

SUBJECT: Human smuggling offenses, penalties; changes to DPS policies

COMMITTEE: Homeland Security & Public Safety — committee substitute recommended

VOTE: 8 ayes — Phillips, Nevárez, Burns, Dale, Metcalf, Moody, M. White, Wray

0 nays

1 absent — Johnson

WITNESSES: For — Ramon Garcia, Eddie Guerra, Joel Rivera, Hidalgo County; Bobby Villarreal, Hidalgo County Judge’s Office; David Carter, Texans for Immigration Reduction & Enforcement, Immigration Reform Coalition of Texas, Minuteman Civil Defense Corps

Against — Eugene Hildebrandt; Abraham Perez, Alan Ramirez, Marivel Reyes, Alianza Latina Ministerial de Austin; Matt Simpson, American Civil Liberties Union of Texas; Zenon Sammy Garcia, Asociacion Bautista Hispana Norte Central de Texas; Pablo Vazquez, Church; Lyndon Rogers, Iglesia Cristiana Principe de Paz Texas; Eddie Menjivar, Iglesia Filadelfia; Celina Moreno, Mexican American Legal Defense and Educational Fund; Juve Prado, Primera Iglesia Bautista; Lynn Godsey, Texas Coalition of Evangelical Alliances; Maxie Gallardo, Workers Defense Project; *(Registered, but did not testify):* Leo Rangel, Alia; Raul Machado, Pedro Cabello, Margarita Jaimes, Jose Vazquez, Blanca Amador, Marco Castilla, Marcelo Franco, Jaime Jaimes, Miguel Maldonado, Judith Ramirez, Alianza Latina Ministerial de Austin; Jacqueline Watson, American Immigration Lawyers Association Texas Chapter; William Randall, Austin Cornerstone Church; Alejandro Caceres, Austin Immigrant Rights Coalition; Aaron Johnson, Equal Justice Center; Ana DeFrates, National Latina Institute for Reproductive Health; Agustin Reyes, Texas Baptist Christian Life Commission; Elizabeth Lippincott, Texas Border Coalition; Yannis Banks, Texas NAACP; Jennifer Allmon, The Texas Catholic Conference of Bishops;

Pablo Vazquez, Church; Jose Foullon; Tana Godsey; Valentin Salimas;
Juan Vasquez)

On — Steve McCraw, Department of Public Safety; (*Registered, but did not testify*: Rich Carney, Austin Bridge Builders Alliance; Pete Inman, Christ Together; Dexter Jones, Texas Alcoholic Beverage Commission; Joshua Houston, Texas Impact)

BACKGROUND: Penalties for smuggling of persons under Penal Code, sec. 20.05 currently range from a state-jail felony (180 days to two years in a state jail and an optional fine of up to \$10,000) for offenses that are not committed for pecuniary benefit to a third-degree felony (two to 10 years in prison and an optional fine of up to \$10,000) for offenses committed for a pecuniary benefit or in a manner that creates a substantial likelihood that the transported individual will suffer serious bodily injury or death.

DIGEST: CSHB 11 would enhance certain penalties for the smuggling of persons, create a new offense of continuous smuggling of persons, expand the use of wiretapping for certain crimes, change certain policies and duties of the Department of Public Safety, implement technology and crime reporting strategies, and reauthorize an anti-gang grant program.

Smuggling of persons. The bill would make “intent to obtain a pecuniary benefit” a required element of all offenses of smuggling of persons. The bill would expand the means by which an individual could be transported in the commission of an offense beyond motor vehicles, aircraft, and watercraft to include “other means of conveyance.” The bill would make it an offense to encourage or induce an individual to enter or remain in the United States in violation of federal law by concealing, harboring, or shielding that person from detection.

The penalty for smuggling of persons would be a third-degree felony, except under certain circumstances. It would be enhanced to a second-degree felony (two to 20 years in prison and an optional fine of up to \$10,000) if the offense were committed in a manner that created a substantial likelihood that the smuggled individual would suffer serious

bodily injury or death or if the smuggled individual were a minor. It 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) if, as a direct result of the offense, the smuggled individual became a victim of sexual assault or aggravated sexual assault or if the smuggled individual suffered serious bodily injury or death.

