Senate Jurisprudence Committee

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FILE # ML-45373-07
I.D. # 45373

The Honorable Greg Abbott
Attorney General of the State of Texas
Office of the Attorney General
300 West 15th Street
Austin, Texas 78701

RQ-0630-GA

Dear General Abbott:

As Chair of the Senate Committee on Jurisprudence, I seek your opinion as to the effect of Chapter 311 of the Texas Government Code (the Code Construction Act), as applied to how Section 531.0972 of the Texas Government Code (effective September 1, 2007),[1] should be interpreted in conjunction with Section 481.125 of the Texas Health & Safety Code (1994).

Provided with this request is a CD containing supporting documentation for your convenience of reference, to provide further details of the statutory provisions, cases, and articles relevant to this request.

Statement of Question

The question is whether the public health and Medicaid evaluation pilot program authorized by law under Section 531.0972 of the Government Code, effective September 1, 2007, and established by local health authority officials of Bexar County pursuant to that law as part of the Omnibus Medicaid Bill amending Chapter 531 of the Government Code, now enables participants of the pilot program (those associated with its operations and those whom it would serve) to

[1] Section 531.0972 of the Government Code was Section 5 of Senate Bill 10 [S.B. 10], containing several Medicaid-related pilot program measures passed by the 80th Legislature.

carry out the mission of the program and the Legislature's intent of preventing the spread of HIV, hepatitis B and C, and other infectious and communicable diseases, without subjecting these persons to criminal prosecution or the threat of criminal prosecution in Texas under the Controlled Substances Act of the Health and Safety Code. In other words, is it self-evident from the context and language of Section 531.0972 that an exception or defense to prosecution was intended and the law should be construed as authorizing the pilot program to proceed, notwithstanding the drug paraphernalia penal provisions stated in the Controlled Substances Act?

Background Statement

This past Legislative Session, S.B. 10 (known as the "Omnibus Medicaid Bill") was enacted, signed by the Governor on June 14, 2007, and became law. It contained a number of sections establishing pilot programs designed to evaluate and improve the manner in which Texas manages and distributes Medicaid and other healthcare funding through prevention and better planning.[2] The legislation came about at a time when certain overwhelming facts have converged in Texas:

1) Medicaid represented about 25.5 percent or about $16.6 billion of *all* state expenditures of Texas in state fiscal year (SFY) 2005;[3]

2) Annual Texas expenditures for hepatitis C were $24,303,816+ in 2006, and they were $85,805,895 for HIV-AIDS in 2005 (a combined cost to the state of over $110,000,000 per year, not counting HMO payment resources);[4]

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[2] As stated in its caption, S.B. 10 relates to *"the operation and financing of the medical assistance program and other programs to provide health care benefits and services to persons in this state; . . . ."* The Bill Analysis provided to the Senate and the House explained that the goal of S.B. 10, the "Omnibus Medicaid Bill," is to improve the Texas Medicaid program, *"by focusing on prevention, individual choice, better planning, modernizing services, reducing Texas' rate of uninsured, and helping Texans to live longer, healthier lives."* C.S.S.B. 10 (Nelson) Appropriations Committee, Senate Research Center, 80R13315 April 5, 2007; House Committee Bill Analysis May 17, 2007.

[3] Not including DSH (disproportionate share hospital) funds, all state and federal funds for Medicaid were estimated to comprise *25.5% or about $16.6 billion* of all state expenditures for SFY 2005. As of July 2006, about one of nine Texans, or 2.8 million of 23.5 million persons, relied upon Medicaid for health insurance or long-term service and support, which would include acute health care services (physician, pharmacy, lab, X-ray, and inpatient/outpatient services). "Texas Medicaid in Perspective," Chapter 1, Page 1-1 (Texas Health and Human Services Commission, 6th Ed. - Jan. 2007, 02/21/07, available at http://www.hhsc.state.tx.us/Medicaid/reports/PB6/PinkBookTOC.html) [Attachment "A"].

3) As of 2005, an estimated 300,000 Texans were infected with hepatitis C (HCV), and most of them did not know it;[5] since the beginning of the HIV epidemic in Texas in the early 1980s to the end of 2005, approximately 67,826 AIDS cases were reported in Texas.[6] About 40 percent of all chronic liver disease is due to HCV infection, which can lead to liver cancer, cirrhosis, and death.[7]

4) There are no vaccines available for the prevention of HIV-AIDS or hepatitis C;[8]

5) The cost of treatment for hepatitis C and HIV-AIDS continues to escalate, both in terms of longevity of treatment and cost of pharmaceuticals and procedures;[9]

6) Counties, public hospitals, and local hospital districts bear the frontline responsibility for treatment of patients who rely on indigent healthcare services;[10]

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4 "Selected Texas Medicaid HIV/AIDS Utilization and Financial Data, State Fiscal Years 2001-2005," Epidemiology Team, Strategic Decision Support, Financial Services Division (Texas Health & Human Services Commission, May 2006) [Attachment "B"]; "Selected Texas Medicaid Utilization and Financial Data for Hepatitis C, State Fiscal Years (SFY) 2002 – 2006," Epidemiology Team, Strategic Decision Support, Financial Services Division, (Texas Health & Human Services Commission, November 2006) [Attachment "C"].

5 "The Texas Hepatitis C Initiative" (Texas Department of State Health Services, 2005, available as last updated September 14, 2007 at: http://www.dshs.state.tx.us/idcu/disease/hepatitis/hepatitis_c/initiative/).

