

ONE SIZE FAILS ALL
REPORT SERIES

A FAILURE IN THE FOURTH DEGREE

Reforming the State Jail Felony System in Texas



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TEXAS CRIMINAL
JUSTICE COALITION

This series explores the failures of Texas' criminal justice system to adequately address the needs of undervalued and marginalized populations, including teenagers and young adults, people with substance use and mental health issues, the LGBTQ community, people without stable housing supports, and people with intellectual/developmental disabilities (I/DD). Not only are these populations failed by the justice system, but Texas families and communities are harmed as more people are driven into incarceration, and taxpayers are left to foot the bill for unsuccessful policies and practices. We urge you to join us in calling for reforms that will create healthy, safe, thriving Texas communities.

The Texas Criminal Justice Coalition advances solutions and builds coalitions to reduce mass incarceration and foster safer Texas communities.

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A FAILURE IN THE FOURTH DEGREE

Reforming the State Jail Felony System
in Texas

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Background: State Jails Then and Now

It started as a groundbreaking reform, remarkable even by today's standards.

In the early 1990's, prison overcrowding in Texas had reached a tipping point, forcing the state to pass nearly \$2 billion in bonds for prison construction or risk having to pay counties to house people awaiting transfer to prison from county jail. At the same time, public pressure was mounting to increase the minimum sentence length for people convicted of violent and aggravated offenses,¹ a policy that would further strain prison capacity and set Texas on course to triple its prison population.

Yet, in the midst of this tough-on-crime wave that would usher in mass incarceration, lawmakers wanted to do something entirely different with respect to drug and nonviolent property offenses: decrease penalties and improve rehabilitation.

Texas created a new fourth degree felony category called the state jail felony.² The maximum sentence for these formerly third degree felonies dropped from ten to two years.

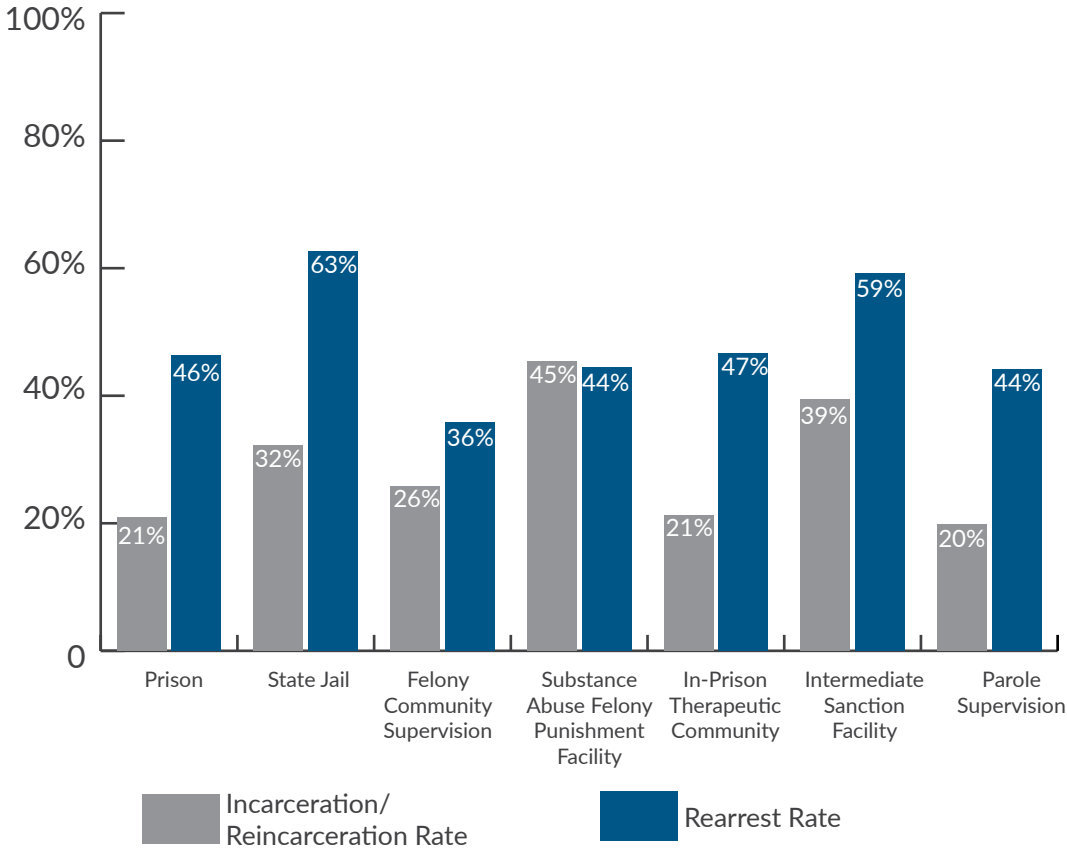
State jails were constructed near major population centers, which ultimately accounted for 75 percent of people committed to the facilities. The hope was that the units would be operated by counties, which would provide incarcerated individuals with rehabilitative services prior to releasing them back to the community.³ Lawmakers also counted on judges to take a special interest in these cases and continue to supervise defendants on community supervision (probation) following their short term in state jail — a lofty aspiration at a time before the advent of drug and specialty courts.⁴

