

## POLITICS &amp; POLICY

# The Policy and Politics of Drug Sentencing

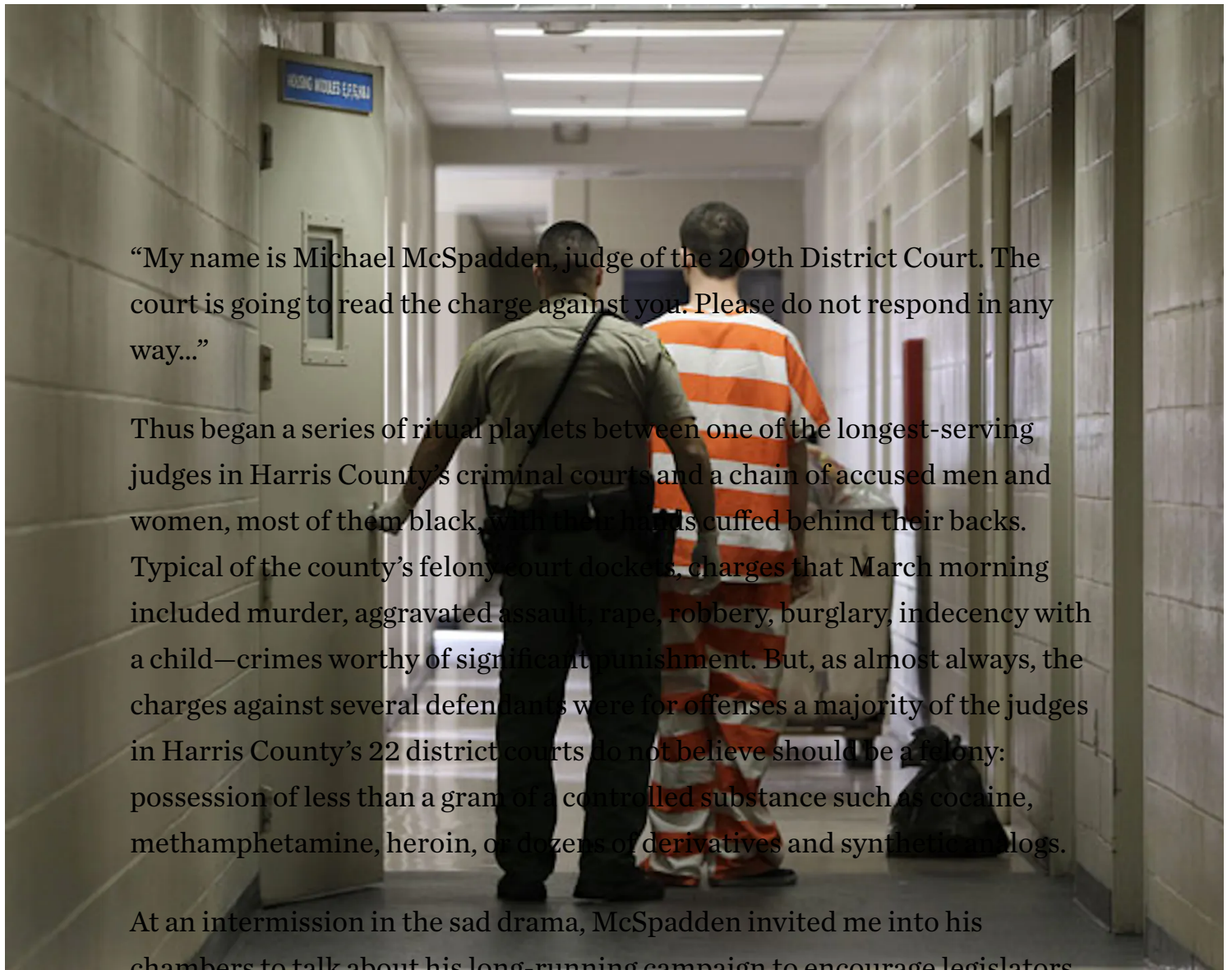
A Republican judge from Harris County, with the support of the conservative TPPF and the left-leaning TCJC, is working with Democratic lawmakers to reduce the sentences for defendants arrested with trace amounts of illegal drugs. But it takes more than bipartisanship to change people's views on the state's drug laws.