6 *HIV/STD Program 2005 Annual Report*, p. 4 (Texas Department of Health Services, 2006 available at: http://www.dshs.state.tx.us/hivstd/info/annual/2005.pdf) [Attachment "D"].

To put this in perspective, consider that when one is infected with a deadly disease, that person is the host, and has choices to make in order to protect other innocents from also being marked by the disease. It is a different story when the disease is dormant and unknown to the host; it is still highly contagious to everyone with whom the host has contact, which includes the exchange of bodily fluids or the sharing of needles. Hepatitis C turns human beings into sleeper cells for the disease and allows the rate of infection to increase rapidly and geometrically. This legislation is the most logical and rational approach to this type of killer. It targets the highest risk populations and "assumes" they may all be carriers, then makes "choices" available to them which they can use to protect other persons.

7 Id.

8 "Report on AIDS and HIV Education Activities," pages 13-14 (Texas Department of Criminal Justice, January 22, 2007, available online at: http://www.tdcj.state.tx.us/publications/health-svcs/report_on_aids_hiv.pdf) [Attachment "E"].

9 *Correctional Managed Health Care Committee Self-Evaluation Report Prepared for the Sunset Advisory Commission*, Pages 15-17 (Texas Department of Criminal Justice August 19, 2005; available online at http://www.sunset.state.tx.us/80threports/cmhc/ser.pdf) [Attachment "F"].

7) Although counties, public hospitals and local hospital districts may apply to the Health and Human Services Commission / Department of Health Services for certain formulaic reimbursement amounts, the limited availability of funds can leave local entities' providers uncompensated for the remaining balance;[11] and

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[10] Presently, the Texas legislative framework for providing indigent health care and treatment places the counties in the forefront to provide services, which can be done through public hospitals or hospital districts or contractual providers. TEX. HEALTH & SAFETY CODE, Subtitle C, Chapter 61, Subchapter A. Indigent Health Care And Treatment Act, Sections 61.001, § 61.005, 61.029, 61.033, 61.035, 61.038, 61.054, 61.055, 61.056, and 61.060 [Attachment "G"].

Although some persons infected with hepatitis, HIV-AIDS, and other infectious and communicable diseases may have access to private healthcare coverage, those who do not must rely upon indigent healthcare treatment resources from the counties and their authorized service providers. "In 2005, over 22,000 persons received HIV-related medical and social support services from publicly funded providers." *HIV/STD Program 2005 Annual Report, supra*, p. 4 [Attachment "D"]:

> "The HIV/STD Program applies for and receives federal funding for HIV and STD prevention and care services. Those funds, together with State HIV and STD funding, are distributed to DSHS regional programs, local health departments, and community-based organizations through competitive and non-competitive means. The total expenditures for HIV and STD programs for Fiscal Year (FY) 2004-2005 were $139,882,050. Of this, over 73 percent, or $101,792,815, was provided by federal HIV and STD grants. The remaining 27 percent, or $38,089,235, was provided by State funds and appropriated receipts. Approximately $20.2M (15%) was spent for prevention and surveillance, $37.8M (27%) for clinical services, and $81.9M (58%) for medication. The FY 2005 expenditures represented a 6.7 percent increase over the FY 2003-2004 budget." *Ibid.*, at 4. See also, TEX. HEALTH & SAFETY CODE, Sec. 61.029.

A needle exchange pilot program provides an alternative from using emergency rooms, the most expensive and least efficient means we have as a society for preventing one person from unknowingly killing his fellow human; it supplements the medical options with a pilot program at the other end of the fiscal spectrum. Because it is cheap and far less intimidating that going to a hospital emergency room, it is more likely to work, and the statistics bear this out.

[11] Public hospitals are liable for health care services provided under Subchapter A by any provider, including another public hospital, to an eligible resident in the hospital's service area. TEX. HEALTH & SAFETY CODE, Sec. 61.060(a). In the case of public hospitals, they are the payor of last resort, in line after public or private sources of payment, but if other payment sources do not adequately cover a health care service provided to an eligible resident, the public hospital becomes responsible for payment. *Id.*, Sec. 61.060 (c) and (d). As for hospital districts, they are liable for health care services as provided by the Texas Constitution and the statute which created the particular hospital district. *Id.*, Sec. 61.060(b). Counties have a $30,000 maximum expenditure for indigent health care per eligible person per year, and can obtain some reimbursement from the state provided they expend at least 8% of the county general revenue levy as described in Sec. 61.037. However, the state may not necessarily provide reimbursement of 100%: "State funds provided under this section to a county must be equal to at least 90 percent of the actual payment for the health care services for the county's eligible residents during the remainder of the state fiscal year after the eight percent expenditure level is reached." *Id.*, Sec.61.030 (b).

8) The incidence of hepatitis C and HIV-AIDS documented among the population of those incarcerated in Texas prisons rose 91%, versus a 16% rise in numeric population.[12]

One of those pilot programs enabled in Senate Bill 10 was a disease-control and prevention program to be established in Bexar County, with a specific provision that the pilot program would be authorized to include a safe and anonymous needle-exchange outreach service. The pilot program was passed with full knowledge of the existence and intent of the Texas Controlled Substances Act (CSA). Rather than conflicting with it, it provides a very clear and precise exception to the application of the CSA, both geographically and in terms of what is and is not covered by the pilot program. This is further reinforced through existing Penal Code defenses to prosecution stated in Section 9.21 (justification in carrying out a public duty) and 2.03(e) (general grounds of defense not labeled as such).

