SUBJECT: Length of probation terms, mandatory review of probation, other revisions

COMMITTEE: Corrections — committee substitute recommended

VOTE: 7 ayes — Madden, D. Jones, Haggerty, R. Allen, Hochberg, McReynolds, Noriega

0 nays

WITNESSES: *On original bill:*
For — Ann del Llano, ACLU of Texas; Allen Place, Texas Criminal Defense Lawyers Association; Dana Hendrick

Against — None

On — Bonita White, TDCJ-CJAD; Jim Stott, Texas Probation Association; Paul David Donnelly, Harris County Community Supervision and Corrections Department; Leighton Iles, Fort Bend County CSCD; Melissa Cahill, Collin County CSCD; Caprice Cosper, John Creuzot, Bradley Smith

On committee substitute:
For — Jim Stott, Texas Probation Association

Against — None

On — Bonita White, Texas Department of Criminal Justice; Mary Anne Bramblett; Caprice Cosper; John Creuzot; Dana Hendricks

BACKGROUND: Under Code of Criminal Procedure, art. 42.12 after a criminal defendant has been convicted or pleaded guilty or *nolo contendere* a judge may suspend the imposition of the sentence and place the defendant on community supervision, also called probation. The vast majority of criminal cases are resolved through plea agreements, and most plea-bargain cases result in probation.

For first-, second-, and third-degree felony offenses, the minimum length of a probation term that can be imposed is the minimum period of imprisonment that the felony carries and the maximum term length is 10

years. For a state-jail felony, the minimum probation term is two years and the maximum is five years. The maximum probation term in misdemeanor cases is two years.

Offenders guilty of certain violent and serious crimes listed in Code of Criminal Procedure, art. 42.12, sec. 3g are not eligible for judge-ordered probation. These crimes often are referred to as "3g" offenses. This means that persons convicted of murder cannot be placed on probation by a judge, but they can receive deferred adjudication for murder from a judge. Juries can place people convicted of murder on probation.

Probation terms can be extended under some circumstances. Art. 42.12, sec. 22(c) allows judges to extend probation periods as often as the judge deems necessary, as long as the total probation period does not exceed the limit of 10 years for first-, second-, third-degree felonies, and state jail felonies and as long as it does not exceed three years for misdemeanors. Art. 42.12, sec. 22A allows judges to extend probation terms for some sex offenders for an additional 10 years beyond the 10-year limit on the original term, and Art. 42.12, sec. 22(c) allows judges to extend misdemeanor terms for up to two years beyond the three-year limit in cases in which defendants have not paid fines, costs, or restitution.

Under art. 42.12, sec. 20, judges can reduce or terminate probation terms after defendants have completed one-third of their original terms or two years, whichever is less.

Health and Safety Code, sec. 469.002 authorizes counties to establish drug courts for persons arrested with or convicted of alcohol or drug offenses or other nonviolent offenses in which alcohol or drugs contributed to the offense. Sec. 469.006 requires counties with populations of more than 550,000 to establish drug court programs. If one of these counties does not establish a drug court program, it is ineligible to receive state funds for a probation department and grants administered by the criminal justice division of the Governor's Office.

DIGEST:

CSHB 2163 would make numerous changes to the statutes governing probation, including:

- reducing the initial length of most felony probation terms and instituting a procedure for judges to extend those terms;

- requiring judges to review probation cases after one-half of the term had been completed;
- requiring judges to give defendants credit on their sentences for time spent in certain types of programs;
- eliminating mandatory community service requirements; and
- requiring additional counties to institute drug courts and expanding who those courts may serve.

CSHB 2193 would take effect September 1, 2005, and would apply to persons on probation on or after that date, regardless of when they initially were placed on probation.

Length of probation terms. CSHB 2193 would reduce from 10 years to five years the length of initial probation and deferred adjudication terms that judges could impose on first-, second-, and third-degree felony offenders, but also would allow for the possibility of extensions of these terms beyond the five-year limit. The bill would remove the current minimum probation and deferred adjudication terms set for first-, second-, and third-degree felons.

Judges would be allowed to extend probation terms in these felony cases by imposing a maximum of five one-year extensions, which could bring the total probation term to 10 years. Judges could not impose more than one extension per hearing, regardless of the number of alleged probation violations.