By William Martin

May 5, 2013





“My name is Michael McSpadden, judge of the 209th District Court. The court is going to read the charge against you. Please do not respond in any way...”

Thus began a series of ritual playlets between one of the longest-serving judges in Harris County’s criminal courts and a chain of accused men and women, most of them black, with their hands cuffed behind their backs. Typical of the county’s felony court dockets, charges that March morning included murder, aggravated assault, rape, robbery, burglary, indecency with a child—crimes worthy of significant punishment. But, as almost always, the charges against several defendants were for offenses a majority of the judges in Harris County’s 22 district courts do not believe should be a felony: possession of less than a gram of a controlled substance such as cocaine, methamphetamine, heroin, or dozens of derivatives and synthetic analogs.

At an intermission in the sad drama, McSpadden invited me into his chambers to talk about his long-running campaign to encourage legislators

to alter Texas law regarding small quantities of illicit drugs. A conservative Republican, McSpadden softly but earnestly explained his long disquiet over the current drug laws. “These people should not be branded as felons for a small amount of cocaine,” he said. “We need a recalibration. I had thought that all along, but then we started hearing it from jurors, especially from the grand juries, who see these cases coming before them every single day—a guy walking on the wrong side of the road, getting stopped, then frisked, then getting pulled in and getting a felony for having residue on a pipe. The jury comes back and says, ‘Don’t they have other crimes to deal with? We watch crime—violent crime—the first ten minutes of every single news report, and we concentrate on this?’”

McSpadden and his allies believe the crime should be dropped down to a misdemeanor, in part because it allows law enforcement to pursue higher-level criminals. “In a recent case we tried,” he said, “they had eleven officers on surveillance for a delivery of less than one gram of cocaine—a \$20 rock of crack. What a waste. But it’s a collar, and they can use it as a felony arrest to go to their higher-ups.”

In January, at the start of the current legislative session, McSpadden sent a letter to state senator John Whitmire, the Houston Democrat who is the longtime chair of the Senate Criminal Justice committee, and to other key legislators, detailing the enormous expense of jail and prison overcrowding and the “revolving door” of dealing with drug addicts. McSpadden called for dropping the penalties for delivery or possession of small amounts of drugs from a felony to a Class A misdemeanor, with reduced time in a lockup, the possibility of probation (now called “community supervision”), and mandatory participation in a drug treatment program. A bolder option he mentioned would reduce the offense to a Class C misdemeanor, with the only punishment being a fine of up to \$500. Such changes, he wrote, “would result in enormous savings to taxpayers by freeing up substantial numbers of jail beds and court resources that could be used to address more serious crimes.” These changes “would be fair, just, and have an immediate positive effect on our overtaxed criminal justice system.”

The idea to revise the penalties for such crimes has been around, but it has been toxic to some officeholders who have embraced it. In January 2010, mid-way through her term, then-Harris County district attorney Pat Lykos announced that her office would no longer prosecute so-called trace cases, as they are called. To help explain her reasoning, at an appearance at Rice University’s Baker Institute, she held up a package of Splenda, which weighs approximately one gram. She and her predecessors had been prosecuting people for less than 1/100th of that amount. “Sometimes they had a little flake extruding from their nose, a little flake [on a shirt collar] or on a crack pipe. We had thousands of cases clogging up our dockets, and that meant thousands of people overcrowding the jail.”

Beyond that, she argued that the policy helped police make better use of their time “When someone is arrested for a trace case, that officer is out of service for two to three hours,” she said. “That neighborhood is unprotected for two to three hours. Officers are getting time-and-a-half to fight the drug war, and this is their drug-war arrest, time-and-a-half to go to court. So the union bosses are not happy with me.”

After Lykos’s change in policy, McSpadden and his fellow judges noticed the effects: trace cases dropped from nearly 30 percent to approximately 10 percent of the dockets. But the police were less enthusiastic. When Lykos filed for re-election in November 2011, the Houston Police Officers’ Union held a press conference to express their disapproval of the DA’s policy and kept up a steady drumbeat against her. Not only was she flouting the law, they charged she was putting the public at risk by letting crack addicts run free to commit other crimes.