This Section of S.B. 10, now enacted as Section 531.0972 of the Government Code, states:

"SECTION 5. Subchapter B, Chapter 531, Government Code, is amended by adding Section 531.0972 to read as follows:
Sec. 531.0972. PILOT PROGRAM TO PREVENT THE SPREAD OF CERTAIN INFECTIOUS OR COMMUNICABLE DISEASES. The commission may provide guidance to the local health authority of Bexar County in establishing a pilot program funded by the county to prevent the spread of HIV, hepatitis B, hepatitis C, and other infectious and communicable diseases. The program may include a disease control program that provides for the anonymous exchange of used hypodermic needles and syringes."

Several interpretations of this law have been advanced since it was signed by the Governor, leading to uncertainties by Bexar County and City of San Antonio

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[12] Whereas the average offender population in Texas increased from 132,386 in 1996 to 153,271 in 2006 (an increase of nearly 16%), the number of HIV - AIDS population increased from 1,876 to 3,587 (an increase of over 91%). "Statistical Information on HIV / AIDS: 1996-2006," Health Services Division (Texas Department of Criminal Justice, July 18, 2007: available online at http://www.tdcj.state.tx.us/health/health-aids-stats.htm) [Attachment "H"].

officials about implementing the pilot program, in light of concerns about whether those administering the program and those receiving its benefits could be or should be criminally prosecuted under the Controlled Substances Act. The effective date of the law was September 1, 2007, and the pilot program has been abated pending your Opinion on this request.

There are some alternate interpretations, each of which would give effect to the legislation and allow the pilot program to be implemented:

a) The law is clear and unambiguous, without need to refer to legislative intent, that an anonymous needle exchange is authorized as part of a pilot program in Bexar County to be established in conjunction with the local health authority, and guidance from the Department of State Health Services, and those who operate the program and those who participate in it may do so lawfully without fear of criminal prosecution;

b) It would be a just and reasonable result to interpret the law in the light of legislative intent as enabling an anonymous needle exchange as part of a Bexar County disease-control and prevention pilot program, however the law needs to be interpreted, and to clarify that those who operate the program and those who receive its benefits may do so lawfully without fear of criminal prosecution;

c) Notwithstanding prior general enactments in the Controlled Substances Act, the 2007 enactment of this law enables a disease-control and prevention program in Bexar County, and insofar as it concerns an anonymous needle exchange service, the specific reference which enables the pilot program is controlling over any general statements to the contrary in the Controlled Substances Act, Sec. 481.125 (TEX. HEALTH & SAFETY CODE, 1994), meaning that distributing or possessing clean needles (or returning dirty needles to the outreach locations for waste disposal) would not be prosecutable offenses involving unlawful drug paraphernalia in regard to conducting the pilot program.

Another interpretation, suggesting that criminal prosecution would be indicated, has given rise to concerns on the part of Bexar County and City of San

Antonio officials, in regard to those public servants who would be operating this disease-control pilot program and serving broader, essential governmental functions of public health and waste disposal in the process.[13] Their concerns consider the public health duty to prevent infectious diseases from spreading, as well as the effect on participants in the pilot program who stand to receive the benefits of the safe needle exchange outreach work.

The interpretation favoring prosecution advances the theory that those persons who provide the pilot program services for safe needle exchange in Bexar County would be subject to criminal prosecution by the county for distribution of drug paraphernalia as defined in Section 481.002 (17) (a Class A misdemeanor),[14] and those who would receive the benefit of the program would be subject to prosecution by the city for possession of drug paraphernalia (a Class C misdemeanor).[15] This interpretation relies further upon the theory that, to allow the pilot program to operate under an exception or defense to prosecution under Section 481.125 of the Health and Safety Code (1994), would demand that Section 531.0972 contain a stated exception or a defense to prosecution under Sections 2.02 and 2.03 of the Penal Code (1994). Further, this theory would give no regard to the justification defense of "public duty" found in Section 9.21 of the Penal Code, and would not treat it as "[a] ground of defense in a penal law that is not plainly labeled in accordance with this chapter," which would still have "the procedural and evidentiary consequences of a defense" under Section 2.03(e) of the Penal Code. This prosecutorial theory would argue that these defenses would not offer the same protection in terms of freeing the program workers and participants from criminal responsibility under Section 481.125 of the Health & Safety Code, without Section 531.0972 containing the procedural wording stated in Section 2.02(a) or 2.03(a) of the Penal Code.

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[13] TEX. GOVT. CODE, Sec.791.003 (D) public health and welfare and (H) waste disposal [Attachment "I"]; see also, TEX. HEALTH & SAFETY CODE, Sections 61.029 and 61.056 [Attachment "F"].

[14] Section 481.125 (e), TEX. HEALTH & SAFETY CODE (1994) [Attachment "J"]. This Request for Opinion assumes for all practical purposes that operations of the pilot program would be limited, by design, to incorporated areas within San Antonio city limits due to budgetary constraints, logistics, and local demographic needs; it also assumes that those who administer the pilot program, and those who would benefit from it, would be adults. It also assumes that persons involved in the distribution aspect of the program would not have a prior conviction record such that it would trigger the enhanced penalty wording of Section 481.125(3).

[15] Section 481.125 (d), TEX. HEALTH & SAFETY CODE (1994) [Attachment "K"].