CSHB 11 would create certain exemptions to the current affirmative defense to prosecution when an actor is related to the transported individual. The affirmative defense would no longer be available in cases if the offense was committed in a manner that created a substantial likelihood that the smuggled individual would suffer serious bodily injury or death, the smuggled individual became a victim of sexual assault or aggravated sexual assault as a direct result of the smuggling, or the smuggled individual suffered serious bodily injury or death.

Continuous smuggling of persons. The bill would create the offense of continuous smuggling of persons. Continuous smuggling of persons would occur when a person engaged in conduct that constituted smuggling of persons two or more times during a period of 30 or more days.

A jury would not have to agree unanimously on which specific conduct constituted smuggling of persons but would be required to agree unanimously that the defendant engaged in conduct that constituted smuggling of persons two or more times during a period of 30 or more days.

A defendant could not be convicted for both smuggling of persons and continuous smuggling of persons in the same criminal action unless the smuggling of persons offense:

- was charged in the alternative;
- occurred outside the 30-day period of the continuous smuggling; or
- was considered by the judge or jury to be a lesser included offense of the offense created by the bill.

A defendant could not be charged with more than one count of continuous smuggling of persons if all the alleged conduct in the smuggling of persons offense had the same victim.

Continuous smuggling of persons would be a second-degree felony, except under certain circumstances. It would be a first-degree felony if it was committed in a manner that created a substantial likelihood that the smuggled individual would suffer serious bodily injury or death or if the smuggled individual was a minor. An offense would be a first-degree felony punishable by imprisonment for life or for any term of not less than 25 years if, as a direct result of the offense, the smuggled individual became a victim of sexual assault or aggravated sexual assault or if the smuggled individual suffered serious bodily injury or death.

The bill would expand the definition of contraband in the Code of Criminal Procedure to include any real, personal, tangible, or intangible property used or intended to be used in the commission of continuous smuggling of persons.

The bill would enhance any penalties for continuous smuggling of persons by one degree if the offense were linked to organized criminal activity.

Wiretapping. The bill would add aggravated promotion of prostitution and compelling of prostitution to the list of crimes for which judges may authorize the interception of wire, oral, or electronic communications if the prosecutor applying for the authorization showed probable cause to believe the communications would show evidence of those crimes.

Policies and duties of the Department of Public Safety. The bill would allow the Department of Public Safety (DPS) to credit up to four years of experience as a peace officer in Texas as years of service for newly commissioned officers. This credit would apply to salary calculations under Schedule C. New troopers still would be subject to the one-year probationary period in current law.

The bill would allow the Public Safety Commission to establish a reserve

officer corps consisting of retired or previously commissioned DPS troopers. The commission would determine the qualifications, training standards, and size of the corps, and the public safety director would appoint its members. The public safety director would have authority to call the reserve officer corps into service any time DPS needed assistance conducting background investigations, sex offender compliance checks, or other duties as determined by the director. Members of the reserve officer corps would qualify as “peace officers” under the Code of Criminal Procedure.

DPS would have to periodically review its information technology system to determine whether security should be upgraded and whether the system provided the department with the best ability to monitor and investigate criminal activity on the Internet. DPS would have to make any necessary improvements to its information technology system.

The bill would require DPS to investigate the feasibility of assisting federal authorities at international border checkpoints with interdicting weapons, bulk currency, stolen vehicles and other contraband, and fugitives being smuggled into Mexico. DPS could share with the federal government the cost of staffing any international border checkpoints for these purposes.

Technology and crime statistics. The bill would require each local law enforcement agency throughout the state to implement by September 2019 an incident-based reporting system that meets the requirements of the FBI’s National Incident-Based Reporting System. That system would be used to submit to DPS information and statistics concerning criminal offenses committed in the local agency’s jurisdiction. DPS would adopt rules to implement the reporting requirements. Any noncompliant agency that received grant funds from DPS or the criminal justice division of the governor’s office could use those funds only to come into compliance with the incident-based reporting system requirements.