Lykos insisted she had no quarrel with police department leadership. “We met with the command staff for the Houston Police Department, the Sheriff’s office, the Harris County Criminal Justice Council, and laid it all out. There were no objections.” HPD Executive Assistant Chief and panel member Michael Dirden confirmed Lykos’s account: “I want to make it clear that the disconnect is not between the District Attorney and the police department. It is the union that is pushing the issue of accepting charges on every case. Those of us in the administration work very closely with the district attorney’s office on a daily basis. We are in one accord on that particular issue, in terms of how it relates to our usage of police resources and also in our understanding of the concepts of fundamental fairness.”

Still, in the Republican primary two months later, Lykos was defeated by former prosecutor and judge Mike Anderson, who got 63 percent of the vote and went on to win the post in November. He received and prominently touted a rousing endorsement by the Houston Police Officers Union and vowed that his office would reinstitute the policy of prosecuting trace cases. He has kept that promise, and trace cases are once again filling the Harris County District Courts. Judge McSpadden noted that on a recent Monday

his docket had fifteen cases for less than a gram, nearly a third of the cases for that day. Chuck Hinton, who has defended indigent clients in McSpadden's court for twenty years, said, "It is so time-consuming, comparatively speaking, to deal with these minor felonies. You still have to read the police report, you have to talk to your client, tell them what the state can offer. Relative to the more serious stuff, it just eats up a lot of time that we don't really have."

McSpadden is reluctant to criticize Anderson. "Mike and I are really good friends," he said. "I have more respect for him than just about anybody down here, but he is taking the line that 'It's on the books and we will follow the law.' I respect that, but I wish he would show some discretion. But what has to be done is to change the law so that nobody has to worry about discretion or stepping over the boundary. We're trying to change it in the Legislature, to take the heat off Mike."

Despite years of seeing his calls for change go unheeded, McSpadden has not been disheartened. He noted that response to his biennial letter had never been better, perhaps reflecting growing public opinion that the War on Drugs, with its emphasis on incarceration, has been a failure. "This is the first time we have had immediate response from more than just one person expressing interest. This time we heard from [representatives] Harold Dutton, Senfronia Thompson, Sylvester Turner, Hubert Vo, and Sarah Davis, as well as [senators] John Whitmire, Rodney Ellis, and two or three more. Senator Ellis's aide has asked me and several other judges to come to Austin to testify."

In the past, legislators have found it difficult to act on these issues, or even to work up the will to try, but in the current session, encouraging signs have begun to come from the Capitol. The Legislative Budget Board called on the 83rd Legislature to establish a sentencing commission to conduct a comprehensive and ongoing review of Texas sentencing laws, "to align penalties with offenses" and "modernize laws." It noted that increased length of sentences over twenty years had cost Texas taxpayers an extra \$602 million just for prisoners released in 2009. Longer sentences, longer

probation terms, more prison admissions, and low parole approval rates had boosted the Texas corrections budget from four percent of General Revenue Funds in the late eighties to eight percent in 2012; other states had been able to achieve significant savings “through policies that change sentencing patterns, re-categorize certain low-level offenses and limit prison admissions to only dangerous and violent offenders....” The LBB specifically recommended that “Texas consider reforming drug sentencing laws to continue to emphasize prison diversion treatment programs for certain low-level possession offenders.” It also commended a general shift from “Tough on Crime” policies to “Smart on Crime” approaches.

Reform gained further momentum in mid-January when the heavyweight Texas Association of Business, which lobbies the Legislature on behalf of some of the state’s largest companies, told the *Austin American-Statesman* that it intended to focus its efforts during the 2013 session on issues of criminal justice. TAB president Bill Hammond said the organization was particularly interested in expanding rehabilitation and community-based corrections programs, putting low-level offenders in local treatment programs rather than sending them to prison (“We’re sending too many people to the slammer”), reducing penalties for possession of small amounts of drugs, and lowering barriers to meaningful employment for people released from jail or prison.