Section 531.0972 of the Government Code (S.B.10, Section 5), did not establish a penalty or offense that would suggest the need or relevance of including exceptions or defenses to prosecution. The purpose of this pilot program was to create a medical vehicle to facilitate disease-prevention and cut Medicaid and other health care costs, not to establish any new penal offense that would require fair notice to a potential defendant of defenses and exceptions, and not to establish any procedural rules for criminal trials.

As a substantive matter, Sections 9.21 and 2.03(3) of the Penal Code provide defenses that should be applied in conjunction with Section 531.0972 of the Government Code, unless an exception to prosecution can be interpreted from the context and intent of the legislation. The wording indicated in Sections 2.02(a) and 2.03(a) for identifying exceptions and defenses are procedural issues affecting the course and conduct of a trial, not substantive matters of penal law.

This prosecutorial interpretation of the new law would create an absurd result, in that it suggests the Legislature enacted the pilot program with the intent or awareness that it would place persons associated with the program in the position of committing a criminal offense under the Controlled Substances Act. The outcome of this interpretation would mean either that program workers could operate the program but there would be no residents of the county served, due to their fear of arrest and prosecution for possession of drug paraphernalia, or else the program workers themselves would be unable to provide the needle exchange services because of the threat of criminal prosecution for distributing and/or possessing drug paraphernalia. This interpretation would effectively put a stop to the needle exchange objectives of the pilot program, and cause the enabling legislation of Sec. 531.0972 to be of virtually no effect in regard to the disease prevention purposes of the Omnibus Medicaid Bill. It would appear that this interpretation of the new law would create an absurd result, and one which runs contrary to the Code Construction Act, Chapter 311 of the Texas Government Code. And, if the pilot program is allowed to go forward, the success of the program surely would be addressed in new and more comprehensive terms during the 81st Legislative Session.

Section 531.0972 of the Government Code does not state a laundry list of requirements or conditions for operating the Medicaid Bill pilot program for

preventing the spread of infectious diseases in Bexar County. Like most other legislation, the wording may not be perfectly crafted, but that does not mean the language enabling the pilot program should be regarded as an ill-fated or failed attempt to establish the pilot program for the purposes stated in the Bill.

Therefore, as Chair of the Senate Committee on Jurisprudence, I seek your opinion in regard to this important matter.

Analysis

Both the Penal Code and the Health & Safety Code defer to Chapter 311 of the Government Code (Code Construction Act), in questions of statutory construction. HEALTH & SAFETY CODE, Title 1, Chapter 1, § 1.002 (September 1, 1989); TEXAS PENAL CODE, Section 1.05 (a), (b) (September 1, 1994):

> "§ 1.002. CONSTRUCTION OF CODE. Chapter 311, Government Code (Code Construction Act), applies to the construction of each provision in this code except as otherwise expressly provided by this code.
> Acts 1989, 71st Leg., ch. 678, § 1, eff. Sept. 1, 1989."

> "§ 1.05. CONSTRUCTION OF CODE. (a) The rule that a penal statute is to be strictly construed does not apply to this code. The provisions of this code shall be construed according to the fair import of their terms, to promote justice and effect the objectives of the code.
>
> (b) Unless a different construction is required by the context, Sections 311.011, 311.012, 311.014, 311.015, and 311.021 through 311.032 of Chapter 311, Government Code (Code Construction Act), apply to the construction of this code. . . .
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> Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974. Amended by Acts 1993, 73rd Leg., ch. 900, § 1.01, eff. Sept. 1, 1994."

In addition, the Communicable Disease Prevention and Control Act manifests a duty upon the state and the public: the state has a duty to protect the public health, and the public ("each person") is required to act responsibly to

prevent and control communicable disease. TEX. HEALTH & SAFETY CODE, Subtitle D, Subchapter A, Sec. 81.002, eff. Sept. 1, 1989.

The setting of Senate Bill 10 and its authorization of several pilot programs, including Section 5 [now Sec. 531.0925 of the Government Code] regarding prevention of infectious diseases, is best understood in the larger context of how the funding cycle for indigent health care operates in Texas. Eligible county residents in Texas who are indigent and need basic health care for hepatitis, HIV-AIDS, or other infectious diseases basically rely upon their local county, public hospital, or hospital district to provide primary and preventative services. These include: immunizations, medical screening services, annual physical exams, inpatient and outpatient hospital services, lab and x-ray services, physician services, up to three prescriptions per month, and skilled nursing facility services. TEX. HEALTH & SAFETY CODE, Sec. 61.028 (1999). By following departmental procedures and meeting a threshold formula, counties may also obtain certain DSHS "assistance funds" for providing optional health care services, which include: home and community health care services; social work services; psychological counseling services; and services provided by physician assistants, nurse practitioners, clinical nurse specialists, and certified registered nurse anesthetists. *Id.*

Prevention of infectious and communicable diseases would significantly reduce local health care costs, thus decreasing the need for the state to provide "assistance fund" reimbursements to counties, public hospitals and hospital districts, primarily in the form of Medicaid.[16] However, funds for prevention of infectious diseases through operation of a needle-exchange program have not been and are not presently available through Medicaid funds, due to federal funding prohibitions.[17]

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[16] "Deregulation of Hypodermic Needles and Syringes as a Public Health Measure: A Report on Emerging Policy and Law in the United States," Ed., S. Burris (American Bar Association AIDS Coordinating Committee, 2001).

