competent for execution purposes. In conjunction with competency evaluation, the trial court orders a medical exam of Defendant to determine if medication could render him competent. Defendant challenges the trial court's forcible medication order but ultimately loses. Trial court sets new execution date. This time, the State files the motion for a competency evaluation. Experts find Defendant competent. Defendant pleads for appellate review of the trial court's finding of competency.

ISSUES: The language of Article 46.05 implies that a motion raising competency will be filed by the defendant or someone acting on his behalf.[41] Here, it was the State who filed the motion.

Given the absence of statutory language authorizing the State to take such action:

- Is it proper for the State to file such a motion?

- Is this action reviewable?
    - If so, then what entity or court has the authority to review such?
    - If so, then what is the standard of review?

FACTS #2: Defendant is sentenced to death. Defendant pleads he is not competent for execution purposes by filing a motion under Article 46.05 and by filing a writ application under Article 11.071 (habeas corpus).

ISSUES: Following a trial court's determination of a Defendant's competency to be executed, Article 46.05(l) states that "on motion of a party, the clerk shall send immediately to the court of criminal appeals in accordance with Section 8(d), Article 11.071, the appropriate documents for that court's review[.]"[42] However, the language is unclear as to what manner of review is proper. The reference to Article 11.071 arguably implies a habeas-styled review, yet, in the context of Article 46.05, this reference practically serves only as a guidepost for which documents should be sent to the Court of Criminal Appeals.

In the absence of legislative guidance, and for purposes of navigating these issues, the Court of Criminal Appeals has interpreted the law as such:

- Article 46.05 provides an adequate remedy (i.e., not a habeas writ) for claims that a Defendant is not competent to be executed[43] -- but is this what the Legislature intended?

- trial court determinations on competency to be executed are reviewed using an abuse of discretion standard[44] -- but, again, is this what the Legislature intended?

FACTS #3: Defendant is sentenced to death. Under Article 46.05, Defendant pleads he is not competent for execution purposes. Trial court finds that Defendant did not make a substantial showing of incompetency under Article 46.05, and thus, the court denies Defendant's motion (which means Defendant is not even evaluated by mental health experts) and schedules Defendant's execution.[45]

ISSUES: Article 46.05(c) states that a motion for determination of competency to execute must be verified by the oath of some person on the Defendant's behalf.[46] And because it doesn't provide any other specifics, the following questions arise:

- Is verification a prerequisite for review?

- Even if verification isn't necessary for review by the Court of Criminal Appeals, is it necessary at the trial court level, i.e., is verification necessary in

order for Defendant (appellant) to obtain the relief he seeks?

In the FACTS #3 scenario, Defendant is never even evaluated by experts because the trial court rules that Defendant did not make a substantial showing of incompetency under Article 46.05(g). Defendant essentially wants this ruling under Subsection (g) reviewed. In reading Article 46.05(k), it seems that a trial court's determination is to be based on a veritable totality of available information (i.e., expert reports, motion, attached documentation, etc.). Thus, the language of the statute suggests that a full evaluation, including experts, has been done. But what about the threshold determination of a substantial showing of incompetency? Article 46.05(l), indicates that the trial court's determination under Subsection (k) is reviewable. All in all, the statutory language seems to suggest that determinations under Subsection (k) are reviewable. And so, once again the question arises as to which determination is reviewable:

- Is it only the determination under Subsection (k), or is the threshold determination under Subsection (g) also intended?
- If both, then who is the proper entity or authority for reviewing such?
- Presuming the Court of Criminal Appeals is the proper authority, what elements constitute a "substantial showing" of competency in accordance with the intent of the Legislature?
  - Further, what is the proper standard of review for determinations under Subsection (g)?

FACTS #4: Defendant is sentenced to death. The trial court finds him competent to execute. Defendant challenges the trial court's finding under Article 46.05 and timely files his motion prior to the 20th day before his scheduled execution date.[47] But, after the 20-day mark, Defendant filed a supplement to his motion.

ISSUES: Article 46.05 is silent on the matter of supplemental materials filed on or after the 20th day before a Defendant's scheduled execution date. As such, it is unclear whether the supplemental materials can be considered, and the following natural questions arise:

- Are supplemental materials ever permitted?
- If so, then must Defendant get leave of court as a prerequisite to having supplemental materials considered?

To reiterate an earlier sentiment, the Committee recommends that ambiguities be clarified, when possible, but especially when it comes to the operation of Article 46.05, given the gravity of the situations it governs.

4. Chapter 55 - Expunction

Anyone with a criminal record, however long or short (but especially the one-timers) would like an expunction, which can be generally described as the removal of a criminal record from one's history. Commonly thought of like a judicial eraser of sorts, expunctions are not well understood by the general public, and in practice, expunction is no simple matter. The statute is designed to protect wrongfully-accused people from inquiries about their arrests.[48] But the expunction statute's purpose is not to eradicate all evidence of wrongful conduct,[49] as certain records and files are excepted by the language of the statute, itself, and such language has been interpreted by the courts

to include various types of records.[50]

Just to clarify the titular language - an "expunction" has occurred when criminal records have been "expunged." So, while a person may petition the court for an "expunction," it is the court who has the authority to "expunge" the records (or not). Folks seeking an expunction typically do so in order to "clear their name" for purposes of job seeking, civic memberships, etc., or for any activities wherein a criminal background check is performed.

One preliminary matter: expunction is purely a statutory privilege and is not a constitutional right, nor is it a common-law right.[51] Article 55.01(a) creates a civil cause of action through which a person can establish an entitlement to expunction.[52] From the outset, expunction appears immediately and inherently contradictory - the criminal law creates a civil case. This fact alone provides the impetus for a discussion about moving the expunction statute (i.e., the current CCP Chapter 55) to another code altogether.[53] A logical first-step in revising Chapter 55 may indeed be to reenact it (in full) in one of the existing civil codes, such as the Government Code, which also includes criminal law-oriented provisions.

Beyond moving expunction into a different code, the function and operation of Chapter 55 is problematic in numerous ways, several of which include: (a) What does it expunge?; (b) Who does it bind?; and (c) How are they bound? Inevitably, the issues stemming from these three basic questions are at times intertwined and overlapping. Regardless, it is helpful to categorize the issues for analytical purposes. And while this Report doesn't pretend to answer these questions, it will hopefully prompt more focused action such that these questions are answered by the legislature.

a. The "What"

In simplest terms, Article 55.01 lays out the elements necessary to create a "right to expunction."[54] The very first sentence of Chapter 55 is articulated in Article 55.01, and this first sentence arguably contains the root of ambiguity for much of the statute.[55] The suspect phrase "all records and files relating to the arrest"[56] is used a total of three times[57] throughout Chapter 55 and generates confusion with regard to what exactly is contemplated by the statute with respect to "all records and files relating to the arrest."

More specifically, the issue stems from the words "relating to the arrest," because of the potentially narrow (or broad) interpretation of such, hence the ambiguity. In the very broadest sense, "relating to the arrest" could include every single record or file in every criminal case because every criminal case begins with an arrest. On the other hand, in its narrowest sense, "relating to the arrest" could mean only those records or files that explicitly refer to or somehow otherwise memorialize detailed information about an arrest. Adding to the arrest-oriented focus is the fact that the phrase "the arrest" (not including the three times previously mentioned) is used a dozen times.[58]

Nothing in the current statutory language indicates the legislative intent as to what is meant by these phrases. The Texas Supreme Court has stated that the statute cannot reasonably be construed to apply to all investigative files and records generated by a state agency, for example.[59] But, how much broader an application of this principle is possible without "legislating from the bench?" This point provides a natural segue to the issue of appellate opinions (which blends the What and the Who questions).

Opinions (sometimes called decisions) by the appellate courts inevitably contain the kinds of information that can be expunged

under Chapter 55.[60] However, a court's opinion in a case (published or unpublished) has not been declared to be a "record [or] file relating to [an] arrest" (in statute or case law). Even so, are these higher courts bound by a lower court's order anyway? Enter: the Who question.

b. The Who

When a person obtains an expunction, an order granting such is executed by the court and sent to all parties who were put on notice by the petition for expunction.[61] All parties named in the order are thereby directed to return, remove, redact, and/or obliterate records or files that identify the person and must delete all index references to the person.[62] But who are these parties that must comply with an expunction order?

