

1-1 By: Nichols S.B. No. 688
1-2 (In the Senate - Filed February 14, 2011; February 23, 2011,
1-3 read first time and referred to Committee on Health and Human
1-4 Services; March 28, 2011, reported adversely, with favorable
1-5 Committee Substitute by the following vote: Yeas 9, Nays 0;
1-6 March 28, 2011, sent to printer.)

1-7 COMMITTEE SUBSTITUTE FOR S.B. No. 688 By: Nichols

1-8 A BILL TO BE ENTITLED
1-9 AN ACT

1-10 relating to the investigation, prosecution, and punishment of
1-11 criminal Medicaid fraud and certain other offenses related to
1-12 Medicaid fraud; providing penalties.

1-13 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-14 SECTION 1. Article 12.01, Code of Criminal Procedure, is
1-15 amended to read as follows:

1-16 Art. 12.01. FELONIES. Except as provided in Article 12.03,
1-17 felony indictments may be presented within these limits, and not
1-18 afterward:

1-19 (1) no limitation:

1-20 (A) murder and manslaughter;

1-21 (B) sexual assault under Section 22.011(a)(2),
1-22 Penal Code, or aggravated sexual assault under Section
1-23 22.021(a)(1)(B), Penal Code;

1-24 (C) sexual assault, if during the investigation
1-25 of the offense biological matter is collected and subjected to
1-26 forensic DNA testing and the testing results show that the matter
1-27 does not match the victim or any other person whose identity is
1-28 readily ascertained;

1-29 (D) continuous sexual abuse of young child or
1-30 children under Section 21.02, Penal Code;

1-31 (E) indecency with a child under Section 21.11,
1-32 Penal Code; or

1-33 (F) an offense involving leaving the scene of an
1-34 accident under Section 550.021, Transportation Code, if the
1-35 accident resulted in the death of a person;

1-36 (2) ten years from the date of the commission of the
1-37 offense:

1-38 (A) theft of any estate, real, personal or mixed,
1-39 by an executor, administrator, guardian or trustee, with intent to
1-40 defraud any creditor, heir, legatee, ward, distributee,
1-41 beneficiary or settlor of a trust interested in such estate;

1-42 (B) theft by a public servant of government
1-43 property over which he exercises control in his official capacity;

1-44 (C) forgery or the uttering, using or passing of
1-45 forged instruments;

1-46 (D) injury to an elderly or disabled individual
1-47 punishable as a felony of the first degree under Section 22.04,
1-48 Penal Code;

1-49 (E) sexual assault, except as provided by
1-50 Subdivision (1); or

1-51 (F) arson;

1-52 (3) seven years from the date of the commission of the
1-53 offense:

1-54 (A) misapplication of fiduciary property or
1-55 property of a financial institution;

1-56 (B) securing execution of document by deception;

1-57 (C) a felony violation under Chapter 162, Tax
1-58 Code;

1-59 (D) false statement to obtain property or credit
1-60 under Section 32.32, Penal Code;

1-61 (E) money laundering;

1-62 (F) credit card or debit card abuse under Section
1-63 32.31, Penal Code; [~~or~~]