The bill would require that the Hidalgo County Sheriff’s Department, in conjunction with the McAllen Police Department, establish and operate

the Texas Transnational Intelligence Center (TTIC). TTIC would serve as a central repository of real-time information relating to criminal activity in the counties along the Texas-Mexico border. DPS would have to assist in the establishment and operation of TTIC.

Each law enforcement agency in a county along the border, the Texas Alcoholic Beverage Commission, and the Parks and Wildlife Department would have to report information regarding criminal activity in their jurisdiction to TTIC.

Texas Anti-Gang Grant Program. The bill would reenact Government Code, sec. 772.007 providing for the administration of a competitive grant program to support regional, multidisciplinary approaches to combat gang violence.

CSHB 11 would take effect September 1, 2015.

**SUPPORTERS
SAY:**

CSHB 11 is needed to protect people from smuggling activity and to adequately punish individuals engaged in smuggling for monetary gain. The bill would accomplish these goals by enhancing the penalties for those convicted of smuggling, creating a new offense for those who continuously smuggle people, and strengthening law enforcement agencies' ability to combat these crimes. The provisions that aid DPS recruitment, review and recommend changes to department IT systems, and establish border crime reporting systems would help the state move toward building a steady law enforcement presence along the border instead of relying on temporary Texas State Guard deployment surges.

Smuggling of persons. The bill would add encouraging or inducing someone to illegally enter or remain in the country to the definition of smuggling to ensure that all forms of human smuggling were covered by law. The language in the committee substitute that makes "intent to obtain a pecuniary benefit" a requirement of smuggling offenses would address concerns about the unintended inclusion in the offense of the activities of churches and charitable organizations and would ensure that the law targeted only the intended criminal element. The enhanced penalties for smuggling minors or exposing smuggled individuals to risks of injury or

sexual assault are necessary to provide a deterrent. The enhancements ensure that the worst forms of smuggling are prosecuted to an extent proportional to the severity of the offenses.

The bill would leave in place a reasonable affirmative defense for when the actor is related to the transported individual, except in cases where the actor placed the smuggled individual in serious risk of harm or sexual abuse. This defense allows people to transport family members without fear of prosecution.

Continuous smuggling of persons. Under current law, someone who commits multiple smuggling offenses must be tried for each offense. This results in the court focusing on only one event at a time and not on the offender's larger record. Except in limited circumstances, prison terms from multiple offenses cannot be stacked and are served at the same time. This can result in inadequate punishment, which CSHB 11 would address by creating a specific offense for repeated instances of smuggling of persons.

Allowing several smuggling incidents to be part of one offense would recognize the serious, repetitive nature of these crimes. The bill would be consistent with similar offenses involving continuous behavior over a period of time. Eliminating the requirement for jury unanimity on the specific conduct and the exact date it occurred would be modeled on existing law dealing with continuous offenses, which has proved successful. This has been upheld by the courts and would allow the conduct to be viewed as a whole. The jury still would have to agree unanimously that the person committed at least two acts of smuggling during the 30-day period, which would ensure that only those who repeatedly smuggle individuals were targeted. The enhanced penalties for the offense would recognize the seriousness of the offense and the danger those offenders represent, which could help deter other potential offenders.

Adding continuous smuggling of persons to offenses under the organized criminal activity statute would provide greater penalties for those offenders involved in gang and cartel activity along the border and

throughout the state.

Wiretapping. Currently, wiretapping and electronic intercepts are allowed, upon judicial determination of probable cause, for some of the most egregious crimes in the criminal justice system. Adding aggravated promotion of prostitution and compelling of prostitution to that list of crimes is appropriate and would give law enforcement agencies a mechanism to help them protect some of society's most vulnerable individuals.

Policies and duties of the Department of Public Safety. The bill would authorize DPS to hire qualified current Texas peace officers as troopers after an abbreviated training course and a one-year probationary period. Under current law, all trooper trainees earn the same entry-level salary regardless of past law enforcement experience. This bill would allow licensed peace officers hired by DPS to receive salaries commensurate with their experience, which would help DPS recruit officers with the skills needed to meet the department's potentially increasing responsibilities along the border.