[17] Please refer to Attachment "L," a whitepaper explanation of the healthcare environment in Texas and in the United States, surrounding the issue of safe needle exchange as a highly effective means of disease prevention, and the funding issues associated with such programs.

Section 531.0972 of the Government Code [S.B. 10, Section 5] authorizes a pilot program which offers an opportunity for law enforcement and the public health sector to stand as partners on common ground in the prevention of infectious hepatitis and HIV-AIDS, among other communicable diseases. This enabling legislation allows for the operation of a pilot program in Bexar County which is authorized to include an anonymous safe needle exchange accessible to the public, under guidance of the Department of State Health Services and local health authority. The pilot program outcomes would be made available to the 81st Legislature, in conjunction with the purposes of S.B. 10. Assuming its success as a pilot program, new legislation would be in order to assure its continuation and clarify issues encountered during the pilot program phase.

Alternate interpretations giving effect to Sec. 531.0972 and allowing the pilot program to be implemented in Bexar County:

Under theory a) stated above:
Section 531.0972 is clear and unambiguous without need to refer to legislative intent, the effect being that an anonymous needle exchange is authorized as part of a pilot program in Bexar County to be established in conjunction with the local health authority, and with guidance from the Department of State Health Services; and, those who operate the program and those who participate in it may do so lawfully as of September 1, 2007, without fear of criminal prosecution in Texas.

Griffith v. State articulates well the standard of review used by the Texas Court of Criminal Appeals in construing a statute that is unambiguous. *Griffith v. State*, 116 S.W.3d 782 (Tex. Crim. App. 2003).

> "When we interpret a statute we seek to effectuate the collective intent or purpose of the legislators who enacted the legislation. *Boykin v. State,* 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). Under our decision in *Boykin,* we must interpret an unambiguous statute literally, unless doing so would lead to an absurd result that the legislature could not possibly have intended. *Ibid.* If a literal reading of the statute leads to an absurd result, we resort to extratextual factors to arrive at a sensible interpretation to effectuate the intent of the legislature. *Id.* at 785-786; *see* TEX. GOV'T. CODE, Section 311.023 (1997). For example, if a statute may be interpreted reasonably in

> two different ways, a court may consider the consequences of differing interpretations in deciding which interpretation to adopt. *Muniz v. State,* 851 S.W.2d 238, 244 (Tex. Crim. App. 1993). If one reasonable interpretation yields absurd results while the other interpretation yields no such absurdities, the latter interpretation is preferred. *Ibid."* [18]

In *Hernandez v. State*, 127 S.W.3d 768 (Tex. Crim. App. 2004), the Court of Criminal Appeals took a slightly broader approach to the standard of review in statutory construction matters.

> "In this case, we are faced with the task of rounding out the legislature's enactment of Article 12.05(b) [Texas Code of Criminal Procedure] because the legislature provided no guidance about how the prior and subsequent indictments should be related to toll the statute of limitations period. As with any act of statutory construction, we seek to fulfill the legislature's purpose in enacting the statute." *Id.*, at 771.[19]

In civil matters, the Texas Supreme Court has taken a somewhat different approach to statutory review: the Court looks to the language of the statute, and, if necessary to clarify it with indicators of legislative intent, does not struggle with deciding first whether the statute is ambiguous before looking to such resources as remarks made in floor debate. For example, in *Mitchell Energy v. Ashworth*, the

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[18] In *Griffith*, the Court of Criminal Appeals decided that although the statute was plain enough, a literal reading was contrary to legislative intent, and would have produced an absurd result: "Under the construction proposed by the appellant, prior convictions for rape and aggravated rape from any other state could be used to enhance a later offense, but prior convictions for rape and aggravated rape from Texas could not be used. Were we to apply the plain language of the statute, a trial court could not impose on a repeat sex offender, such as the appellant, a mandatory life sentence. We believe that such a reading is contrary to the Legislature's intent, and we agree with the Court of Appeals that the plain language of the statute produces an absurd result. *Griffith,* 81 S.W.3d at 514-515." *Griffith,* 116 S.W.3d at 786 (2003).

[19] The issue in *Hernandez* was whether a prior indictment would toll the statute of limitations for a later indictment where the two are different offenses. The relevant statute was silent on the issue, and the Court said that silence allowed for the judiciary to round out the legislation, and considered the legislative intent and the statutes of other states. Ultimately, the Court held that a previous indictment, when it concerns the same conduct, tolls the statute of limitations for a later indictment. *Id.*, 127 S.W.3d at 774. The concurring opinion reached the same result as the Court. However, it said that silence should be interpreted as an ambiguity, which would be more in line with the traditional rules found in *Boykin v. State*, 818 S.W.2d 782, *supra*, and would still allow consideration of legislative intent and ultimately yield the same result. *Hernandez*, 127 S.W.3d at 775.

Court referred to the Code Construction Act in determining the meaning of the statute governing appointments of visiting judges when a party objects:

> "We consider the object to attain, the circumstances of the statute's enactment, legislative history, former statutory and common law, and the consequences of a particular construction. TEX. GOV'T. CODE § 311.023; *Union Bankers Ins. Co. v. Shelton,* 889 S.W.2d 278, 280 (Tex. 1994)." *Mitchell Energy Corporation v. Ashworth*, 943 S.W.2d 436, 439 (Tex. 1997).[20] *See also*, *In re Canales*, 52 S.W.3d 698, 702 fn.11, 12 (Tex. 2001) (referring to *Mitchell Energy* and Section 311.023 (1) (3) and (5) of the Code Construction Act, in construing the Court Administration Act). *See also*, Tex. Atty. Gen. Op. GA-0535, (April 04, 2007) (interpreting the Education Code under the Code Construction Act); *See also*, Tex. Atty. Gen. Op. GA-0243 (September 4, 2004) (interpreting of the Local Government Code in conjunction with the Code Construction Act).

