

- SUBJECT:** Prevention, investigation, prosecution, and punishment for gang activities
- COMMITTEE:** Criminal Jurisprudence — committee substitute recommended
- VOTE:** 6 ayes — Gallego, Fletcher, Kent, Miklos, Moody, Pierson
0 nays
5 absent — Christian, Hodge, Riddle, Vaught, Vo
- SENATE VOTE:** On final passage, April 24 — 28-2 (Duncan, Fraser)
- WITNESSES:** For — David Mintz, Texas Apartment Association; (*Registered, but did not testify*: Kathy Barber, Texas Retailers Association; Phil Cates, Texas Paint Council; Katrina Daniels, Bexar County District Attorney’s Office; Randy Erben, Home Depot; Rebecca Forest, Immigration Reform Coalition of Texas; MerryLynn Gerstenschlager, Texas Eagle Forum; Maria Martinez, Brent Munhofen, Immigration Reform Coalition of Texas; Brad Shields, National Council to Prevent Delinquency; Gary Tittle, Dallas Police Department)
- Against — Omar Janwar; Matt Simpson, ACLU of Texas; (*Registered, but did not testify*: Brent Brewer; Katie Brewer, Texans for Accountable Government Political Action Committee; Erica Grignon; Heather King-Fazio)
- On — (*Registered, but did not testify*: Shannon Edmonds, Texas District and County Attorneys Association)
- BACKGROUND:** Penal Code, sec. 71.01 defines “criminal street gang” as three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities.
- Under Penal Code, 71.02 a person commits the offense of engaging in organized criminal activity by committing, or conspiring to commit, certain offenses with the intent to establish, maintain, or participate in a

combination of three or more persons, or in the profits of such a combination, or as a member of a criminal street gang.

Under the Texas Tort Claims Act, Civil Practice and Remedies Code, ch. 101, a governmental entity is liable for certain tort claims.

Among the fees an accused or defendant or party to a civil suit in juvenile court will pay are a teen court administration fee not to exceed \$10 and a juvenile delinquency prevention fee.

DIGEST:

Gang activity. CSSB 11 would amend Penal Code, ch. 71 to create the offense of directing activities of certain criminal street gangs. A person would commit an offense if the person knowingly initiated, organized, financed, or directed a criminal street gang or its members with the intent to benefit or promote the interests of the gang, or increase the person's standing in the gang. An offense would be a first-degree felony (life in prison or a sentence of five to 99 years and an optional fine of up to \$10,000). "Criminal street gang" would be defined for the purposes of the new offense.

The list of offenses considered an element of engaging in organized criminal activity would be amended to include certain offenses constituting the unlawful transfer of certain weapons.

Penal Code, sec. 15.031 would be amended to provide that criminal solicitation of a minor would be the same category as the solicited offense if it was shown at trial that the actor was 17 years of age or older at the time of the offense, a member of a criminal street gang, and committed the offense with the intent to further the criminal activities of the gang, or avoid detection as a member of a gang.

Penal Code, sec. 22.015 would be amended to include that a person would commit the offense of coercing, soliciting, or inducing gang membership if the person threatened a child's family member with imminent bodily injury, or caused a child's family member imminent bodily injury with the intent to coerce, induce, or solicit a child to participate in criminal gang activity.

Gang-free zones. Penal Code, ch. 71 would be amended to provide that the offense of engaging in organized criminal activity would be increased to the punishment prescribed for the next highest category of offense,

unless the offense was a first degree felony, if the actor was 17 years of age or older, and it was shown at the trial that the actor committed the offense at a location that was:

- in, on, or within 1,000 feet of school, school board, or higher education institution property, a shopping mall, a movie theater, any premises of a public or private youth center, or playground; or
- in, on, or within 300 feet of the premises of a public swimming pool or video arcade; or
- on a school bus.

In a prosecution for engaging in organized criminal activity, a map produced or reproduced by a municipal or county engineer showing the location and boundaries of a gang-free zone would be admissible as prima facie evidence of the location of those zones if the governing body of the municipality or county adopted a resolution or ordinance approving the map as an official finding and record of the location or boundaries of those zones.

