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November 5, 2020

Representative Clay Schexnayder
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804

RE: HOUSE RESOLUTION NO. 200 OF THE 2017 REGULAR SESSION

Dear Mr. Speaker:

The Louisiana State Law Institute respectfully submits its report to the legislature relative to criminal justice legislation.

Sincerely,

A handwritten signature in blue ink, appearing to read "Guy Holdridge".

Guy Holdridge
Director

email cc: David R. Poynter Legislative Research Library
drplibrary@legis.la.gov
Secretary of State, Mr. R. Kyle Ardoin
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**LOUISIANA STATE LAW INSTITUTE
CODE OF CRIMINAL PROCEDURE COMMITTEE**

**REPORT TO THE LEGISLATURE IN RESPONSE TO HOUSE
RESOLUTION NO. 200 OF THE 2017 REGULAR SESSION**

Relative to criminal justice legislation

Prepared for the
Louisiana Legislature on

November 5, 2020

Baton Rouge, Louisiana

LOUISIANA STATE LAW INSTITUTE

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Judge Guy Holdridge, Acting Reporter
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2017 Regular Session

HOUSE RESOLUTION NO. 200

BY REPRESENTATIVE LEGER

A RESOLUTION

To direct the Louisiana State Law Institute to study and review legislation relative to the criminal justice system enacted during the 2017 Regular Session of the Legislature, to study and review its incorporation into Louisiana law, and to identify and recommend necessary changes to correct any inconsistencies with other provisions of Louisiana law that may exist.

WHEREAS, according to United States Bureau of Justice Statistics, Louisiana has the highest incarceration rate in the United States; and

WHEREAS, over the last several years, Louisiana has taken steps to implement cost-effective, evidence-based practices and programs to control the growth in the state's prison population; and

WHEREAS, in order to build upon this promising foundation and chart a data-driven course for comprehensive reform, in the 2015 Regular Session, the Louisiana Legislature passed House Concurrent Resolution No. 82 which created the Louisiana Justice Reinvestment Task Force (Task Force), under the jurisdiction of the Louisiana Sentencing Commission and the Department of Public Safety and Corrections; and

WHEREAS, beginning work in June 2016, the Task Force, comprised of legislators, judges, defense lawyers, prosecutors, law enforcement, faith leaders, and community advocates, was directed to develop recommendations for statutory and budgetary changes affecting sentencing and corrections practices with the goal of reducing the corrections population and associated spending, expanding research-based supervision and sentencing practices, and strategically reinvesting savings to reduce recidivism and improve reentry outcomes; and

WHEREAS, as a result of the Task Force's work, a report was issued in March of 2017, and several legislative instruments were introduced in the 2017 Regular Session of the Legislature including Senate Bill Nos. 16, 139, 220, and 221 and House Bill Nos. 116, 249, 489, 519, 680, and 681; and

WHEREAS, in addition to legislation directly affecting the criminal justice system including the reinvestment of savings into research-based programs that reduce recidivism and legislation regarding victim notification and services, criminal offenses, probation, parole, diminution of sentence for good behavior, certified treatment and rehabilitation programs, and criminal justice financial obligations; this legislative package impacted other areas of Louisiana law including occupational licenses, public assistance, and child support; and

WHEREAS, given the comprehensive nature of this legislative package and the numerous provisions of law affected, it is necessary to conduct a comprehensive review of the legislation and study its incorporation into and impact on other provisions of Louisiana law.

THEREFORE, BE IT RESOLVED that the House of Representatives of the Legislature of Louisiana does hereby direct the Louisiana State Law Institute to study and review legislation relative to the criminal justice system enacted during the 2017 Regular Session of the Legislature, to study and review its incorporation into Louisiana law, and to identify and recommend necessary changes to correct any inconsistencies with other provisions of Louisiana law that may exist.

BE IT FURTHER RESOLVED that the Louisiana State Law Institute shall report its findings to the legislature by March 1, 2018.

BE IT FURTHER RESOLVED that a suitable copy of this Resolution be transmitted to the Louisiana State Law Institute.

