



# CRIMINAL JUSTICE COMMITTEE REPORT & RECOMMENDATIONS

October 2016



## Texas Judicial Council

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## Pretrial Decision-Making Practices

*"In our society liberty is the norm, and detention prior to trial...is the carefully limited exception."*

U.S. v. Salerno, 481 U.S. 739, 755 (1987)

In June 2015, the Texas Judicial Council established the Criminal Justice Committee to assess the impact of pretrial criminal justice statutes and policies in Texas to determine if there are ways in which Texas courts can enhance public safety and social outcomes when making pretrial confinement decisions, and identify judicial policies or initiatives that could be enacted to further those goals. The members of the committee are:

Regional Presiding Judge Kelly Moore, Chair	District Court Judge Scott Jenkins
Presiding Judge Sharon Keller	Justice Court Judge Bill Gravell, Jr.
Senator Brandon Creighton	Mr. Carlos Amaral
Representative Andrew Murr	

The committee appointed an advisory committee to assist in its efforts. The members of the advisory committee are:

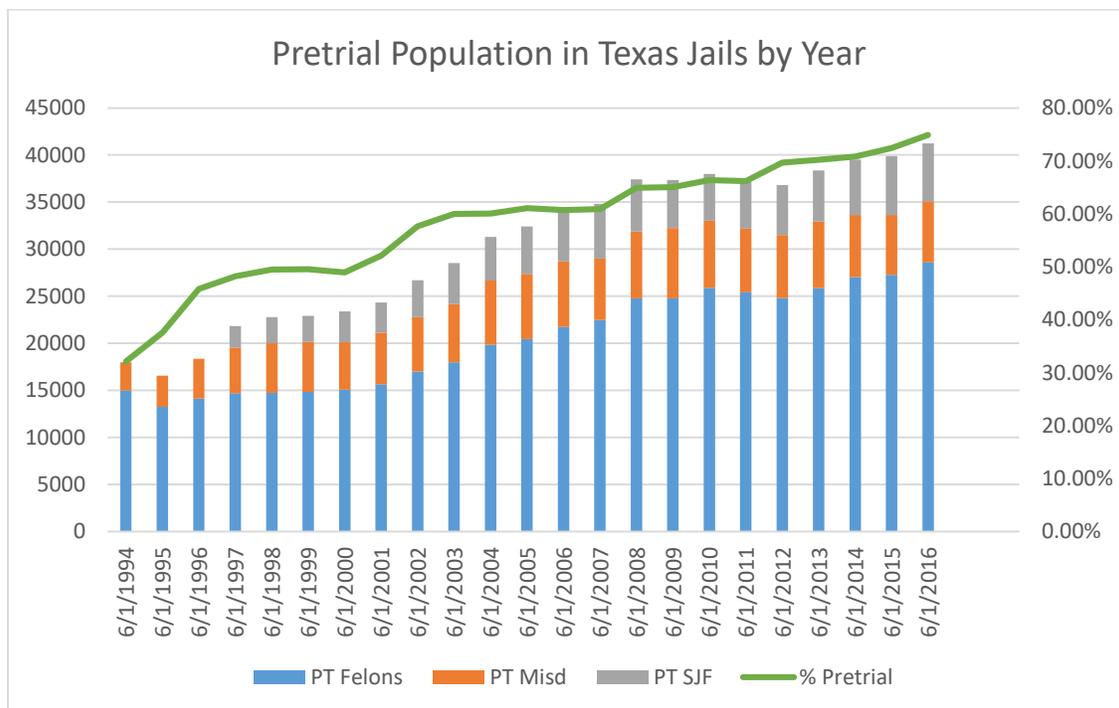
Don Allred, County Judge, Oldham County	Community Supervision & Corrections Department
Sam Bassett, President, Texas Criminal Defense Lawyers Association	Mary Mergler, Director, Criminal Justice Project, Texas Appleseed
Rebecca Bernhardt, Executive Director, Texas Fair Defense Project	Alfredo Padilla, Magistrate, Cameron County
Danette Castle, Chief Executive Officer, Texas Council Community Centers	Dean Stanzione, Court Administrator, Lubbock
Tony Fabelo, Director, Research, Justice Center, Council of State Governments and Senior Fellow, The Meadows Mental Health Policy Institute of Texas	Sandy Guerra Thompson, Alumnae College Professor of Law and Director, Criminal Justice Institute - University of Houston Law School
Irma Guerrero, Division Director, Travis County Pretrial Services	Bronson Tucker, Program Attorney, Texas Justice Court Training Center
Brian Hawthorne, Sheriff, Chambers County	Ryan Turner, General Counsel & Director of Education, Texas Municipal Courts Education Center
Jay Jenkins, Harris County Project Attorney, Texas Criminal Justice Coalition	Tim Vasquez, President, Texas Police Chiefs Association and Chief of Police, San Angelo
Marc Levin, Director, Center for Effective Justice & Right on Crime, Texas Public Policy Foundation	Carey Welebob, Director, Community Justice Assistance Division, Texas Dept. of Criminal Justice
Mike Lozito, Director Judicial Services, Bexar County Pretrial Services	Sharen Wilson, District Attorney, Tarrant County
Teresa May, Director, Harris County	

