

BILL ANALYSIS

C.S.S.B. 11
By: Carona
Criminal Jurisprudence
Committee Report (Substituted)

BACKGROUND AND PURPOSE

In recent years, criminal street gangs have become an increasing problem in Texas. Gang activity has grown in cities and rural areas, and cartel-style gangs based along the border with Mexico have moved into Texas. Dealing with this dangerous problem should be a priority. Currently, Chapter 71 (Organized Crime), Penal Code, establishes penalty increases for certain crimes committed in furtherance of gang activity.

This bill focuses on a number of issues related to the growth in gang activity in Texas, including prevention of youth involvement in gangs, intervention programs to reduce gang involvement, the increase of penalties for certain offenses, the creation of new offenses focused on deterring illegal gang activity, and the collection of information necessary to deal with the gang problem.

C.S.S.B. 11 provides for criminal and civil penalties and enforcement options for individuals committing offenses related to gang activity; addresses post-conviction and post-adjudication provisions, provisions relating to an offense of graffiti, and matters relating to driver's license restriction; provides for the electronic monitoring of certain criminal street gang members; and creates gang-free zones.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the executive commissioner of the Health and Human Services Commission in SECTION 1.08 of this bill.

ANALYSIS

Criminal Penalties Related to Organized Criminal Activity and Criminal Street Gangs; Gang Prevention Efforts

C.S.S.B. 11 amends the Penal Code to provide an exception to the decrease in penalty to the category lower than the solicited offense for an offense of criminal solicitation of a minor by making such offense the same category as the solicited offense if it is shown at trial that the actor at the time of the offense was 17 years of age or older, a member of a criminal street gang, and committed the offense with the intent to further the criminal activities of the criminal street gang or to avoid detection as a member of a criminal street gang. The bill expands the conditions that constitute an offense of coercing, soliciting, or inducing gang membership to include threatening a member of a child's family with imminent bodily injury or causing bodily injury to a member of a child's family with intent to coerce, induce, or solicit the child to actively participate in the activities of a criminal street gang. The bill defines "family" for the purposes of such an offense.

C.S.S.B. 11 adds an offense involving the unlawful transfer of a handgun for unlawful use to the list of offenses which constitute the commission of an offense of engaging in organized criminal activity, if the person commits or conspires to commit one or more offenses included in the list with the intent to establish, maintain, or participate in a combination or in the profits of a combination or as a member of a criminal street gang.

C.S.S.B. 11 creates the first-degree felony offense of directing activities of certain criminal street gangs for a person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises a criminal street gang or members of a criminal street gang with the intent to benefit, promote, or further the interests of the criminal street gang or to increase the person's standing,

position, or status in the criminal street gang. The bill defines "criminal street gang" for the purposes of the offense.

C.S.S.B. 11 increases the punishment prescribed for an offense of engaging in organized criminal activity to the punishment prescribed for the next highest category of offense if the actor is 17 years of age or older and it is shown beyond a reasonable doubt at trial that the actor committed the offense in a gang-free zone, which is a location that was in, on, or within 1,000 feet of any real property that is owned, rented, or leased by a school or school board, premises owned, rented or leased by an institution of higher education, shopping mall, movie theater, premises of a public or private youth center, or playground; in, on, or within 300 feet of the premises of a public swimming pool or video arcade facility; or on a school bus. The bill prohibits the punishment prescribed for such an offense from being increased because it occurred in a gangfree zone if the offense is punishable as a felony of the first degree. The bill provides that, in a prosecution of such an offense for which punishment is increased because it occurred in a gangfree zone, a map produced or reproduced by a municipal or county engineer for the purpose of showing the location and boundaries of gang- free zones is admissible in evidence and is prima facie evidence of the location or boundaries of those zones if the governing body of the municipality or county adopts a resolution or ordinance approving the map as an official finding and record of the location or boundaries of those zones. The bill authorizes a municipal or county engineer, on request of the governing body of the municipality or county, to revise a map that has been approved by the governing body of the municipality or county and requires a municipal or county engineer to file the original or a copy of every approved or revised map with the county clerk of each county in which the zone is located. The bill establishes that such provisions relating to the use of maps as evidence of location or area of a gang-free zone do not prevent the prosecution from introducing or relying on any other evidence or testimony to establish any element of an offense for which punishment is increased or using or introducing any other map or diagram otherwise admissible under the Texas Rules of Evidence. The bill defines "institution of higher education," "playground," "premises," "school," "video arcade facility," "youth center," and "shopping mall."

