CourTex

Texas Judicial Branch News

Special Edition: State Sentencing Policy January 2007

From the Office of Court Administration Director

Welcome to the second edition of CourTex, a special report on the topic of state sentencing policy, in light of the "big picture" correctional capacity issue facing the 80th Texas Legislature. For those with no interest in this topic, please keep an eye out for the next quarterly issue of CourTex, coming to a desktop near you in February.

In a nutshell, the legislature confronts the first major decision between building additional prison capacity and other alternatives, since the building boom of over 100,000 beds culminated in 1995 and the state began to accept all "state ready" inmates from counties within 45 days. The legislature faces this decision after the demise of the Criminal Justice Policy Council in 2003, and in the absence of the unifying policy guidance that Dr. Fabelo provided.

In the first part of this report, I trace my own history of engagement with the issue of state sentencing, hopefully to inform today's debate from a historical perspective, but also to lay my own policy perspectives on the table. The other major themes in the report are (i) notable activity on state sentencing policy at the National Center for State Courts and elsewhere around the country, and (ii) constitutional issues to be aware of in the sentencing arena. For further background on the Texas situation, please see my recent summary, "Sentencing and Corrections: From Crowding to Equilibrium (and Back Again?)," in the March 2006 Texas Bar Journal, and other online resources listed in the final section below. - Carl

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Perspectives on State Sentencing Policy

In the late 1980s I served as counsel to the Senate Committee on Criminal Justice and witnessed the heyday of *Ruiz*, the start of the prison building boom, the creation of the Department of Criminal Justice from three separate agencies, and major new funding of community corrections. From a legislative perspective, one major concern was the cost of prison construction (made easier with general obligation bonds) and the subsequent cost of prison operations (made more painful by the ease of funding construction).

Another key point I learned was that the Texas sentencing system was (and remains) highly decentralized, with locally elected judges and prosecutors, jury sentencing, and wide sentencing discretion granted by the legislature. County government and county resources were implicated in the dividing line between felonies and misdemeanors. It was a traditional, discretion-laden indeterminate sentencing system, much like the pre-guidelines federal scheme described by the United States Supreme Court in *Mistretta v. United States*:[1]

> Congress delegated almost unfettered discretion to the sentencing judge to determine what the sentence should be within the customarily wide range so selected. This broad discretion was further enhanced by the power later granted the judge to suspend the sentence and by the resulting growth of an elaborate probation system. Also, with the advent of parole, Congress moved toward a "three-way sharing" of sentencing responsibility by granting corrections personnel in the Executive Branch the discretion to release a prisoner before the expiration of the sentence imposed by the judge. Thus, under the indeterminate-sentence system, Congress defined the maximum, the judge imposed a sentence within the statutory range (which he usually could replace with probation), and the Executive Branch's parole official eventually determined the actual duration of imprisonment.

As the decade played out, the unfettered population pressure on the system and the constraints on capacity imposed by state law and by *Ruiz* led to primary reliance on "back-end" strategies to ease crowding: parole, mandatory supervision, good conduct time (which affects eligibility for parole and mandatory supervision), and the Prison Management Act. The parole approval rate went from 41 percent of cases considered in 1984 to a peak of 77 percent in 1990, with 38,041 prison releases occurring in the latter year. That rate and number of releases went down to 39 percent and 29,048, respectively, in 1993, despite large increases in the confined population and, concomitantly, the parole eligible pool of inmates.[2] Back-end strategies had been replaced by backlogging of felons in county jails.

From 1991 to 1993, I served as director of the short-lived, Texas version of a sentencing commission, the Texas Punishment Standards Commission (PSC)[3]. The legislature prospectively repealed the Penal Code and established this blue-ribbon commission to rewrite it and propose sentencing reform. One committee of the PSC worked through the entire Penal Code, proposing revisions to many offenses and the repeal of many others, in an effort to streamline and clean up the accumulated detritus of many a legislative session. Another committee ranked the felony offenses in terms of severity, using their collective expertise and reaching consensus about the nature of the "typical case" under each provision, then grouping them in terms of severity. The result of that effort was a fourth degree of felony in addition to the three that already existed below the level of capital. This became the "state jail felony" when the legislature took up the PSC's recommendations in 1993.