With orders from the LBB and political cover from TAB, the infantry in the trenches is a coalition force led by the right-leaning Texas Public Policy Foundation (**TPPF**) and its left-leaning counterpart, the Texas Criminal Justice Coalition (**TCJC**). During the current session, they are comrades in arms rather than competing forces.

TPPF’s Center for Effective Justice is led by Marc Levin, whose articles, speeches, reports, and PowerPoint Presentations on the **TPPF website** stress the superiority of probation over incarceration, as measured by economy, efficacy, and public safety. He is a strong advocate for rigorous treatment that keeps offenders in the community rather than in prison, including drug courts that comprise some combination of treatment,

counseling, employment, and education, and whose graduates have a markedly lower recidivism rate than offenders who receive no treatment and have a better chance to reintegrate into society as productive citizens.

TCJC, headed by Dr. Ana Yáñez-Correa, largely agrees with TPPF on these issues, but places greater emphasis on the growing recognition by medical and public health authorities that drug addiction is a diagnosable chronic brain disease that physically alters the chemistry of the brain and “leads to compulsive cravings and limits the ability of an individual to make voluntary decisions.” Given that understanding, TCJC stresses that, absent other forms of criminal behavior, **drug addicts should be treated as people with an illness** rather than as criminals, and be afforded increased and improved treatment resources.

A January **TCJC report** contained the eye-catching information that “About 90 percent of all drug-related arrests in Texas are for possession of a controlled substance, not delivery or distribution” and that such individuals who entered Texas lockups in FY 2011 cost Texas taxpayers \$725,000 every day of the year.

As a result, Houston Rep. Sylvester Turner filed **HB 2044**, which would lower possession of less than a gram of any of the major controlled substances from a felony to a Class A misdemeanor, with a requirement that a judge sentence first-time offenders to community supervision and mandatory drug treatment in an approved program. The fiscal note on the bill estimates that diverting first offenders from prison or state jail would save taxpayers \$321 million over five years.

In a **hearing** before the House Criminal Jurisprudence committee Levin commended HB 2044’s emphasis on treatment. In dealing with people who have not committed a violent or property crime, he explained, “Incapacitation is not really the goal. We should focus instead on curing their addiction.” He added that many low-level drug offenders are not truly chemically dependent—just letting them know they will be subject to random drug tests will be enough to keep many of them clean. Rebecca Bernhardt of the Texas Defender Service concurred, citing **a massive annual**

**government survey of drug use and abuse** that shows that “the vast majority of people who have tried cocaine or other drugs in their lifetime do not become addicts. They do not develop a substance abuse problem. We’d like to see a more nuanced perception [that would] help people stop partying and get it together.”

Still, HB 2044 has not received a vote and will likely remain in “left pending in committee” limbo, but the committee did send two significant drug bills on to the Calendars Committee, which will decide whether they will go to the House floor for open debate. Rep. Harold Dutton’s **HB 184** would reduce penalties for use of marijuana and synthetic cannabinoids (perhaps a portent, the hearing began at almost exactly 4:20, the traditional time for an afternoon toke), and Rep. Senfronia Thompson’s **HB 2914** would set 0.02 grams as the minimum amount of a controlled substance necessary to cause an arrest; though the amount involved is still tiny, the bill would prevent most trace-case prosecutions.

Compared to measures enacted by other states, most notably Colorado and Washington in 2012, the aim of HB 184 is quite modest—changing possession of less than an ounce of marijuana or a synthetic cannabinoid from a Class B to a Class C misdemeanor. This would remove the threat of incarceration but still require offenders to take a drug abuse and awareness class.

For more than two hours, a stream of supporters pieced together a compelling mosaic of arguments for ending the prohibition of marijuana. Bryan-College Station Judge John Delaney reported that probation officers in Brazos County had told him that passage of the bill, with its removal of incarceration and therefore of probation, would devastate their offices. Why? Because almost half of the county’s misdemeanor probationers have been convicted of possession of less than two ounces of marijuana. “We live off our under-two-ounce misdemeanor guys. They pay the rent.”