SPEAKER OF THE HOUSE OF REPRESENTATIVES

November 5, 2020

To: Representative Clay Schexnayder
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804

**REPORT TO THE LEGISLATURE IN RESPONSE TO
HOUSE RESOLUTION NO. 200 OF THE 2017 REGULAR SESSION**

House Resolution No. 200 of the 2017 Regular Session directed the Louisiana State Law Institute to study and review legislation relative to the criminal justice system enacted during the 2017 Regular Session, to study and review its incorporation into Louisiana law, and to identify and recommend necessary changes to correct any inconsistencies with other provisions of Louisiana law that may exist. In fulfillment of this request, the Law Institute assigned the project to its Criminal Code and Code of Criminal Procedure Committee.

The Committee began its work by compiling extensive background information with respect to the instruments included in the package of justice reinvestment legislation during the 2017 Regular Session; namely, Acts 2017, Nos. 258, 260, 261, 262, 264, 265, 277, 280, 281, and 281. Specifically, the Committee considered summaries and reports prepared by the Department of Corrections, Pew Charitable Trusts, the Louisiana District Attorneys Association, and the Department of Public Safety and Corrections for purposes of identifying potential problems or inconsistencies that may have resulted from the incorporation of the revisions in each of these Acts into Louisiana law. The Committee generally discussed issues concerning probation and parole, costs and fees, and substantial hardship, as well as inconsistencies with respect to weight requirements in the statutes on drug offenses and responsive verdicts. The Committee also considered the following issues that were referred to them for review:

1. Applicability of Revisions to Habitual Offender Penalties

Acts 2017, No. 282 amended habitual offender penalties to tailor them to the severity of the offense by lowering the mandatory minimum penalties, differentiating the applicable “cleansing periods” based on whether the prior offense was violent or nonviolent, and providing for judicial discretion to adjust unfair, constitutionally excessive sentences. Section 2 of the Act provided that these revisions “shall have prospective application only to offenders whose convictions became final on or after November 1, 2017.” One potential problem presented to the Committee with respect to this Act was that this language in Section 2 does not specify which conviction is being contemplated – the conviction of the prior offense, or the conviction of the current offense as a habitual offender. Another related issue that was presented to the Committee concerned the applicability of the cleansing period under R.S. 15:529.1(C), specifically whether a second conviction after November 1, 2017 of a nonviolent offense would be subject to a five- or ten-year cleansing period.

2. Reducing Penalties for Possession of Legend Drugs

Acts 2017, No. 281 focused prison space on serious and violent offenders by, among other revisions, tailoring penalties for drug offenses to the severity of the offense by narrowing sentences for simple possession of small amounts of controlled dangerous substances and scaling penalties for other offenses in accordance with the weight of the controlled substance. Specifically, this Act amended several provisions in Title 40 to reduce the penalties for distributing, manufacturing, and possessing certain drugs, including marijuana and heroin, but did not make similar amendments to provisions concerning legend drugs. Rather, the penalties for selling, delivering, or possessing legend drugs under R.S. 40:1060.13 remained imprisonment with or without hard labor for up to five years and imposition of a fine of up to five thousand dollars.

3. Applicability of R.S. 14:67 to Cheating and Swindling

In addition to tailoring penalties for drug offenses, Acts 2017, No. 281 simplified the crimes of theft and burglary, reduced penalties for some theft offenses, and increased the felony theft threshold to one thousand dollars. In doing so, this Act also repealed R.S. 14:67.18 concerning cheating or swindling in connection with gaming operations, which previously provided as follows:

R.S. 14:67.18. Cheating and swindling

A. It shall be unlawful for any person who by any trick or sleight of hand performance, or by fraud or fraudulent scheme, cards, dice, or device, for himself or another, wins or attempts to win money or property or a combination thereof, or reduces a losing wager or attempts to reduce a losing wager, increases a winning wager or attempts to increase a winning wager in connection with gaming operations.

B. (1) Whoever violates the provisions of this Section when the value of such money or property or combination thereof or reduced or increased wager amounts to a value of one thousand five hundred dollars or more shall be imprisoned, with or without hard labor, for not more than ten years, or may be fined not more than three thousand dollars, or both.