2-1 (G) fraudulent use or possession of identifying
 2-2 information under Section 32.51, Penal Code; or
 2-3 (H) Medicaid fraud under Section 35A.02, Penal
 2-4 Code;
 2-5 (4) five years from the date of the commission of the
 2-6 offense:
 2-7 (A) theft or robbery;
 2-8 (B) except as provided by Subdivision (5),
 2-9 kidnapping or burglary;
 2-10 (C) injury to an elderly or disabled individual
 2-11 that is not punishable as a felony of the first degree under Section
 2-12 22.04, Penal Code;
 2-13 (D) abandoning or endangering a child; or
 2-14 (E) insurance fraud;
 2-15 (5) if the investigation of the offense shows that the
 2-16 victim is younger than 17 years of age at the time the offense is
 2-17 committed, 20 years from the 18th birthday of the victim of one of
 2-18 the following offenses:
 2-19 (A) sexual performance by a child under Section
 2-20 43.25, Penal Code;
 2-21 (B) aggravated kidnapping under Section
 2-22 20.04(a)(4), Penal Code, if the defendant committed the offense
 2-23 with the intent to violate or abuse the victim sexually; or
 2-24 (C) burglary under Section 30.02, Penal Code, if
 2-25 the offense is punishable under Subsection (d) of that section and
 2-26 the defendant committed the offense with the intent to commit an
 2-27 offense described by Subdivision (1)(B) or (D) of this article or
 2-28 Paragraph (B) of this subdivision;
 2-29 (6) ten years from the 18th birthday of the victim of
 2-30 the offense: injury to a child under Section 22.04, Penal Code; or
 2-31 (7) three years from the date of the commission of the
 2-32 offense: all other felonies.
 2-33 SECTION 2. Subdivision (2), Section 1, Article 18.21, Code
 2-34 of Criminal Procedure, is amended to read as follows:
 2-35 (2) "Authorized peace officer" means:
 2-36 (A) a sheriff or a sheriff's deputy;
 2-37 (B) a constable or deputy constable;
 2-38 (C) a marshal or police officer of an
 2-39 incorporated city;
 2-40 (D) a ranger or officer commissioned by the
 2-41 Public Safety Commission or the director of the Department of
 2-42 Public Safety;
 2-43 (E) an investigator of a prosecutor's office;
 2-44 (F) a law enforcement agent of the Alcoholic
 2-45 Beverage Commission;
 2-46 (G) a law enforcement officer commissioned by the
 2-47 Parks and Wildlife Commission; ~~or~~
 2-48 (H) an enforcement officer appointed by the
 2-49 executive director of the Texas Department of Criminal Justice
 2-50 under Section 493.019, Government Code; or
 2-51 (I) an investigator commissioned by the attorney
 2-52 general under Section 402.009, Government Code.
 2-53 SECTION 3. Subsection (a), Section 3, Article 37.07, Code
 2-54 of Criminal Procedure, is amended by adding Subdivision (3) to read
 2-55 as follows:
 2-56 (3) Regardless of the plea and whether the punishment
 2-57 is assessed by the judge or the jury, during the punishment phase of
 2-58 the trial of an offense under Section 35A.02, Penal Code, the state
 2-59 and the defendant may offer evidence not offered during the guilt or
 2-60 innocence phase of the trial concerning the total pecuniary loss to
 2-61 the Medicaid program caused by the defendant's conduct or, if
 2-62 applicable, the scheme or continuing course of conduct of which the
 2-63 defendant's conduct is part. An employee of the Health and Human
 2-64 Services Commission's office of inspector general or the office of
 2-65 attorney general's Medicaid fraud control unit may testify
 2-66 concerning the total pecuniary loss to the Medicaid program. An
 2-67 employee who testifies under this subdivision is subject to
 2-68 cross-examination. Evidence offered under this subdivision may be
 2-69 considered by the judge or jury in ordering or recommending the

3-1 amount of any restitution to be made to the Medicaid program or the
 3-2 appropriate punishment for the defendant.

3-3 SECTION 4. Subsection (g), Section 531.1021, Government
 3-4 Code, is amended to read as follows:

3-5 (g) All information and materials subpoenaed or compiled by
 3-6 the office in connection with an audit or investigation or by the
 3-7 office of the attorney general in connection with a Medicaid fraud
 3-8 investigation are confidential and not subject to disclosure under
 3-9 Chapter 552, and not subject to disclosure, discovery, subpoena, or
 3-10 other means of legal compulsion for their release to anyone other
 3-11 than the office or the attorney general or their [its] employees or
 3-12 agents involved in the audit or investigation conducted by the
 3-13 office or the attorney general, except that this information may be
 3-14 disclosed to ~~[the office of the attorney general]~~ the state
 3-15 auditor's office, ~~[and]~~ law enforcement agencies, and other
 3-16 entities as permitted by other law.