In brief, any party named in the order must comply. But when it comes to governmental employees and officials, these folks need only acquire knowledge of the arrest and the expunction order to be bound.[63] Typical parties include governmental agencies and entities at various levels, as well as private data collection companies. Virtually any entity with information "relating to the arrest" could be named. And this seems clear enough. But, a few issues arise that muddy the water with regard to Who can be bound by an expunction order.

A district court may expunge all records and files relating to the arrest of a person,[64] thus the expunction order comes out of the district court. It is natural to expect a district court order to command private entities, as well as some governmental entities. But what about higher courts? It appears that Chapter 55 operates in somewhat of a backwards way (authority-wise) because it permits a district court to issue an order that binds higher courts, such as the Court of Criminal Appeals or any other appellate court.

Appellate courts may possess records and files that fall under Chapter 55. Indeed, the Court of Criminal Appeals may acquit a person and thereby provide an avenue for a potential expunction.[65] But, any question regarding the eventual expunction would never come before the Court of Criminal Appeals because expunction is a civil matter.[66] Regardless, take it a step further, and the possibility arises that the very opinion by which the Court of Criminal Appeals acquitted the person could potentially be a record targeted by the expunction order.[67] But does the lower court have power over the higher court? Now take the matter even further: The Texas Supreme Court could review an expunction case in which the Court of Criminal Appeals is a party. With no mandamus power over the Court of Criminal Appeals,[68] the Texas Supreme Court would arguably have no authority to enforce its judgment as to the Court of Criminal Appeals. Would the Texas Supreme Court, itself, ever be bound by a trial court's expunction order? The issue of binding power and authority as to expunction orders needs to be addressed.

Notice, as a legal matter, is a building-block of sorts for our justice system. Yet, the relevancy of notice is unclear under Chapter 55, because a party may not be listed as a party in a petition for expunction but may nevertheless end up listed in the order (and thus bound by the order).[69] Being listed as a party prompts the court to provide "reasonable notice" but nothing in enforcement-oriented language of the statute suggests that receipt (or non-receipt) of notice holds any significance.[70] Plain reading of the statutory language suggests that only parties named in the order are bound to comply with the order, but then there is the caveat-of-sorts with respect to governmental employees and/or officials.[71] At any rate, if the issue of notice is nullified,

then ordinary notions of accountability and procedure are effectively discarded. And if notice is arguably meaningless, then how is a party bound under Chapter 55, if at all?

c. The How

Under Chapter 55, violators can be charged with a Class B Misdemeanor.[72] Thus, the "how" seems pretty simple. To knowingly release, disseminate, or otherwise use the expunged records or files constitutes an offense, as does failing to return or to obliterate identifying portions of an expunged record or file.[73] But what if the alleged violator was not listed on the order or was/is not employed by any entity listed on the order? Are they bound? If so, then how? And what about the governmental employee/official caveat-of-sorts under Art. 55.04? How are they to proceed?

With regard to being bound by an expunction order, it may do well to describe the function of such in terms of what an unbound party (i.e., not listed on the order) must do. If not listed on the expunction order, then an entity is not required, indeed, is not even legally authorized to remove or obliterate any records, as doing so would potentially constitute the offense of tampering with a governmental record.[74] But Chapter 55 clearly states that "the release, maintenance, dissemination, or use of the expunged records and files for any purpose is prohibited[.]"[75]

A proverbial "damned if you do, damned if you don't" type of scenario isn't difficult to imagine for, say, a court clerk whose office knows about the expunction but was not listed on an expunction order and who needs to "use" the records for its annual statistics calculations. What does "use" mean? And isn't keeping the records intact arguably furthering their maintenance? And just who at the clerk's office would take the fall for a violation like this? And what court would have authority to hear the case on appeal (And what if it was a clerk for one of the higher courts?)? None of these questions begins with "how" but they all beg the question: How does Chapter 55 even operate in its current form?

After Article 42.12, Chapter 55 was the next most popular portion of the Code to be mentioned by stakeholders as needing legislative attention. Under the circumstances, it is likely better for the legislature to clear up the uncertainty rather than leave the matter to judicial interpretation which would create an opportunity for judicial activism. But activism aside, with a statute as ambiguous as Chapter 55, to allow courts to sort it out with precedent upon precedent would likely confound the situation further. Legislative direction is needed.

5. Clay v. State[76]

The opinion in *Clay* addresses interpretation of Article 18.01(b), which governs the proper issuance of an evidentiary search warrant for the extraction of blood for forensic testing. In *Clay*, an officer obtained a warrant over the telephone (i.e., by calling the magistrate and swearing out a supporting affidavit). The issue on appeal was whether obtaining a warrant telephonically was proper under Article 18.01(b). The Court of Criminal Appeals granted the appellant's petition for discretionary review in order to resolve the issue of interpretation, given that more than one other appellate court had reached a different opinion based on comparable facts. Rather than delving into a detailed case analysis of *Clay*, the Committee's focus is on the potential role of the legislature as pertains to revising the CCP in light of the *Clay* decision.

All but one of the judges on the Court of Criminal Appeals agreed that obtaining a

warrant telephonically is permissible under Article 18.01(b). Interestingly, the lone dissenting opinion considers an identical factor to the majority opinion - that the legislature alone can amend or supplement Article 18.01(b). Both opinions refer to the legislature's ability to modify Article 18.01(b) so as to specifically and fully regulate the telephonic and/or electronic obtainment of search warrants. But where the majority opinion resolves to proceed on a case-by-case until the legislature acts, the dissenting opinion recommends that, until the legislature does in fact act to broaden Article 18.01(b), no court rulings should expand the statute. In other words, the majority view finds no fault in allowing the law to stretch with technological advances, but the dissenting view holds fast to the concept of waiting for the legislature to specifically change the law.

Indeed, supporters of the dissenting opinion likely view the majority opinion as an instance of judicial activism. But, supporters of the majority opinion can easily point to commonsensical and pragmatic reasons for taking a case-by-case approach, especially given that utilization of technology is acutely involved. In any event, both opinions acknowledge a hole of sorts in the law, inasmuch as the law is silent on the matter of telephonic (or any other electronic) means for obtaining a search warrant under Article 18.01(b).

Thus, the Committee sees the *Clay* case as playing a natural role in prompting the legislature to take Article 18.01(b) under consideration for revision. Several reasons exist for doing so, not the least of which is an interest in keeping case law free of potentially conflictive precedents. Indeed, a refining of the statute would give practitioners a clearer idea of what is permitted under the Code. Beyond that, it seems increasingly prudent to keep laws (in general) in-step with modern technologies, especially in the criminal justice arena. And of course, the potential savings in judicial resources that would stem from less appeals because of an arguably ambiguous statute maintains perennial allure.

6. Article 46B.022 and Article 46C.102 - Competency and Insanity - Qualifications for Experts

The topic of Mental Health grabs headlines in newspapers and magazines, whether in print or online, and for criminal justice practitioners, the topic narrows dramatically with regard to the technical aspects of handling a case where the criminal defendant arguably suffers from mental illness. Of course, the Code provides specific procedures in cases involving mental health issues. This area of the law is particularly detailed and, at times, confusing. Myriad issues arise as a result of the interplay between criminal justice and mental health, and indeed, such a topic could demand the exclusive attention of its own select committee. But here, the Committee is focused on the provisions in the Code governing determination of who qualifies as an expert in cases where competency or insanity are at issue.

While the two categories are certainly linked, they do not mean the same thing procedurally. If determined incompetent to stand trial, a criminal defendant is usually committed to a facility or released on bail, and unless they later become competent, their case may be dismissed (and thus the question of insanity will never even come up, much less the question of guilt or innocence). On the other hand, insanity is a defense in criminal cases, and the question of insanity is submitted along with the question of guilt or innocence. But in either type of case, the court will apply certain CCP provisions with the goal of properly considering and adjudicating the matters at

issue in a given case. And, whether competency or sanity is being determined, experts are usually appointed to provide testimony and/or reports bearing opinion(s) on the matter.