## Background

The founders of Texas, in its Declaration of Independence from Mexico, complained that the government “incarcerated in a dungeon, for a long time, one of our citizens.” Shortly thereafter, the citizens of Texas adopted a bill of rights that included provisions to ensure that individuals arrested would be bailable without excessive bail. These provisions have remained in the Texas Constitution for the last 180 years. Our founders also believed that individuals accused of a crime are innocent until proven guilty.

In his concurrence in *Stack v. Boyle*,<sup>1</sup> United State Supreme Court Justice Robert H. Jackson wrote that bail “is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty.” Chief Justice William Rehnquist furthered this line when he stated that “in our society liberty is the norm, and detention prior to trial...is the carefully limited exception.”<sup>2</sup>

Despite these bedrock principles, many defendants are detained in jail before and during trial – while they are presumed innocent – because they cannot post bail. In the past 25 years, the pretrial population in Texas jails has risen from just over 32 percent of the population to almost 75 percent of the population, excluding federal contract inmates and state parole violator inmates.



Source: Texas Commission on Jail Standards; Excludes federal contract and state parole violator inmates.

<sup>1</sup> 342 U.S. 1, 7-8 (1952)

<sup>2</sup> *United States v. Salerno*, 481 U.S. 739, 755 (1987)

With almost twenty percent of felony cases pending over one year before disposition and almost 56 percent of misdemeanors pending over six months, individuals held in jail while awaiting trial often stay in jail for considerable amounts of time. The ramifications are significant.

### ***Local Government Fiscal Ramifications***

According to the Texas Commission on Jail Standards, the average cost per day to house an inmate in a Texas county jail is \$60.12.<sup>3</sup> With a population of 41,243 individuals being held in Texas jails as of June 1, 2016, the cost per day to local governments is \$2,479,529. Assuming that the pretrial population in local jails remains steady throughout the year, the annual cost to local governments to house pretrial inmates is \$905,028,085.

### ***Ramifications for Outcomes in Criminal Cases***

Recent research in other jurisdictions has shown a causal relationship between pretrial detention and case outcomes. A 2016 study from Philadelphia found that pretrial detention leads to a 13% increase in the likelihood of being convicted due to an increase in the number of guilty pleas among defendants who would have otherwise been acquitted or had their charges dismissed.<sup>4,5</sup> That same study found that on average, pretrial detainees would be liable for \$128 more in court costs and will receive incarceration sentences that are almost five months longer. These differences were noted for both felonies and misdemeanors regardless of age or race, but the effects were particularly large for first or second time arrestees.

### ***Ramifications for Future Recidivism***

Studies have long pointed to the need to right-size supervision practices when supervising low-risk offenders, as over-supervision may have unfavorable impacts on the recidivism of those offenders.<sup>6</sup> Texas has recognized these findings and adjusted probation and parole tactics to appropriately supervise offenders so as not to increase their likelihood of recidivism. Recent research has pointed to a correlation between lengthy pretrial detention and increased likelihood of recidivism.<sup>7</sup> The findings indicate that “detaining low- and moderate-risk defendants, even just for a few days, is strongly correlated with higher rates of new criminal activity both during the pretrial period and years after case disposition.” Specifically, the study

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<sup>3</sup> Average cost per day for Texas jails – August 2015-July 2016. Information provided by the Texas Commission on Jail Standards on August 17, 2016.

<sup>4</sup> Stevenson, Megan. *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*. (May 2, 2016). Available at SSRN: <http://ssrn.com/abstract=2777615>.

<sup>5</sup> Data from the Timothy Cole Exoneration Review Commission’s review of Texas exonerations since 2010 revealed that the leading cause of exonerations during that period were from guilty pleas where the defendant was later exonerated. See <http://www.txcourts.gov/media/1204064/Texas-Exonerations-Since-2010-Recording-Custodial-Interrogations-Practices-Nationally.pdf> (Factors Contributing to Wrongful Conviction).