The prosecution would not be prevented from introducing or relying on any other evidence or testimony to establish any element of the offense, or using or introducing any other map or diagram otherwise admissible.

A municipal or county engineer could revise the approved map on request of the municipality or county's governing body. The engineer would be required to file the original or a copy of every approved or revised map with the county clerk of each county in which the zone was located.

Education Code, ch. 37 would be amended to provide that, beginning with the 2009-2010 school year, the superintendent of each public school district and the administrator of each private elementary or secondary school located in that district would be required to provide information on gang-free zones and the consequences of engaging in organized criminal activity within those zones in the student handbook for each campus in the district. Beginning with the 2009 fall semester, the governing board of each institution of higher education would have to include that information in any student handbook or similar publication for the institution.

Human Resources Code, ch. 42 would be amended to provide that each day-care center would have to distribute this information to the parents and guardians of children who attended the center.

Post-adjudication. A juvenile court in a disposition hearing regarding a child who had been adjudicated to have engaged in delinquent conduct that was also gang-related conduct would be required to order the child to participate in a criminal street gang intervention program appropriate for the child based on the level of involvement in the gang's criminal activities. The intervention program would have to include at least 12 hours of instruction, and could include voluntary tattoo removal. If a child required to attend an intervention program was committed to the Texas Youth Commission as a result of gang-related activity, the child would have to complete the intervention program prior to being discharged from custody or released under supervision.

Post-conviction. If a defendant was found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action, the sentences could run consecutively or concurrently if each sentence was for a conviction for gang-related conduct. This would not apply to a defendant whose case was transferred from juvenile court.

Code of Criminal Procedure, ch. 42 would be amended by providing that, on motion of the state attorney, a judge would make an affirmative finding of fact if the judge determined that the applicable conduct was engaged in as part of the activities of a criminal street gang. The judge would be required to enter an affirmative finding of gang-related conduct in the judgment in the case.

The list of conditions of probation a judge could impose would be amended to include avoiding persons or places of disreputable or harmful character, including any person, other than a defendant's family member, who was an active member of a criminal street gang.

A court that granted probation to a defendant convicted of a felony offense could require as a condition that the defendant submit to electronic tracking. This would apply only to a defendant identified as criminal street gang member in a criminal combination or gang intelligence database, and had two or more previous convictions for, or grants of deferred adjudication probation or an equivalent form of supervision or probation for, a felony offense under the laws of this state, another state, or the United States.

A parole panel could require as a condition of release on parole or to mandatory supervision that a releasee submit to electronic tracking. This

would apply only to a releasee who was identified as criminal street gang member in a criminal combination or gang intelligence database, and had three or more previous convictions for, or grants of deferred adjudication probation or an equivalent form of supervision or probation for a felony offense under the laws of this state, another state, or the United States.

Intelligence databases. Code of Criminal Procedure, art. 61.02 would be amended to add to the list of enumerated items in a criminal justice intelligence database:

- a self-admission of gang membership not made during a judicial proceeding, including the use of the Internet or other electronic format or medium to post photographs or other documentation that identified the person as gang member;
- evidence that the person had visited a known gang member, other than a member of the person's family, while the gang member was confined in or committed to a penal institution; or
- evidence of the person's use of technology to recruit new gang members.

Evidence that a person visited a gang member in a penal institution or used technology to recruit new members would not be sufficient to create the eligibility of a person's information to be included in an intelligence database unless it was combined with other information from the enumerated list.

Intelligence database information would have to be removed after five years, subject to existing conditions. Code of Criminal Procedure, art. 61.06(c) would be reenacted and amended to provide that the five-year period could not include any period during which the individual was incarcerated.

License Restrictions. A court that granted probation to a defendant convicted of an organized crime offense could impose as a condition restrictions on operation of a motor vehicle. The court could specify the hours during which, and locations at or in which, a defendant could not operate a motor vehicle.