Article 46B.022 deals with qualifications for experts in competency determination cases, while Article 46C.102 deals with qualifications for experts in cases where the defendant has plead an insanity defense. When Chapter 46C was codified in 2005, the legislative intent conveyed, in part, a desire to conform the standards for experts in insanity cases to the standards used for experts in competency determination cases.[77] However, the provisions fell out of conformity upon the enactment of H.B. 2725 after the 2011 Regular Session.[78]

Apparently, the standards for qualifying experts in competency cases and insanity cases were intended to be reflective of each other. The efforts to conform the language in 2005 appear to have been inadvertently undone. With regard to considering specific aspects of the statutory language, the Committee suggests review of what should be considered as adequate "experience" for appointment in a given case, particularly in light of the following:

- whether a requisite number of years' experience should be required;
- the current continuing education requirements for psychologists and psychiatrists;
- the current, increased availability of certification and training;
- the fact that, in exigent circumstances, the court has authority to appoint an examiner who is not otherwise qualified.[79]

The ultimate goal should be clarification of the criteria used for determining whether an expert is qualified in a given case. With clearer criteria comes an increased likelihood that experts who end up getting appointed are, in fact, qualified and not mistakenly passed through because of a misunderstanding or misapplication of the law. In any event, the Code will be much cleaner (i.e., simpler and more properly utilized) with conforming standards for expert qualifications in competency and insanity cases.

7. Cates v. State[80]

In the *Cates* opinion, once again is heard a call for legislative attention to a specific provision in the Code - Article 26.05(g), which allows a trial court to order a criminal defendant to repay costs of a court-appointed counsel that the court finds the defendant is financially able to pay.[81] Some defendants are determined to be indigent when arrested but later are found to no longer be indigent. More often, defendants found indigent at the start of a case remain indigent through the end of the case. The Cates opinion sparks a debate about policy considerations surrounding a defendant's potential future ability to pay.

In *Cates*, the defendant was found indigent at the time of trial, but as it turned out, he had money in an inmate trust account,[82] and the trial court ordered that the trust account monies be used to reimburse indigent defense costs and fees while the defendant was incarcerated. Essentially, the trial court and the lower appellate court interpreted the law as allowing access to defendant's money later. The Court of Criminal Appeals opined otherwise but, at the same time, intentionally raised a policy issue that merits debate.

First, some interpretation of the current law proves helpful. One case in particular, *Mayer v. State*,[83] has offered some guidance

on interpreting Article 26.05(g), where the court stated that "the defendant's financial resources and ability to pay are explicit critical elements in the trial court's determination of the propriety of ordering reimbursement of costs and fees."[84] In short, a trial court needs to scrutinize the defendant's financial wherewithal before ordering reimbursement. In light of its opinion in *Mayer*, the court in *Cates* noted that "a defendant who is determined by the court to be indigent is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant's financial circumstances occurs."[85] In other words, a finding of indigence sticks, but it only sticks as long as the court doesn't find otherwise. If a defendant comes into some money during the pendency of his case, then the court may find he is no longer indigent. The court was keen to point out that the trial court had made no finding on the record of the defendant's ability to pay.[86]

The court went on to state that Article 26.05(g) "requires a *present* determination of financial resources and does not allow speculation about possible future resources."[87] Thus, under current law, a court cannot properly order a defendant to repay costs and fees for court-appointed counsel based on the potential likelihood that the defendant will be able to pay later. In essence, a court cannot order potential future access to an offender's potential future funds. But herein lies the issue for debate - why not grant potential future access?

In *Cates*, the concurring opinion specifically proposes a policy reason (based on the concept of individual fiscal responsibility) for changing the law to allow the court to order a defendant to repay at a future date. In her concurring opinion, Presiding Judge Keller states that "[i]f a defendant subsequently acquires the financial resources to compensate the county for defense-counsel fees associated with his conviction, he ought to be required to do so."[88] Judge Keller proposes that the statute could be amended such that the trial judge may conditionally impose attorneys' fees to be paid if the defendant obtains sufficient financial resources during the pendency of his sentence. As the law stands now, a trial judge can impose fees only on the basis of the defendant's financial status during the pendency of the trial or upon conviction - the court cannot reach further. But should it be able to? And how would such a determination be made?

Stakeholders brought up various concerns with respect to such a change in the law. Some feel that the current law favors the defendant in that he can be indigent during the pendency of his trial and then get rewarded with a large trust fund deposit after conviction (presumably from criminal benefactors via family). Or, after a short sentence, the defendant could secure gainful employment and never have to repay the county for the free legal representation. Some judges felt that implementation would be difficult, particularly from the standpoint of speculatively determining whether access should be ordered in a given case. If one, then why not all? In any event, county auditors would need to find a responsible and secure way to account for fund balances and transfers under such a law.

Fiscal responsibility principles beckon the issue forward, especially considering that the proposed change would hold offenders financially responsible for a taxpayer-funded social service - paying one's fair-share is a popular mantra for many (if not most) Texans. But, the logistics in implementing such a change suggest challenges and difficulties. Under the circumstances, the Committee feels this issue merits further consideration. Equitable reimbursement of taxpayer-funded programs

by those who benefit from those very programs may ring true in the ears of Texans.

III. Non-substantive

Of course, the Texas Legislative Council (TLC) is responsible for non-substantively revising all Texas statutes, taking each code in turn (and in its entirety) and effectively updating it in order to maintain uniformity of style, language, et cetera. However, the CCP has not received such a full-body treatment by TLC, but instead, certain provisions have been addressed in a piecemeal fashion. Arguably, this approach has been the result of a combination of several factors, including the inherent complexity of the Code, the adversarial nature of the subject matter, as well as the often necessarily oppositional stances of the stakeholders involved.

TLC's typical approach is to divide a given project into multiple parts and have periodic meetings during the process. Stakeholder input is taken along the way. All efforts culminate in the drafting of a bill for consideration by the legislature that amounts to a non-substantive rewrite *of an entire code*. The intent is never to substantively change the law - only to update its language. Of course, this can be a matter of debate. One example of this kind of effort is the revision of Article 42.18 during the 1997 Session. Essentially, Article 42.18 was moved to the Government Code and became a new chapter (Chapter 508). This move helped to streamline the law, making it more functional and navigable. And while this piecemeal method has been successful, it has not been consistently utilized, i.e., it has not addressed the CCP in continuing successive sessions.

A. Article 42.12

As previously discussed, a consensus of stakeholders view Article 42.12 as being in need of significant legislative attention. Substantive concerns were discussed *supra*, but the Committee also elected to take a non-substantive look at Article 42.12 in its entirety. To that end, the Committee requested that TLC act as drafter and to assist practitioners in preparing a non-substantive revision of Article 42.12 (again, in its entirety). The goals for the revision (maybe more directly a *rewrite*) include, but are not limited to, reorganization and restructuring of Article 42.12, in order to render it more accessible, comprehensible, and "user-friendly" for practitioners.

Here, the Committee aims to have a full and complete non-substantive rewrite of Article 42.12 produced in bill form for filing in the 2015 Session. Keep in mind, this is *one article within the Code*, and not all of Chapter 42, much less the entire CCP. Stakeholders generally welcomed the idea of *at least* a non-substantive rewrite of *at least* Article 42.12.

B. Revision Program

Regardless of whether the Article 42.12 rewrite bill successfully navigates the legislative process, the Committee strongly recommends that the CCP be consistently addressed in *every* legislative session. Specifically, the Committee suggests that entire Chapters be non-substantively addressed in every session on an *ad hoc* basis. At any given time, different statutes may become problematic for any number of reasons (or may remain problem-free) and may need attention (or may not), and the legislature should have a perennial plan for dealing with such - a CCP revision program of sorts. In practice, there should be at least one CCP chapter (or complex article) that is

non-substantively revised by TLC in every interim and then considered by the legislature in the following session.