<sup>6</sup> Lowenkamp, C.T., Latessa, E.J., & Holsinger, A.M. *The Risk Principle in Action: What Have We Learned From 13,676 offenders and 97 Correctional Programs?* *Crime and Delinquency*, 52(1), 77-93. (2006)

<sup>7</sup> Lowenkamp, C.T., Van Nostrand, M., & Holsinger, A. *The Hidden Costs of Pretrial Detention*. (2013)

found that “when held 2-3 days, low-risk defendants are almost 40% more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours.” The likelihood of recidivism increases to “51% more likely to commit another crime within two years after completion of their cases than equivalent defendants held no more than 24 hours” for those held between 8-14 days.

### ***Ramifications for Racial Disparities***

Over 25 research studies have consistently shown that African American defendants are more adversely impacted by pretrial detention decisions than are white defendants. Specifically, the studies have concluded that African Americans are subjected to “higher bail amounts than are white arrestees with similar charges and similar criminal histories.”<sup>8</sup> A study of bail practices in Dallas County found that there was “substantial evidence of bias against blacks in bail setting.”<sup>9</sup> Similar studies have found disparities in the pretrial detention decisions with Hispanic defendants, with Hispanic defendants being “most likely to have to pay bail, the group with the highest bail amounts, and the group least able to pay bail.”<sup>10</sup>

### ***Ramifications on the Economic Stability of the Defendant and Family***

While there is ample research on the impacts of post-trial detention on the defendant and the family, there has been little research done to determine if those impacts are similar on pretrial detention. A recent study explored this issue and has begun to show the impacts of pretrial detention.<sup>11</sup> The study showed that defendants who spent three or more days in jail were:

- significantly more likely to lose employment (5% drop in employment for those in jail less than three days versus 14% decline for those in jail three or more days);
- more likely to report serious financial difficulty than those who spent less than three days in jail;
- more likely to experience issues with residential stability;
- less likely to be able to support dependent children.

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<sup>8</sup> Jones, Cynthia. “Give Us Free”: Addressing Racial Disparities in Bail Determinations. (2014). Available at <http://www.nyujlpp.org/wp-content/uploads/2014/01/Jones-Give-Us-Free-16nyujlpp919.pdf>.

<sup>9</sup> Bushway, S. & Gelbach, J. *Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimation of a Parametric Model*. (2011).

<sup>10</sup> Levin, D. *Pretrial Release of Latino Defendants Final Report* (2008).

<sup>11</sup> Holsinger, A. *Analyzing Bond Supervision Survey Data: The Effects of Pretrial Detention on Self-Reported Outcomes*. (2016). Crime and Justice Institute.

## Definitions

As described in this report, “**bail**” is the security given by the accused that the accused will appear and answer before the proper court the accusation brought against him/her, and includes a bail bond or a personal bond.<sup>12</sup> The security may be given by the person charged with a crime, or by another person on his or her behalf, in exchange for release from custody while awaiting trial. Bail was designed for the purpose of securing the appearance of the defendant in court at his trial.<sup>13</sup>

A “**bail bond**” is a written undertaking entered into by the defendant and the defendant’s sureties for the appearance of the defendant before a court or magistrate to answer the criminal accusation, commonly known as a surety bond. The defendant may also deposit money in the amount of the bond in lieu of having sureties, known as a cash bond. When a defendant utilizes a cash bond to secure his/her release and complies with the conditions of the defendant’s bond, the funds are refunded to the person who paid the funds or the defendant, if no other person is able to produce a receipt for the funds.<sup>14</sup>

A magistrate may release the defendant on a “**personal bond**” or on personal recognizance without sureties or other security. The judge may choose to or be required to set certain conditions for release.<sup>15</sup>

The amount of the bail is required to be set by the court, judge, magistrate or officer taking the bail pursuant to the exercise of discretion and the following rules:<sup>16</sup>

1. The bail is to be sufficiently high to give reasonable assurance that the undertaking will be complied with;
2. The power to require bail is not to be so used to make it an instrument of oppression;
3. The nature of the offense and the circumstances under which it was committed are to be considered;
4. The ability to make bail is to be regarded, and proof may be taken upon this point; and
5. The future safety of a victim of the alleged offense and the community shall be considered.

