SUBJECT: Allowing modification of state-jail felony record to class A misdemeanor

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: *(On April 29)*
6 ayes — Herrero, Burnam, Canales, Leach, Moody, Toth

0 nays

2 absent — Carter, Hughes

1 present not voting — Schaefer

WITNESSES: *(On March 19)*
For — Caitlin Dunklee, Texas Criminal Justice Coalition; Marc Levin, Texas Public Policy Foundation; Sandra Martinez, Centex Family Solutions and Counseling; Arnold Patrick, Hidalgo County Adult Probation; Todd Jermstad; (*Registered, but did not testify*: Kristin Etter, Texas Criminal Defense Lawyers Association; Ana Yanez Correa and Travis Leete, The Texas Criminal Justice Coalition; Andrea Marsh, Texas Fair Defense Project; Jeanette Moll, Texas Public Policy Foundation; Matt Simpson, ACLU of Texas; Derek Muller; Tiffany Muller; Gabriela Rosas)

Against — (*Registered, but did not testify*: Brian Eppes,Tarrant County District Attorney's Office; Clifford Herberg, Bexar County Criminal District Attorney's Office; Justin Wood, Harris County District Attorney's Office)

On — Shannon Edmonds, Texas District and County Attorneys Office

BACKGROUND: State-jail felonies are criminal offenses punished by180 days to two years in a state jail and an optional fine of up to $10,000. Class A misdemeanors are punished by up to one year in jail and/or a maximum fine of $4,000.

Under Code of Criminal Procedure (CCP), art. 42.12, after a criminal defendant has been convicted or pleaded guilty or nolo contendere, a judge may suspend the imposition of the sentence and place the defendant on community supervision, also called probation.

CCP art. 42.12, sec. 15 establishes procedures relating to community supervision for state-jail felonies. For state-jail felony offenses, the minimum probation term is two years and the maximum is five years, and terms can be extended. Under CCP art. 42.12, sec. 20 community supervision terms can be reduced or terminated under certain conditions.

DIGEST:

CSHB 1790 would authorize judges, under certain circumstances, to modify an offender's record of conviction for certain eligible state-jail felonies to reflect a conviction for a class A misdemeanor.

After probationers completed two-thirds of their original community supervision terms for eligible state-jail felonies, judges would be required to review defendants' records and consider whether to modify them to reflect a conviction for a class A misdemeanor, rather than a state-jail felony. Judges would be required to dispose of cases as required by the current provisions in CCP art. 42.12, sec. 20, governing the reduction or termination of community supervision.

Upon discharge of a defendant, judges would be required to modify the convictions records to reflect a conviction for a class A misdemeanor, instead of a state- jail felony, if:

- the offense was not an offense against a person listed in Penal Code Title 5, an offense involving family violence, improper sexual activity with an adult in custody at a correctional facility, driving while intoxicated with a child passenger, or failure to comply with a requirement of the sex offender registry;
- the defendant had satisfactorily fulfilled the conditions of community supervision, including paying restitution, and was not delinquent on fines, costs, and fees that the defendant had the ability to pay;
- the judge provided written notice of the right to request a hearing to the prosecutor and the defendant or defendant’s attorneys; and
- before the community supervision term ended, neither party requested a hearing or, after a hearing, the judge found that a modification of the record of conviction was in the best interests of justice.

Judges could not modify the name of the state-jail felony offense for which the defendant was placed on community supervision. Defendants whose records were modified would not be considered to be convicted of a

felony for any purpose other than the purposes of CCP sec. 20(a)(1), which states that proof of the conviction must be made known to the judge should a defendant again be convicted of a criminal offense.

A judge who placed a defendant on community supervision after conviction of a state-jail felony would have to inform the defendant of the procedure for a modification of the order under this bill.

CSHB 1790 would take effect September 1, 2013, and would apply only to a defendant placed on probation on or after that date, regardless of when the offense took place.

SUPPORTERS SAY:

CSHB 1790 would give a narrow group of low-level, non-violent state-jail offenders an incentive to agree to and then successfully complete probation terms. This would benefit the offenders, the state, and the public through reduced offender recidivism. Reduced recidivism would translate into increased public safety and savings for the state.

Currently, some state-jail felons elect to be sentenced directly to state jail because community supervision can require more responsibility, accountability, and work. Sending offenders to a state-jail instead of placing them on probation can be counterproductive for the state because offenders more often are successfully rehabilitated on probation. One measure of this is seen in the 31.1 percent recidivism rate for state-jail offenders released in 2009, compared with 15.2 percent of offenders on active felony community supervision in 2009 having their probation revoked.

Better outcomes can occur on probation because state jails can be lacking in treatment, education, and rehabilitation programs, with the vast majority of offenders released from state jails with no post-release community supervision or support. In contrast, the probation system can provide better access to meaningful services and resources, such as employment support and substance abuse and mental health treatment while under the supervision of a probation officer.