The CCP may be unique ways, and so it may need a piecemeal approach to large-scaled non-substantive revision (as previously discussed). But, like all other codes, the CCP will inevitably need to be non-substantively revised in perpetuity. And given the apparent need for a piecemeal approach (and coupled with the legislative calendar in Texas), it stands to reason that every single legislative session should non-substantively address at least one piece of the Code. Under the circumstances, there is no excuse for not having a plan this simple. The most difficult aspect will be deciding which portion of the Code get addressed, and this task should naturally fall to this Committee (if in existence), some other duly appointed committee, or the Criminal Jurisprudence Committee.

According to stakeholder input, potential candidates for such biennial non-substantive projects could be any of the following:

- Chapter 42
- Chapter 46
- Chapter 46B
- Chapter 46C
- Chapter 55

Even considering only the above-listed sections should provide enough material for at least the next three to five session-cycles. As the current proponent of and for this new approach, and based on stakeholder input, the Committee suggests Chapter 55 be the next candidate for TLC's non-substantive statutory revision project during the 2015-2016 Interim.

IV. Modernization

Revision of the code, whether substantively or non-substantively, could achieve a "modernizing" result. However, after close consideration and discussions with stakeholders, the committee has identified one particular aspect of the Code that is in need of modernization on somewhat of a global scale: A concerted move toward a paperless system. A modern reality in virtually every field of business, industry, and government is the shift toward electronic data management, where feasible. The criminal justice system is no different, and indeed, it is already stretching in the direction of an electronic (paperless) future.[89]

A. Paperless Systems

While it is probably impossible to completely eliminate paper from criminal procedure, it is entirely possible to streamline, improve, and lessen the cost of criminal proceedings throughout our justice system in Texas. Other States (Minnesota is the forerunner) have implemented paperless systems that are statewide in nature and have realized measurable increases in revenue with decreases in wasted money, along with improved service of local communities.[90]

Some entities in Texas are already attempting to "go paperless" with electronic filing capabilities, but this is a vast minority of locales, and these electronic filing capabilities do not begin to seize upon the opportunities for cost savings and increased revenue that even a paperless charging system would bring. The paperless world is a potentially very big place. Minnesota recognized the value of implementing a paperless charging system, where citations and complaints (and DWIs) are handled via an electronic system, and after committing the resources, their local communities (and thus, the State as a whole) are reaping the benefits, most notably in financial ways. Some other States are thinking smart and

following suit. Texas needs to make a move.

a. Basic Function

In March 2014, the Committee held an exploratory hearing regarding practical and financial considerations for implementing a paperless charging system for processing criminal cases in Texas.[91] Testimony was heard from various professionals with direct ties to the courts and criminal justice system.[92] Generally speaking, the testimony was positive concerning paperless systems, and every witness seemed encouraged and excited about the prospect of such a project in Texas.

The processing of a speeding ticket is probably the simplest illustration of how a paperless charging system would work. Currently, officers use a handwritten method or they may use an electronic ticket writer.[93] If handwritten, then the citation is physically taken to the court by the officer. If electronic, then the information may be electronically transferred to the court. After that step, the electronic processing stops. This is not to say that computers are no longer used, but instead, any further sharing or transfer of electronic data is limited or maybe non-existent. If the violator fails to appear at their court date, then a complaint must be filed, and that complaint must be sworn to by the arresting officer (which requires another trip to the court). It is easy to see where paper, fuel, and manpower could be saved or more efficiently used if the process was paperless.

With a paperless system, ideally, the citation could be handled as follows:

- data entered into the system in the field (i.e., everything that would normally be handwritten would instead be entered into the system directly)

- citation would be generated and a paper copy printed and given to the violator (or electronically sent to the violator, if such was elected)

- the citation would then be electronically filed with the court

- data entered into the system from the field would automatically populate future documents and/or filings related to that citation

- all future documents or filings related to the citation would be transferred, signed, reviewed, etc. electronically, and the data would automatically populate the form documents, thus reducing repetitive data entry and clerical errors[94]

- if a violator fails to appear for their court date, then an officer can electronically swear to and file a complaint, thus better utilizing the officer's time and reducing fuel expenses (especially in large counties or in high-traffic areas).

Of course, the above outlines a simple and basic scenario, but it is conceivable that the technology would eventually develop to handle even the most complicated matters.

b. Benefits

Benefits of paperless systems generally include labor cost avoidance, lower operating expenses (e.g., postage, paper, records storage, fuel), more efficient use of time,[95] as well as intangible benefits like improved data quality alongside increased administrative and integration capabilities. Even potential increases in revenue are possible due to increased connectivity and accountability for violators whose citations don't "slip through the cracks" and whose fines are paid more quickly.[96] Other

foreseeable benefits entail improvements in data accuracy, faster reporting, more consistency in recordkeeping policies, and increased officer safety.[97]

Tom Clarke, an economist with extensive knowledge concerning the large-scaled implementation of government projects, testified that going paperless is one of the best information sharing technology projects a State can undertake.[98] Mr. Clarke indicated that studies show the move to paperless yields a high return on investment. Costs are typically borne by the same entities who benefit from the program, which includes local governments and law enforcement (and ultimately the State on some level).

c. Costs & Challenges

Implementation costs are typically high, particularly with respect to new hardware and software, and State funding assistance to local entities would likely be required, especially for less populous entities. Collaboration between local entities can ease the high start-up cost by spreading it. Mr. Clarke also identified potential implementation difficulties for Texas because of the generally decentralized nature of our governmental infrastructure. However, he remarked that a Statewide portal[99] would help overcome some of the challenges posed by decentralization.

David Slayton from the Office of Court Administration testified to the civil eFiling program (the portal) in Texas as evidence that the move to paperless is feasible and that criminal cases can be handled through the portal when rules and infrastructure are in place to allow for such to occur.[100] Several specific challenges and considerations were brought up by several witnesses, including:

- currently, Texas does not have a standardized citation form[101]
- necessity of paper citation printing in the field (which implies the necessity of utilizing electronic ticket writers[102])
- the existence of different case management systems in different jurisdictions[103]
- electronic case management systems, in general, are expensive and may be cost-prohibitive for entities with low case volume and/or low population
- whatever the size of the entity, electronic case management systems should be tailored to fit the needs of the local jurisdictions served[104]
- a technology gap currently exists between entities who have gone paperless and those who are still paper-based, thus the electronic sharing of information between these entities is currently limited or impossible[105]
- private vendors currently provide some entities with paperless capabilities,[106] thus there are existing agreements and contracts by and between private entities and public entities, and so, integration with these existing proprietary systems could be complicated.

d. Other Considerations

Testimony confirmed that, regardless of whether the approach is a Statewide system or a regional system, national standards for information exchange and data transfer should be followed and that any system must be scalable to accommodate new functionalities and capacities.[107] It was generally noted that using a standards-based approach would aid in quicker, cleaner

integration, particularly given the variety of electronic case management systems across Texas.

One key difference between electronic filings in civil cases compared to criminal cases is the payment of filing fees. Civil eFiling of claims using the portal (eFileTXCourts.gov) requires the party filing a document to pay a fee for doing so, and in civil cases, both plaintiffs and defendants are most often private individuals or companies. In criminal matters, one party is governmental in nature (i.e., city, county, or State) while the other is private. Arguably, it would be financially burdensome to charge a county or city to pay a fee to use a system that they are already paying to provide. On the other hand, many criminal defendants are indigent, and so, their case expenses are passed along to the county, thus the county is again in the difficult spot of having to pay twice (or three times). Some arrangement would need to be worked out for purposes of making sure that undue financial burdens would not be placed on prosecutors' offices or on indigent defendants.

e. *In Closing...*

Broad consensus indicates that electronic processing of data, i.e., paperless systems, are the inevitable future of administration, especially in places with substantial volume. However, it appears that even smaller entities can enjoy benefits as long as they can overcome the initial start-up costs. In Texas, county governments pay all court infrastructure costs, with the exception of judicial salaries.[108] As such, collaboration among and between counties will be necessary to defray the high costs of implementing the necessary software and hardware.