Four Texas appellate courts have also held that, in addition to the statutory factors for setting bail, the court should also weigh the following factors in determining the amount of the bail:

1. The possible punishment for the offense;
2. The accused’s work record;
3. The accused’s family ties;

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<sup>12</sup> Tex. Crim. Proc. Code Ann. § art. 17.01

<sup>13</sup> Ex Parte Vance (Cr.App. 1980) 608 S.W.2d 681

<sup>14</sup> Tex. Crim. Proc. Code Ann. § art. 17.02

<sup>15</sup> Tex. Crim. Proc. Code Ann. § art. 17.03

<sup>16</sup> Tex. Crim. Proc. Code Ann. § art. 17.15

4. The accused's length of residency;
5. The accused's prior criminal record, if any;
6. The accused's conformity with the conditions of any previous bond;
7. The existence of outstanding bonds, if any; and
8. Aggravating circumstances alleged to have been involved in the charged offense.<sup>17</sup>

A magistrate is required to release a defendant charged with a non-violent offense on personal bond unless good cause is shown otherwise if the defendant is examined and is found to have a mental illness or is a person with mental retardation and is nonetheless competent to stand trial and the expert recommends mental health treatment for the defendant.<sup>18</sup> A magistrate must also find that there is appropriate community-based mental health or mental retardation services for the defendant available. Release under this provision must require as a condition of release that the defendant submit to outpatient or inpatient treatment as recommended. The Judicial Council's Mental Health Committee has found significant issues with the implementation of these provisions and is recommending modification contemporaneously with these recommendations.

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<sup>17</sup> Ex Parte Scott (App. 2 Dist. 2003) 122 S.W.3d 866; Ex Parte Ragston (App. 14 Dist. 2014) 422 S.W.3d 904; Ex Parte Castellanos (App. 14 Dist. 2014) 420 S.W.3d 878; Brown v. State (App. 14 Dist. 2000) 11 S.W.3d 501; Jobe v. State (App. 11 Dis. 2016) 482 S.W.3d 300; Cooley v. State (App. 1 Dist. 2007) 232 S.W.3d 228; Ex Parte Hunt (App. 2 Dist. 2004) 138 S.W.3d 503; Ex Parte Ruiz (App. 1 Dist. 2004) 129 S.W.3d 751; In re Hulin (App. 1. Dist. 2000) 31 S.W.3d 754; Nguyen v. State (App. 1 Dist 1994) 881 S.W.2d 141; Ex Parte Goosby (App. 1 Dist. 1985) 685 S.W.2d 440; and Ex Parte Rubac (Crim.App. 1981)

<sup>18</sup> Tex. Crim. Proc. Code Ann. § art. 17.032

## Findings

Texas' current system of pretrial bail decision-making by magistrates:

1. Is primarily void of evidence-based pretrial risk assessment with which to determine the defendant's flight risk or risk to public safety.
2. Addresses ensuring that the defendant will appear and answer the accusation brought against him/her most often through a monetary condition of release.
3. Prohibits managing the risks of pretrial misconduct through the denial of bail. For all defendants charged with a crime, with certain few exceptions, the Texas Constitution requires a bail to be set or the defendant released.
4. Is primarily dependent upon a defendant's ability to post money bail, which, in turn, is dependent upon his/her financial resources.
5. Results in detention of poor defendants who present low risks of flight or danger to the community.
6. Results in release of more affluent defendants who present severe risks of flight or danger to the community.
7. Attempts to mitigate risk of flight or danger to the community through nonmonetary conditions of release, such as interlock devices on vehicles and "no contact" conditions, or through the setting of a high amount of monetary bail.
8. Is dependent upon the defendant's compliance with nonmonetary conditions to protect the public.
9. Is ineffective in ensuring the defendant's compliance with nonmonetary conditions due to a lack of supervision in place to monitor the defendant's compliance with nonmonetary conditions.

## Recommendations

**Recommendation 1:** The Legislature should require defendants arrested for jailable misdemeanors and felonies to be assessed using a validated pretrial risk assessment prior to appearance before a magistrate under Article 15.17, Code of Criminal Procedure.

**Recommendation 2:** The Legislature should amend the Texas Constitution bail provision and related bail statutes to provide for a presumption of pretrial release through personal bond, leaving discretion with judges to utilize all existing forms of bail.

**Recommendation 3:** The Legislature should amend the Texas Constitution and enact related statutes to provide that defendants posing a high flight risk and/or high risk to community safety may be held in jail without bail pending trial after certain findings are made by a magistrate and a detention hearing is held.

**Recommendation 4:** The Legislature should provide funding to ensure that pretrial supervision is available to defendants released on a pretrial release bond so that those defendants are adequately supervised.

**Recommendation 5:** The Legislature should provide funding to ensure that magistrates making pretrial release decisions are adequately trained on evidence-based pretrial decision-making and appropriate supervision levels.