This recruiting incentive also is necessary because the state is anticipating more trooper retirements than usual during the next two years, a time during which DPS may be expected to add hundreds of recruits. The ability to recruit effectively from the ranks of current peace officers would help DPS meet its recruitment needs and would provide the department with experienced law enforcement officers.

The reserve officer corps created by the bill would give DPS an inexpensive tool to lighten the troopers' load of paperwork and administrative duties. Corps members would serve in unpaid positions but would retain their commission as peace officers. This commission maintenance preserves former troopers' ability to reenter service without starting as a new recruit.

DPS's information technology systems are essential to the daily operations of the department and other law enforcement agencies, but the department currently does not have the infrastructure in place to recover from potential future data center disasters. This bill would help strengthen

DPS's IT infrastructure by requiring that the department review its existing system to determine whether the system's security should be upgraded and to make any necessary improvements.

Technology and crime statistics. The creation of the Texas Transnational Intelligence Center (TTIC) would help law enforcement agencies along the border identify patterns that could reveal large, organized criminal operations. TTIC would not duplicate the efforts of DPS, as DPS's existing Joint Operations Intelligence Center (JOIC) in the Rio Grande Valley would be merged with TTIC. TTIC is necessary because some — but not all — agencies currently report to the JOIC, and TTIC would give agencies a more complete picture of criminal activity in the border region.

The implementation of the incident-based reporting system used by the FBI would standardize criminal reporting throughout the state. This reporting system would aid TTIC operations and allow multiple crimes to be linked together quickly, which would help prosecutors seek stronger penalties for repeat offenders. The 2019 deadline set by the bill would provide several years to implement the reporting system, which is not too onerous a burden on the department.

OPPONENTS
SAY:

CSHB 11 would create an unnecessary new offense for continuous smuggling of persons when smuggling of persons is already illegal under Texas law. The bill also would enhance punishment to a degree that may not always be appropriate in specific circumstances and would impose unfair hiring and cost burdens on local law enforcement agencies.

Smuggling of persons. Creating an offense for those who “encourage or induce an individual to enter or remain in this country in violation of federal law” unintentionally would criminalize behavior that did not constitute smuggling. The “encourage or induce” language of the bill could be used to prosecute a variety of otherwise non-criminal activity. Simply hiring a person who is present in this country in violation of federal law could constitute a felony offense under the bill. State judges and state peace officers would be made responsible for the complicated task of interpreting whether a transported person was in violation of federal immigration law, a requirement that could lead to racial profiling.

Under the bill, offenses that create a substantial likelihood that the smuggled individual would suffer serious bodily injury or death would be subject to enhanced penalties, but the activities that provision could encompass would be too broad. A similar provision in the federal smuggling statute has been broadly construed to include activities such as transporting someone who is not wearing a seat belt, traveling without food or water, and traveling in the desert. If this bill were enacted, many more instances of smuggling could be prosecuted as second-degree felonies, even when the enhancement did not fit the offense.

Because the bill would remove the affirmative defense for relatives in cases where the smuggled person was exposed to a substantial likelihood of serious bodily injury or death, and because that “substantial likelihood” provision has been so broadly construed, the affirmative defense would be unavailable to some defendants who should be allowed to take advantage of it.

Continuous smuggling of persons. Current law already harshly punishes smuggling of persons. The smuggling of persons offense is currently punishable with penalties ranging from a state-jail felony to a third-degree felony. These offenses can carry long prison terms. While the continuous smuggling offense created by this bill is intended to punish the most egregious acts, the punishment structure it would erect — a second-degree felony to a first-degree felony with a 25-year minimum sentence — would be too severe. Although all incidents of smuggling of persons are serious, the punishment for these crimes should not be enhanced to this extent, especially because the “substantial likelihood for serious bodily injury or death” element has been so broadly construed in federal case law. These enhancements could lead to overly severe prosecution for crimes that are not as egregious as the ones this bill aims to combat. Eliminating the requirement for jury unanimity when deciding on the specific conduct that constitutes an offense and the exact date it occurred could be unfair to defendants and difficult to defend against.