But where does Texas begin? Arguably with the hearing referenced herein. But where to now? Should it be a "top-down" approach, where an agency takes control and manages the program? Or, should it be a "bottom-up" approach where local entities gradually update and upgrade on an as-needed basis? Though the "top-down v. bottom-up" question wasn't formally addressed at the hearing, the testimony seemed to suggest that stakeholders would have more of an affinity to the latter. This dichotomy hints at another question of whether it should be a "Statewide v. Regional" system.

The Committee is sensitive to local governmental entities wanting to maintain control of how they like to do business. At the same time, the greater good of Texas suggests that paperless systems are a reality and will be the eventual rule, rather than the exception in the near future, and so, Texas ought to start making strides toward such. In any event, more exploration is needed in more detail.

A paperless charging system is a big idea with a potentially big impact, and thus the topic merits its own independent study. Just the idea of paperless systems acts to feed the imagination. And imagination sparks innovation. There is no reason to believe that Texas will benefit from waiting to act or from delaying efforts to plan for the paperless future that is, in some respects, is no longer in the future but is already here as our waking present. Texas has already implemented an electronic system for civil matters. Now, it's the criminal justice system's turn.

V. Recommendations

Rather than force interested parties to scan through the body of this report for the Committee's recommendations to the Texas Legislature, what follows is a list of such.

- Amend Article 4.12 in order to simplify

the criteria for determining venue in misdemeanor cases before justice courts, while still allowing justices to maintain local control.

- Amend Articles 15.08, 15.10, 15.11, 15.12, and 15.13 to update and modernize the Code by eliminating the use of the telegraph as a mode of forwarding arrest warrants to the court.

- Repeal Article 26.053, which solely and unnecessarily provides for a public defender in Randall County (which has access to a public defender under current law, irrespective of Article 26.053.

- Amend Article 27.14(d) to clarify ambiguity in existing law and eliminates confusion by explicitly stating who may file complaints in certain misdemeanor cases.

- Reenact the controlling version of Article 46B.0095 pursuant to the Code Construction Act in order to eliminate duplicative provisions.

- Reenact the controlling version of Article 46B.010 pursuant to the Code Construction Act in order to eliminate duplicative provisions.

- Appoint a select committee charged with reforming current Article 42.12 policies and practices with the ultimate goal being the generation of a stakeholder-backed policy reform bill. Specifically, the select committee should explore ways to:
    - reduce existing code-imposed limitations on judicial discretion
    - eliminate existing code-generated tendency to over-supervise low-risk offenders by implementing sentencing practices that are based on the offender rather than the offense
    - implement outcome-driven and evidence-based practices that aim to reduce recidivism

- Explore implementation of regional public defender programs with a focus on improving criminal justice systems in rural counties. Amend the Code to allow for greater flexibility in how counties may obtain funding for such programs. Key factors for a successful program should include assistance to public defenders and to prosecutors and should incorporate measures to reduce property taxes in participating counties.

- Amend Article 46.05 in order to clarify ambiguities concerning the procedural requirements at the trial court level, as well as the review of those actions by higher courts.

- Amend Chapter 55 in order to eliminate ambiguities in its form and function. Chapter 55, in its entirety, should be referred to TLC for a non-substantive rewrite to be performed during the 2015-2016 Interim. Specific goals for the revisions should include:
    - clarification of what is meant by the phrase "all records and files relating to the arrest"
    - clarification on which entities are or are not bound by an expunction order
    - clarification on the effect of an expunction order, particularly with regard to the responsibilities of parties not named in the order

- Amend Article 18.01(b) in light of the *Clay* opinion to keep the Code in step with available technology. Specifically, Article 18.01(b) should be broadened such that a search warrant may be obtained telephonically or by other electronic means.

- Amend Article 46C.102 to clarify the criteria used for determining whether an expert is qualified in a given case. Specifically, conforming changes should be made, such that 46C.102 and 46B.022 delineate a common standard for expert qualifications in competency cases and insanity cases.

- Examine Article 26.05(g) in light of the *Cates* opinion, particularly with respect to whether the statute should be broadened to allow a criminal defendant to be ordered, post-conviction, to repay counties for indigent defense costs and fees.

- Develop a systematic approach for initiating recurrent, article-specific, non-substantive revisions of the CCP to be performed by TLC during each interim.

    - Consider the Committee-prompted TLC non-substantive rewrite of 42.12 as the inaugural project in what should become a continuing effort in successive interims to ensure that the Code is perpetually kept up to date.

- Appoint a select committee charged with developing a concrete plan for the eventual implementation of a paperless system to handle criminal matters in Texas. Goals of the committee should include:

    - Determination of whether a Statewide plan or a Regional plan would better serve Texas

        - Development of a plan for initiating a pilot program based on either a Statewide model or a Regional model, which should include identifying potential pilot entities from around the State

ENDNOTES

[1] When discussing the CCP, depending on who is speaking, the term "provision" roughly equals "section" roughly equals "article" unless otherwise distinguished. A "chapter" is usually made up of a bunch of "articles." Using the term "provision" typically suggests the most general, while "article" intimates the most specific. And beware, for the term "subsection" certainly implies a very, very specific "provision" indeed.

[2] Please note that "non-substantive" revisions practically amount to a reorganization of sections and language, along with a modernization of the vernacular, all in an effort to make the Code more accessible to practitioners, as well as to the public. In short, the goal for a non-substantive revision is not to "change" the law but to clarify how the law reads. Thus, the goal of the "Code Update Project" should be taken quite literally in light of its namesake, particularly in the sense that the language is being updated for "today's" reader(s).

[3] Texas Government Code section 323.007 requires TLC to make a complete, non-substantive revision of Texas statutes. The ultimate goal is for all general and permanent statutes to be included in one of twenty-seven codes. Interestingly, the CCP is one of the last standing "old" codes. A future "Criminal Procedure Code" currently exists only in legislative dreams, while the arguably nightmarish "Title 2, Code of Criminal Procedure" (as we know it) has maintained hegemony over all things criminally procedural since its enactment in 1985, when it codified miscellaneous criminal procedure statutes that had been omitted from the 1965 version of the Code.

[4] Essentially, there is a built-in opposition to virtually any suggested revision. For example, if a change is proposed by prosecutors, then criminal defense attorneys tend to view the proposal skeptically, and vice versa, simply because each side may presume the other wouldn't have proposed the change but for the change being a self-serving one. Of course, this isn't always true.

[5] The Committee elected a stakeholder-driven model for determining what areas of the CCP would receive focus and attention. Any and all issues addressed by the Committee originated with a stakeholder or group thereof. Stakeholders came from all over the State and included (but are not limited to) police chiefs and other local law enforcement agency officials, the Texas Department of Public Safety, criminal defense attorneys, prosecutors, trial and appellate court judges and justices, the Court of Criminal Appeals, the Judicial Advisory Council, leaders within various divisions of the Texas Department of Criminal Justice and the Office of Court Administration, along with folks from local county, justice, and municipal courts, the Texas Indigent Defense Commission, various criminal justice education and advocacy groups such as the Texas Justice Court Training Center, the Texas Center for the Judiciary, the Texas Association Against Sexual Assault, the Texas Criminal Justice Coalition, the Texas Council on Family Violence, the Texas Public Policy Foundation and even some input from out-of-State experts with respect to the economics and emerging technologies of criminal justice systems. Thanks to all of these folks and more.

[6] With respect to "substantive" revisions, please understand such to mean a veritable change of, in, and to the law. While discussion of substantive v. non-substantive may, at first blush, seem a bit pedestrian to the legislatively-experienced reader, it was not always so apparent during meetings and discussions by and between stakeholders, the Committee, and TLC. Often, what appeared to be a non-substantive change was actually substantive, and thankfully, TLC staff was quick to guide us toward a proper understanding in these situations. For instance, eliminating a provision allowing an arrest warrant to be forwarded via telegraph may seem non-substantive (and indeed would, practically-speaking, be a non-substantive matter in the day-to-day of anybody working in the criminal justice system this millennium). But, as legislative matters go, it is most definitely a substantive change because an independently functioning piece of the law would completely disappear from the books.