**Recommendation 6:** The Legislature should ensure that data on pretrial release decisions is collected and maintained for further review.

**Recommendation 7:** The Legislature should expressly authorize the Court of Criminal Appeals to adopt any necessary rules to implement the provisions enacted by the Legislature pursuant to these recommendations.

**Recommendation 8:** The Legislature should provide for a sufficient transition period to implement the provisions of these recommendations.

## Detailed Recommendations

**Recommendation 1:** The Legislature should require defendants arrested for jailable misdemeanors and felonies to be assessed using a validated pretrial risk assessment prior to appearance before a magistrate under Article 15.17, Code of Criminal Procedure.

As previously described in this report, most judges or magistrates in Texas make pretrial bail decision without adequate information to determine the defendant's risk of flight or risk to the public safety. The lack of information results in decisions by magistrates that may result in the release of individuals who pose a great deal of risk to the community. At the same time, a significant number of individuals who may not have the financial resources to make a monetary bond but who pose low risk of flight or risk to public safety may remain in jail pending trial. The pretrial detention of low- to moderate-risk defendants is costly to local governments and may result in more negative outcomes for defendants and for future public safety.

The advent of validated pretrial risk assessments that provide information to magistrates predictive of risk of flight and to public safety have great potential to ensure that individuals who pose high risk to public safety are held in jail and those posing low- to moderate-risk defendants are not held pretrial. Several Texas jurisdictions have implemented pretrial risk assessments, including Bexar County, Harris County and Travis County. It is the committee's opinion that all magistrates should have access to the risk analysis for defendants before the magistrate for bail-setting proceedings.

Many validated pretrial risk assessments require an interview of the defendant. While the committee has no doubt in the utility of the interview-based assessments, the committee recognizes that implementing an interview-based risk assessment in most counties in Texas would require the addition of trained interviewer staff at a significant cost to counties. In addition, research shows that quantitative risk assessment instruments combined with subjective judgment, as opposed to qualitative risk assessment instruments that gather subjective information from interviews alone, provide more accurate information about a defendant's failure to appear or risk to the community.<sup>19</sup> Research has also shown that this quantitative risk assessment information can be gathered without the need for an interview without diminishing the predictive nature of the risk assessment.<sup>20</sup> Rather than advocating an interview-based risk assessment approach, the committee recommends that the State implement a non-interview based validated pretrial risk assessment and seek to automate the risk assessment using technology. The committee has studied the Laura and John Arnold Foundation's Public Safety Assessment (PSA) that has been or is being implemented in over 20 cities and states. It is the committee's view that the PSA should be automated by the state and made available to jurisdictions across the state should they choose to use that validated pretrial risk assessment. However, it is not the committee's recommendation that there be a single mandated validated pretrial risk assessment should a jurisdiction choose another validated assessment tool.

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<sup>19</sup> Mamalian, C. *State of the Science of Pretrial Risk Assessment*. (2011); Summers, C. & Willis, T. *Pretrial Risk Assessment: Research Summary*. (2010)

<sup>20</sup> VanNostrand, M. & Lowenkamp, C.T. *Assessing Pretrial Risk without a Defendant Interview*. (2013)

**Recommendation 2:** The Legislature should amend the Texas Constitution bail provision and related bail statutes to provide for a presumption of pretrial release through personal bond, leaving discretion with magistrates to utilize all existing forms of bail.

**Recommendation 3:** The Legislature should amend the Texas Constitution and enact related statutes to provide that defendants posing a high flight risk and/or high risk to community safety may be held in jail without bail pending trial after certain findings are made by a magistrate and a detention hearing is held.

With the committee's firm belief that pretrial detention decisions should be made based upon risk of flight and to public safety, it is important to orient the Constitution and statutory framework to this approach. Studies and information from other states reveal that the majority of individuals arrested for misdemeanor and felony offenses are low- or moderate-risk of flight and to public safety. A small percentage of those individuals are high-risk. Therefore, the committee believes that the Texas Constitution and related bail statutes should provide for a presumption that individuals arrested for a misdemeanor or felony offense should be released on personal bond. However, the committee believes that magistrates should retain the discretion to utilize all existing forms of bail as the magistrate deems appropriate. The magistrate would have the discretion to determine the appropriate method of pretrial release based upon the risk assessment information provided to the magistrate at the bail-setting proceeding.