(2) When the value of such money or property or combination thereof or reduced or increased wager amounts to a value of five hundred dollars or more, but less than a value of one thousand five hundred dollars, the offender shall be imprisoned, with or without hard labor, for not more than five years, or may be fined not more than two thousand dollars, or both.

(3) When the value of such money or property or combination thereof or reduced or increased wager amounts to less than a value of five hundred dollars, the offender shall be imprisoned for not more than six months, or may be fined not more than five hundred dollars, or both. If the offender in such cases has been convicted of cheating and swindling two or more times previously, upon any

subsequent conviction he shall be imprisoned, with or without hard labor, for not more than two years, or may be fined not more than two thousand dollars, or both.

C. For purposes of this Section, “gaming operations” means the conducting or assisting in the conducting of gaming activities or operations upon a riverboat, at the official gaming establishment, by operating an electronic video draw poker device, by a charitable gaming licensee, or at a pari-mutuel wagering facility or the operation of a state lottery which is licensed for operation and regulated under the provisions of Chapter 4 of Title 4, Chapters 4, 5, 6, and 7 of Title 27, or Chapter 11 of Title 4 or Subtitle XI of Title 47 of the Louisiana Revised Statutes of 1950, or any other gaming operation authorized by law.

One issue presented for the Committee’s consideration with respect to the repeal of this provision is whether the previous crime of cheating and swindling would now be covered under the general theft statute, R.S. 14:67.

4. Eligibility for Drug Division Probation Program

Acts 2017, No. 280 improved the probation and parole system in Louisiana by, among other things, expanding eligibility for participation in the drug division probation program under R.S. 13:5304(B)(10)(b). Specifically, this Act created an exception to the previous limitation with respect to crimes of violence by providing that a person convicted of a crime of violence with a maximum prison sentence of ten years or less will still be eligible for the program, provided that it is the person’s first conviction and that the offense was not committed against a family member, household member, or dating partner. However, after the 2017 Regular Session, it was discovered that previous amendments to R.S. 13:5304(B)(10)(b) had not been included in the legislative database prior to the drafting of Act 280, thereby resulting in an inadvertent reversion of the text of this provision.

Prior to the 2016 Regular Session, R.S. 13:5304(B)(10)(b) read as follows:

R.S. 13:5304. The drug division probation program

* * *

B. Participation in probation programs shall be subject to the following provisions:

* * *

(10) In order to be eligible for the drug division probation program, the defendant must satisfy each of the following criteria:

* * *

(b) The crime before the court cannot be a crime of violence as defined in R.S. 14:2(B) or an offense of domestic abuse battery which is punishable by imprisonment at hard labor as provided in R.S. 14:35.3.

* * *

Acts 2016, No. 509 made the following amendments to R.S. 13:5304(B)(10)(b):

R.S. 13:5304. The drug division probation program

* * *

B. Participation in probation programs shall be subject to the following provisions:

* * *

(10) In order to be eligible for the drug division probation program, the defendant must satisfy each of the following criteria:

* * *

(b) The crime before the court cannot be an offense that is designated in the court minutes as a crime of violence as defined in R.S. 14:2(B) pursuant to Code of Criminal Procedure Article 890.3 or an offense of domestic abuse battery ~~which~~ that is punishable by imprisonment at hard labor as provided in R.S. 14:35.3.

* * *

However, because the 2016 amendments were not included in the legislative database, the following version of R.S. 13:5304(B)(10)(b) was included in Acts 2017, No. 280 and ultimately approved by the legislature:

R.S. 13:5304. The drug division probation program

* * *

B. Participation in probation programs shall be subject to the following provisions:

* * *

(10) In order to be eligible for the drug division probation program, the defendant must satisfy each of the following criteria:

* * *

(b) The crime before the court cannot be a **crime of violence as defined in R.S. 14:2(B)**, except a first conviction of an offense with a maximum prison sentence of ten years or less that was not committed against a family member or household member as defined by R.S. 14:35.3, or against a dating partner as defined by R.S. 46:2151, or an offense of domestic abuse battery **which** is punishable by imprisonment at hard labor as provided in R.S. 14:35.3.