Also unprecedented, lawmakers required people charged with first-time drug possession offenses to be automatically placed on probation rather than incarcerated, a bold effort to address drug use.

Under no circumstances did the original architects of the state jail system intend for people to be sentenced to incarceration without rehabilitative programming or community supervision. Yet, the system today strays from the original intent in key ways. Counties are largely uninvolved with the operation of state jails, and courts routinely sentence defendants to terms of incarceration with little to no rehabilitation, reentry programming, or post-release supervision. In fact, of the 19,985 state jail discharges in 2016, only 87 people (0.4 percent) were released to community supervision.⁵

The results have become inevitable: People released from state jails have the highest rate of re-offending of any population released from a state correctional institution in Texas. The most recent state jail re-arrest rate as reported by the Legislative Budget Board (LBB) is nearly 63 percent, compared to 46 percent for prison releases.⁶

**Recidivism Rates Based on Type of Correctional Population
(Three-Year Follow-Up from Releases in FY 2013)**



There have been some efforts to improve the state jail system. In 2011, the Texas Legislature passed House Bill 2649, which provides people with time credits (early release from state jail) for “diligent participation” in rehabilitative programming while incarcerated.⁷ Prior to this legislation, people were required to serve the entirety of their sentence with no incentive to enroll in even the limited rehabilitative programming available inside facilities. HB 2649 incentivized state jail inmates to participate in programming by making them eligible to be released up to 20 percent earlier than expected. Unfortunately, not all judges grant this credit,⁸ and there are limited rehabilitative opportunities within state jails, thereby increasing the likelihood that people will simply continue to cycle in and out of the criminal justice system without having their underlying needs met.

Despite the efforts to improve the system through diligent participation credits and mandatory community supervision for first-time drug offenses, the state jail model simply does not work. In this report, we outline the severe limitations of the state jail felony as a means of promoting rehabilitation. We also show that community-based resources for substance use disorder and mental illness — the primary drivers of state jail incarceration — are inadequate, increasing the likelihood that vulnerable populations are brought into the criminal justice system on state jail felonies. Finally, we present key recommendations for improving rehabilitation, reducing incarceration, and promoting a public health response to behavioral health issues that are too often driving people into the justice system.

Long Enough for People to Lose Everything, But Too Short to Provide Them Meaningful Rehabilitation

People in state jails typically have low education and employment levels, and high rates of substance use and mental illness. More specifically, people sent to state jail have an average educational achievement score of 7.73, or a seventh-grade education — the lowest of any correctional population inside the Texas Department of Criminal Justice (TDCJ).⁹ In interviews conducted by the Texas Criminal Justice Coalition with people incarcerated in state jails, 32 percent of males and 25 percent of females were unemployed at the time of arrest, while 13 percent of males and two percent of females were homeless at the time of arrest.

Sadly, 43 percent of male interviewees and 50 percent of female interviewees have been diagnosed with mental illness, and 43 percent of males and 53 percent of females have been diagnosed with a substance use disorder. These rates are likely higher, as some people go undiagnosed.