[7] Please see Endnote 4.

[8] Among them are Chapters 42, 43, 55, 56, 57, 60, 62, and 104. Some of these will be discussed in more detail later in this Report.

[9] A non-substantive rewrite of Article 42.12, in its entirety, is the goal of a Committee project wherein TLC has acted as drafter. This non-substantive project, as well as other similar potential projects, will be discussed in the **Non-substantive** section of this Report.

[10] Senior District Judge Larry Gist of Beaumont is a

Presiding Judge at the Jefferson County Drug Impact Court, and is also a member of the Judicial Advisory Council. Judge Gist is a wealth of institutional knowledge and wit.

[11] JAC advises the director of the Community Justice Assistance Division and the Texas Board of Criminal Justice on matters of interest to the judiciary. Half of the JAC members are appointed by the chief justice of the Supreme Court of Texas, and half are appointed by the presiding judge of the Texas Court of Criminal Appeals. There are twelve members.

[12] Legislative Budget Board, figures extrapolated using data from *Criminal Justice Uniform Cost Report: Fiscal Year 2010-2012* (Jan.2013).

[13] *See* Bourgon, Guy. "The Demands on Probation Officers in the Evolution of Evidence-Based Practice: The Forgotten Foot Soldier of Community Corrections." *Federal Probation.* Vol 77, No.2 (Sept.2013) published by the Administrative Office of the United States Courts (citing Andrews, D. A., & Bonta, J. (2010). *The psychology of criminal conduct (5th ed.).* New Providence, NJ: LexisNexis Matthew Bender.), click on link: http://www.uscourts.gov/uscourts/FederalCourts/PPS/Fedprob/2013-09/demands.html.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *See id.* (and citing Bourgon, G., & Gutierrez, L. (2012). "The general Responsivity principle in community supervision: The importance of probation officers using cognitive intervention techniques and its influence on recidivism." *Journal of Crime & Justice, 35,* 149–166.).

[20] *See* TDCJ 2016-17 Legislative Appropriation Request.

[21] *See* Trotter, Chris. "Reducing Recidivism Through Probation Supervision: What We Know and Don't Know From Four Decades of Research." *Federal Probation.* Vol 77, No.2 (Sept.2013) published by the Administrative Office of the United States Courts, click on link: http://www.uscourts.gov/uscourts/FederalCourts/PPS/Fedprob/2013-09/demands.html

[22] Passed as S.B. 7 in the 77th Legislature, Regular Session, the following CCP provisions were amended: TEX.CODE.CRIM.PROC. arts. 1.051, 14.06, 15.17, 17.033, 26.04, 26.044, 26.05, 26.052, and 102.075. Chapters 51 and 71 of the Family Code and Government Code, respectively, were also affected. The Fair Defense Act became effective January 1, 2002.

[23] *See* House Research Organization Bill Analysis of S.B. 7, dated May 16, 2001, click on link: http://www.hro.house.state.tx.us/pdf/ba77r/sb0007.pdf#navpanes=0; *see also* Bill Analysis for S.B. 7, 77th Leg., Ch.906, eff. January 1, 2001, click on link: http://tlis/BillLookup/Text.aspx?LegSess=77R&Bill=SB7#.

[24] Senate Bill 7 amends the Code of Criminal Procedure to establish provisions relating to the appointment, standards, and compensation of counsel in representing an indigent person accused of a crime. The bill establishes certain deadlines for a defendant to be taken before a magistrate, to be released on bond, and to have counsel appointed if the defendant cannot afford counsel. In addition, the bill requires the judges of the county courts, statutory county courts, and district courts with jurisdiction over criminal matters to adopt and publish county-wide procedures for timely and fairly appointing attorneys for indigent defendants.

Senate Bill 7 also establishes the Task Force on Indigent Defense to develop policies and standards for providing legal representation and other defense services to indigent defendants at trial, on appeal, and in postconviction proceedings.

[25] While lots of Texans think, "I know rural when I drive through it," the task of defining rural areas is far from simple and is likely to change with each census. The United States Census Bureau's urban-rural classification is fundamentally a delineation of geographical areas, identifying both individual urban areas and the rural areas of the nation. The Census Bureau's urban areas represent densely developed territory, and encompass residential, commercial, and other non-residential urban land uses. The Census Bureau identifies two types of urban areas: (1) Urbanized Areas (UAs) of 50,000 or more people; and (2) Urban Clusters (UCs) of at least 2,500 and

less than 50,000 people. "Rural" encompasses all population, housing, and territory not included within an urban area. *See* U.S. Census Bureau at: http://www.census.gov/geo/reference/urban-rural.html. Another distinction, metropolitan and micropolitan statistical areas (metro and micro areas) are geographic entities delineated by the Office of Management and Budget (OMB) for use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics. The term "Core Based Statistical Area" (CBSA) is a collective term for both metro and micro areas. A metro area contains a core urban area of 50,000 or more population, and a micro area contains an urban core of at least 10,000 (but less than 50,000) population. Each metro or micro area consists of one or more counties and includes the counties containing the core urban area, as well as any adjacent counties that have a high degree of social and economic integration (as measured by commuting to work) with the urban core. In Texas, the Department of State Health Services uses the terms "Non-metropolitan and Metropolitan" interchangeably with "Rural and Urban." *See* Texas Department of State Health Services at: http://www.dshs.state.tx.us/CHS/HPRC/counties.shtm. Indeed, the TLC Research Division recently completed a detailed analysis of the definition of "rural" in Texas statutes and published its report here: http://www.tlc.state.tx.us/pubspol/Def_Rural_Statutes.pdf.

[26] Because of small population, many rural counties lack an adequate personal property tax base to support a public defender program (among other things). Of course, accuracy in determining capable counties (or regions) would need to be done on a county-by-county basis, and then all of the data analyzed with a mind toward the formation of regional groupings of counties. For those counties (or regions) determined to be financially incapable of supporting such a program, a funding match (based on some reasoned and practical percentage) from the State could be a solution.

[27] The relative lack of willingness could result from any number of factors, not the least of which are based in economic concerns. Urban-based attorneys with adequate experience must take time away from their practices to represent rural clients, which practically costs money in not only the time taken, but also the distance traveled. While some rural communities may, indeed, be home to experienced attorneys, there are not always enough of them to adequately serve the legal needs of their communities.

[28] TIDC is a permanent standing committee of the Texas Judicial Council, governed by a board consisting of eight ex officio members and five members appointed by the Governor. http://tidc.texas.gov/#sthash.eVygFq49.dpuf

[29] Pro se disposition rates were calculated by combining data reported by county financial officers to the Texas Indigent Defense Commission (TIDC) with data reported by county clerks to the Office of Court Administration (OCA) in their Judicial Council Monthly Court Activity Reports. The pro se rates used the following formula: Number of misdemeanor dispositions reported to OCA in FY13 (Oct – Sept) minus Number of Retained cases (reported to OCA) minus Number of Cases Paid (reported to TIDC). Specific reasons for increased numbers of pro se defendants can be difficult to ascertain, as defendants may simply refuse the assistance of counsel. And of course, there could be inaccuracies in reporting from some areas. But, other causes may relate to the lack of available attorneys and/or the lack of funding to pay court-appointed counsel. The possibility that defendants in rural communities are effectively being denied counsel, either systematically, or as a default-result of the combination of other factors, is unacceptable (especially because it is unconstitutional). A regional public defender program would be an appropriate remedy.

[30] The cost for regional public defender program is manageable. One proposal called for $7.5M of State funds matched by $7.5M in county funds (annual cost) to cover comprehensive representation for 34 of the poorest counties in South Texas. Of course, the 34 selected counties could be any group of counties anywhere in Texas (either as designated by TIDC, or as determined by the counties, themselves, depending on which ones volunteer to participate in the regional defender program). So, dollar-figures would change, accordingly. Source Texas RioGrande Legal Aid, Inc.