CSHB 2193 would keep the 10-year maximum period of probation and deferred adjudication for offenders guilty of "3g" felony offenses and for offenses that result in a person having to register as a sex offender. The bill would remove current authority for judges to extend probation terms for some sex offenders, and a current requirement that probation terms for committing certain sex offenses against children be from five to 10 years. It also would eliminate current authority to extend misdemeanor terms beyond the two-year limit in some cases.

CSHB 2193 would reduce the maximum probation term that could be given to state jail felons from five to three years. This term could be extended to a total of five years instead of the current authorization for terms to be extended to a total of 10 years. The minimum probation term for state jail felons would remain two years.

The bill would expand the current mandate that some low-level state jail drug offenders be placed on probation to include state jail felons with a previous state jail drug offense that was punished as a misdemeanor.

Jury-recommended probation. CSHB 2193 would prohibit a person convicted of murder from receiving jury-recommended probation.

The bill would allow state jail felons who opted for jury sentencing to be eligible for jury-recommended probation, except for state jail felons convicted of some low-level drug offenses who under current law automatically are placed on probation by a judge.

Mandatory review for possible reduction or termination of probation. Judges would be required to review defendants' records and consider whether to reduce or terminate probation after defendants had served one-half of their sentences. Judges would retain their current authority to reduce or terminate probation terms after the lesser of one-third of the term or two years.

Judges would not have to review defendants' records if defendants were delinquent in paying restitution, fines, costs, or fees that they had the ability to pay or if they had not completed court-ordered counseling or treatment. Judges would have to review these cases within 12 months of a defendant completing their payments, counseling, or treatment. Judges could not refuse to terminate probation solely on the grounds that a defendant was indigent and unable to pay restitution, fines, costs, or fees.

If a judge determined that a defendant had failed to fulfill his conditions of probation, the judge would have to tell the defendant in writing what would be necessary to fulfill the conditions.

The current prohibition on early termination for state jail felons would be eliminated so that these defendants could have their probations terminated or reduced before the end of their terms. The bill would make "3g" defendants ineligible for early termination and continue the prohibition on early termination for offenders subject to the state's sex offender registration laws.

Giving credit against a sentence. CSHB 2193 would require judges to give defendants credit against their sentences for time spent in a court-ordered residential program or facility, just as judges now are required to

give credit for time spent in jail. The current prohibition on giving credit for time spent in jail as a condition of deferred adjudication would be lifted, and these defendants would have to receive credit for the same factors as defendants on regular probation.

Judges would be required, instead of authorized as under current law, to give state jail felons credit on their sentences for time served in county jail. Judges also would have to give state jail felons credit for time spent in court-ordered residential programs and facilities as a part of probation and for time spent in custody waiting to enter one of these programs or facilities.

Defendants would have to receive credit for time served in a county jail, community corrections facility, or court-ordered residential program or facility if their probation was revoked.

Community service. CSHB 2193 would give judges discretion about whether to require probationers to perform community service, instead of the current mandate that all defendants be required to do so.

Drug courts. CSHB 2193 would require more counties to establish drug courts, but the requirement would take effect only in counties that received federal or state funding for the courts. The requirement to establish drug courts would be applied to counties with populations of 200,000, instead of the current requirement applied to counties of 550,000. Counties that did not establish a drug court as required would be ineligible for state funding for their probation department and for grants from the criminal justice division for substance abuse treatment programs. Counties would be required to establish drug courts by September 1, 2006, or within one year of the federal census putting their population over 200,000.

CSHB 2193 would authorize a $50 fee to fund the state's drug courts, which would be charged to defendants convicted of driving while intoxicated and other intoxication, alcoholic beverage, and drug offenses. Counties would be able to keep 10 percent of the fee. These provisions would apply only to offenses committed on or after the bill's effective date. Drug courts also would be authorized to charge their participants additional fees related to testing, counseling, and treatment.

CSHB 2193 would allow courts to defer further proceedings against persons charged with state jail felonies who entered a drug court program.