Collectively, these factors highlight the need for a comprehensive array of programming within state jails, including educational and vocational programming to prevent unemployment, substance use treatment, ongoing care for mental illness, robust reentry planning that includes linkage to community services prior to release, and assistance with housing. However, the state jail model itself prevents people from accessing more robust services. Following a term of confinement in county jail during the pretrial phase, people sent to state jail serve an average of 6.2 months in a state jail facility.¹⁰

Of the 15 state jail units in the state, only six offer the State Jail Substance Abuse Treatment Program,¹¹ a three- or six-month program depending on the severity of addiction. Many people do not qualify for either program length because they are not incarcerated in state jail long enough to complete it. Of the 16,755 people sent to state jail between May 2017 and April 2018, 2,249 served less than two months, and 9,867 people (more than half of the total population) served less than six months.¹²

Allison's Story

I spent over 10 years collectively behind bars, nearly always for state jail felonies like drug offenses, and the vast majority of those happened while I was being sexually trafficked. I was gang trafficked for nearly a decade. I was low-hanging fruit for law enforcement to pick up on prostitution charges, and after so many charges, that offense becomes a state jail felony in Texas. Not only was I my traffickers' prostitute, I purchased all his drugs, sold all his drugs, and have been to state jail for his drugs. Only once was I offered a PR [personal recognizance] bond. Only twice was I offered probation. Only once was I connected to services that were tailored to my needs.

I often wonder how different my life might be today had I been offered early individualized intervention or diversion rather than arrested. I also question how different my life would be had someone, at each point I came in contact with the criminal justice system, noticed just how much danger I was in.

I am a survivor of severe childhood sexual abuse. One thing we know about trauma, especially early childhood trauma, is that it can literally rewire the brain and manifest later in a variety of ways. Most prevalent are mental health issues, substance abuse, and behavioral issues. My abuse manifested in all of these and more. I have been to three mental institutions, once at age 13 and the other two in Harris County Jail as an adult. I began to use drugs, self-medicating to address my trauma and mental health issues. My addiction later would tie me to the underworld of violence, crimes, gangs, prison, and, eventually, human trafficking.

The correlation between trauma and substance abuse cannot and must not be ignored. Nor must that of mental health and substance dependence. On one occasion, I was sentenced to a Substance Abuse Felony Punishment Facility. Having an extensive history of childhood and adult trauma, I can tell that this behavior modification program was extremely re-traumatizing, which in turn only exacerbated my underlying issues.

My last charge was seven years ago. Today, I am a recognized expert and speaker on sex trafficking and sexual exploitation, and I know all too well how co-morbid drug abuse and mental illness increases the likelihood that people will enter the criminal justice system. Despite years of recovery and national recognition for my work on behalf of survivors of sex trafficking, I am continually overlooked for employment and housing. I have been told that my car insurance rates would increase due to my criminal record. Being sentenced to state jail made my life significantly more challenging.

Even when people are able to participate in the program, its effectiveness is hindered by the lack of aftercare, a crucial component for those leaving prison-based treatment programs. In one study, 76 percent of people released from prison-based treatment without aftercare had used illicit drugs within one year of release, and 55 percent had been re-arrested; nearly the same rates of drug use and re-arrest were found among those who received no treatment at all. In contrast, only 54 percent of people released from in-prison treatment to aftercare had used illicit drugs, and only 27 percent were re-arrested.¹³

Vocational programming is similarly limited in state jails. While vocational trades are available, TDCJ has identified gaps in vocational and reentry services for the state jail population and had previously requested additional funding from the Texas Legislature to address these gaps.¹⁴ That request was not funded.

Gaps in mental health-based reentry services place people with complex mental health needs at highest risk of recidivating. For instance, research suggests that nearly three quarters of justice system-involved women have a co-occurring mental health and substance use disorder; most serve short sentences and are returned to the community without having received treatment or services.¹⁵ The optimal reentry practice for incarcerated people with co-occurring disorders is to facilitate access to mental health services within 24 to 72 hours of release, provide case management to help people navigate multiple social service providers, offer assistance with relationship issues, and provide long-term follow up.¹⁶ To a limited extent, Texas provides this type of ongoing support through the Texas Correctional Office on Offenders with Medical or Mental Impairments to people leaving prison with special needs, but these services are largely aimed at people placed on probation or released on parole.¹⁷ There is no parole in the state jail system, and 99.6 percent of people are discharged from state jail directly back to the community with no follow up.¹⁸

