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INTERIM TESTIMONY 2016
Senate Committee on Criminal Justice

Dear Members of the Committee,

My name is Jay Jenkins. I am a Project Attorney for the Texas Criminal Justice Coalition (TCJC); I am based in Harris County. Thank you for allowing me this opportunity to present testimony on Charge #4: "Examine the success of current pretrial diversion and treatment programs in Texas and in other states. Make recommendations on best practices and how to implement and expand these programs in Texas to maximize effective use of resources and reduce populations in jails."

THE NEED FOR PRETRIAL DIVERSION

Hundreds of thousands of people cycle through Texas' local jails every year, with about 63,000 individuals housed in county jails on a daily basis. On average, more than half have not been convicted of the crime for which they are accused; they are simply awaiting trial. In fact, Texas' county jails are currently housing more than 38,000 pretrial detainees, accounting for over 60% of the total jail population.¹

Especially for the men and women who do not pose a risk to public safety, this pretrial population creates unnecessary costs and has the potential to overcrowd jails. In Harris County, the operational and medical costs devoted to pretrial detainees alone cost taxpayers hundreds of millions of dollars every year.²

As counties struggle to stretch resources to manage both pretrial detainees and convicted individuals sentenced to county jail time, state and local leaders must develop effective strategies for managing jail population levels and reducing costs. Counties in Texas and across the country have begun to develop pretrial diversion and supervision programs with the aim of safely and effectively managing individuals in the community who traditionally would have been held in jail awaiting trial. Many individuals suffering from mental illness or substance abuse problems are being better served in such programming, which can effectively address the underlying causes of criminal involvement and prevent re-offending. The lessons learned in Texas and elsewhere in the United States can help inform decisions on pretrial programs going forward.

KEY FINDINGS

- **The longer someone remains in pretrial detention, the more likely it is that he or she will face conviction and costly incarceration.** According to a study on the impact of pretrial detention on sentencing, "Compared to defendants released at some point pending trial, defendants detained for the entire pretrial period are more likely to be sentenced to jail or prison – and for longer periods of time."³ It is critical to determine which individuals can be safely released prior to trial, enabling them to maintain their employment and housing, or to participate in needed programming to address the root causes of their criminal behavior.
- **Local and national research has established effective pretrial diversion practices.**
 - » Effective pretrial diversion programs are evidence-based programs that revolve around three components: (1) uniform eligibility criteria; (2) structured services and supervision; and (3) charge dismissal upon successful completion of required conditions.⁴

- » Specific practices associated with effective pretrial programs include the following:
 - formalized cooperative agreements between the pretrial diversion agency and stakeholders to assure program continuity and consistency;
 - defendant access to counsel before the decision to participate in pretrial diversion;
 - specific due process protections incorporated into programming;
 - broad, equitable, and objective diversion eligibility criteria, applied consistently at multiple points of case processing;
 - use of a uniform and validated risk and needs assessment to determine the most appropriate and least restrictive levels of supervision and services needed;
 - intervention plans tailored to individual participant risks and needs, and developed with the participant’s input;
 - graduated sanctions – short of termination – as responses to participant behavior;
 - maximum possible privacy protections for participants and program records; and
 - independent program evaluations.⁵

- **Existing pretrial programs – such as the Law Enforcement Assisted Diversion program and Harris County’s First Chance Intervention Program – are already saving taxpayer resources and improving recidivism rates.**

- » In 2014, Harris County District Attorney Devon Anderson instituted her First Chance Intervention Program aimed at individuals with first-time, low-level marijuana offenses. Through that program, eligible individuals have the opportunity to avoid a criminal conviction by completing 8 hours of community service or an 8-hour class; Harris County Pre-Trial Services supervises the program and monitors participants.