Upon successful completion of the program and on the motion of the prosecutor, the court could dismiss the charge. If the defendant did not complete the program, the court could proceed as if the case had not been stayed. The bill would require courts to expunge the records of certain drug court graduates. This would apply to first-time offenders who were not arrested or convicted for another felony within two years of their completion of a drug court program. These provisions would apply to any defendant who entered a drug court program regardless of when the offense was committed.

CSHB 2193 would authorize additional types of drug courts. It would allow counties to establish drug courts for certain juvenile offenders, parolees, family members involved in suits affecting parent-child relationships, and anyone else who might benefit from a drug court program.

Drug courts would be authorized to report on their programs to the criminal justice division of the Governor's Office.

Prison diversion pilot program. CSHB 2193 would require TDCJ to establish a pilot program that gives grants to local probation departments to implement a system of progressive sanctions designed to reduce the revocation rate of defendants placed on probation. Priority would have to be given to counties in which the revocation rate significantly exceeded the statewide average. The bill would require the inclusion of certain components in any progressive sanction plan funded by the department and would require the department to give preference to programs targeting medium and high-risk offenders.

TDCJ would have to make the grants by September 1, 2006. The department would have to report on the program to its board, and the board would have to forward the report to the lieutenant governor and the speaker of the House by December 15, 2006.

Administration of probation departments and judicial immunity. CSHB 2193 would make several changes in the administration of local probation departments. It would add statutory county court judges trying criminal cases in a judicial district to the list of judges who are required to establish and run a probation department. It would delineate the duties of probation department directors and limit the personnel decision responsibilities of judges running probation departments to the

appointment of a department director and fiscal officer. A judge's budgetary responsibilities would be limited to appointing a fiscal officer and approval of the department's budget. Probation departments, instead of judges, would be given the authorization for the expenditure of certain department funds.

CSHB 2193 also would give judges running probation departments judicial immunity from lawsuits arising from the performance of their duties and require the attorney general to defend statutory county court judges from suits arising out of their duties managing a probation department.

The bill would remove the current requirement that judges managing probation departments authorize the carrying of weapons by probation officers, thereby allowing department directors to make the authorization.

Local probation departments would be able to accept credit cards from defendants to pay fees, fines, court costs, and other charges and to collect a fee for processing the payment by credit card. The state auditor would be added to the list of those who could audit the records of local probation departments.

SUPPORTERS SAY:

CSHB 2193 would create a stronger and more effective probation system that better supervised and rehabilitated probationers, which would enhance public safety. Currently, several factors in Texas' probation system work against the best interests of public safety and offender rehabilitation. CSHB 2193 would address some of these factors by creating shorter but more intense probation terms for some offenders and giving judges more flexibility so that they could focus state and local resources on probationers that needed the most supervision. A strong, effective probation system could encourage judges to place appropriate offenders on probation rather than sending them to prison and could result in fewer probationers being sent to prison after having their probations revoked. This would help the state reserve its prison space for violent and habitual criminals and could reduce the state's need to expand prison capacity. The proposed changes in CSHB 2163 are based on research and experience.

The changes made in CSHB 2163, in conjunction with additional funding provided by the House and the Senate in the proposed general appropriations bill for fiscal 2006-07, would give judges more community resources to do a better job of handling probationers. The budget proposals

would fund about 500 local beds, which would serve about 1,500 offenders per year and 3,000 over the biennium to be used for residential treatment and for sanctioning offenders. Some $7.2 million would fund outpatient substance abuse treatment for about 2,000 offenders per year or 4,000 for the biennium. About $28.2 million would provide funds to local probation departments for 350 to 400 new probation officers so that the average direct supervision caseload could be reduced from 116 per probation officer to about 95 cases per officer. Currently, it costs about $2.27 per day to supervise an offender on probation versus an average of about $40 per day for a prison bed.

It is illogical to compare the changes proposed in CSHB 2193 with parole policies used decades ago. Under CSHB 2193 and the increased local options and treatment funds in the proposed budget, CSHB 2193 would enhance probation, make it more meaningful, and lead to better offender rehabilitation. Offenders released from prison decades ago often returned to the street after receiving no treatment or other programs and no meaningful supervision.