Wiretapping. Wiretapping, by its nature, allows government intrusion on personal privacy. Expanding its use, even in the investigation of serious crimes, could result in violations of individual rights.

Policies and duties of the Department of Public Safety. Encouraging DPS recruitment of licensed peace officers could jeopardize local law enforcement agencies. Local law enforcement agencies invest time and money in training peace officers, and a large-scale siphoning of their best and most experienced officers could hamper agencies' ability to perform their duties. Although local law enforcement agencies are accustomed to officers transitioning to other agencies, the number of officers that DPS would need to recruit in a transition to a permanent presence along the border could pose a threat to local law enforcement, especially in smaller counties. Peace officers in some agencies often make less than half of the salary that DPS could offer, and without financial assistance, local agencies could not compete with DPS for officers.

Technology and crime statistics. The bill would not provide sufficient assurance that the Texas Transnational Intelligence Center would not maintain data that violated personal privacy rights. The bill should include language that would prevent TTIC from collecting or maintaining information about the political, religious, or social views, associations, military history, activities, or health information of any individual or organization unless the information directly related to criminal activity and reasonable suspicion existed that the subject of the information was or might be involved in criminal activity.

Implementing the reporting requirements of the incident-based reporting system could come at a significant cost to law enforcement agencies, most of which currently do not use the system. This mandate should not be imposed on agencies unless the transition is properly funded.

OTHER
OPPONENTS
SAY:

CSHB 11 would impose an unnecessary burden on prosecutors to prove that an offense was committed for a pecuniary interest. Proving a pecuniary interest is often difficult, even when such an interest exists, because smuggled persons often are deported before trial and unavailable to give testimony that could prove such an interest existed. While supporters say the pecuniary interest requirement would protect churches and other charitable organizations from prosecution under this law, the activities of those organizations would not be offenses even if the pecuniary interest requirement were removed. Current law requires either

intent to conceal an individual from a peace officer or intent to flee from a peace officer, and it is unlikely that activities of churches and charitable organizations would meet those requirements.

The added offense for those who “encourage or induce an individual to enter or remain in this country in violation of federal law” would be unworkable for prosecutors. Evidentiary rules would make it difficult to present evidence, such as testimony by a federal agent, that the person who was encouraged or induced was in violation of federal law.

Instead of providing DPS with recruitment tools that could harm local law enforcement, the state should create avenues for former military personnel who are not licensed peace officers to receive abbreviated training courses to become DPS troopers. This would both assist with DPS’ increasing recruitment needs and create employment opportunities for Texas veterans.

NOTES:

The committee substitute differs from the bill as introduced in numerous ways, including:

- removing the exception to the one-year probationary period for licensed peace officers transitioning to DPS service and the establishment of a 10-hour workday and 50-hour workweek
- eliminating the requirement for DPS to work with federal authorities to establish southbound checkpoints near the Texas-Mexico border;
- establishing that any licensed peace officers could credit up to four years of experience as years of service rather than allowing only peace officers with at least four years of experience to start DPS at the position of Trooper II;
- reenacting the Texas Anti-Gang Grant Program;
- renaming the South Texas Border Crime Information Center as the Texas Transnational Intelligence Center and including the Texas Alcoholic Beverage Commission and Parks and Wildlife Department as agencies that report to and may access the information in TTIC;
- replacing “recklessly” as a condition of the smuggling of persons

offense with a requirement that the offender have an “intent to obtain a pecuniary benefit”;

- retaining language in current law on the transportation of an individual for smuggling of persons;
- retaining language in current law on fleeing from a peace officer for smuggling of persons;
- retaining the affirmative defense in current law to smuggling of persons for family members, with some exceptions;
- adding “other means of conveyance” to means of transportation for smuggling of persons; and
- adding “concealing, harboring or shielding that person from detection” to the “encourage or induce” offense.

The Legislative Budget Board’s fiscal note estimates a cost from the bill of \$4.1 million in general revenue through fiscal 2016-17 and a cost of \$842,000 every year thereafter.