Under theory b) stated above:
Section 531.0972 of the Government Code now enables an anonymous needle exchange as part of a Bexar County disease-control and prevention pilot program; however, this new law needs to be interpreted in the light of its legislative intent, to clarify that those who operate the program and those who participate in it may do so lawfully as of September 1, 2007, without fear of criminal prosecution in Texas.

In *Garza v. State*, the Court of Criminal Appeals applied Section 1.05(b) of the Texas Penal Code to the Code Construction Act (Chapter 311 of the Government Code). *Garza v. State*, 213 S.W.3d 338, 348-349 (Tex. Crim. App. 2007). The Court reviewed the legislative history, the actions taken in the House

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[20] Mitchell Energy, a defendant in a water well contamination case, objected to the appointment of a former, unretired judge assigned to serve as a visiting judge. The Texas Supreme Court considered the legislative history and transcript of the Senate debate when it determined the meaning of Section 74.053 of the Government Code. Mitchell argued that the legislative intent of Section 74.053 meant the visiting judge could not be assigned to the case after objection, because she was formerly a judge, but not a retired former judge. The Court stated that its primary goal in construing Section 74.053 was to give effect to the legislative intent. *Mitchell Energy Corporation*, 943 S.W.2d at 438. The Court considered the legislative history and the transcript of the Senate debate in connection with the language of the statute to be effectuated. *Id.*, at 439-40. The Court granted mandamus conditionally, because it agreed that the statute was intended to make visiting judge assignments to former judges who had already retired.

and Senate and in the Conference Committee, and the hearing record of the Committee proceedings. At issue in *Garza* were two separate criminal charges, both of which resulted in convictions and death penalty sentences for capital murder; one was for the deadly shooting of four women in the same transaction, and one for the deadly shooting of the same four women as an organized criminal activity. The Court debated the appropriate punishment under the enactment of Sec. 71.02(a) (1) and (b) of the Penal Code, which included capital murder among those offenses which, if committed as a member of a criminal street gang, would constitute a separate offense.

The Court considered it clear in *Garza* that the statute made it an offense to commit capital murder while acting as a member of a criminal street gang, but saw the statute as far less clear about how to classify that offense. In reaching its decision to affirm both convictions and the capital murder death sentence, but vacating the death sentence for the organized criminal activity conviction, the Court of Criminal Appeals concluded that the offense of committing capital murder as organized criminal activity was not intended by the Legislature to be an unclassified offense. *Id.*, at 350. It would have been absurd, the Court reasoned, to conclude that there was no penalty assigned to an organized criminal activity offense being of such gravity that a law was enacted to penalize it, and that it would be a "result capable of execution" under Section 311.021(4) to construe the offense as a first-degree felony, giving effect to the legislation under Section 311.021 (2) and (5), rather than negating it. *Garza*, 213 S.W.3d at 351.

Also, in *Basden v. State*, the Court of Criminal Appeals looked to the legislative history of the statute in question, Art. 42.08(b) (then Vernon's Code of Criminal Procedure), by referring to the Bill analysis prepared for the Bill, S.B.186, 69th Leg. Reg. Session, 1985. *Basden v. State*, 897 S.W.2d 319 (Tex. Crim. App. 1995). Also, it considered the testimony presented before the House Committee on Law Enforcement, and concluded that the legislative intent was to stack sentences for crimes committed by inmates, rather than allow them to run concurrently. *Id.*, at 322. The Court cited Section 311.023 of the Government Code[21] in regard to the object sought to be obtained by the statute, being to discourage crimes committed while incarcerated:

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[21] TEX. GOVT. CODE SECTION 311.023 (1985):

> "The starting point for statutory analysis is the text of the statutory provision at issue. *Boykin v. State,* 818 S.W.2d 782 (Tex. Crim. App. 1991). Our duty is to attempt to discern the legislative intent or purpose of the statute by, if reasonably possible, giving effect to the plain meaning of the statute's language. *See Boykin*, 818 S.W.2d at 785-86 [additional citation omitted]. However, where application of the plain meaning of the statute's language would lead to 'absurd' consequences that the Legislature could not possibly have intended, this Court, in arriving at a sensible interpretation of the legislative intent of the statute, will consider such extra-textual factors as the legislative history and the object sought to be obtained by the statute. *See Boykin*, 818 S.W.2d at 785-786; Texas Government Code, Section 311.023." *Basden,* 897 S.W.2d at 321.

In *Allen v. State*, the Court of Criminal Appeals agreed that the Court of Appeals had reasoned correctly in applying Section 311.023 of the Code Construction Act to Section 724.046(a) of the Transportation Code. *Allen v. State*, 48 S.W.3d 775 (Tex. Crim. App. 2001). The lower Court had interpreted the Legislature's intent of this enactment was to raise revenue to offset the cost of administration of driver's license suspensions, and that the Legislature had not extended the suspension period until the actual date of payment of the license reinstatement fee. Therefore, the Court of Appeals was correct that that the correct offense against the defendant was for driving without a license, and reversed the conviction for driving with a suspended license. *Ibid.*, at 776.