According to the fiscal note, CSHB 2193 could result in a savings to the state of about $44 million during fiscal 2006-07. In addition, counties would retain a portion of the new drug court fee enacted by the bill, estimated to be about $701,000 for the biennium. The state could see even more gains depending on the extent the early termination option was used for some parolees, according to the fiscal note.

Length of probation terms. CSHB 2193 would allow for shorter, but more intense, probation terms for first-, second- and third-degree felons which would result in more meaningful probation oversight and contribute to improved public safety. CSHB 2193 would not shorten terms for the serious and violent "3g" offenses and sex offenses.

Current probation terms of up to 10 years are unrealistic and can catch even rehabilitated probationers in violation of one of the numerous and detailed conditions of probation. Being in violation of a probation condition can lead to a probationer being sent back to prison.

By increasing the effectiveness of probation and reducing the time that a probationer spends on probation, CSHB 2193 could decrease the likelihood that a probationer would be tripped up by a technical probation violation and sent to prison for something that might not warrant this

action. Technical violations can include a wide range of behavior, including showing up late for an appointment with a probation officer, missing a treatment or counseling session, not paying a probation fee, or failing a drug or alcohol test. Revocations of felony probation terms increased 18 percent between fiscal 2001 and 2004, according to the Legislative Budget Board. About 55 percent of these revocations are for technical violations and the rest primarily for new arrests or convictions.

CSHB 2193 would authorize judges to extend felony probation so that supervision could continue for longer than the five years, if necessary. This would enhance public safety by giving judges the necessary flexibility to continue to supervise probationers if appropriate. To ensure that judges were taking a critical look at probationers and only extending supervision in appropriate cases, the bill would authorize only one-year extensions. Any logistical problems with this easily could be worked out.

CSHB 2193 would eliminate some special probation provisions for sex offenders so that the laws could be more uniform and appropriate. Sex offenders would continue to be subject to an array of sanctions and tools, including required registration with law enforcement authorities.

CSHB 2193 more closely would align Texas' probation terms with those in other states. According to a 2002 report, Texas probation terms were about 67 percent longer than the national average, with a Texas average of 67 months versus a national average of 40 months.

Jury-recommended probation. State jail felony defendants now can receive probation if they plead guilty or are sentenced by a judge, but they cannot receive probation if they opt for jury sentencing. This undermines the flexibility and intent of the laws governing state jail felonies, leads to disparate results, and skews decisions made by defendants. CSHB 2193 would address this by giving juries the full range of punishment options so that penalties could be tailored to fit individual defendants. This would continue the trend of the Legislature to change laws so that state jail felons are treated, in general, like other felons. The number of additional jury trials resulting from CSHB 2193 would be small enough not to burden the courts.

Mandatory review for possible reduction or termination of probation. CSHB 2193 would ensure that judges took a critical look at all probationers and give judges a formal opportunity to release from

probation those defendants who were doing a good job. CSHB 2193 would not mandate that a judge terminate probation in any case. The bill would not institute a bias toward early release because all decisions would remain within the full discretion of a judge. Although current law authorizes judges to review probationers, it would be better to have a requirement for review so all cases were examined. Public safety would be protected by making persons convicted of "3g" offenses and sex crimes ineligible for early termination.

To ensure judicial resources were not wasted, CSHB 2193 would not require review in cases in which defendants were delinquent in their required payments or had not completed court-ordered treatment or counseling. Judges would be required to tell defendants why probation was not being terminated to ensure that defendants understood what they had done wrong and what they needed to do for the remainder of their terms.

Giving credit against a sentence. Requiring judges to give credit against a sentence to defendants for time spent in court-ordered treatment programs is only fair since the time spent in the program is court-ordered. This time is analogous to time spent in jail and should be treated the same.

Community services. CSHB 1263 would give judges more discretion and flexibility in assigning community service. Current mandates that the service be imposed in all cases can result in a condition of probation requiring service that was inappropriate. In some cases it would be better for defendants to concentrate on other factors, such as getting a job or attending a treatment class, than community service. It is more important that judges have authority to make decisions on a case-by-case basis about imposing community service than to have a uniform statewide requirement.