- As of April 30, 2016, the Harris County District Attorney’s Office had offered the program to 3,536 individuals, with over 80% successfully completing or presently enrolled in the program.⁶
- The success of the Harris County First Chance Program allowed for the Harris County District Attorney’s Office to expand the First Chance Intervention Program to individuals with first-time, low-level shoplifting offenses.⁷
- Additionally, the Harris County District Attorney’s Office has developed the Felony Pretrial Intervention Program, which will apply to individuals with first-time offenses caught with less than one gram of a controlled substance; they will be offered treatment and probation over the course of a year to avoid a criminal conviction.⁸

- » In 2011, leaders in Seattle and King County, Washington, established the Law Enforcement Assisted Diversion (LEAD) program, with the primary aim of reducing criminal recidivism and secondary aims including reductions in criminal justice service utilization and associated costs, as well as improvements for psychosocial, housing, and quality of life outcomes.⁹

- The LEAD program is a pre-booking diversion program that focuses on diverting those suspected of low-level drug and prostitution criminal activity to case management and support services instead of jail and prosecution.¹⁰
- LEAD participants had a 60% lower likelihood of arrest in the six months subsequent to entry into the program, while over the longer term (approximately 5 years), LEAD participants had a 58% lower odds of at least one arrest subsequent to entry.¹¹

- In addition to reducing recidivism, the LEAD program drastically reduced system costs – with individuals in the program averaging 1.4 fewer jail bookings, 39 fewer jail days served, and an 87% reduction in the likelihood of at least one prison incarceration subsequent to entry—**amounting to system resource savings of \$8,061 per individual per year.**¹² **These savings applied to pretrial detainees held on state jail felony charges would save Texas counties over \$45 million.**
- The LEAD model is a flexible model and can be adapted to fit a jurisdiction’s unique needs. Santa Fe, New Mexico, and Albany, New York, have begun implementing LEAD programs tailored to their at-risk populations.

COST-SAVING AND PUBLIC SAFETY-DRIVEN SOLUTIONS TO REDUCE COSTLY JAIL POPULATIONS

When considering the fiscal and human costs associated with pretrial detention, the Texas Criminal Justice Coalition recognizes the importance of ensuring that people who can be safely released from detention have the opportunity to remain in their communities pending trial; otherwise, the collateral consequences – to employment, housing, and/or education – threaten a person’s stability, productivity, and family bond.

But it is also important to reduce the *length* of pretrial waiting periods. As such, below we have included recommendations that emphasize the need for strong pretrial programs, as well as strategies for lessening pretrial incarceration periods. Cost savings realized from such strategies can be reinvested in pretrial diversion programs that solve underlying behavior issues.

(1) Help Counties Develop Evidence-Based Pretrial Diversion Programs. An evidence-based pretrial diversion program that implements the practices described above can help alleviate the massive allocation of resources required to operate county jails, while also reducing recidivism rates and the likelihood that an individual will eventually be incarcerated in the Texas Department of Criminal Justice. Incentivizing diversion programs is an investment that will pay off for local taxpayers in the future.

Again, while it is cost-effective to release individuals who can safely remain in the community prior to trial, it is also critical to ensure that specialized populations have access to programming and resources that will address the underlying issues leading to criminal behavior – like mental health and/or substance abuse problems. Treatment programs are exponentially better equipped than local jails to stabilize individuals, make effective medical recommendations, supervise medication regimens, and recommend appropriate behavioral programming to address long-term needs.

(2) Promote the Adoption of Risk Assessment Tools and Ensure the Provision of Counsel at Magistration Hearings. Jurisdictions across the country are rethinking pretrial release and cutting down on pretrial incarceration rates through the use of a pretrial risk assessment tool. Such tools help pretrial practitioners and judges determine who can be safely released pending trial, and which individuals are good candidates for programming that will help them address the root causes of criminal behavior.

Whether or not a risk assessment tool is available, early access to counsel is an integral part of any effective pretrial diversion program, ensuring that diversion takes place as early as possible and that conditions are set to ensure the defendant’s rights and the safety of the community.

(3) Reduce Reliance on Cash Bonds. Counties should consider lowering the presumptive bond amounts applicable to individuals charged with misdemeanors and low-level felonies and make increased use of personal bonds, with conditions of supervision that are appropriate to the nature and level of risk posed by the person’s release.