Other Texas courts have also relied upon the Code Construction Act in regard to penal provisions. In *Ex Parte Canady*, the Court of Appeals considered an administrative penalty provision of the Texas Water Code, interpreting it as sufficiently ambiguous to apply the extra-textual factors of Section 311.023, TEX.

"In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the:

(1) object sought to be attained;
(2) circumstances under which the statute was enacted;
(3) legislative history;
(4) common law or former statutory provisions, including laws on the same or similar subjects;
(5) consequences of a particular construction;
(6) administrative construction of the statute; and
(7) title (caption), preamble, and emergency provision."

GOV'T. CODE, in construing the provision. *Ex Parte Canady*, 140 S.W.3d 845, 849 (Tex. App. – Houston [14th], 2004). In reaching its conclusion that more than one party could be penalized for an administrative violation of the Water Code, the Court looked at a definition contained in another provision of the Government Code, the legislative history of a related provision in the Water Code, to related discussion on the House Floor of a similar provision, and other laws from the Penal Code. *Ibid.*, at 849-850.

It would accomplish a just and reasonable result to construe new Section §31.0972 of the Government Code under Chapter 311 of the Government Code, allowing implementation of the pilot program, because 1) of the stated purpose of the law, 2) the intent of the legislation as reported to the Legislature by the Conference Committee, and 3) because the public health and waste disposal operations of the pilot program constitute essential governmental functions.

For example, in applying Sections 311.021 and 311.023 to the Code of Criminal Procedure, the Texas Supreme Court reasoned in an expunction case that the primary goal when construing a statute is to carry out the legislative intent, and that consequences of a particular construction may be considered, assuming that a just a reasonable result is intended and that the public interest is to be favored over private interest. *Harris County District Attorney's Office v. J.T.S.*, 807 S.W.2d 572, 574 (Tex. 1991). Among other indicators of legislative intent, the Court considered the taped hearing on the Senate Bill in the hearing by the Subcommittee on Criminal Matters of the Senate Jurisprudence Committee. *Id.* The Court held that the legislative intent of Art. 55.01 of the Texas Code of Criminal Procedure allowed the expunction of records for wrongful arrest, but not for a guilty plea followed by probation, and that the public interest favored over the private interest allowed for arrest records to be archived for deterring recidivism. The Court characterized this as a just and reasonable result under Section 311.021.[22]

Previously, in Opinion No. GA-0036 March 13, 2003, the question under consideration was whether the Ethics Commission would be bound to release certain information under TEX. GOV'T. CODE Section 571.140 (1994), while at

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[22] *See also, Industrial Accident Bd. v. Martinez*, 836 S.W.2d 330, 333 (Tex. App.– Houston [14th] 1992) (construing survivors' beneficiary eligibility requirements under the "just and reasonable result" language of Section 311.021, TEX. GOV'T. CODE).

the same time it appeared that the Commission might be prohibited from doing so on pain of criminal liability. In that instance, it was said, a result allowing for a redacted release of information would strike a permissible balance: "We are instructed by the Code Construction Act to avoid such consequences as this in the interpretation of a statute, if it is possible to do so. *See id.* Section 311.021(2) (Vernon 1998) (entire statute intended to be effective); (3) (just and reasonable result intended); (4) (result feasible of execution intended)."[23]

We turn now to the statement of intent as expressed regarding the Conference Committee report on S.B.10, archived on the Senate proceedings of May 27, 2007. It makes the Legislature's intent unmistakably clear: the pilot program for infectious disease control in Bexar County is authorized to begin operations as of September 1, 2007, and allows for the program to include an anonymous, safe needle exchange accessible to the public, any other laws to the contrary notwithstanding. This is quite the opposite of suggesting that criminal prosecution would be appropriate for those distributing or receiving needles in participating in the program services. The legislative intent indicates that an exception to prosecution is the outcome, in regard to actions taken in connection with the pilot program. This is further reinforced by the existing defenses stated in Section 9.21 and 2.03(3) of the Penal Code.

Here are the remarks by Senator Robert Deuell, M.D., and Senator Jane Nelson, author of S.B.10, beginning at 1:58:25 and ending at 1:58:55 on the Senate video archives, specifically addressing the meaning of Section 5 of S.B.10:

LEGISLATIVE INTENT of S.B. 10 AMENDMENT, CREATING SECTION 5

"Senator Deuell:

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[23] *See also,* Tex. Atty. Gen. Op. No. GA-0118 (October 28, 2003): "[W]e believe that section 203.003(6) [Local Government Code] should be read to mean the same thing as section 118.0216(d). *See* Tex. Gov't Code Ann. § 311.021(2), (3) (Vernon 1998) (directing a construer to presume that the legislature intended an entire statute to be effective and to provide a 'just and reasonable result'); *cf., Commercial Standard Fire & Marine Co. v. Commissioner of Insurance,* 429 S.W.2d 930, 933 (Tex. Civ. App. – Austin 1968, no writ) (stating that inconsistencies in earlier enacted general statute must yield to later enacted special statute)." *See also,* Tex. Atty. Gen. Op. No. GA-0291 (January 5, 2005), in which Section 321.021(3) was applied to the Controlled Substances Act and the Family Code in determining that it was a just and reasonable result to conclude that a physician would not be subject to criminal liability for not reporting drug use by a pregnant patient.

"Senator Nelson, I did want to establish some legislative intent on the amendment regarding needle exchange. Is it your intent that, notwithstanding any other statutes, Bexar County will be allowed to legally operate a needle exchange program under the provisions of the bill?"