Drug courts. CSHB 1263 would expand the state's successful drug court programs so that more probationers could take advantage of the opportunities they afford. This would result in more defendants receiving the necessary treatment to keep them from reoffending. In one study of Texas drug courts, 12 percent of offenders participating in the courts were incarcerated in prison within three years of entering a drug court compared with about 27 percent of a comparison group, according to a 2003 report by the now-defunct Criminal Justice Policy Council. Only about 3.4

percent of offenders completing a drug court program were in prison three years after entering the program, according to the report.

CSHB 2193 would not be an unfunded mandate because the bill would make this requirement take effect only if the county received state or federal funding for the courts. Moving the threshold requiring drug courts to counties of 200,000 would take in 13 additional counties, six of which already have drug courts, and bring the state total to 20 counties. CSHB 1263 would enable the state to fund these new drug courts through a new $50 fee that would be enacted in the bill. According to the fiscal note, the bill would generate revenue in addition to the current state annual appropriation of about $750,000, which would allow the state to fund the 20 drug courts at a higher level per court than currently occurs.

Prison diversion pilot program. CSHB 1263 would authorize grants to local probation departments that would help them implement a progressive sanctions model that has proved successful in Fort Bend County in reducing the number of probationers sent to state facilities following technical violations of probation. Under the program, the state gave the county's local probation department $363,000 to reduce caseloads for officers supervising high- and medium-risk probationers, to increase monitoring and field contacts, to institute the use of timely, graduated sanctions and incentives, to allow intensive judicial participation and monitoring, and to increase treatment and other programs. So far, the county, which had 212 felony revocations in fiscal 2004, has seen a 31 percent reduction in felony revocations to prison, due mainly to a 58 percent reduction in revocations for technical violations. The county also has seen a 57 percent increase in community service hours, and a 7.9 percent increase in the collection of probation fees.

Administration of probation departments and judicial immunity. CSHB 1263 would delineate the specific responsibilities of those involved in the community supervision and corrections department, clarifying the roles of all parties. The bill would codify current practice by putting the day-to-day management details in the hands of the director, while limiting a judge's role and responsibility to setting up local probation departments. CSHB 2193 would formalize the involvement of statutory county court judges while giving them the same immunity protections as district judges. It also would remove judicial liability for acts not within a judge's control.

OPPONENTS SAY:

CSHB 2193 could result in more — not fewer — criminals being sent to state prisons and could compromise public safety if defendants did not receive adequate, long-term supervision. Shorter probation terms and a mechanism for early release from probation would make probation a less attractive option in many cases, which could result in defendants being sentenced directly to prison.

There has not been enough study of the effect that proposed changes such as early release would have on the state. Many of these changes seem to be driven by a desire to reduce growth in the prison population and the demand for state resources, not by a focus on public safety. CSHB 2193 could create a system biased toward early release of offenders to address a lack of state resources similar to the one employed decades ago when the state's parole rate peaked at almost 80 percent. That resulted in increased crime, which preceded the state's massive prison expansion program.

Many of the changes in CSHB 2193 are unnecessary because judges have authority to do these things but choose not to. The state should not force judges to do things that they currently choose not to do when they strike a balance between the best interests of the public and offenders.

Length of probation terms. Reducing the maximum length of probation terms would upset the sentencing dynamics currently used in Texas. In many felony cases, prosecutors enter into plea agreements because of the availability of 10-year probation terms. Limiting felony probation to five years would be unreasonable and unacceptable to many prosecutors, victims, and members of the public. For example, burglary of a habitation can be a first-degree felony, and even though this can be a serious offense, it would fall under the five-year limit set by the bill. Long probation terms can help ensure that a defendant is rehabilitated and not a danger to the public, partly because it gives courts the option of revoking probation and sending defenders to prison if they do not meet probation conditions. In some cases, witnesses may even prefer long probation terms in which defendants could make restitution rather than prison terms. Without this option, prosecutors would be less inclined to agree to probation in some cases, which could lead to more direct prison admission.

The state should not eliminate some special probation provisions for sex offenders that were carefully crafted as part of the state's package of sex offender sanctions.