A critical companion to our work was the parallel effort by the Criminal Justice Policy Council to develop meaningful, case-level information about actual sentences in Texas. This was a first in modern times, and has not been replicated since 1993. The PSC's work was thus uniquely informed by current, powerful information that everyone agreed was valid, such as:

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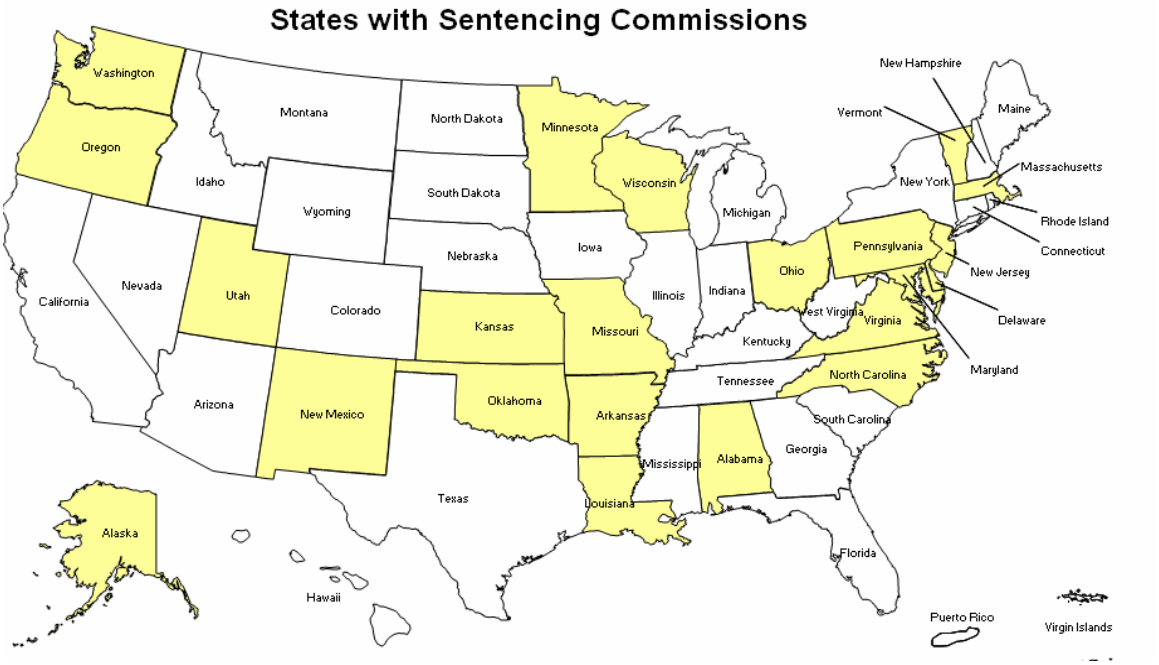
[1] 488 U.S. 361, 364 (1984); see also, e.g., The Sentencing Commission and Its Guidelines, Von Hirsch, Knapp, and Tonry (1987), p. 1.

[2] Texas Criminal Justice Policy Council, "The Big Picture in Adult and Juvenile Justice Issues," January 2003, p. 4.

[3] H.B. 92, 72nd Legislature, Second Called Session, 1991 (Article 37.15, Code of Criminal Procedure).

- Burglary accounted for 20% of those sent to prison.
- Fully 57% of felons sent to prison were for drug possession, drug delivery, theft, and fraud; drug possession is more than one-third of this 57%.
- Three quarters of drug offenses involve cocaine or crack, and 70% of those cases involve one gram or less;
- Almost 60 percent of drug cases involve African-Americans; and
- Incarceration rates (number of people sent to prison per 100,000 in the population) varied widely by jurisdiction - Harris County sent 635 (per 100,000) to prison, Dallas County sent 465, and Bexar County sent 260.

While the PSC was around, we became involved with existing and new sentencing commissions in other states. Currently there are sentencing commissions in 22 states, and a National Association of State Sentencing Commissions, supported by the Federal Sentencing Commission. Sentencing commission profiles are available as of 1997.