Senator Nelson:
"That is correct."

Senator Deuell:
"Okay, thank you . . . ."[24]

Under theory c) stated above:
The enactment of Section 531.0972 of the Government Code enables a disease-control and prevention program in Bexar County starting as of September 1, 2007, and insofar as it concerns an anonymous needle exchange service, the specific reference in that law which enables the pilot program is controlling over any general statements to the contrary in other laws (including the Controlled Substances Act (TEX. HEALTH & SAFETY CODE, 1994)); as such, it negates *any other statutory provisions which would otherwise mean that distribution or possession of clean needles (or returning dirty needles to the outreach locations for proper waste disposal), in conjunction with the pilot program, would be considered criminal offenses involving unlawful drug paraphernalia.*

In *Jones v. State*, the Court of Appeals applied Section 1.05(b) of the Penal Code and looked to Chapter 311 of the Government Code for guidance in construing alternative (and arguably conflicting) provisions for enhanced penalties of felony convictions occurring after prior felonies generally, and after sexual assault felonies specifically. *Jones v. State*, 225 S.W.3d 772 (Tex. App. – Houston [14th] 2007).

"Pursuant to Texas Penal Code section 1.05(b), certain sections of the Code of Construction Act apply unless a different construction is required

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[24] *See*, Senate actions on S.B. 10 archived in video on May 27, 2007, available at http://www.senate.state.tx.us/avarchive/ starting at 1:56:34 -- ending at 1:59:13. Senate Journal archives of May 27, 2007 are available online at: http://tlo2.tlc.state.tx.us/sjrnl/80r/html/80RSJ05-27-F.HTM. *Also see*, Senate Journal, 80th Legislature, Regular Session, 69th day, page 5203.

> contextually.[FN6] *See* Tex. Penal Code Ann. § 1.05(b) (Vernon 2003). We are required to presume by enactment that all words within a statute are intended to be effective, and the language therein will create a just and reasonable result. See Tex. Gov't Code Ann. § 311.021 (Vernon 2005). If a general provision conflicts with a specific provision, the provisions shall be construed, if possible, to give effect to both. Tex. Gov't Code Ann. § 311.026(a) (Vernon 2005); *State v. Mancuso*, 919 S.W.2d 86, 88 (Tex.Crim.App.1996). If we are unable to reconcile statutory provisions, the specific statute will prevail as an exception to the general statute, unless the general statute is the later enactment and the legislature's manifest intent is that the general provision prevail. Tex. Gov't Code Ann. § 311.026(b) (Vernon 2005); *Mancuso*, 919 S.W.2d at 88.
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> *FN6.* 'Unless a different construction is required by the context, Sections 311.011, 311.012, 311.014, 311.015, and 311.021 through 311.032 of Chapter 311, Government Code (Code of Construction Act), apply to the construction of this code.' Tex. Penal Code Ann. § 1.05(b)."
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> *Jones,* 225 S.W.3d at 781-782.

In the present situation, it would create an incongruous result to prosecute those public servants authorized to operate the pilot program, and subject them to the threat of a Class A misdemeanor penalty under Health & Safety Code Section 481.125 and Texas Penal Code Section 12.21, for their work in distributing disease prevention kits to adult program participants, containing sterile needles and/or hypodermic syringes. To place authorized local governmental personnel and their agents at risk of prosecution for carrying out what Sec. 531.0972 plainly allows them to do as public servants makes no sense, logically or legally.

For instance, the Connecticut Legislature enacted a law in 1990 allowing a safe needle exchange pilot program in New Haven. CONN. GEN. STAT. Sec. 19a-124. In 1992, the Legislature enabled it in other cities, Bridgeport and Hartford. However, after the enactments, law enforcement officials in Bridgeport continued to arrest and prosecute persons involved in the program. As a result, plaintiffs Doe, Roe and the Connecticut Harm Reduction Coalition brought a class action in 2000 against the Bridgeport, Connecticut Police Department and its

police chief. *Doe v. Bridgeport Police Department*, U. S. Dist. Ct., D. Connecticut, No. CIV.A. 3:00 CV2167JCH (Nov. 15, 2000). The plaintiffs obtained a permanent injunction, and eventually prevailed in their action under 42 U.S.C. Section 1983 for federal civil rights violations, including Fourth Amendment rights to be free from illegal search and seizures, false arrest and malicious prosecution. As the prevailing parties, they were ultimately awarded costs and attorney's fees in 2006 under 42 U.S.C. Section 1988. *Doe v. Bridgeport Police Department*, 468 F.Supp.2d 333 (D. Conn., Dec. 2006), 434 F.Supp.2d 107 (May, 2006).

In regard to my capacity as Chair of the Senate Jurisprudence Committee, it is essential to an understanding of the impact and effect of new laws enacted by the Legislature that when a new law becomes effective that elected officials and courts be able to interpret the law so as to provide a just and reasonable result under Chapter 311 of the Government Code. In this instance specifically, officials in Bexar County need to have clarification that this new law allows the newly legislated pilot program to proceed as authorized by Sec. 531.0972, in effect creating either an exception to prosecution or, if not an exception, incorporating the existing Penal Code defenses stated in Sections 9.22 and 2.03(3). The officials in Bexar County need to know whether it will be possible to carry out the mission of the pilot program as stated in Senate Bill 10, time being of the essence considering the September 1, 2007 effective date.

Respectfully submitted,

Jeff Wentworth