3-17 SECTION 5. Subsections (a-1), (b), (d), (f), and (g),
 3-18 Section 22.04, Penal Code, are amended to read as follows:

3-19 (a-1) A person commits an offense if the person is an owner,
 3-20 operator, or employee of a group home, nursing facility, assisted
 3-21 living facility, intermediate care facility for persons with mental
 3-22 retardation, or other institutional care facility and the person
 3-23 intentionally, knowingly, recklessly, or with criminal negligence
 3-24 by omission causes to a child, elderly individual, or disabled
 3-25 individual who is a resident of that group home or facility:

- 3-26 (1) serious bodily injury;
- 3-27 (2) serious mental deficiency, impairment, or injury;
- 3-28 or
- 3-29 (3) bodily injury~~[, or~~
- 3-30 ~~[(4) exploitation].~~

3-31 (b) An omission that causes a condition described by
 3-32 Subsection (a)(1), (2), or (3) or (a-1)(1), (2), or (3)~~[, or (4)]~~ is
 3-33 conduct constituting an offense under this section if:

- 3-34 (1) the actor has a legal or statutory duty to act; or
- 3-35 (2) the actor has assumed care, custody, or control of
 3-36 a child, elderly individual, or disabled individual.

3-37 (d) For purposes of an omission that causes a condition
 3-38 described by Subsection (a)(1), (2), or (3), the actor has assumed
 3-39 care, custody, or control if he has by act, words, or course of
 3-40 conduct acted so as to cause a reasonable person to conclude that he
 3-41 has accepted responsibility for protection, food, shelter, and
 3-42 medical care for a child, elderly individual, or disabled
 3-43 individual. For purposes of an omission that causes a condition
 3-44 described by Subsection (a-1)(1), (2), or (3), ~~[or (4)]~~ the actor
 3-45 acting during the actor's capacity as owner, operator, or employee
 3-46 of a group home or facility described by Subsection (a-1) is
 3-47 considered to have accepted responsibility for protection, food,
 3-48 shelter, and medical care for the child, elderly individual, or
 3-49 disabled individual who is a resident of the group home or facility.

3-50 (f) An offense under Subsection (a)(3) or (a-1)(3) ~~[or (4)]~~
 3-51 is a felony of the third degree when the conduct is committed
 3-52 intentionally or knowingly, except that an offense under Subsection
 3-53 (a)(3) is a felony of the second degree when the conduct is
 3-54 committed intentionally or knowingly and the victim is a disabled
 3-55 individual residing in a center, as defined by Section 555.001,
 3-56 Health and Safety Code, or in a facility licensed under Chapter 252,
 3-57 Health and Safety Code, and the actor is an employee of the center
 3-58 or facility whose employment involved providing direct care for the
 3-59 victim. When the conduct is engaged in recklessly, the offense is a
 3-60 state jail felony.

3-61 (g) An offense under Subsection (a) is a state jail felony
 3-62 when the person acts with criminal negligence. An offense under
 3-63 Subsection (a-1) is a state jail felony when the person, with
 3-64 criminal negligence and by omission, causes a condition described
 3-65 by Subsection (a-1)(1), (2), or (3)~~[, or (4)]~~.

3-66 SECTION 6. Subsection (d), Section 32.46, Penal Code, is
 3-67 amended to read as follows:

3-68 (d) In this section:
 3-69 (1) "Deception"~~[, "deception"]~~ has the meaning

4-1 assigned by Section 31.01.
4-2 (2) "Document" includes electronically stored data or
4-3 other information that is retrievable in a readable, perceivable
4-4 form.

4-5 SECTION 7. Subchapter D, Chapter 32, Penal Code, is amended
4-6 by adding Section 32.53 to read as follows:

4-7 Sec. 32.53. EXPLOITATION OF CHILD, ELDERLY INDIVIDUAL, OR
4-8 DISABLED INDIVIDUAL. (a) In this section:

4-9 (1) "Child," "elderly individual," and "disabled
4-10 individual" have the meanings assigned by Section 22.04.

4-11 (2) "Exploitation" means the illegal or improper use
4-12 of a child, elderly individual, or disabled individual or of the
4-13 resources of a child, elderly individual, or disabled individual
4-14 for monetary or personal benefit, profit, or gain.

4-15 (b) A person commits an offense if the person intentionally,
4-16 knowingly, or recklessly causes the exploitation of a child,
4-17 elderly individual, or disabled individual.

4-18 (c) An offense under this section is a felony of the third
4-19 degree.