From 1993 to 2005 I was the General Counsel to the Board of Criminal Justice and then the Department of Criminal Justice, which provided me a narrower, executive branch perspective on sentencing law and policy. For example, it is inherent in the executive function to decide where an inmate is housed, and occasionally I was called upon to firmly defend this position. TDCJ also fulfills the following functions relevant to an inmate's sentence:

- Credit time served in jail as directed by the court.
- Credit the inmate with good conduct time.
- Determine eligibility for parole, mandatory supervision (S.B. 152, 1977), discretionary mandatory supervision (H.B. 1433, 1995), street time credit (H.B. 1649, 2001), and one-year set-off if parole is denied. (S.B. 917, 2003); and

- Determine whether the inmate is subject to sex offender registration or referral for civil commitment of sexually violent predators.

Finally, I learned that a correctional agency has an inherent interest in maintaining some otherwise unpopular features in state sentencing laws - good conduct time and parole - that provide "back end discretion," and therefore some behavioral incentive during incarceration. This is the enduring lesson of the state jail sentencing scheme, which does not provide any such incentive, and has proved challenging to implement as a result. Other problems with the state jail innovation were (and remain): inadequate funding for rehabilitation of the low-level offenders targeted; prison-like state jails rather than smaller, community-based facilities; and minimal judicial use of the ability to review an offender's progress in custody.

In 2005 I assumed my current role as "state court administrator," which is in quotes due to the highly decentralized court system described above. My primary official duty in the sentencing realm is to promulgate a uniform felony judgment form, for many years an optional resource document, but made mandatory for prison sentenced offenders in 2005 (H.B. 967). Our office is also the repository of court system statistics, which we publish in our annual statistical report. This year's report includes a discussion of trends from 1997-2006 in new felony cases filed in district court.

Another court administration connection to sentencing is our work on "integrated justice," a future in which the court "system" is unified by technology or at least by the information that it carries, if not by software systems, political structure or funding. This work is ongoing between OCA (with the guidance and encouragement of the Judicial Committee on Information Technology), and the members of the Texas Integrated Justice Information Systems Steering Committee.

My new role brings involvement with the Conference of State Court Administrators (COSCA), which is supported by the excellent resources of the National Center for State Courts. After a recent appointment as vice-chair of the American Bar Association Sentencing Committee, I have determined to maintain some attention to these issues, and try to provide a clearinghouse of information for those who share this interest, hence this report.

The NCSC Sentencing Reform Project

With the support of the Conference of Chief Justices and the Conference of State Court Administrators, the National Center for State Courts has launched a national sentencing reform project, "Getting Smarter about Sentencing." The leader is Roger K. Warren, a former judge and the President Emeritus of the NCSC. The project has seven objectives:

I. **Reduce over-reliance on incarceration.**
II. **Promote alternatives to incarceration.**
III. **Eliminate inappropriate racial and ethnic disparities.**
IV. **Promote greater flexibility and judicial discretion.**
V. **Provide greater rationality.**
VI. **Use evidence-based practices to promote public safety and reentry.**
VII. **Promote sentencing commissions and flexible guideline systems.**

In January, 2006, NCSC started the project by conducting a survey of court leaders about sentencing reform activities, with a nine-question survey to chief justices and state court administrators. These leaders identified objectives I, II, and VI as the most important for their states:, and over 80% reported some significant current governmental discussion or public concern about sentencing. The need for greater reliance on empirical data, risk assessment tools, and sentencing programs, were also reported to be frequent topics of discussion in current reform efforts.

NCSC also commissioned a public Sentencing Attitudes Survey that used telephone interviews with a nationally representative sample of 1,502 adults in March 2006. In their responses, Americans expressed desire for a criminal justice system that is tough to ensure public safety, but flexible in dealing with non-violent offenders. Almost 80% of the public believes that given the right conditions, many offenders can turn their lives around and 88% believe that treatment programs should be used "often" or "sometimes" as alternatives to prison in sentencing non-violent offenders.

A 1998 report to Congress funded by the National Institute of Justice reviewed all relevant research and concluded that rehabilitation programs can effectively change offenders.[4] Building on that report subsequent research and meta-analysis (studies of studies) have led to the development of "evidence based practices" (EBP) in corrections.[5] The central finding of this research is that punishment alone tends to increase post-incarceration recidivism, while cognitive-behavioral interventions based on social learning theory, properly applied to appropriate (particularly medium risk) offenders, can lower recidivism rates by 30% on average. The NCSC Sentencing Project promotes 10 sentencing policies to improve the effectiveness of sentencing outcomes, reduce recidivism, reduce over-reliance on incarceration, and promote community corrections and intermediate sanctions programs:

1) Explicitly include risk and recidivism reduction as key objectives of effective state sentencing policy.
2) Ensure that state sentencing policy allows sufficient flexibility for judges to implement risk reduction strategies.
3) Promote the use of actuarial risk assessment instruments in assessing suitability of sentencing options.
4) Create offender-based data and sentencing support systems that facilitate data-driven sentencing decisions.
5) Develop effective community-based corrections programs that address the criminogenic needs of felony offenders.
6) Develop community-based intermediate sanctions appropriate to the nature of committing offenses and offender risks.
7) Provide judges and advocates with access to accurate and relevant sentencing data & information.
8) Include a curriculum on EBP in judicial education programs for sentencing judges.
9) Revise sentencing processes to support risk reduction strategies.
10) Ensure effective collaboration among local criminal justice agencies to reduce barriers to risk reduction.

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[4] Sherman et al., *Preventing Crime: What Works, What Doesn't, What's Promising: A Report to the United States Congress Prepared by the National Institute of Justice* (1998).

[5] See, e.g., Crime & Justice Institute, *Implementing Evidence-Based Practices in Community Corrections: The Principles of Effective Intervention* (April 2004).

Most of these strategies are taking shape in Texas, through the efforts of the legislature, TDCJ-CJAD and the community supervision and corrections departments that it funds, and certain judicial education events. The major missing pieces are #4 and #7, which concern the systematic collection and analysis of information about sentencing decisions.

Council of State Governments Re-Entry Policy Council

The Council of State Governments (CSG) established the Re-Entry Policy Council (RPC) in 2001 to develop recommendations to improve the likelihood that adults released from prison and jail will avoid crime and become productive, healthy members of families and communities. To guide the work of the RPC in the areas of public safety and restorative activities, supportive health and housing, and workforce development and employment opportunities, CSG partnered with 10 organizations:

American Probation and Parole Association
Association of State Correctional Administrators
Corporation for Supportive Housing
National Association of Housing and Redevelopment Officials
National Association of State Alcohol/Drug Abuse Directors
National Association of State Mental Health Program Directors
National Association of Workforce Boards
National Center for State Courts
Police Executive Research Forum
Urban Institute

In late 2006 the CSG created a Justice Center to assist policy makers in the analysis and implementation of justice and correctional policies. The Justice Center is overseen by a board of executive, legislative and judicial policy makers representing a broad spectrum of national interests, including vice-chair Sharon Keller, Presiding Judge of the Texas Court of Criminal Appeals, and member Representative Jerry Madden, Chair of the Texas House Corrections Committee. Dr. Tony Fabelo, formerly of the Texas Criminal Justice Policy Council, is a Senior Research Consultant with the Justice Center.

The Justice Reinvestment Initiative is a project of the new Justice Center. The Initiative is addressed to mounting fiscal pressure on state budgets coupled with growing prison populations, increasing numbers of admissions to prison from violators of probation/parole, and weakening community supervision and community supports. Justice Reinvestment refers to saving money by managing the growth of the corrections system, and increasing public safety by using a portion of the savings generated to strengthen community supervision and build community capacity to receive offenders released from prison.

American Law Institute
Model Penal Code: Sentencing

The philosophical cornerstone of contemporary sentencing theory, as reflected in the American Law Institute's Model Penal Code Sentencing revisions, is known as "limited retributivism." Retributivism - or "just desserts" in the form of punishment proportionate to the blameworthiness of the offender's conduct - sets a range of permissible sentencing severity, such that a sanction below the lower boundary of the range would be considered too lenient, and a sanction above the higher end of

the range would be too harsh. Within that permissible range of punishments proportional to the blameworthiness of the offender's criminal conduct, "utilitarian" objectives such as incapacitation, deterrence and rehabilitation may be pursued.[6]

In addition to this philosophical position, the proposals under development by the American Law Institute promote: state sentencing commissions & guidelines; greater judicial authority in sentencing; balanced appellate review of sentencing; and reinvention of prison release discretion. Sentencing commissions and the attendant data collection on sentencing are suggested to improve the state's capacity for systemic policy making in the sentencing arena, to make possible accurate predictions of future patterns in sentencing, and to depoliticize (to some extent) developments in sentencing.