[31] Interlocal agreements can be labor-intensive and burdensome, especially for the county taking the "lead" role in the group (Lubbock and Dickens counties are examples and could be consulted further).

[32] Potential considerations for any public defender program may include its being voluntary (i.e., no mandatory participation) and incorporating flexibility for participating counties to establish in their Rule

26.04 plans which cases they want covered by the public defender. Additional considerations may involve the ability for participating counties to contract annually with the TIDC for the numbers and types of cases to be handled by the public defender program. It should also be noted that local prosecutors' offices could benefit through regional public defender programs by receiving funds as part and parcel of the program. Some stakeholder discussions intimated the possibility of property tax decreases for participating counties.

[33] *See* http://tidc.texas.gov/

[34] *See* Endnote 31.

[35] *See* U.S. Census Bureau; *see also* Endnote 25.

[36] *See* Texas Department of State Health Services; *see also* Endnote 25.

[37] *See* U.S. Census Bureau.

[38] TEX.CODE.CRIM.PROC. art. 46.05(a).

[39] *See* TEX.CODE.CRIM.PROC. art. 46.05(h) (1) and (2).

[40] *See* TEX.CODE.CRIM.PROC. art. 46.05, generally.

[41] *See id.*

[42] *See* TEX.CODE.CRIM.PROC. art. 46.05(l).

[43] *Green v. State*, 374 S.W.3d 434 (Tex. Crim. App. 2012).

[44] *Id.*

[45] *See* TEX.CODE.CRIM.PROC. art. 46.05(g).

[46] TEX.CODE.CRIM.PROC. art. 46.05(c).

[47] *See* TEX.CODE.CRIM.PROC. art. 46.05(l) and (l-1).

[48] *In re State Bar of Texas*, 13-0161, Supreme Court of Texas, August 22, 2014 (citing *Ex parte S.C.*, 305 S.W.3d 258, 263-64 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (stating "statute was enacted to prevent the record of a wrongful arrest from negatively impacting a person for the remainder of his life")).

[49] *See id.* (citing *Gomez v. Tex. Educ. Agency*, 354 S.W.3d 905, 917-18 (Tex. App.–San Antonio 2011, pet. denied) (holding that a police officer's eyewitness testimony in a contested case administrative hearing was not barred by an expunction order issued before the hearing, but after the administrative petition); *Ex parte S.C.*, 305 S.W.3d at 266 (holding an expunction order overbroad because it included state securities board's investigation records mentioning S.C.); *Bustamante v. Bexar Cnty. Sheriff's Civil Serv. Comm'n*, 27 S.W.3d 50, 53-54 (Tex. App.–Austin 2000, pet. denied) (concluding that civil service commission did not rely on expunged records or files but on officers' testimony about their personal observations)).

[50] *See id.; See* TEX.CODE.CRIM.PROC. art. 55.02 §§ 4 and 5.

[51] Despite the potentially confusing short title of Article 55.01 being "Right to Expunction." *See* TEX.CODE.CRIM.PROC. art. 55.01. For interpretation and authority, *see Texas Dept. of Public Safety v. Nail*, 305 S.W.3d 673, 675 (Tex. App. -- Austin 2010) (citing *Heine v. Texas Dep't of Pub. Safety*, 92 S.W.3d 642, 648 (Tex.App.-Austin 2002, pet. denied); *McCarroll v. Texas Dep't of Pub. Safety*, 86 S.W.3d 376, 378 (Tex.App.-Fort Worth 2002, no pet.); *Harris County Dist. Attorney v. Lacafta*, 965 S.W.2d 568, 569 (Tex.App.-Houston [14th Dist.] 1997, no pet.).

[52] *Id.*

[53] The Government Code seems at least an appropriate, if not a likely, place to move the expunction statute. See Section III of this report for a brief reference to a past (and successful) code-swap effort from the CCP to the Government Code, involving parole laws.

[54] Again, the short title of Article 55.01 is "Right to Expunction." TEX.CODE.CRIM.PROC. art. 55.01.

[55] *See* TEX.CODE.CRIM.PROC. art. 55.01(a).

[56] *See id.*

[57] *See* TEX.CODE.CRIM.PROC. art. 55.01 at Subsections (a), (b), and (d).

[58] *See* TEX.CODE.CRIM.PROC. Ch. 55, generally.

[59] *See In re State Bar of Texas*, 13-0161, Supreme Court of Texas, August 22, 2014.

[60] *See* TEX.CODE.CRIM.PROC. art. 55.02 §3, generally.

[61] *See* TEX.CODE.CRIM.PROC. art. 55.02, generally. But, please keep in mind that 55.02 §1 provides for a truncated expunction procedure requiring neither the filing of a petition, nor a hearing.

[62] *Id.*

[63] *See* TEX.CODE.CRIM.PROC. art. 55.04 §1.

[64] TEX.CODE.CRIM.PROC. art. 55.01(b) (emphasis added).

[65] TEX.CODE.CRIM.PROC. art. 55.01(b)(1)(C).

[66] *See* Endnote 51.

[67] It should be noted that the "What?" question arises once again in this context because of the type of documents (a clerk's record and a reporter's record) that may or may not have been reviewed by the Court of Criminal Appeals. Sometimes the clerk's record and/or reporter's record contains arrest warrant documentation, which likely is "relating to the arrest" but other times, there is no arrest-related documentation in either record. And so, as far as the applicability of Chapter 55 is concerned, the questions of What? and Who? become relevant here.

[68] *See* TEX GOV'T CODE §22.002(a).

[69] Basically, there is nothing in the statutory language that delineates whether a party must receive proper notice before being bound by an expunction order. The statutory language of Chapter 55, instead, generally implies that a party's being listed on the order is controlling and binds that party. Hence, the statutory language of Chapter 55 potentially nullifies the fundamental legal theory of notice to parties.

[70] *See* TEX.CODE.CRIM.PROC. art. 55.02, generally.

[71] *See id.; see also* TEX.CODE.CRIM.PROC. art. 55.04 §1.

[72] TEX.CODE.CRIM.PROC. art. 55.04 §3.

[73] *See id.* at §§1 and 2.

[74] *See* TEXAS PENAL CODE §37.10(3).

[75] TEX.CODE.CRIM.PROC. art. 55.03(1) (emphasis added).

[76] *Clay v. State*, 391 S.W.3d 94 (Tex. Crim. App. 2013).

[77] *See* House Research Organization Bill Analysis of S.B. 837, dated May 23, 2005, link: http://www.lrl.state.tx.us/scanned/hroBillAnalyses/79-0/SB837.PDF); *see also* Bill Analysis for S.B. 837, 79th Leg., Ch. 831 (S.B. 837), Sec. 2, eff. September 1, 2005, link: http://tlis/tlisdocs/79R/analysis/pdf/SB00837F.pdf#navpanes=0.

[78] Aside from breaking up the conformity, H.B. 2725 created conflicts in other (somewhat related) sections of the Code, as well. See *supra*, regarding the Committee's Draft Bills for Articles 46B.0095 and 46B.010, both of which seek to apply the Code Construction Act in order to eliminate duplicative and conflicting language. By way of some history, during the 82nd Regular Session, one version of each of the above articles was enacted under H.B. 2725, while another version was enacted under H.B. 748. It should be noted that H.B. 2725 and H.B. 748 were both signed by the governor on the same day. However, H.B. 748 was passed (in both chambers) one day after H.B. 2725 was passed (in both chambers). According to the Code Construction Act, the versions stemming from H.B. 748 are authoritative and controlling, and thus, should be reenacted. It should be noted that Article 46B.022 was not affected by H.B. 748, and so, there is no Code Construction Act application available for smoothing-out any perceived conflicts between Articles 46B.022 and 46C.102.

[79] See Article 46C102(c).

[80] *Cates v. State*, 402 S.W.3d 250 (Tex. Crim. App. 2013).

[81] It should be noted that the trial court must make a finding on the issue of the defendant's ability to repay. Such a finding is then a part of the record for any future proceedings.