4-20 (d) A person who is subject to prosecution under both this
4-21 section and another section of this code may be prosecuted under
4-22 either or both sections. Section 3.04 does not apply to criminal
4-23 episodes prosecuted under both this section and another section of
4-24 this code. If a criminal episode is prosecuted under both this
4-25 section and another section of this code and sentences are assessed
4-26 for convictions under both sections, the sentences shall run
4-27 concurrently.

4-28 (e) With the consent of the appropriate local county or
4-29 district attorney, the attorney general has concurrent
4-30 jurisdiction with that consenting local prosecutor to prosecute an
4-31 offense under this section that involves the Medicaid program.

4-32 SECTION 8. Section 35A.01, Penal Code, is amended by adding
4-33 Subdivision (10) to read as follows:

4-34 (10) "High managerial agent" means a director,
4-35 officer, or employee who is authorized to act on behalf of a
4-36 provider and has duties of such responsibility that the conduct of
4-37 the director, officer, or employee reasonably may be assumed to
4-38 represent the policy or intent of the provider.

4-39 SECTION 9. Section 35A.02, Penal Code, is amended by
4-40 amending Subsections (b) and (c) and adding Subsections (e) and (f)
4-41 to read as follows:

4-42 (b) An offense under this section is:

4-43 (1) a Class C misdemeanor if the amount of any payment
4-44 or the value of any monetary or in-kind benefit provided or claim
4-45 for payment made under the Medicaid program, directly or
4-46 indirectly, as a result of the conduct is less than \$50;

4-47 (2) a Class B misdemeanor if the amount of any payment
4-48 or the value of any monetary or in-kind benefit provided or claim
4-49 for payment made under the Medicaid program, directly or
4-50 indirectly, as a result of the conduct is \$50 or more but less than
4-51 \$500;

4-52 (3) a Class A misdemeanor if the amount of any payment
4-53 or the value of any monetary or in-kind benefit provided or claim
4-54 for payment made under the Medicaid program, directly or
4-55 indirectly, as a result of the conduct is \$500 or more but less than
4-56 \$1,500;

4-57 (4) a state jail felony if:

4-58 (A) the amount of any payment or the value of any
4-59 monetary or in-kind benefit provided or claim for payment made
4-60 under the Medicaid program, directly or indirectly, as a result of
4-61 the conduct is \$1,500 or more but less than \$20,000;

4-62 (B) the offense is committed under Subsection
4-63 (a)(11); or

4-64 (C) it is shown on the trial of the offense that
4-65 the amount of the payment or value of the benefit described by this
4-66 subsection cannot be reasonably ascertained;

4-67 (5) a felony of the third degree if:

4-68 (A) the amount of any payment or the value of any
4-69 monetary or in-kind benefit provided or claim for payment made

5-1 under the Medicaid program, directly or indirectly, as a result of
 5-2 the conduct is \$20,000 or more but less than \$100,000; or

5-3 (B) it is shown on the trial of the offense that
 5-4 the defendant submitted more than 25 but fewer than 50 fraudulent
 5-5 claims under the Medicaid program and the submission of each claim
 5-6 constitutes conduct prohibited by Subsection (a);

5-7 (6) a felony of the second degree if:

5-8 (A) the amount of any payment or the value of any
 5-9 monetary or in-kind benefit provided or claim for payment made
 5-10 under the Medicaid program, directly or indirectly, as a result of
 5-11 the conduct is \$100,000 or more but less than \$200,000; or

5-12 (B) it is shown on the trial of the offense that
 5-13 the defendant submitted 50 or more fraudulent claims under the
 5-14 Medicaid program and the submission of each claim constitutes
 5-15 conduct prohibited by Subsection (a); or

5-16 (7) a felony of the first degree if the amount of any
 5-17 payment or the value of any monetary or in-kind benefit provided or
 5-18 claim for payment made under the Medicaid program, directly or
 5-19 indirectly, as a result of the conduct is \$200,000 or more.

5-20 (c) If conduct constituting an offense under this section
 5-21 also constitutes an offense under another section of this code or
 5-22 another provision of law, the actor may be prosecuted under either
 5-23 this section or the other section or provision or both this section
 5-24 and the other section or provision.