* * *

Code of Criminal Procedure Article 890.3 provides as follows:

Article 890.3. Sentencing for crimes of violence

A. Except as provided in Paragraph C of this Article, when a defendant is sentenced for any offense, or the attempt to commit any offense, defined or enumerated as a crime of violence in R.S. 14:2(B), the district attorney may make a written recommendation to the court that the offense should not be designated as a crime of violence only for the following purposes:

(1) The defendant's eligibility for suspension or deferral of sentence pursuant to Article 893.

(2) The defendant's eligibility for participation in a drug division probation program pursuant to R.S. 13:5304.

B. In the absence of a written recommendation by the district attorney as provided in Paragraph A of this Article, the offense shall be designated as a crime of violence as a matter of law.

C. The following crimes of violence enumerated in R.S. 14:2(B) shall always be designated by the court in the minutes as a crime of violence:

- (1) Solicitation for murder.
- (2) First degree murder.
- (3) Second degree murder.
- (4) Manslaughter.
- (5) Aggravated or first degree rape.
- (6) Forcible or second degree rape.
- (7) Simple or third degree rape.
- (8) Sexual battery.

- (9) Second degree sexual battery.
- (10) Intentional exposure to AIDS virus.
- (11) Aggravated kidnapping.
- (12) Second degree kidnapping.
- (13) Aggravated arson.
- (14) Armed robbery.
- (15) Assault by drive-by shooting.
- (16) Carjacking.
- (17) Terrorism.
- (18) Aggravated second degree battery.
- (19) Aggravated assault with a firearm.
- (20) Armed robbery; use of firearm; additional penalty.
- (21) Second degree robbery.
- (22) Disarming of a peace officer.
- (23) Second degree cruelty to juveniles.
- (24) Aggravated crime against nature.
- (25) Trafficking of children for sexual purposes.
- (26) Human trafficking.
- (27) Home invasion.

Whereas the list of offenses defined by R.S. 14:2(B) as crimes of violence are as follows (offenses in bold are not included in Code of Criminal Procedure Article 890.3):

R.S. 14:2. Definitions

* * *

B. In this Code, "crime of violence" means an offense that has, as an element, the use, attempted use, or threatened use of physical force against the person or property of another, and that, by its very nature, involves a substantial

risk that physical force against the person or property of another may be used in the course of committing the offense or an offense that involves the possession or use of a dangerous weapon. The following enumerated offenses and attempts to commit any of them are included as "crimes of violence":

- (1) Solicitation for murder.
- (2) First degree murder.
- (3) Second degree murder.
- (4) Manslaughter.
- (5) Aggravated battery.**
- (6) Second degree battery.**
- (7) Aggravated assault.**
- (8) Repealed by Acts 2017, No. 281, §3.
- (9) Aggravated or first degree rape.
- (10) Forcible or second degree rape.
- (11) Simple or third degree rape.
- (12) Sexual battery.
- (13) Second degree sexual battery.
- (14) Intentional exposure to AIDS virus.
- (15) Aggravated kidnapping.
- (16) Second degree kidnapping.
- (17) Simple kidnapping.**
- (18) Aggravated arson.
- (19) Aggravated criminal damage to property.**
- (20) Aggravated burglary.**

- (21) Armed robbery.
- (22) First degree robbery.**
- (23) Simple robbery.**
- (24) Purse snatching.**
- (25) Repealed by Acts 2017, No. 281, §3.
- (26) Assault by drive-by shooting.
- (27) Aggravated crime against nature.
- (28) Carjacking.
- (29) Repealed by Acts 2017, No. 281, §3.
- (30) Terrorism.
- (31) Aggravated second degree battery.
- (32) Aggravated assault upon a peace officer.**
- (33) Aggravated assault with a firearm.
- (34) Armed robbery; use of firearm; additional penalty.
- (35) Second degree robbery.
- (36) Disarming of a peace officer.
- (37) Stalking.**
- (38) Second degree cruelty to juveniles.
- (39) Aggravated flight from an officer.**
- (40) Repealed by Acts 2014, No. 602, §7, eff. June 12, 2014.
- (41) Battery of a police officer.**
- (42) Trafficking of children for sexual purposes.

(43) Human trafficking.

(44) Home invasion.

(45) Domestic abuse aggravated assault.