C.S.S.B. 11 amends the Education Code to require the superintendent of each public school district and the administrator of each private elementary or secondary school located in the public school district to ensure that the student handbook for each campus in the public school district includes information on gang-free zones and the consequences of engaging in organized criminal activity within those zones and makes this requirement applicable beginning with the public school district's 2009-2010 school year and effective on passage, or, if the bill does not receive the necessary vote, September 1, 2009. The bill requires the governing board of each institution of higher education to ensure that any student handbook or similar publication of the institution includes information on gang- free zones and the consequences of engaging in organized criminal activity within those zones and makes this requirement applicable beginning with the 2009 fall semester and effective on passage, or, if the bill does not receive the necessary vote, September 1, 2009.

C.S.S.B. 11 amends the Human Resources Code to require each day-care center, in accordance with rules adopted by the executive commissioner of the Health and Human Services Commission, to distribute information on gang-free zones and the consequences of engaging in organized criminal activity within those zones to parents and guardians of children who attend the center and provides that this requirement takes effect on passage, or, if the bill does not receive the necessary vote, September 1, 2009.

Civil Consequences and Liability

C.S.S.B. 11 amends the Civil Practice and Remedies Code to provide that a criminal street gang or a member of a criminal street gang is liable to the state or a governmental entity injured by the violation of a temporary or permanent injunctive order. The bill requires the plaintiff in an action brought against a member of a criminal street gang to show that the member violated the temporary or permanent injunctive order. The bill authorizes a district, county, or city attorney or the attorney general to sue for money damages on behalf of the state or a governmental entity. The bill authorizes the state or governmental entity that prevails in the suit to recover actual damages, a civil penalty in an amount not to exceed \$20,000 for each violation, and court costs and attorney's fees. The bill authorizes the seizure of the property of the criminal street gang or a

member of the street gang in execution on the judgment unless the owner or interest holder in the property can show by a preponderance of the evidence that they are not in a criminal street gang and did not violate any temporary or injunctive order and that the property to be seized was either stolen or was used or intended to be used without their consent by the gang or a member of the gang. This provision allows for innocent owners of property used in commission of a crime to not have their property subject to seizure unfairly.

C.S.S.B. 11 requires the attorney general to deposit money received for damages or as a civil penalty in the neighborhood and community recovery fund held by the attorney general outside the state treasury. The bill provides that money in the fund is held by the attorney general in trust for the benefit of the community or neighborhood harmed by the violation of a temporary or permanent injunctive order and may only be used for such benefit. The bill requires interest earned on money in the fund to be credited to the fund. The bill requires the attorney general to account for money in the fund so that money held for the benefit of a community or neighborhood, and interest earned on that money, are not commingled with money in the fund held for the benefit of a different community or neighborhood.

C.S.S.B. 11 requires a district, county, or city attorney who brings suit on behalf of a governmental entity to deposit money received for damages or as a civil penalty in an account to be held in trust for the benefit of the community or neighborhood harmed by the violation of a temporary or permanent injunctive order, authorizes the money to be used only for such a benefit, and requires interest earned on the money in the account to be credited to the account. The bill requires the district, county, or city attorney to account for money in the account so that money held for the benefit of a community or neighborhood, and interest earned on that money, are not commingled with money in the account held for the benefit of a different community or neighborhood. The bill provides that an action brought by the state or a governmental entity does not waive sovereign or governmental immunity for any purpose. The bill defines "governmental entity" for purposes of a civil action for a violation of injunction.

C.S.S.B. 11 reenacts and amends Subdivision (2), Article 59.01 Code of Criminal Procedure, as amended by Chapters 127 (S.B. 1694), 822 (H.B. 73), and 885 (H.B. 2278), Acts of the 80th Legislature, Regular Session, 2007, to add to the definition of "contraband" for purposes of forfeiture of contraband, property of any nature, including real, personal, tangible, or intangible that is used or intended to be used in the commission of any offense relating to organized crime or any offense involving the unlawful transfer of a handgun, that are proceeds gained from the commission of any misdemeanor of those offenses, or that is acquired with such proceeds.