Vera Institute Center on Sentencing & Corrections

The Center on Sentencing and Corrections (CSC) provides support to government officials and criminal justice professionals charged with addressing their jurisdiction's sentencing and corrections policy. CSC's researchers study and analyze state sentencing and correctional programs. They have also developed an archive of national and state criminal justice data to help states better understand how their systems compare.

Constitutional Issues – Sixth Amendment Right to Jury

In the last eight years, the Supreme Court of the United States has provided fresh illumination to the Sixth Amendment right to trial by jury, as it affects state and federal sentencing law, in a procession of cases, including the most recent one on January 22, 2007:

Jones v. United State, 1999[7] - the Court holds that different maximum sentences based on harm to the victim make such harm an element of the crime.

Apprendi v. New Jersey, 2000[8] - the Court states:

> [o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

Ring v. Arizona, 2002[9] - the Court expounds:

> If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt.

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[6] ALI, Model Penal Code: Sentencing, Report pp. 36-41 (April 11, 2003).
[7] 526 U.S. 227, 230, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999).
[8] 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000).
[9] 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002).

Blakely v. Washington, 2004[10] - addressing a sentence enhanced by judicial findings in Washington state's guideline system, the Court holds:

> the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*

United States v. Booker and *United States v. Fanfan,* 2005[11] - the Court confronts the federal guidelines scheme and holds:

> In each case, the courts below held that binding rules set forth in the Guidelines limited the severity of the sentence that the judge could lawfully impose on the defendant based on the facts found by the jury at his trial. In both cases the courts rejected, on the basis of our decision in [*Blakely*] the Government's recommended application of the Sentencing Guidelines because the proposed sentences were based on additional facts that the sentencing judge found by a preponderance of the evidence. We hold that both courts correctly concluded that [HN1] the *Sixth Amendment* as construed in *Blakely* does apply to the Sentencing Guidelines. In a separate opinion authored by Justice Breyer, the Court concludes that in light of this holding, two provisions of the *Sentencing Reform Act of 1984* (SRA) that have the effect of making the Guidelines mandatory must be invalidated in order to allow the statute to operate in a manner consistent with congressional intent.

Cunningham v. California[12] - Cunningham was tried and convicted of continuous sexual abuse of a child under 14. Under California's determinate sentencing law (DSL), that offense is punishable by one of three enumerated terms of imprisonment: a lower term sentence of 6 years, a middle term sentence of 12 years, or an upper term sentence of 16 years. The DSL obliged the trial judge to sentence Cunningham to the 12-year middle term unless the judge found one or more additional aggravating circumstances by a preponderance of the evidence (under court rules), which the judge found, and sentenced Cunningham to the upper term of 16 years. The Supreme Court held that the DSL, by placing sentence-elevating fact-finding within the judge's province, violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments.

The lesson for Texas sentencing policymakers? Our fairly unique right to jury sentencing has avoided any impact from these cases, and any reforms should preserve jury sentencing in some form; this is a fairly major constraint on the contours of any Texas guideline scheme, should policymakers even want to "go there."

[10] 542 U.S. , 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004),
[11] 543 U.S. 220; 125 S. Ct. 738; 160 L. Ed. 2d 621;
[12] No. 05-6551, argued 10/11/06, decided 01/22/07.

Constitutional Issues – Separation of Powers

In Texas, separation of powers doctrine has had a peculiar effect on criminal justice jurisprudence for a long time. In 1912, the Court of Criminal Appeals held unconstitutional a statute allowing courts to suspend sentences, reasoning that such a suspension was really a form of clemency, and that under Article 4, §11, the executive (at that time the governor, now the parole board) was exclusively vested with the clemency power.[13]

This decision was questionable, and only a year later the court ruled that a new statute was constitutional because it provided for suspending the sentence as an alternative to conviction, instead of suspending the sentence after conviction. The court managed to find this distinction meaningful, reasoning that the new law did not conflict with the clemency power because it did not relieve the defendant of punishment after conviction.[14] This distinction did not provide a very satisfactory basis for an effective system of probation, so in 1935 the Constitution was amended by adding Article 4, §11A:

> The Courts of the State of Texas having original jurisdiction of criminal actions shall have the power, after conviction, to suspend the imposition or execution of sentence and to place the defendant upon probation and to reimpose such sentence, under such conditions as the Legislature may prescribe.