5-25 (e) The punishment prescribed for an offense under this
 5-26 section, other than the punishment prescribed by Subsection (b)(7),
 5-27 is increased to the punishment prescribed for the next highest
 5-28 category of offense if it is shown beyond a reasonable doubt on the
 5-29 trial of the offense that the actor was a provider or high
 5-30 managerial agent at the time of the offense.

5-31 (f) With the consent of the appropriate local county or
 5-32 district attorney, the attorney general has concurrent
 5-33 jurisdiction with that consenting local prosecutor to prosecute an
 5-34 offense under this section that involves the Medicaid program.

5-35 SECTION 10. Subsection (a), Section 71.02, Penal Code, as
 5-36 amended by Chapters 153 (S.B. 2225), 1130 (H.B. 2086), and 1357
 5-37 (S.B. 554), Acts of the 81st Legislature, Regular Session, 2009, is
 5-38 reenacted and amended to read as follows:

5-39 (a) A person commits an offense if, with the intent to
 5-40 establish, maintain, or participate in a combination or in the
 5-41 profits of a combination or as a member of a criminal street gang,
 5-42 the person commits or conspires to commit one or more of the
 5-43 following:

5-44 (1) murder, capital murder, arson, aggravated
 5-45 robbery, robbery, burglary, theft, aggravated kidnapping,
 5-46 kidnapping, aggravated assault, aggravated sexual assault, sexual
 5-47 assault, forgery, deadly conduct, assault punishable as a Class A
 5-48 misdemeanor, burglary of a motor vehicle, or unauthorized use of a
 5-49 motor vehicle;

5-50 (2) any gambling offense punishable as a Class A
 5-51 misdemeanor;

5-52 (3) promotion of prostitution, aggravated promotion
 5-53 of prostitution, or compelling prostitution;

5-54 (4) unlawful manufacture, transportation, repair, or
 5-55 sale of firearms or prohibited weapons;

5-56 (5) unlawful manufacture, delivery, dispensation, or
 5-57 distribution of a controlled substance or dangerous drug, or
 5-58 unlawful possession of a controlled substance or dangerous drug
 5-59 through forgery, fraud, misrepresentation, or deception;

5-60 (6) any unlawful wholesale promotion or possession of
 5-61 any obscene material or obscene device with the intent to wholesale
 5-62 promote the same;

5-63 (7) any offense under Subchapter B, Chapter 43,
 5-64 depicting or involving conduct by or directed toward a child
 5-65 younger than 18 years of age;

5-66 (8) any felony offense under Chapter 32;

5-67 (9) any offense under Chapter 36;

5-68 (10) any offense under Chapter 34, ~~or~~ 35, or 35A;

5-69 (11) any offense under Section 37.11(a);

- 6-1 (12) any offense under Chapter 20A;
- 6-2 (13) any offense under Section 37.10; [~~or~~]
- 6-3 (14) any offense under Section 38.06, 38.07, 38.09, or
- 6-4 38.11;
- 6-5 (15) [~~(14)~~] any offense under Section 42.10; or
- 6-6 (16) [~~(14)~~] any offense under Section 46.06(a)(1) or
- 6-7 46.14.

6-8 SECTION 11. Subdivision (4), Subsection (c), Section 22.04,
6-9 Penal Code, is repealed.

6-10 SECTION 12. (a) The changes in law made by this Act to
6-11 Article 37.07, Code of Criminal Procedure, and Sections 22.04,
6-12 32.46, 35A.01, 35A.02, and 71.02, Penal Code, apply only to an
6-13 offense committed on or after the effective date of this Act. An
6-14 offense committed before the effective date of this Act is covered
6-15 by the law in effect when the offense was committed, and the former
6-16 law is continued in effect for that purpose. For purposes of this
6-17 section, an offense was committed before the effective date of this
6-18 Act if any element of the offense occurred before that date.

6-19 (b) The change in law made by this Act in amending Article
6-20 12.01, Code of Criminal Procedure, does not apply to an offense if
6-21 the prosecution of that offense becomes barred by limitation before
6-22 the effective date of this Act. The prosecution of that offense
6-23 remains barred as if this Act had not taken effect.

6-24 SECTION 13. This Act takes effect September 1, 2011.

6-25 * * * * *