C.S.S.B. 11 authorizes the attorney representing the state to proceed under provisions on forfeiture of contraband or provisions on the disposition of gambling paraphernalia, a prohibited weapon, a criminal instrument, or other contraband, if property that is used or intended to be used in the commission of any offense relating to organized crime or any offense involving the unlawful transfer of a handgun is subject to forfeiture.

Post-conviction and Post-adjudication Provisions

C.S.S.B. 11 amends the Code of Criminal Procedure to require a judge, in the trial of an offense and on a motion of the attorney representing the state, to make an affirmative finding of fact and enter the affirmative finding in the judgment in the case if the judge determines that the applicable conduct was engaged in as part of the activities of a criminal street gang and to provide that a judgment in general should reflect such an affirmative finding, if applicable. The bill includes the avoidance of any person, other than a family member of the defendant, who is an active member of a criminal street gang in the basic conditions that may be included in community supervision.

C.S.S.B. 11 authorizes a court granting community supervision to a defendant, who is identified as a member of a criminal street gang in the gang intelligence database and who has two or more times been previously convicted of, or received a grant of deferred adjudication community supervision or another functionally equivalent form of community supervision or probation for, a felony offense under any state or federal law, on the defendant's conviction of a felony offense, to require as a condition of community supervision that the defendant submit to electronic monitoring designed to track a person's location.

C.S.S.B. 11 amends the Family Code to require a juvenile court, in a disposition hearing regarding a child who has been adjudicated as having engaged in delinquent conduct that is also gang-related conduct, to order the child to participate in a criminal street gang intervention program that is appropriate for the child based on the child's level of involvement in the criminal activities of a criminal street gang. The bill requires the intervention program to include at least 12 hours of instruction and authorizes the program to include voluntary tattoo removal. The bill requires a child who is required to attend a criminal street gang intervention program and who is committed to the Texas Youth Commission (TYC) as a result of the gang-related conduct to complete the intervention program before being discharged from the custody of or released under supervision by TYC. The bill defines "criminal street gang" and "gang-related conduct."

C.S.S.B.11 amends the Government Code to authorize a parole panel to require as a condition of release on parole or to mandatory supervision that a release who is identified as a member of a criminal street gang in the gang intelligence database and who has three or more times been convicted of, or received a grant of deferred adjudication community supervision or another functionally equivalent form of community supervision or probation for, a felony offense under any state or federal law submit to electronic monitoring designed to track a person's location.

C.S.S.B. 11 amends the Penal Code to add an offense for which the judgment in the case contains an affirmative finding that the applicable conduct was engaged in as part of the activities of a criminal street gang to the list of offenses the sentences of which may run concurrently or consecutively if the accused is found guilty of more than one offense arising out of the same criminal episode. The bill provides that such addition does not apply to a defendant whose case was transferred to the court by a juvenile court.

Graffiti

C.S.S.B. 11 amends the Civil Practice and Remedies Code to make the Texas Tort Claims Act inapplicable to a claim for property damage caused by the removal of graffiti.

C.S.S.B. 11 amends the Code of Criminal Procedure to prohibit the amount of a juvenile delinquency prevention and graffiti eradication fee, required to be paid as a court cost on the conviction of a graffiti offense, from being less than \$50 or more than \$500, rather than set at \$50. The bill requires the court, in setting the amount of such a fee, to increase the fee based on the amount of the pecuniary loss in the case and the number of times the defendant has been previously convicted of a graffiti offense. The bill includes the provision of funding for community art programs among the authorized uses of funds from the county juvenile delinquency prevention fund.

C.S.S.B. 11 amends the Family Code to prohibit the amount of a juvenile delinquency prevention fee, required to be paid as a court cost on the adjudication of a child as having engaged in delinquent conduct that constitutes a graffiti violation, from being less than \$50 or more than \$500, rather than set at \$50. The bill requires the court, in setting the amount of the fee, to increase the fee based on the amount of pecuniary loss resulting from the conduct and the number of times the child has been previously adjudicated as having engaged in delinquent conduct constituting a graffiti violation.