At least 27 states and the District of Columbia, as well as the federal system, have statutes or constitutional provisions that authorize detention without bail in non-capital cases. These preventive detention provisions are in recognition that there are some defendants for which there are no conditions of release which would reasonably assure the defendant's appearance at court and the safety of the community. Except for very limited circumstances, the current Texas Constitution and statutory framework does not provide magistrates with this preventive detention authority, even when the defendant before the magistrate poses the highest risk of flight or to public safety. Reaffirming its belief that pretrial detention decisions should be made based upon risk of flight and to public safety, the committee believes that the Texas Constitution and related statutes should be amended to provide magistrates with the authority to use preventive detention to hold defendants posing a high flight risk and/or high risk to community safety.

Some may find that the concept of preventive detention is concerning and apt to potential abuse by magistrates. Therefore, the committee recommends that magistrates who determine to hold a defendant in jail pending trial be required to make written findings regarding their reasons for the preventive detention. Such findings may include information on the risk of flight and/or risk to public safety of the defendant. In addition, the committee believes that the defendant should be afforded a detention hearing within 10 days where the preventive detention could be reviewed. As an additional safeguard, the defendant should continue to have the ability to seek appellate review of the bail determination through an expedited review procedure.

**Recommendation 4:** The Legislature should provide funding to ensure that pretrial supervision is available to defendants released on a pretrial release bond so that those defendants are adequately supervised.

While most low- to moderate-risk individuals released from jail pending trial will not need significant supervision, there will be times when there is a need for increased levels of supervision. At the very least, best practices for pretrial supervision indicate that court date phone reminders are effective in ensuring the presence of the defendant at court settings. In addition, judges and magistrates will be reassured with releasing moderate-risk defendants if there are adequate supervision resources available for the supervision of the released defendant.

Unfortunately, most counties do not have personal bond supervision offices available to supervise individuals released on personal bond. While counties may fund supervision offices or seek to have the offenders pay for the supervision, most counties have not been able to fund the offices. In the late 2000s, state funding for pretrial supervision was limited when adult community supervision (probation) officials were informed that state funding could only be used to fund 1/10 of one full-time equivalent employee in the department. This restriction applies at the same level regardless of the size of the department.

The committee believes that pretrial supervision should be available in every county for individuals released on personal bond. The supervision staff could be funded by county government, but this may not be feasible or desirable in many counties. Therefore, the committee believes that the existing structure of community supervision and corrections departments (CSCD) is an appropriate infrastructure in which supervision could be placed in each county. Every county has a CSCD responsible for supervising individuals on probation.

The committee has conducted preliminary research into the costs of providing pretrial services statewide. The state of Kentucky and Washington DC's Pretrial Services Agency are helpful points of reference in this regard. The Kentucky General Assembly appropriates nearly \$13 million to the Kentucky Supreme Court annually to support its statewide pretrial program, which offers a full range of supervision and related services and is centrally administered by the Administrative Office of the Courts. The program handles approximately 185,000 arrests annually, meaning that the average cost for supervision is \$70.27 per arrest. The highly-regarded Pretrial Services Agency (PSA) of the Court Services and Offender Supervision Agency for the District of Columbia is funded by appropriation from Congress. PSA was appropriated just over \$60 million in 2015.

Both of these programs use a standardized risk assessment tool and make extensive use of data to ensure that screening is conducted and releases are made timely, supervision levels are proportionate to risk of failure to appear or risk to the community under the least restrictive terms necessary, and staff are allocated properly.

Translating the costs of operating pretrial programs from one jurisdiction to another can be challenging, and the committee acknowledges that the actual costs of establishing and operating pretrial release programs in Texas that are oriented to making the greatest use of personal bonds as possible will be highly dependent on the following:

- screening tools and processes used;
- rates of release;
- supervision terms required, including supervision levels ordered;
- the cost of services (not paid by the defendant) ordered as a condition of release;
- local administrative costs, including staffing, travel, and overhead costs; and
- any efficiencies that may be achieved through centralizing some portion of these activities at the local, regional, or state level.

Nonetheless, planning for program development and program improvements can be informed by considering the costs associated with rates of pretrial release and the number of community service officers (CSOs) needed to supervise released individuals.