Texas' Broken State Jail System Necessitates Pretrial and Probation Improvements

A common assertion that surfaces during conversations with probation chiefs, judges, and district attorneys is that state jail felony defendants are increasingly selecting state or county jail time over probation and/or treatment options. The truth is somewhat more complicated, as examined below, but it is clear that probation placements for offenses such as drug possession are on the decline. In 2017, 38.5 percent of people adjudicated for possession of a controlled substance were placed on probation or deferred adjudication, a drop from 39.6 percent in 2013.¹⁹ Over that same period, the proportion of drug possession cases committed to county jail increased.²⁰

PROBLEM: People are "Accepting" Time Served in County Jail Over Probation Due to Lengthy Pretrial Incarceration

While the minimum term of confinement for people convicted of a state jail felony is 180 days,²¹ courts may impose a sentence within the Class A misdemeanor range or even drop the state jail felony to a Class A misdemeanor.²² This penalty reduction provision is referred to by its statutory reference in the Penal Code: 12.44.

12.44 (a) allows for a term of confinement less than the minimum 180 days, but the conviction remains a state jail felony, whereas 12.44 (b) allows the district attorney to prosecute the state jail felony as a Class A misdemeanor. However, the latter rarely happens; most state jail felonies prosecuted under 12.44 remain felony convictions. And, in fact, there has been an increased use of 12.44 (a) as a sentencing alternative to state jail or community supervision.

We must emphasize that the 12.44 (a) option may be more attractive to a defendant than a probation term because he or she has already served considerable time in county jail, which will count as “time served” for the shorter state jail felony term under 12.44 (a). Many defendants are held pretrial due to their inability to afford bail; others who reside in counties that offer release on a personal recognizance bond may not meet the eligibility requirements due to past arrests, lack of housing, or lack of personal references. People who are not released early in the pretrial process can lose jobs and housing and accrue considerable time in county jail – which makes the 12.44 (a) option appealing.

On the other hand, additional time on community supervision — which requires stable housing and employment, and imposes high fees and strenuous reporting requirements (*discussed more fully below*) — may not seem realistic to those who have already served time.

We are seeing this play out in the data. As noted above, community supervision placements have declined slightly for drug possession offenses; however, county jail commitments for this offense are on the rise. In 2013, 14 percent of drug possession cases were handled through county jail incarceration, while 16.9 percent were given a state jail term. By 2017, the trend had reversed: 16.1 percent of cases were handled through county jail incarceration, and 12.8 percent were committed to state jail.²³

Sadly, many people who accept a state jail felony conviction pursuant to 12.44 (a) are not fully aware that the conviction makes it exceedingly difficult to obtain housing and employment. They return to the exact circumstance they were in at the time of arrest, having received no treatment or services, but they now face lifelong barriers to economic opportunity.

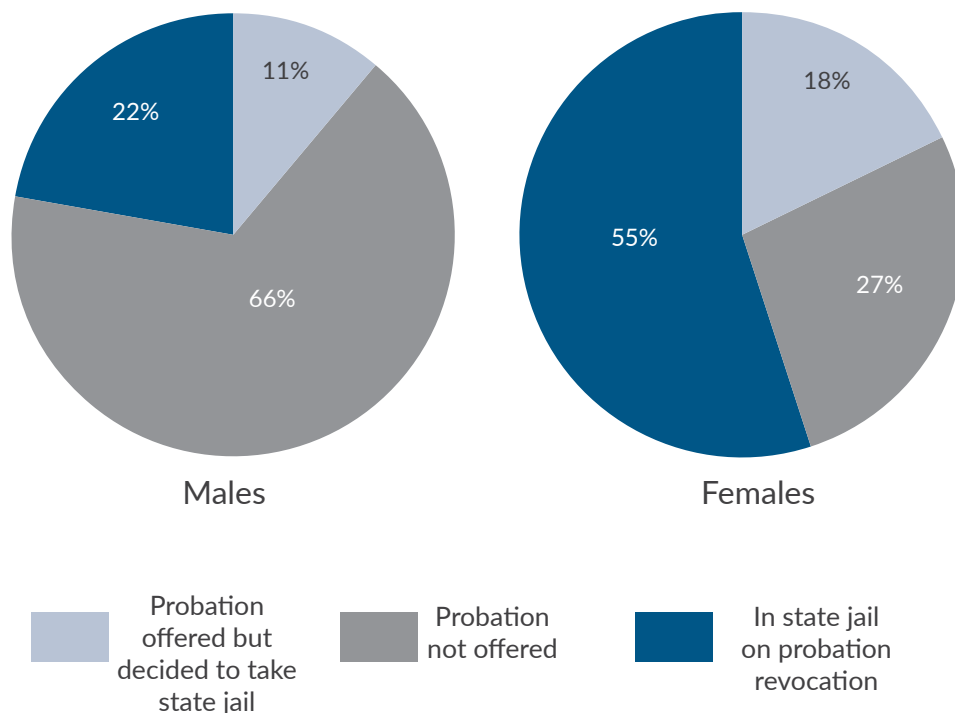
Reforms to the state jail system must therefore include pretrial reforms, emphasizing less time in county jail to prevent people from accepting a 12.44 plea. It is important for **eligible defendants to be released to the community during the pretrial phase to prevent accrual of jail time and the associated loss of housing and employment.**