Although HB 184 does not address the use of marijuana for medical purposes, Vincent Lopez told of how pain and other symptoms of his multiple sclerosis had been eased by marijuana, whose use his doctor approved. Army retiree David Bass told of thousands of veterans disabled by

injuries and PTSD who face incarceration and thousands of dollars in fines and legal costs because they have turned to marijuana as a safe and effective alternative to the dangerous, debilitating, and highly addictive pharmaceutical pain medications provided by the VA. Joe Ptak added that both Israel and Canada provide or help veterans obtain marijuana to deal with military-related illnesses. Dr. Neeraj Shah, a physician at Austin's Seton Hospital, gave a long, sometimes disjointed but powerful account of his evolution from adamant opposition to marijuana to extensive scientific research that convinced him that marijuana is exceptionally safe, with no known lethal dose and far fewer risks than many widely prescribed pain relievers and sleeping pills, which now cause more deaths than car accidents.

Significantly, no one testified against the bill. Representative Matt Schaefer (R-Tyler) acknowledged he was struggling with the bill, but conceded he wanted “to keep kids from spending any time in jail for something like this—to mix with the criminal elements, where they will go in with an associate's degree and come out with a Ph.D. in crime.” Woodlands Representative Steve Toth, a member of the tea party, raised a crucial point: “The question is what kind of support would we have back home to get this done. That's what it's going to come down to. So I'm thankful we're having this discussion. And I really appreciate Representative Dutton's bringing this bill to us so we can struggle with this.” These were not empty words. Schaefer and Toth were part of the 6-3 majority that sent HB 184 to the Calendars Committee.

As for Thompson's **HB 2914**, it is a true trace-case bill, setting the minimum qualifying for a state jail felony charge as “a usable quantity that is larger than 0.02 of a gram.” She provided copies of Judge McSpadden's letter to the committee, noting that “He is not soft on crime, but he has seen that there is a necessity for us to be able to take this kind of action.” In laying out her bills, Thompson noted that 16,262 individuals had been sentenced to state jail for drug convictions in 2011-2012 and that 88 percent of those had been convicted for possession of less than a gram without attempt to deal or distribute. A striking 31 percent of the state's total state jail population, and 42 percent of the nearly 44,000 individuals newly admitted to state jail or prison in 2011-12 were incarcerated for less than a gram.

TCJC policy analyst Caitlin Dunklee explained in oral and written testimony that drug offenders tend to have more expensive needs than offenders in other classifications. Individuals locked up for possession of less than a gram at the end of August 2012 and filling beds in the medical or psychiatric units or in the intellectually disabled program had already cost the state more than \$6 million over the span of their incarceration. In sharp contrast, community supervision costs the state only \$1.38 per person per day and gets better results.

Speaking in support of the trace-case bill, Levin said prosecutors in several counties agreed it is difficult to be sure that an amount smaller than 2/100ths is actually an illicit drug. He quoted Judge McSpadden as saying, “I don’t want somebody saddled with a felony conviction for what is truly a residue amount. That changes their life forever, getting a job, going to school, and so forth.” He also quoted DA Mike Anderson as having said, “Look, I feel I have an obligation to prosecute cases to the fullest extent of the law as it stands, but I’m not against the legislature’s changing the law.” Levin called that an understandable position, but noted that Harris County had experienced a 26 percent drop in violent crime and a 7 percent drop in property crime during the two years when Lykos’s policy was in place, so the contention that if we didn’t put those people in trace residue cases in jail for a long time they would be out committing crimes is dubious. During those two years, Levin said, the Harris County daily jail population was reduced by 400 inmates, at a savings of more than \$10 million.

HB 2914 made it through the committee on a 5-3-1 vote. Rep. Thompson’s Legislative Director Brete Anderson thought the House might approve it, but was uncertain about its prospects in the Senate, where Houston Senator Rodney Ellis has filed a similar bill (SB 1291) that would likely be merged with it. Ellis has also filed SB 90, which would enable judges to place appropriate low-level felony drug offenders in a drug treatment program under community supervision, quite close to what Judge McSpadden favors. TCJC’s Yáñez-Correa characterized SB 90 as “one of the smartest bills that gets to the core of the problems in a therapeutic way.” An essentially identical bill (SB 1909), crafted with the counsel of legendary Dallas Drug

Court Judge John Creuzot passed the Senate in 2007 but stalled in the House before the legislative session ended. When the Senate Criminal Justice Committee brought it up again in 2009, as **SB 1118**, former Williamson County District Attorney John Bradley testified against it, calling it the Drug Dealer Protection Act, essentially asserting that anyone possessing more than a gram of a controlled substance is likely to be a drug dealer.