While a program’s caseload ratio is considered a “mission critical” measure of performance for a pretrial release program,<sup>21</sup> there is not a national standard with regard to staff to offender ratio. Pretrial supervision caseload sizes nationwide vary significantly (between 0 and 650 according to one national survey),<sup>22</sup> though the average staff to defendant ratio for pretrial programs nationwide is 1:75.<sup>23</sup> In Kentucky, pretrial CSOs have an average caseload of 100 defendants. Washington DC’s Pretrial Services Agency reports an overall staff to defendant ratio of 1:40.<sup>24</sup>

A CSO’s caseload will depend on a jurisdiction’s arrest and release rate, the supervision level of defendants released in the jurisdiction, and the resources available to support supervision activities. It may also be impacted by the composition of the CSO’s caseload and workload – i.e., whether officers supervise individuals on release in the pretrial program in addition to individuals on other kinds of community release, both pre- and post-adjudication (e.g., diversion, probation, parole). Workload factors generally may also impact caseloads. CSOs in some jurisdictions may also have responsibility for conducting pretrial risk and need assessments and/or conducting investigations. These arrangements will be individualized across jurisdictions, based on resources, program design, and related factors.

Funding the supervision could be accomplished in multiple ways, and the committee leaves the funding mechanism decision to the legislature:

1. County-only funding

Reduced county jail populations should be the result of an increase pretrial release population. This means that counties will be the primary beneficiary of decreased jail costs. It is expected that the decreased jail costs will exceed the cost of supervision in most counties. Thus, one mechanism for funding would be that counties fully fund the supervision program.

The drawback of county-only funding is that some small counties may not realize enough reduced jail population to fully cover the cost of the supervision program. In addition, a lack

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<sup>21</sup> See <https://www.pretrial.org/download/performance-measures/Measuring%20What%20Matters.pdf>, page 7.

<sup>22</sup> See [http://www.crij.org/page/-/cijfiles/FAQ\\_Sheet\\_Webinar4\\_Pretrial.pdf](http://www.crij.org/page/-/cijfiles/FAQ_Sheet_Webinar4_Pretrial.pdf), page 5.

<sup>23</sup> See <http://www.abell.org/sites/default/files/files/cja-pretrialappentix.pdf>, page 2.

<sup>24</sup> See See <http://www.csosa.gov/about/financial/budget/2017/FY17-PSA-Budget-Submission.pdf>, page 29.

of state funding would most likely mean a lack of standardized supervision practices. A lack of standardization may mean less successful outcomes and increase the risk of missing court settings or public safety.

## 2. State-only funding

State funding for supervision programs would likely result in increased standardization of evidence-based supervision practices through standards promulgated by the state. This would likely increase the effectiveness of pretrial supervision and lower missed court settings and ensure higher public safety.

The drawback of state-only funding for supervision programs is that the cost savings from reduced jail populations would be to county governments while state-only funding of supervision would place all of the cost on the state.

## 3. Offender-only funding

Many supervision programs, including adult probation supervision, require defendants who have an ability to pay to contribute to the supervision costs. This funding mechanism would ensure that general taxpayer funding is not provided and that the users of the system pay for the cost of the system.

The drawback to offender-only funding for supervision programs is that there may not be a sufficient caseload to cover the cost of the program. Offender-only payment would produce instability in the funding mechanism based upon the supervision population. Lastly, imposing an additional burden on offenders who are unable to pay the costs of supervision due to indigency or an overall lack of financial resources would impede the ability to release those individuals from jail effectively. Thus, offender funding methods should be limited to diminish the negative impacts that might come from this type of funding.

## 4. County-state partnership or County-state-offender partnership funding

County-state partnership funding of supervision programs would bring about the advantages of the county-only and state-only funding models. It has been suggested that the state could design a hold-harmless program to ensure that counties who fund supervision programs do not see a negative impact on cost-benefit, which is not expected in most counties.

County-state-offender partnership funding would bring about the advantages of all other funding mechanisms, but would ensure greater stability of funding.

**Recommendation 5:** The Legislature should provide funding to ensure that magistrates making pretrial release decisions are adequately trained on evidence-based pretrial decision-making and appropriate supervision levels.

Art. 2.09 of the Code of Criminal Procedure designate who are magistrates in Texas. Included in that list are justices of the Supreme Court and judges of the Court of Criminal Appeals, justices of the Courts of Appeals, district judges, county judges, statutory county court judges, statutory probate judges, justices of the peace, municipal court judges, mayors and recorders of the municipal courts, associate judges and magistrates in certain counties, associate statutory probate judges, and other associate judges and magistrates appointed under Chapters 54 and 54A of the Government Code.

Chapters 54 and 54A of the Government Code authorize magistrates and associate judges to be established in counties to assist with the determination of bail. The statutes contemplate that this position may be a full-time or part-time position. Many counties have established part-time positions who assist in the determination of bail during evening or weekend hours.

