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INTERIM TESTIMONY 2014

House Committee on Criminal Jurisprudence

Charge #6: Evaluate the approximately 1,500 non-traditional criminal offenses that can be found outside of the Penal Code. Study the feasibility of streamlining these offenses and examine ambiguities in the law. Study the existing use of the Rule of Lenity and Mens Rea requirements in Texas and the benefit of codifying both of these standards.

Dear Members of the Committee,

My name is Elizabeth A. Henneke. I am a Policy Attorney for Texas Criminal Justice Coalition (TCJC). Thank you for allowing me this opportunity to present testimony on the Rule of Lenity.

RULE OF LENITY

The Rule of Lenity is a tool that courts employ when trying to interpret ambiguous statutes, rules, or codes related to criminal conduct. The Rule is simple: if the meaning of a statute is unclear after a court has employed all other legitimate tools of interpretation, the court must choose the interpretation most favorable to the defendant.¹

The Rule of Lenity could apply in numerous factual situations. For example, the Rule of Lenity has been applied when new technologies emerge that were not contemplated by the legislature. For instance, the Texas Penal Code makes it a crime of forgery “to alter, make, complete, execute, or authenticate any writing so that it purports to be the act of another.” Assume that Joe and Sarah purchase a home in a lovely part of Austin. Their real estate agent sends them a contract electronically using new software that allows the buyers to “electronically sign” after logging in with their email address. Joe opens and electronically signs the contract on a laptop he shares with Sarah, using Sarah’s e-mail account by mistake. The real estate agent then presents the contract to the sellers, and a deal is reached. Three weeks later, Sarah and Joe both seek to have the deal invalidated because Joe did not intend to “sign” the contract when he accidentally opened Sarah’s email. The seller, angry at the couple for wasting his time and costing him potential buyers, calls the local district attorney and asks her to charge Joe with forgery. Joe asserts that the statute only covers “writings” and that electronic signatures are not “writings,” and therefore cannot incur criminal liability. He assures the court that had he known that the electronic signature would constitute a writing, he would have been much more careful when opening Sarah’s email. After considering all other legitimate tools of interpretation, the court is unable to determine whether the legislature meant “writings” to include electronic signatures. If applied, the Rule of Lenity would result in the court holding in favor of Joe because the statute did not clearly reflect that “writings” included electronic signatures.

This Rule, which so generously grants any ties to the defendant, is almost as old as the Constitution itself.² The Rule exists to make clear that “. . . a just legislature will not decree punishment without making clear what conduct incurs the punishment and what the extent of the punishment will be; or at least on the judge-made public policy that a legislature *ought* not do so.”³ Thus, the Rule places the burden on the legislature to avoid and correct any ambiguities in legislative drafting — recognizing perhaps that clarifications may be needed to ensure that the legislature’s best-laid rules and commands are reasonably clear before conduct can be punished. Thus, the purpose of a penal code, “to put all reasonable people on notice of precisely what conduct, under what circumstances, is subject to criminal liability and punishment,” can be achieved.⁴

Generally, rules of interpretation, like the Rule of Lenity, do not need to be codified because courts have established common law rules for their application. Texas, however, has already demonstrated a willingness to provide guidance to courts when interpreting legislation. For instance, the Code Construction Act — which applies to all statutes, rules, or codes passed by the legislature — provides in part,

In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the: (1) object sought to be attained; (2) circumstances under which the statute was enacted; (3) legislative history; (4) common law or former statutory provisions, including laws on the same or similar subjects; (5) consequences of a particular construction; (6) administrative construction of the statute; and (7) title (caption), preamble, and emergency provision.⁵

The Rule of Lenity, like the interpretive rules listed above, should be codified to give courts reasonable instruction as to the scope of their authority to interpret and apply law. Doing so would assure that the courts are best fulfilling the commands of the legislature, and it would avoid situations whereby courts overreach by choosing their preferred definitions and then telling the legislature to fix the statute if it does not like the court's interpretation. It also may save statutes from being found unconstitutional by courts for vagueness (as often happens when the statute is subject to more than one interpretation).⁶

Codifying the Rule has one additional advantage. As recognized by Judge Michael Keasler on the Texas Criminal Courts of Appeals, Texas courts have greatly limited the application of the Rule over time.⁷ Instead, courts have relied upon the statutory interpretation guidelines codified by the legislature in the Code of Construction.⁸ This is the approach taken in the leading Texas case on statutory construction, *Boykin v. State*, which does not even mention the Rule of Lenity.⁹ This lack of clarity on both the role of the Rule of Lenity in Texas jurisprudence, and the scope of the Rule, has created interpretive disputes between judges.¹⁰ The legislature should clarify its position that the Rule of Lenity reflects sound public policy by codifying it in the Code of Construction.

COST-SAVING AND PUBLIC SAFETY-DRIVEN SOLUTIONS

- **Codify the Rule of Lenity, making clear to courts its importance in protecting the rights of defendants to avoid prosecution pursuant to ambiguous laws.** The Rule of Lenity plays an important role in protecting Texans from prosecution for acts that they did not have notice would incur criminal liability. The legislature should ensure the Rule's continued viability and robust application by adding it to the Code of Construction.
- **Apply the Rule of Lenity only when, after all the legitimate tools of interpretation have been applied, a "reasonable doubt persists."** United States Supreme Court Justice Antonin Scalia advocates this standard, arguing that the government should bear the burden of making clear any conduct it intends to punish.¹¹ While this standard is somewhat vague, it relies upon a "reasonable doubt" standard which judges are familiar with applying.
- **The Rule of Lenity should apply to all statutes, rules, and codes that result in punishment, including the Penal Code and the Controlled Substances Act.** Because the Rule of Lenity is merely a longstanding rule of statutory interpretation and by itself conveys no substantive right to defendants, it should apply equally to all statutes that prohibit conduct. There is no justification for limiting its applicability in one area versus another.

Citations

¹ For a wonderful discussion of the theory and development of the Rule of Lenity as a canon of statutory interpretation, I would refer you to Antonin Scalia & Brian Garner, *Reading Law: The Interpretation of Legal Texts* § 49 (2012).

² In fact, the Rule has been applied in Texas since 1886. See *Cuellar v. State*, 70 S.W.3d 815, 822 (CCA, 2002).

³ *Ibid.*

⁴ *Cuellar*, 70 S.W.3d at 822 n. 2.

⁵ Tex. Gov't Code Ann. § 311.023 (West).

⁶ See *id.* at 825.

⁷ *Id.* at 837.

⁸ *Ibid.*

⁹ See generally, *Boykin v. State*, 818 S.W.2d 782 (CCA, 1991) (en banc).

¹⁰ See the opinions by Judge Cochran and Judge Keasler in *Cuellar v. State*, 70 S.W.3d 815 (CCA, 2002) for one such example.

¹¹ Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* § 49, at 299.