C.S.S.B. 11 amends Sections 102.041, 102.061, and 102.081, Government Code, as amended Chapter 921 (H.B. 3167), Acts of the 80th Legislature, Regular Session, 2007 to reflect the change in the amount of a juvenile delinquency prevention and graffiti eradication fee required to be collected as a court cost by the clerk of a district court, statutory county court, and county court, respectively.

C.S.S.B. 11 includes in the juvenile court fees and court costs that an accused or defendant or a party to a civil suit is required to pay if ordered by the court or otherwise required a \$20 request fee for a teen court program if the court ordering the fee is located in the Texas-Louisiana border region, but otherwise not to exceed \$10, and a \$20 fee to cover costs of required duties of a teen court if the court ordering the fee is located in the Texas-Louisiana border region, but otherwise a fee not to exceed \$10.

C.S.S.B. 11 amends the Health and Safety Code to provide that the prohibition against a political subdivision or an agency of the state enacting an ordinance or rule that requires a business establishment to display an abusable volatile chemical in a manner that makes the chemical assessable to patrons of the business only with the assistance of personnel of the business does not apply to the display of aerosol paint.

C.S.S.B. 11 authorizes a county by order or a municipality by ordinance to require the owner of property within the jurisdiction of the county or municipality to remove graffiti from the owner's property on receipt of notice from the county or municipality and requires such an order or ordinance to require a property owner to remove the graffiti on or before the 10th day after the date the property owner receives that notice. The bill provides an exception authorizing the county or municipality to remove the graffiti and charge the expense of removal to the property owner in accordance with a fee schedule adopted by the county or municipality if the property owner requests the county or municipality, as applicable, to remove the graffiti or if the property owner fails to remove the graffiti on or before the 10th day after the date of receipt of the notice. The bill requires the notice for graffiti removal to be given in a certain manner.

C.S.S.B. 11 authorizes the county or municipality to assess expenses incurred in the removal of graffiti against the property on which graffiti removal is performed. The bill requires the governing body of the county or municipality to file a statement of expenses with the county clerk to obtain a lien against the property for expenses incurred. The bill requires the statement of expenses to contain the name of the property owner, if known; the legal description of the property; and the amount of expenses incurred in the removal of graffiti. The bill provides that a lien against the property attaches to the property on the date on which the statement of expenses is filed in the real property records of the county in which the property is located and is subordinate to any previously recorded lien and the rights of a purchaser or lender for value who acquires an interest in the property subject to the lien before the statement of expenses is filed. The bill requires an order or ordinance for graffiti removal to include an exception from the requirement that an owner of property remove graffiti from the owner's property if the graffiti is located on transportation infrastructure and the removal of the graffiti would create a hazard for the person performing the removal.

Intelligence Databases

C.S.S.B. 11 amends the Code of Criminal Procedure to include in the list of evidential items, any two of which are required to be included in the criminal combination and criminal street gang intelligence database, evidence that the individual has visited a known criminal street gang member, other than a family member of the individual, while the gang member is confined in or committed to a penal institution and evidence of the individual's use of technology, including the Internet, to recruit new criminal street gang members. The bill specifies that the evidential item included in the list that is the self-admission by the individual of criminal street gang membership that is not made during a judicial proceeding includes the use of the Internet or other electronic format or medium to post photographs or other documentation identifying an individual as a member of a criminal street gang. The bill provides that evidence that the individual frequents a documented area of a criminal street gang and associates with known criminal street gang members and evidence that the individual has visited a known criminal street gang member, other than a family member of the individual, while the gang member is confined in or committed to a penal institution is not sufficient to create the eligibility of a person's information to be included in an intelligence database unless the evidence is combined with other evidential information included in the list. The bill defines "family member" and "penal institution."

C.S.S.B. 11 increases from three to five years the time period after which information collected in the intelligence database relating to a criminal street gang is required to be removed from the database if the information relates to the investigation or prosecution of criminal activity engaged in by an individual other than a child and if the individual who is the subject of the information has not been arrested for criminal activity reported to the Department of Public Safety (DPS) under provisions relating to the criminal history record system. The bill reenacts and amends Subsection(c), Article 61.06, Code of Criminal Procedure, as amended by Chapters 258 (S.B. 11), 263 (S.B. 103), and 1308 (S.B. 909), Acts of the 80th Legislature, Regular Session, 2007, to make a conforming change.