Texas Government Code Sec. 56.003(b) provides the statutory basis for funds to be appropriated to the Court of Criminal Appeals for the “continuing legal education of judges of the appellate courts, district courts, county courts at law, county courts performing judicial functions, full-time associate judges and masters appointed pursuant to Chapter 201, Family Code, and full-time masters, magistrates, referees, and associate judges appointed pursuant to Chapter 54 as required by the Court of Criminal Appeals.”

Sec. 56.003(c) and (d) of the Government Code provide the statutory basis for funds to be appropriated to the Court of Criminal Appeals for the continuing legal education of judges of the justice courts and municipal courts.

Rules 2, 3, and 5 of Judicial Education promulgated by the Court of Criminal Appeals require judicial education for judges of the appellate, district, county, justice and municipal courts. Rule 4 of Judicial Education promulgated by the Court of Criminal Appeals requires “judicial officers” to “complete within one year after taking office, at least 12 hours of instruction in the administrative duties of office and substantive procedural and evidentiary laws. Thereafter, the “judicial officer” is required to complete at least 12 hours of instruction in substantive, procedural and evidentiary laws and court administration. The term “judicial officer” is defined to include *full-time* masters, magistrates, or referees appointed pursuant to Chapter 54 of the Government Code.

Rules 2, 3, and 5 provide a list of entities authorized to provide training to the judges of the appellate, district, county, justice and municipal courts. Rule 4 provides that the training to “judicial officers” can be provided by any entity listed in Rule 2c, which lists 18 organizations including the Texas Center for the Judiciary, bar associations, and the National Judicial College. Many of the organizations listed in Rule 2c are quite capable of delivery outstanding education to magistrates regarding evidence-based pretrial decision-making and appropriate supervision levels.

The committee recognizes two issues with the delivery of judicial education to all judges and magistrates making pretrial bail determinations:

1. There is no mechanism to formally train part-time magistrates or associate judges conducting bail determination proceedings.
2. There may be insufficient funding to properly educate all judges and magistrates on the determination of bail and appropriate supervision levels.

The committee recommends that the legislature amend Government Code Sec. 54.003(b) to include part-time and full-time magistrates and associate judges appointed under Chapters 54 and 54A of the Government Code. The committee also recommends that the Court of Criminal Appeals amend its Rules of Judicial Education to require continuing legal education for part-time and full-time magistrates and associate judges under Chapters 54 and 54A of the Government Code.

The committee recommends that the Court of Criminal Appeals examine its funding levels for judicial education and supports the Court's efforts to increase funding to a level sufficient to provide the education discussed above.

**Recommendation 6:** The Legislature should ensure that data on pretrial release decisions is collected and maintained for further review.

The study undertaken by the committee in conjunction with the Texas A&M Public Policy Research Institute revealed the lack of systematic data with which to evaluate the effectiveness of pretrial decision-making in Texas. Through research efforts, the committee expects to produce an analysis of the effectiveness and impacts of pretrial decision-making in two counties and a descriptive analysis of practices in most Texas jurisdictions. However, determining the effectiveness of any changes to the pretrial decision-making process should be continually evaluated to ensure that the changes are having the intended impacts and that there are no unintended consequences.

Therefore, the committee recommends that the legislature and the Judicial Council evaluate the data elements required to assess the effectiveness and impact of pretrial decision-making and require the collection and analysis of that data on a regular and continuing basis.

**Recommendation 7:** The Legislature should expressly authorize the Court of Criminal Appeals to adopt any necessary rules to implement the provisions enacted by the Legislature pursuant to these recommendations.

As with any significant statutory change, there may be a need to develop procedural rules to fully effectuate the intent of the legislative action. This method has been used repeatedly by the legislature in direction to the Supreme Court of Texas to promulgate rules to implement legislation. The Court of Criminal Appeals could assist in this transition in implementing the intent of the legislature with regard to this recommended pretrial decision-making reform initiative. The rule-making process by the Court of Criminal Appeals should be inclusive of stakeholders in an advisory process similar to the Supreme Court's Rules Advisory Committee.

**Recommendation 8:** The Legislature should provide for a sufficient transition period to implement the provisions of these recommendations.

Other states that have embarked on similar efforts as this set of recommendations have found it useful to have a delayed implementation period to allow rules, processes, and infrastructural needs to be in place prior to the effective date of the change. The committee believes that approach is wise in this transition and recommends a delayed effective date to January 1, 2020. Jurisdictions who wish to implement portions of the law prior to the effective date of the act would be able to do so, as many of these recommendations could be implemented under existing law. However, the mandatory compliance with the recommendations could be sufficiently delayed to provide jurisdictions ample time to be compliant with the new provisions.