PROBLEM: Many People are in State Jail Because They Were Not Offered Probation or Their Probation Was Revoked

The Texas Criminal Justice Coalition, in collaboration with Dr. William Kelly, Director of the Center for Criminology and Criminal Justice Research at The University of Texas at Austin, conducted interviews with people incarcerated in state jail to determine the factors that led them to accept or decline an offer of community supervision. The Texas State Jail-Probation Study included 140 interviews, 89 with males incarcerated at Travis State Jail, and 51 with females in Woodman State Jail.

When asked about probation, a surprisingly small percentage of interviewees — 11 percent of males and 18 percent of females — had been offered probation but refused and instead opted for state jail incarceration. Probation was not offered to 66 percent of male interviewees and 27 percent of female interviewees. Many interviewees — 55 percent of women and 22 percent of men — had been placed on probation but were not able to meet the conditions; they were revoked and are now in state jail.

Were You Offered Probation?
Have You Had Your Probation Revoked?



These findings seem to contradict the assertion that high numbers of defendants are choosing state jail over probation. But separately, probation may not truly be an option — especially for people with previous offenses.

There were 28,543 state jail felony placements onto community supervision between May 2017 and April 2018. Of these, only 15.5 percent had prior

“I had been living well for 5 years when a relapse led me back into the system. By that point, I had a mortgage, three young children, and an elderly grandmother who all depended on me for care. If ever I had been a good candidate for probation, that was the time, but because I had priors they wouldn’t offer it to me.”

Lauren,
Formerly Incarcerated in
State Jail

Perspectives on Probation From People Incarcerated in State Jail

“Probation has too many fees and costs.”

“Probation is a money scheme. You are set up for failure.”

“If you lose your job and can’t make a payment, they will violate you. Or they set appointments during work and you can’t leave work.”

state jail or prison experience.²⁴ Courts may be unwilling to offer probation to a defendant with prior felony offenses, which is largely the demographic inside state jails. Our interviewees had been in the system before, including having previously served time in a state jail. Male interviewees had an average of 13 prior arrests, 3 prior felony convictions, 9 prior misdemeanor convictions, and 3 prior incarcerations. Females had an average of 7.4 prior arrests, 2 felony convictions, 2.4 prior misdemeanor convictions, and 1.4 prior incarcerations.

In addition to interviews conducted inside state jails, we spoke with people formerly incarcerated in state jails. Some formerly incarcerated individuals expressed frustration that probation was not offered despite their prior offenses. One individual who had been previously incarcerated on drug-related charges explained, “I had been living well for 5 years when a relapse led me back into the system. By that point, I had a mortgage, three young children, and an elderly grandmother who all depended on me for care. If ever I had been a good candidate for probation, that was the time, but because I had priors they wouldn’t offer it to me.”

Changes to the state jail system must include workable, safe incentives for courts to offer treatment and community supervision to people with past justice system involvement. Separately, probation departments must implement best practices to reduce high rates of revocation.