License Restrictions

C.S.S.B. 11 amends the Code of Criminal Procedure to provide that if a defendant convicted of an offense under Chapter 71 of the Penal Code (Organized Crime) and is given community supervision by the court, the court may then impose restrictions on the defendant's operation of a motor vehicle to include restrictions on the hours during which and locations at which the defendant may operate a motor vehicle.

Miscellaneous Provisions

C.S.S.B. 11 requires the governor's criminal justice division 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 bill requires the anti-gang grant program to be directed toward regions of Texas that have demonstrably high levels of gang violence. The bill requires the criminal justice division to award grants to qualified applicants, as determined by the division, that demonstrate a comprehensive approach that balances gang prevention, intervention, and suppression activities to reduce gang violence. The bill requires the criminal justice division to include in its biennial report to the legislature, reporting the division's activities during the preceding biennium, a detailed reporting of the results and performance of the anti-gang grant program. The bill authorizes the criminal justice division to use any revenue available for purposes of the anti-gang grant program.

Conflict of Law

C.S.S.B. 11 provides that, to the extent of any conflict, the provisions of this bill prevail over another Act of the 81st Legislature, Regular Session, 2009, relating to nonsubstantive additions to and corrections in enacted codes.

EFFECTIVE DATE

Except as otherwise provided, September 1, 2009.

COMPARISON OF ORIGINAL TO SUBSTITUTE

SECTION 1.04 ONLINE HARASSMENT TO FURTHER INTERESTS OF CRIMINAL STREET GANG removed and remaining sections renumbered accordingly.

Under original SECTION 1.05(a), "(14) any offense under Section 28.08" was removed as well as "or 46.14" from "(15) any offense under Section 46.06(a)(1) or 46.14" and the subsections were renumbered accordingly.

Amends SECTION 2.01, Section 125.070. CIVIL ACTION FOR VIOLATION OF INJUNCTION as follows:

(e) Incorporates an innocent owner provision into the Act to prevent seizure of property under certain circumstances. The owner or interest holder in the property to be seized must prove by a preponderance of the evidence that they were not a member of the criminal street gang and also did not violate the temporary/permanent injunctive order. They must also show that the property was either stolen or was used or intended to be used without their consent by the gang or a member of the gang.

Amends SECTION 4.09 as follows:

Strikes "and 250.007" from original on page 31, line 10. Strikes all of Sec. 250.006 SURCHARGE ON SALE OF AEROSOL PAINT and renumbers previously Sec. 250.007 GRAFFITI REMOVAL to 250.006.

Strikes all of SECTION 4.10 (Sec. 30.021 BURGLARY OF BUILDING TO CREATE GRAFFITI) and renumbers remaining sections accordingly.

Strikes the following Articles and renumbers remaining Articles accordingly:

C.S.S.B. 11 81(R)

Article 5 USE OF FALSE OR FICTITIOUS IDENTITY OR IDENTIFYING DOCUMENTS

Article 6 PENAL PROVISIONS RELATED TO FIREARMS

Strikes original Sections 8.01, 8.02, and 8.03, replaces with the following (now under Article 6 after renumbering):

SECTION 6.01 Changes license restrictions application from Transportation Code originally to Art. 42.12, Code of Criminal Procedure, by adding Section 13F. This Section provides that any defendant convicted of an offense under Chapter 71, Penal Code, and subject to community supervision by the court may have as a condition of that community supervision restrictions on the operation of a motor vehicle. These restrictions include specifying hours during which the defendant may not operate a motor vehicle and locations at or in which the defendant may not operate a motor vehicle.

The remaining section, original SECTION 8.04, is renumbered to reflect the change as SECTION 6.02.

Strikes the following from original Article 9 MISCELLANEOUS PROVISIONS:

SECTION 9.01 relating to interception orders for communication by specified persons.

SECTION 9.02 relating to the creation of a public corruption unit.

SECTION 9.03 relating to the gang report requirements to be submitted to the governor.

SECTION 9.05, SECTION 9.06, and SECTION 9.07 which all make certain parts of the Act prospective or define applicability and a time certain for application for the sections.

Renumbers Article 10 CONFLICT OF LAW AND EFFECTIVE DATE PROVISIONS accordingly to Article 8 and renumbers its sections accordingly.