Contraband. Code of Criminal Procedure, art. 59.01 would be reenacted to define "contraband" in the context of contraband forfeiture, and would be amended to include property that was used in the commission of any

organized crime offense, or the offense of unlawful transfer of certain weapons in which the person sold, rented, leased, loaned, or gave a handgun to any person knowing the recipient intended to use it unlawfully or in the commission of an unlawful act.

If property was subject to forfeiture under art. 59.01 or Code of Criminal Procedure, art. 18.18, which also provides for the forfeiture of certain illegal items, the state attorney could proceed under either article.

Civil suit. Civil Practice and Remedies Code, ch. 125, which covers public nuisances, would be amended by adding sec. 125.070, which would provide that a criminal street gang or any of its members would be liable to the state or a governmental entity injured by the violation of a temporary or permanent injunctive order under ch. 125.

A district, county, or city attorney, or the Attorney General could sue for damages on behalf of the state or a governmental entity without waiving sovereign or governmental immunity. If the state or governmental entity prevailed, it could recover actual damages, a civil penalty not to exceed \$20,000 for each violation, and court costs and attorney's fees.

The gang or member's property could be seized in execution on a judgment but could not be seized if the owner or interest holder proved that he or she was not a member of the gang and did not violate the injunctive order. The owner or interest holder of property in the possession of a gang or gang member would have to show that the property was stolen, or was used or intended to be used by the gang or gang member without consent.

The attorney general would deposit money received as damages or a civil penalty in the Neighborhood and Community Recovery Fund, held by the attorney general outside the state treasury. A district, county or city attorney who brought suit on behalf of a governmental entity would deposit money received in trust for the benefit of the community or neighborhood harmed by the violation of the injunctive order. Money received could be used only for the benefit of the community or neighborhood harmed by the violation. Interest earned on the money would be credited to the fund, and the money would not be allowed to commingle with money held for the benefit of a different community or neighborhood.

Graffiti. A county order or municipality ordinance could require the owner of property within its jurisdiction to remove graffiti from the owner's property on receipt of notice from the county or municipality. The order or ordinance would have to require a property owner to remove the graffiti on or before the 10th day after notice was received, unless the property owner requested the county or municipality to remove the graffiti. The order or ordinance would have to include an exception from the removal requirement if the graffiti was located on transportation infrastructure and its removal would create a hazard for the person removing it.

If a property owner did not remove the graffiti by the 10th day, the county or municipality could remove the graffiti and charge the removal expenses to the property owner. The expenses could be assessed against the property on which the removal work was performed. To obtain a lien against the property for these expenses, the governing body would have to file a statement of expenses that contained the name of the property owner, if known, the legal description of the property, and the amount of expenses incurred. A lien would attach to the property on the date the statement of expenses was filed and would be subordinate to any previously recorded lien, and the rights of a purchaser or lender who acquired an interest in the property before the statement of expenses was filed.

The notice would have to be given personally to the owner in writing, by letter sent by certified mail, or if notice could not be given by those methods, by at least one publication in a generally circulated newspaper in the county or municipality, or by posting the notice on or near the front door of each building or on a placard attached to a stake in the ground on the property.

A political subdivision or an agency of this state could enact an ordinance or rule to require aerosol paint be made accessible only with the assistance of personnel of the business.

A defendant convicted of a graffiti offense, or if a juvenile, the parent or guardian, would pay, as a court cost, a juvenile delinquency prevention and graffiti eradication fee of at least \$50 and not more than \$500. The court would increase the fee based on the amount of pecuniary loss in the case and the number of times the defendant had been previously convicted of a graffiti offense. The list of projects for which the County Juvenile

Delinquency Prevention Fund money could be used would be amended to include funding for community art programs.

The lists of additional court costs collected upon conviction of a defendant in district court, statutory county court, or county court would be amended to include a juvenile delinquency prevention and graffiti eradication fee of at least \$50 and no more than \$500.