In more modern decisions--during the last thirty years--the Court of Criminal Appeals has continued to strictly construe the separation of powers doctrine. In *Smith v. Blackwell,* the court reaffirmed the exclusivity of the executive's clemency power, nullifying the legislature's presumably benevolent attempt to allow district courts to resentence certain marijuana offenders.[15] Two months later, the court went further by holding that the legislature had no power to provide for resentencing in cases pending on appeal on the effective date of new legislation.[16]

More recently, the court has over-turned several criminal justice enactments on separation of powers grounds. Three holdings in a row were based on the legislature's encroachment on judicial power involving remittitur of bail bonds: the bail bond industry kept persuading the legislature of ways to ensure that bondsmen almost always get their money back, and the court kept finding interference with the judiciary's need for finality of judgments.[17] Then the court found that the legislature, by enacting the Speedy Trial Act, unconstitutionally encroached upon the judicial branch by infringing upon the exclusive prosecutorial discretion of a county attorney.[18] Finally, also in 1987, *Rose v. State* continued the theme of protecting executive clemency power from judicial infringement caused by an enactment; there the court overturned the jury instruction

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[13]Snodgrass v. State, 67 Tex.Crim. 615, 150 S.W. 162 (1912).

[14]Baker v. State, 70 Tex.Crim. 618, 158 S.W. 998 (1913).

[15] 500 S.W.2d 97 (Tex.Crim.App. 1973, no writ).

[16]Ex parte Giles, 502 S.W.2d 774 (Tex.Crim.App. 1973).

[17]State v. Matyastik, 811 S.W.2d 102 (Tex.Crim. App. 1991); Armadillo Bail Bonds v. State, 802 S.W.2d 237 (Tex.Crim.App. 1990); and Williams v. State, 707 S.W.2d 40 (Tex.Crim.App. 1986).

[18]Meshell v. State, 739 S.W.2d 246 (Tex.Crim.App. 1987). *Cf. Holmes v. Morales*, 924 S.W.2d 926 (Tex. 1996) (the district attorney's office is not included in the meaning of "judiciary" [for purposes of the Public Information Act] because the Texas Constitution invests no judicial power in that office).

on good conduct time and parole.[19] These cases examine three basic facets of the separation of powers constraint on legislation: the judicial/executive boundary for exercising clemency; the legislative/executive boundary for exercising clemency; and the legislative/judicial (including prosecutorial) balance of power over the process more generally. Based on these cases and other experience with Texas separation of powers law, policymakers should assume that:

- Judicial control of the sentence imposed is time-limited, to preserve executive clemency.
- Judicial control of the details of incarceration violates executive powers.
- Legislative leniency (in cases already adjudicated) violates judicial and executive powers.
- Composition and location of a sentencing commission may raise separation of powers issues.
- Control of community corrections may raise separation of powers issues.

Conclusion and Further Texas Resources

The state's continuing ability to match capacity with demand currently depends largely on the parole board's release and revocation practices. The options for addressing population pressure, short of new commitments to capacity, would appear to be: attempt to affect parole approval and revocation rates; affect sentence lengths and release laws through legislation; reduce penalties or judicial discretion directly through legislation; dramatically increase funding for alternatives and hope for minimal "net widening"; or adopt a sentencing commission/guidelines model that was implicitly rejected in 1993. These choices are timely this session, but longer term they are cyclical and incessant. To meet this continuing challenge, and consistent with much that is happening and recommended around the country, Texas policymakers should develop a more consistent focus on sentencing policy and data collection, in some form.

The criminal justice and public safety issues facing the legislature are well summarized beginning on page 5 of the House Research Organization's "Topics for the 80th Legislature." Other resources online include:

- Legislative Budget Board Public Safety and Criminal Justice webpage, including selected reports of the Criminal Justice Policy Council, 1983-2003
- Sunset Staff Committee Report on TDCJ
- House Corrections Committee Interim Report 2006
- TDCJ's Report on Monitoring Community Supervision Diversion Funds
- Records of the Texas Punishment Standards Commission
- Texas Politics, University of Texas Liberal Arts Instructional Technology Services

[19] 752 S.W.2d 529 (Tex.Crim.App. 1987). The legislature and voters responded with a constitutional amendment to Article 4, §11(a), giving the legislature specific authority to enact jury instructions on good conduct time and parole eligibility.

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Organization Chart
Divisions and Contacts
Strategic Plan

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Please refer comments or questions about this newsletter or the Office of Court Administration to:
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