In **that hearing**, Judge Creuzot cited extensive behavioral and economic research and said, “All the research shows that this approach reduces recidivism, reduces victimization, and costs less. That’s not a liberal position. It’s not a conservative position. It’s good public policy position.” Now retired from the bench, Creuzot retains his contempt for opposition to this bill. In a recent telephone conversation he said, “There is no factual basis for shooting it down. There is no principled, logical reason I know of to oppose that bill. It’s just obstruction for the sake of it.”

Public knowledge of John Bradley’s six-year effort to block the DNA testing that ultimately proved Michael Morton did not murder his wife has damaged Bradley’s reputation for probity and good judgment, but he is reported to have been working behind the scenes to keep SB 90 from getting a hearing—successful so far—and still calling it a Drug Dealer Protection Act. Dr. Yáñez-Correa called that “completely, 100 percent false. That is not at all applicable. But it has really resonated with Republicans, and that’s really sad. It’s a beautiful piece of legislation.” Even if the House bills succeed and SB 90 gets a hearing, Senate approval faces a formidable hurdle in Criminal Justice Committee Vice Chair Joan Huffman (R-Houston), a former Harris County prosecutor and District Judge who tends to take a hard line on drug use.

Regardless of what happens in this session, drug policy reform is under way in Texas. An emerging bipartisan coalition is turning from reflexive “throw ’em in the can and sit on the lid” responses to drug use and abuse to approaches grounded in solid evidence, tested in other locales, and combining fiscal responsibility with clearheaded compassion more concerned to restore troubled souls to full participation in a healthy society

than to toss them out as toxic waste to further poison the social environment. Judge Michael McSpadden is by no means the only leader in this movement, but his dogged determination to hound political leaders until they pay attention has had a marked and growing impact, and he has no plans to slack off. Aware that the current legislative session is winding down and deadlines for bills fast approaching, he hopes lawmakers will move forward on legislation that has previously died a quiet death in committee. He summed up the strength of his commitment by saying, “Because it would be doing the right thing for the justice system and the defendants coming before me, I would regard putting these offenses in the proper category as my finest accomplishment in more than thirty years on the bench.”

**Letter from Judge Michael McSpadden of the 209th District Court to State Senator John Whitmire.**

[SCRIBD]



PRESIDING JUDGE  
209TH  
DISTRICT COURT

**MICHAEL T. McSPADDEN**



1201 FRANKLIN  
HOUSTON, TEXAS 77002  
(713) 755-6378  
FAX (713) 755-5733

January 3, 2013

The Honorable John Whitmire  
Texas Senate  
P.O. Box 12068  
Austin, Texas 78711-2068

Re: Reclassification of minor state jail drug offenses

Dear Senator Whitmire:

In Texas, we have traditionally had a “no tolerance” attitude toward drug-related crimes. Common wisdom held that our tough penalties for delivery / possession of drugs would serve as a deterrent to wrongdoers. It has not. Over time, the public has realized that draconian punishment of minor drug offenses as state jail felonies is not working, and as judges, we hear countless complaints from trial juries and grand juries who do not believe these cases should be tried as felonies.

Judges Barr, Campbell, Carter, Collins, Guerrero, Jackson, Mendoza, Reagin, Roll, Velasquez, Wallace, and I suggest that the 83rd Texas Legislature take a new approach in addressing this growing problem by reducing the penalty for the state jail offense of delivery/possession of a controlled substance for amounts less than one gram. This change in our penal laws would be fair, just, and have an immediate positive effect on our overtaxed criminal justice system.

[Download this PDF](#)

1 / 4



*William Martin, a longtime contributing editor for Texas Monthly, is the Director of the Drug Policy Program at Rice University's Baker Institute.*