[82] For those unfamiliar with inmate trust accounts, these accounts are authorized by §501.014, Texas Government Code. The accounts essentially provide a place of safekeeping for funds to which an offender may have access (but not physical control) during the period of their confinement. An inmate's account

funds may be used to make purchases from the facility commissary or through approved vendors, or to send funds to family or friends (or utilized as ordered by the court according to statute). Money on the offender's person or received at the time of the offender's arrival at the facility is deposited into the account. Family and friends may also deposit money in the account. An inmate's trust fund balance is refunded upon their release.

[83] *Mayer v. State*, 309 S.W.3d 552 (Tex. Crim. App. 2010).

[84] *See id.* at 556; *see also Cates* at 251 (quoting *Mayer*).

[85] *See Cates* at 251 (citing and quoting TEX.CODE.CRIM.PROC. art. 26.04(p)).

[86] *See id.* at 251-52.

[87] *Cates* at 252 (emphasis added).

[88] *Id.*

[89] The terms "paperless" and "electronic" will be used interchangeably.

[90] *See* Minnesota Bureau of Criminal Apprehension Product Fact Sheet "ECHARGING SERVICE," Version 2.2, published by Minnesota Justice Information Services (May 2011), link: https://dps.mn.gov/divisions/bca/bca-divisions/mnjis/Documents/eCharging Fact Sheet May 2011.docx. The Minnesota BCA was extremely forthcoming and helpful to the Committee, particularly with respect to informational support concerning paperless systems implementation.

[91] Public Hearing, House Select Committee on Criminal Procedure Reform, held March 26, 2014 at 10am, noticed February 26, 2014.

[92] Witnesses: Tom Clarke from the National Center for State Courts; David Slayton from the Office of Court Administration; Judge David Cobos from the Justices of the Peace and Constables Association; Chief James McLaughlin, Jr. (Ret.) from the Texas Police Chiefs Association; Mark Erwin from the Travis County Courts; Chief Steve Dye from the Grand Prairie Police Department; Presiding Judge Barbara Hartle from the City of Houston Municipal Courts; Michelle Brinkman from the Travis County District Clerk; Robby Chapman from the Texas Municipal Courts Education Center; Patricia Cummings from the Texas Criminal Defense Lawyers Association; Shannon Edmunds from the Texas District and County Attorneys Association; Donald Lee from the Texas Conference of Urban Counties.

[93] Electronic ticket writers have been in existence for a number of years, and the technology has improved dramatically since the first writers were introduced. Indeed, a truly paperless system would ultimately require that new cases (citations) be initiated into the system by an electronic device. The benefits of electronic ticket writers will be discussed elsewhere in this Report, but it should be noted that the writers are expensive. Chief Steve Dye of the Grand Prairie Police Department testified that his department protects about 181,000 people, arrests about 12,000 people per year, and issues about 70,000 citations per year. According to Chief Dye, at the time of the hearing, 47 writers were in use (and plans were to increase that number to 150 writers). Each device cost approximately $5,000.00 new. For the 47 devices, a total of $16,000.00 in maintenance costs per year was required to keep them up and running. Chief Dye stated that funding for the devices, including the yearly maintenance, is provided through court revenues, i.e., using the collections of fines on the very citations the devices are writing. It should be noted that electronic ticket writers can also be used for generating field interrogation reports, vehicle towing slips, and criminal trespass warnings, and so, the devices are capable of much more than merely writing citations. It should also be noted that multiple witnesses objected to the idea of allowing "pay on the side of the road" capabilities (no witnesses voiced support for the idea).

[94] States like Minnesota have further developed their systems to recognize whether the proper charging statute has been entered, thus preventing wasted resources associated with cases being dismissed based on an improper charge.

[95] According to testimony by Chief Steve Dye, a court clerk in his jurisdiction was typically able to code 100 citations into the their system in about 8 hours, but when electronic ticket writers were used to file the citations, the clerk was able to code 100 citations in a matter of 5 minutes.

[96] Capabilities could include paying fines online, court-date reminders via text or email, etc.. And according to economist Tom Clarke, research

indicates that the chance of collecting fines and fees decreases with time. Thus, technologies that make collection (i.e., payment) more convenient and immediate have the potential of increasing revenues.

[97] Testimony indicated that use of electronic ticket writers (which would be a primary and integral component of a paperless system) by law enforcement officers during routine traffic stops were key to improving efficiency and safety by reducing the amount of time officers spend on the roadside. Chief Steve Dye of Grand Prairie testified that utilization of electronic ticket writers reduced average traffic stop times from 15-20min down to 8-10min.

[98] Mr. Clarke refers specifically to "eCitation" programs. In the paperless world, many terms are loosely interchangeable or are mutually inclusive. For instance, the term "eCitation" intimates a specific program where citations are electronically generated and processed in the field, yet "eCitation" also contemplates an electronic, i.e., paperless, system is utilized further along in the process when the citation inevitably ends up at the courthouse. As such, any references to "e" or "electronic" or "paperless" have narrow and broad applications, depending on the context.

[99] In Texas, "eFile.TXCourts.gov" is currently utilized as a Statewide portal for electronic filing in civil cases, but it has the capability of being used for criminal cases, as well. Naturally, this portal (or one like it) would be instrumental in the implementation of a paperless system for processing criminal cases.

[100] A more detailed approach is needed when considering electronic filings in criminal cases because of constitutional considerations, as well as due to the larger numbers of pro se parties, a large percentage of whom are indigent.

[101] Mr. Slayton suggested that a model form be developed but that the form itself not be statutory, given the difficulty in changing such should modifications become necessary. He further suggested that a State agency be charged with control over the form to avoid the need for legislative action.

[102] One issue with the electronic ticket writers involved problems after an officer forgets to "clear" the device after each citation is issued. If not "cleared," then citations issued to subsequent violators can be added to the previous violator, such that, if left "uncleared," it would be possible for the first violator cited on a given day to be charged with every citation for every violator for the rest of that day. This creates a potentially serious problem for the initial violator in having to answer for multiple violations that they did not commit. Testimony from several witnesses confirmed that the "failure to clear" problem does, in fact, happen. However, Robby Chapman's testimony indicated that, in his experience as a prosecutor of approximately 200 cases, he saw a "failure to clear" problem 2-3 times. Regardless of the anecdotal frequency evidenced by the testimony, "clearing" devices is an issue, but it is one that can be preempted by training. Additionally, it seems that instances of this problem are recognizable to prosecutors (who can take appropriate steps to ensure that citizens are not improperly charged).

[103] Across the State, local entities may use whatever case management system they desire. Some still use paper, while others are electronic. For those that use an electronic system, the system would need to be able to interface with the Statewide portal, i.e., data flow between the systems must be possible, and national standards should be observed with respect to such data transfers.

[104] Michelle Brinkman suggested that different jurisdictions and entities be allowed leeway to experiment with various functionalities in efforts to identify what works best. This idea corresponds with a "bottom-up" type approach to building a Statewide or regional paperless system.

[105] Robby Chapman testified that over 900 municipal courts currently exist in Texas, but that most of these courts do not have paperless capabilities due a lack of financial wherewithal.

[106] For example, the Grand Prairie Police Department participates in electronic filing (citations or evidence submission) with Tarrant County and Dallas County, but the agreements are different, even though the technology is similar, if not practically the same.

[107] When a paperless system is actually in place for criminal matters in Texas, increased connectivity could pave the way for public access to warrant information, such that citizens can keep track of their own cases or their attorneys could help them in doing so. This kind of function would essentially increase personal responsibility and accountability for citizens and, at a minimum, would allow for more efficient processing of persons with outstanding warrants.

Another possible function would be to figure out a way (if one exists) to use the technology to reduce number of warrants that issue for Failure To Appear, likely by some form of automated notice being sent.

[108] According to testimony by Donald Lee. Mr. Lee stressed that, other than cost, the key implementation challenge will be ensuring smooth operation of the system (particularly on the Statewide level) based on the interface between the portal and the myriad electronic case management systems across the State.