(4) Increase Reliance on Cite-and-Summons to Further Reduce Pretrial Populations. Texas' 2007 Legislature approved an alternative to the typical arrest, booking, and initial appearance mechanism for initiating a case against a person charged with certain nonviolent offenses. As per HB 2391, a law enforcement officer can issue county residents a ticket and ask them to return to court at a later date rather than immediately arrest and book them into jail (Art. 14.06, Code of Criminal Procedure).

The following violations fall under the purview of the law: Driving With an Invalid License; marijuana possession up to 4 ounces; graffiti with less than \$500 damage; criminal mischief with less than \$500 damage; theft by check with less than \$500 value; theft of service with less than \$500 value; and contraband in a corrections facility (Class B misdemeanor only). Once the person appears before the magistrate, the process proceeds as it normally would have.

The cite-and-summons bill was meant to eliminate pre-initial appearance jail time for individuals with low-level offenses, thus saving the state the costs of this period of incarceration. Yet despite the availability of this strategy, some law enforcement agencies continue to book individuals with these offenses into jail, wasting resources. For instance, it has been estimated that adoption of cite-and-summons procedures in Harris County would result in 22% of misdemeanor defendants being diverted from jail.¹³

(5) Consider Creation of a Specialty Docket to Address "Frequent Flyers," Who Cycle In and Out of Jail at High Rates. It is becoming increasingly important to address the needs of individuals who are creating the greatest stress on law enforcement and jail beds. Policy-makers should consider a diversion docket pilot program, where individuals who have been evaluated to be "frequent flyers" in the system are diverted into a program that connects them with resources to address their criminogenic needs, without receiving a criminal conviction upon successfully completing all program requirements.

Local Pretrial Services staff could be trained to identify, through a series of questions, individuals in need of wrap-around services who are eligible for diversion. (In planning stages, care should be taken to establish eligibility and exclusion criteria for participants based upon empirical evidence indicating which types of individuals can be treated safely and effectively through diversion.) Candidates should be evaluated using evidence-based assessment tools and procedures.

Pretrial Services staff should recommend that this subset of identified individuals be diverted from the probable cause hearing into the diversion docket. This docket should be held immediately after the person is assessed by Pretrial Services, in lieu of the probable cause hearing; and it should involve both a prosecutor and a defense attorney. Based on the results of the assessment conducted by Pretrial Services, the prosecutor should offer specific terms that would allow the individual to avoid the filing of charges if he or she successfully completes a diversion program.

Prior to agreeing to participate in a protracted diversion program, participants should be informed of their right to counsel and given an opportunity to consult with defense counsel about the terms of the diversion program.

Citations

¹ Texas Commission on Jail Standards, *Texas Jail Population Report*, April 1, 2016.

² The budget for Harris County Jail operations and medical for FY2015-16 was \$238,500,000.

³ Laura and John Arnold Foundation, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, November 2013.

⁴ “Performance standards and goals for pretrial diversion/intervention,” National Association of Pretrial Service Agencies, 2008.

⁵ Creating an Effective Pretrial Program, Crime and Justice Institute 2013.

⁶ Harris County District Attorney’s Office POM First Chance Program – Stats as of 4/30/16.

⁷ Flynn, Meagan, “Harris County Plans To Be Nicer to People Charged With Drug and Non-Violent Crimes,” Houston Press 8 Jan. 2016.

⁸ Id.

⁹ Collins, Susan E., Heather S. Lonczak, and Seema L. Clifasefi, “LEAD Program Evaluation: Recidivism Report,” University of Washington—Harborview Medical Center, March 27, 2015.

¹⁰ Id.

¹¹ Id.

¹² Collins, Susan E., Heather S. Lonczak, and Seema L. Clifasefi, “Criminal Justice and Legal System Utilization and Associated Costs,” University of Washington – Harborview Medical Center, June 24, 2015.

¹³ Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. Rev. 1126, 1174 (2013) [citing Marcia Johnson & Luckett Anthony Johnson, *Bail: Reforming Policies to Address Overcrowded Jails, the Impact of Race on Detention, and Community Revival in Harris County, Texas*, 7 Nw. J. L. & Soc. Pol’y 42, 56 & n.96 (2012) (citing May 2011 statistics retrieved from the Case Master Files of Harris County’s Justice Information Management Systems)].