In general, probation terms currently established by courts are not unreasonable. For example they include things such as getting a job, supporting dependents, and not committing another crime. They are not designed to set up hurdles for probationers to trip over but to ensure that probationers are rehabilitated and not endangering the public. Many probationers who are doing a good job over the years are placed on a kind of inactive status while they pay their debts and check in with probation officers. Other probationers who are not doing such a good job while on probation deserve to continue under long-term supervision and to be held to the conditions.

Jury-recommended probation. CSHB 2163 could increase the work of courts if more defendants accused of state jail felonies opted for jury trials, rather than choosing trials by judges or pleading guilty to preserve the option of probation.

Mandatory review for possible reduction or termination of probation. It is unnecessary to require judges to review probationers upon completion of half of their terms. Current law allows judges to review offenders at their own discretion and to reduce or terminate a probation term after one-third of the original term, or two years, whichever is less.

The mandatory review established in CSHB 2193 would contribute to distortions in the state's sentencing dynamics. Many prosecutors would assume upfront that any term of probation could or would be cut in half. This would be unreasonable and unacceptable to many prosecutors, victims, and members of the public, and could result in fewer persons being placed on probation and more direct prison sentences.

It is unnecessary and burdensome to require judges to tell defendants in writing why they did not receive an early termination. Defendants are aware if they have not met their probation conditions and do not need to receive a written document from the judge. In other cases, judges may prefer not to put their reasoning in writing because they chose not to terminate a case due to something less concrete, such as a combination of the nature of an offense, a defendant's criminal history, and efforts made toward meeting their probation terms.

Giving credit against a sentence. CSHB 2193 would infringe on judicial discretion by requiring judges to give credit to defendants for time spent in court-ordered residential programs or facilities. Rather than mandate that

judges give this kind of credit, it would be better to give judges authority to make these decisions on a case-by-case basis.

Community services. One reason current law mandates community service and sets requirements for it is to ensure the uniform application of these laws. Eliminating this requirement could result in disparate treatment of defendants from court to court.

Drug courts. The state should not mandate that any counties establish drug courts. It would be better to authorize or encourage the courts but not to institute something that could become an unfunded mandate in the future.

Prison diversion pilot program. The state should not base a major criminal justice policy initiative in large part on the results from the small, short-term pilot project in Fort Bend County. The project has been underway only for about six months, and it is unclear whether the results could be duplicated statewide, especially given the diversity of the state and the large size of probation populations in some urban counties.

Administration of probation departments and judicial immunity. CSHB 2193 could absolve public officials from liability for acts for which they directly were responsible, leaving no one accountable to the victims. This could, in effect, exempt judges from liability while still giving judges decision-making power.

OTHER OPPONENTS SAY:

Length of probation terms. Allowing extensions of probation terms for only one-year increments could create logistical problems involved with moving defendants from an uncompleted treatment program to court for an extension hearing. It would be better to allow extensions for two-year increments.

NOTES:

The committee substitute made numerous changes to the original bill, including:

- eliminating provisions changing minimum probation terms;
- adding the authorization for one-year extensions of maximum terms in felony cases;
- adding the prohibition on jury-ordered probation for persons convicted of murder;
- requiring mandatory reviews of probation terms;

- requiring credit for time spent in certain programs;
- adding provisions about drug courts; and
- adding many of the provisions for the administration of local probation departments.

The provisions in CSHB 2193 relating to the administration of probation departments and judicial immunity were approved by the House on March 23 in HB 1326 by Hope, which was reported favorably as substituted by the Senate Criminal Justice Committee on May 5 and has been placed on the May 12 Senate Local and Uncontested Calendar.

The provision in CSHB 2193 that would allow state jail felons who opted for jury sentencing to be eligible for probation was approved by the House on April 22 in HB 1759 by Keel, which was reported favorably, without amendment, by the Senate Criminal Justice Committee on May 5 and has been placed on the May 12 Senate Local and Uncontested Calendar.

A related bill, SB 1266 by Whitmire, which also would revise the community supervision system, was reported favorably, as substituted, by the Senate Criminal Justice Committee on May 3.

The fiscal note estimates a gain in general-revenue related funds of approximately $44.4 million for fiscal 2006-07 as a result of changes made by CSHB 2193.