(46) Vehicular homicide, when the operator's blood alcohol concentration exceeds 0.20 percent by weight based on grams of alcohol per one hundred cubic centimeters of blood.

(47) Aggravated assault upon a dating partner.

(48) Domestic abuse battery punishable under R.S. 14:35.3(L), (M)(2), (N), (O), or (P).

(49) Battery of a dating partner punishable under R.S. 14:34.9(L), (M)(2), (N), (O), or (P).

(50) Violation of a protective order if the violation involves a battery or any crime of violence as defined by this Subsection against the person for whose benefit the protective order is in effect.

(51) Criminal abortion.

(52) First degree feticide.

(53) Second degree feticide.

(54) Third degree feticide.

(55) Aggravated criminal abortion by dismemberment.

During its review of these and other issues, the Committee found that several bills were introduced during the 2018 Regular Session and ultimately enacted to correct some of the inconsistencies that were identified by the Committee with respect to the 2017 package of justice reinvestment legislation. For example, the Committee reviewed Acts 2018, No. 680, which amended the responsive verdicts provided in Code of Criminal Procedure Article 814 to reflect the amended penalties for theft and drug offenses. With respect to the issue concerning the revisions relating to habitual offender penalties, the Committee reviewed Acts 2018, No. 542, which amended R.S. 15:529.1 to clarify the applicability of Acts 2017, No. 282. Additionally, the penalties for the sale, distribution, or possession of legend drugs were reduced by Acts 2018, No. 203 to imposition of a fine of up to five hundred dollars (as opposed to five thousand dollars), imprisonment for up to six months (as opposed to five years), or both.

In reviewing both the 2017 and 2018 legislation, the Committee also discussed the importance of preserving the compromises that took place during each of these Sessions with respect to the various stakeholders, many of whom serve as members of the Committee. As a result, and after these members consulted with their various constituencies, the Committee generally concluded against making any recommendations that could potentially upset or otherwise impact the delicate balance of interests achieved during the legislative process, particularly with respect to policy decisions made by the legislature in conjunction with the stakeholders. The Committee also determined that no recommendation should be made with respect to the previous repeal of R.S. 14:67.18 concerning cheating and swindling after concluding that this statute was not being used prior to its repeal and that these offenses would indeed be covered under existing provisions of law. However, the Committee did determine that one of the issues presented for its consideration, the amendment with respect to drug division probation program eligibility, was created unintentionally and therefore should be corrected. As a result, the Law Institute presently makes the following recommendations to the legislature:

1. Amend R.S. 13:5304(B)(10)(b) as follows:

§5304. The drug division probation program

* * *

B. Participation in probation programs shall be subject to the following provisions:

* * *

(10) In order to be eligible for the drug division probation program, the defendant must satisfy each of the following criteria:

* * *

(b) The crime before the court cannot be an offense of domestic abuse battery that is punishable by imprisonment at hard labor as provided in R.S. 14:35.3 or an offense that is designated in the court minutes as a crime of violence as defined in R.S. 14:2(B) pursuant to Code of Criminal Procedure Article 890.3, except a first conviction of an offense with a maximum prison sentence of ten years or less that was not committed against a family member or household member as defined by R.S. 14:35.3, or against a dating partner as defined by R.S. 46:2151, ~~or an offense of domestic abuse battery that is punishable by imprisonment at hard labor as provided in R.S. 14:35.3.~~

* * *

Note to the Legislature

Without the coding of the “except” clause added by Acts 2017, No. 280, the Law Institute determined that it may no longer be clear that an offense of domestic abuse battery is one of the crimes that cannot be before the court for purposes of the defendant’s eligibility for the drug

division probation program. In other words, after the 2017 amendments, this provision might be misread as providing that domestic abuse battery is one of the exceptions to the list of crimes that cannot be before the court under this statute (“except a first conviction . . . of an offense of domestic abuse battery that is punishable by imprisonment at hard labor as provided in R.S. 14:35.3”). As a result, the Law Institute concluded that for purposes of clarity, and in addition to changing the citation from R.S. 14:2(B) to Code of Criminal Procedure Article 890.3 to correct the database error, the last clause of R.S. 13:5304(B)(10)(b) should be inserted at the beginning of the provision as indicated above. The coded and uncoded versions of this statute as amended by Acts 2017, No. 280 are reproduced below:

R.S. 13:5304. The drug division probation program

* * *

B. Participation in probation programs shall be subject to the following provisions:

* * *

(10) In order to be eligible for the drug division probation program, the defendant must satisfy each of the following criteria:

* * *

(b) The crime before the court cannot be a crime of violence as defined in R.S. 14:2(B), except a first conviction of an offense with a maximum prison sentence of ten years or less that was not committed against a family member or household member as defined by R.S. 14:35.3, or against a dating partner as defined by R.S. 46:2151, or an offense of domestic abuse battery which is punishable by imprisonment at hard labor as provided in R.S. 14:35.3.

* * *

R.S. 13:5304. The drug division probation program

* * *

B. Participation in probation programs shall be subject to the following provisions:

* * *

(10) In order to be eligible for the drug division probation program, the defendant must satisfy each of the following criteria:

* * *

(b) The crime before the court cannot be a crime of violence as defined in R.S. 14:2(B), except a first conviction of an offense with a maximum prison sentence of ten years or less that was not committed against a family member or household member as defined by R.S. 14:35.3, or against a dating partner as defined by R.S. 46:2151, or an offense of domestic abuse battery which is punishable by imprisonment at hard labor as provided in R.S. 14:35.3.

* * *

2. Amend Code of Criminal Procedure Article 903.1(B) as follows:

Article 903.1. Substance abuse probation program; eligibility

* * *

B. The provisions of this Article shall not apply to any defendant who has participated in or declined to participate in a drug division probation program as provided for in R.S. 13:5301 et seq. or any defendant who has been convicted of a sex offense as defined in R.S. 15:541 or a crime of violence as defined in R.S. 14:2(B), except for a first conviction of an offense with a maximum prison sentence of ten years or less that was not committed against a family member or household member as defined by R.S. 14:35.3, or against a dating partner as defined by R.S. 46:2151, or a sex offense as defined in R.S. 15:541, or any defendant who has participated in or declined to participate in a drug division probation program as provided for in R.S. 13:5301 et seq.

Note to the Legislature

This Article suffers from the same problem as R.S. 13:5304(B)(10)(b) in that, without the coding of the “except” clause added by Acts 2017, No. 280, it may no longer be clear that in order for the provisions of this Article to apply, a defendant cannot have been convicted of a sex offense. In other words, after the 2017 amendments, this provision might be misread as providing that a sex offense is one of the exceptions to the list of crimes for which the defendant cannot have been convicted under this Article (“except for a first conviction . . . of a sex offense as defined in R.S. 15:541”). In conjunction with this recommendation and for purposes of absolute certainty, the Law Institute also decided to recommend insertion of the last clause at the beginning of the Article, even though, despite the 2017 amendments, it is likely still sufficiently clear that this provision does not apply to any defendant who has participated or declined to participate in a drug division probation program. The coded and uncoded versions of this Article as amended by Acts 2017, No. 280 are reproduced below:

Article 903.1. Substance abuse probation program; eligibility

* * *

B. The provisions of this Article shall not apply to any defendant who has been convicted of a crime of violence as defined in R.S. 14:2(B), except for a first conviction of an offense with a maximum prison sentence of ten years or less that

was not committed against a family member or household member as defined by R.S. 14:35.3, or against a dating partner as defined by R.S. 46:2151, or a sex offense as defined in R.S. 15:541, or any defendant who has participated in or declined to participate in a drug division probation program as provided for in R.S. 13:5301 et seq.

Article 903.1. Substance abuse probation program; eligibility

* * *

B. The provisions of this Article shall not apply to any defendant who has been convicted of a crime of violence as defined in R.S. 14:2(B), except for a first conviction of an offense with a maximum prison sentence of ten years or less that was not committed against a family member or household member as defined by R.S. 14:35.3, or against a dating partner as defined by R.S. 46:2151, or a sex offense as defined in R.S. 15:541, or any defendant who has participated in or declined to participate in a drug division probation program as provided for in R.S. 13:5301 et seq.