The fees an accused or defendant or party to a civil suit in juvenile court would pay would be amended to include a request fee for a teen court program of \$20, if the court ordering the fee was located in the Texas-Louisiana border region, but otherwise, not to exceed \$10, a juvenile delinquency prevention fee of at least \$50 but no more than \$500, and a fee to cover costs of required duties of teen court of \$20, if the court ordering the fee was located in the Texas-Louisiana border region, but otherwise, not to exceed \$10.

The Texas Tort Claims Act would not apply to a claim for property damage caused by the removal of graffiti under Local Government Code, sec. 250.006.

Grant program. Government Code, ch. 772 would be amended by adding sec. 772.007 which would require the Criminal Justice Division in the Governor's Office to administer a competitive grant program to support regional, multidisciplinary approaches to combat gang violence through the coordination of gang prevention, intervention, and suppression activities. The program would have to be directed toward regions of the state with demonstrably high levels of gang violence. The division would award grants to qualified applicants that demonstrated a comprehensive approach that balanced prevention, intervention, and suppression activities to reduce gang violence. The division would include in its required biennial report a detailed reporting of the results and performance of the grant program, and could use any available revenue to administer the program.

This bill would prevail over another act of the 81st Legislature, Regular Session, 2009, in the event of any conflict related to non-substantive additions to and corrections in enacted codes.

This bill would take effect September 1, 2009, except that changes to Education Code, sec. 37.110 and 51.973, and Human Resources Code,

sec. 42.064 would take immediate effect if the bill was finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2009.

**SUPPORTERS
SAY:**

By increasing the penalties and costs associated with criminal gang activity, CSSB 11 would deter involvement in gangs and stem the growing threats posed by gang activity and membership. The presence of gangs in Texas has increased in recent years, and transnational gangs have established a foothold in the border area. These gangs are the primary channel for human and drug trafficking into the United States, weapons trafficking into Mexico and Central America, and the violence associated with these activities. CSSB 11 would allow adult offenders to be sentenced consecutively in certain circumstances, provide harsher penalties for certain gang-related crimes and for involving minors in gang activities, and increase court costs and civil penalties. By imposing harsher penalties and targeting the financial assets of gangs and gang members, CSSB 11 would recognize the serious nature of gang activity and provide strong deterrence against gang involvement and crimes.

Expanded gang database criteria would allow law enforcement to gather intelligence essential to dismantling organized crime cartels. By allowing gang members and connections between gangs to be identified, CSSB 11 would help law enforcement monitor gang activities and track gang assets and make it easier to prosecute these criminals. Electronic monitoring of certain gang members and license restrictions would be additional tools to track gang members and deter further criminal activity.

CSSB 11 would provide a comprehensive approach to the problem of gang involvement and gang violence. By requiring juveniles involved with gangs to participate in a gang intervention program, CSSB 11 would help prevent children from engaging in further gang activity.

**OPPONENTS
SAY:**

CSSB 11 would give law enforcement invasive new tools that would necessarily not improve public safety. By expanding the list of criteria, any two of which would qualify a person for inclusion in a criminal intelligence database, it would increase the likelihood that non-gang members would be included in the database. A person easily could impersonate another on a web posting, and a photograph could be altered to make it appear that someone was in a gang who was not. In addition, visiting gang members in prison is a common activity for counselors, social workers, and faith-based volunteers. The inclusion of innocent

Texans in the gang database would diminish its effectiveness as a law enforcement tool.

The expanded use of electronic monitoring would be a waste of resources. Electronic monitoring already is allowed for certain high-risk offenders. The expanded use of electronic monitoring without a finding that the offender presented a unique danger to the community would not be a cost-effective law enforcement tool.

Enhanced penalties for gang activities would not be an effective deterrent. A comprehensive approach to gang activity, with a focus on intervention, would have a greater chance of preventing gang violence than increased punishments. The most effective time for intervention occurs prior to a juvenile's gang involvement or after the juvenile's first brush with the law. Over-criminalization of minor gang activity would minimize this window of opportunity.

NOTES:

The companion bill, HB 4310 by Gallego, was left pending in the House Criminal Jurisprudence Committee on April 22.