Increased use of probation for state- jail felons could save the state money and lead to the collection of more in restitution and fines. It costs about $43 per day to house an offender in a state jail, while the state pays, on average, about $1.40 per day for regular probationers. Probationers often are more successful in paying restitution than state-jail felons, so victims

might see more money under the bill. Total collections could be increased because the potential modification of a conviction would provide an incentive for offenders to pay restitution and fines.

Having a state-jail felony offense modified to reflect a conviction for a class A misdemeanor would help offenders overcome the barriers associated with felony offenses. These barriers can include difficulties getting a job or apartment, and reducing them would increase the likelihood of a successful reentry into society.

CSHB 1790 would apply only to a narrow group of appropriate offenders. The offense would have to be a state-jail felony, the lowest level of non-violent felony offenses. While numerous crimes qualify as state-jail offenses, serious incidents are punished at a higher level. The offender would have to have been put on probation for the state- jail felony, and any person convicted of an eligible state-jail felony could be sentenced to time in a state jail if appropriate. The bill specifically would not apply to offenders who commit certain crimes. These include all of the Penal Code Title 5 crimes against a person such as homicide, kidnapping, human trafficking, sex, and assaultive offenses. The bill also excludes offenders convicted of family violence, failing to register as a sex offender, and other serious offenses.

CSHB 1790 would not distort sentencing. No penalty established on the front end of a case would be changed, and any offender still could be sentenced to time in a state jail instead of probation. Modifications of convictions would never be a certainty, as they would occur after at least two-thirds of a successful probation term and only when the conditions in CSHB 1790 were met. Prosecutors would have a voice in the decision to modify a conviction because they could request a hearing on the issue and argue that a modification was not in the best interest of justice.

Rather than distort plea agreements, CSHB 1790 could facilitate them by giving prosecutors another tool to use when crafting them. Pleas to probation for state-jail felonies could benefit both the state and offender because the potential modification to a misdemeanor could be held out as a carrot for successfully completing probation.

Judicial discretion would not be infringed upon because modifications would occur only if offenders were placed on probation, successful on probation, and then, following the current provisions for the reduction and

termination of community supervision, a judge decided to discharge the offender. In addition, if a hearing were held on a modification under the bill, judges would have discretion in making the finding required by the bill that the modification was in the best interest of justice.

CSHB 1790 would not cause confusion with criminal records nor distort sentencing for subsequent offenses. The bill states that a judge may not modify the name of the state- jail felony offense for which a person was placed on community supervision. It also states that a state-jail felon with a record modified to a misdemeanor would be considered to be convicted of a felony for the purposes of CCP sec. 20(a)(1), which states that proof of the conviction or guilty plea must be made known to the judge should a defendant again be convicted of a criminal offense. Under this, judges could be made aware that a class A misdemeanor was modified from a state-jail felony.

CSHB 1790 would not be an unconstitutional delegation of the executive branch's clemency authority. A recent attorney general's opinion (GA-1000) said that a court likely would conclude that a 2011 law allowing diligent participation credits for state-jail inmates did not conflict with the state constitution's clemency provisions, and the same reasoning could apply to CSHB 1790.

A Utah law allowing felonies to be reduced to misdemeanors works well, and the same concept could work in Texas with CSHB 1790.

OPPONENTS SAY:

Allowing the modification of a criminal conviction from a felony to a misdemeanor would introduce confusion into state-jail convictions and distort the current process in which a conviction is determined in the beginning, not the end, of a criminal case.

CSHB 1907 would give a judge too much authority to override the initial charging decision by the elected district attorney and the verdict of a jury and of another judge in cases in which a probation case had been transferred between courts. For example, under the bill, a judge could modify a conviction so that a jury's conviction on a state- jail felony offense would not be the level of offense in the offender's record of conviction. This could result in confusion when examining criminal history records.

CSHB 1907 would apply to a broad group of state-jail felony offenses,

some of which it may be inappropriate to reduce to class A misdemeanors. For example, types of arson, theft, and burglary of a building are state-jail felonies.

Allowing convictions to be modified could distort sentencing and plea agreements. Judges and juries may be reluctant to sentence an offender to probation for a state-jail felony if the result could be a modification of the record. Prosecutors could be reluctant to enter in plea agreements for the same reason.

CSHB 1790 would reduce judicial discretion in handling state-jail probationers. The bill would require judges to take certain actions, including reviewing a case after a certain period of time and requiring the judge to modify records of conviction under certain circumstances.

It is unclear what effect CSHB 1790 would have on laws allowing previous offenses to be used to enhance a punishment for subsequent offenses. For example, if a state-jail felony drug offense were modified to be a class A misdemeanor and was not counted as a previous felony offense, second and subsequent offenses could end up being treated like first offenses.

CSHB 1790 could raise questions about whether a modification of a conviction record would be an unconstitutional delegation of the executive branch's clemency authority to the judicial branch.

A similar law in Utah should not be the model for Texas because of significant differences between the two states' criminal justice systems.