PROBLEM: People Are Not Accepting Probation Due to Onerous Conditions, Length, and Costs

Only a small subset of our interviewees serving time in state jail had the opportunity to consider a probation offer, but across all interviewees, they had largely unfavorable perspectives about probation — claiming that there were too many requirements, the costs were too high, probation terms were too long, and doing time was easier.

These perspectives are not without merit. There is evidence that many more people are unsuccessful on felony probation than is generally believed. The Legislative Budget Board (LBB) reports a revocation rate of 15.3 percent, which implies that 84.7 percent of people placed on felony probation are successful.²⁵ This is a faulty calculation, as the revocation rate reported by the LBB merely takes the percentage of the average felony direct supervision population that is revoked *each year*.

A more accurate way of determining a revocation rate is to take everyone placed on felony probation in a given year and follow them over a period of years to determine the percentage who are revoked during that period of examination. The Texas Department of Criminal Justice conducted such a study in 2016, following all those placed on

felony probation in 2014 for two years.²⁶ By probationers' second year on felony community supervision, more than 23 percent (over 11,900 people) had been revoked and sent to prison.²⁷ Had this study continued to examine this same cohort for additional years, it is likely that more people were revoked and sent to prison. Therefore, the actual felony probation revocation rate today is likely greater than 23 percent.

Also of note: There are over 23,000 felony probation revocations each year,²⁸ representing more than one-third of all people sent to prison,²⁹ and 54 percent are for failure to meet the conditions of probation, not a new offense.³⁰ As our interviewees claimed, the requirements of probation are challenging.

For instance, nearly 33 percent of male interviewees and 55 percent of female interviewees who had prior experience with probation reported that the conditions were unrealistic and difficult, and that probation officers did not consider individual circumstances — like parenting, work schedules, or the need to travel outside the county for work — when setting appointments or evaluating compliance with probation conditions. Moreover, many felt that probation simply lasted too long. For an offense as minor as possession of less than a gram of a controlled substance (the equivalent of a sugar packet), courts can place people on probation for up to five years and can extend that term to ten years.³¹

Costs were also cited as a major barrier to the successful completion of community supervision. In our interviews, 43 percent of males and 71 percent of females said that probation simply costs too much. In addition to a monthly \$60 supervision fee, probationers must pay court costs, as well as for classes, treatment expenses, drug screens, and more. The burden can be overwhelming, especially for women, single parents, young adults, and those struggling to find a job.

“Probation is Too Expensive”

Out-of-Pocket Costs	Possession of a Controlled Substance (<1 Gram)
Fine	Up to \$10,000
Court costs	\$275 (mandatory) \$225 (judge's discretion)
Required classes	\$40–\$60
Drug education (to renew driver's license)	\$100
Driver's license reinstatement	\$125–\$325
Aftercare	\$160
Drug screen/urinalysis	\$10–\$25 per week
Victims of Crime Fund	\$100
Crime Stoppers	\$50
Supervision fee	\$25–\$60 per month

Source: Office of Court Administration, District Clerk's Felony Conviction Court Cost Chart — 01/01/2016, www.txcourts.gov/media/1437646/dc-fel-ct-cst-010116.pdf

In fact, of the women we interviewed in Woodman State Jail, 55 percent were incarcerated as a result of a probation violation, and their comments pointed to a cost burden that is unrealistic, especially for primary caretakers of children:

- “Probation is too expensive.”
- “You can’t pay rent and for all of the classes they require.”
- “How do you pay the fees, pay rent, and take care of the children?”

Collectively, interviewees’ perspectives on the ability — or inability — to successfully complete probation are important when considering the other life challenges facing people in state jail, and their choice between state jail and probation, if offered. As noted previously, people incarcerated in state jail face a myriad of challenges, including low educational achievement, unemployment, homelessness, mental illness, and substance use disorder. For many people facing these obstacles, probation simply is not a realistic choice.

Probation requires frequent meetings with probation officers, participation in treatment programming and classes, completion of community service hours, and frequent unscheduled drug screens. To navigate these requirements, people need transportation, an understanding employer, and reliable child care. People also need ongoing treatment and peer support to achieve and maintain recovery from mental illness and substance use disorder. The requirements of probation are a challenge for anyone, much less someone who faces the obstacles above. It is not surprising, then, that the most frequent comments made by our interviewees about probation were that “probation sets you up for failure,” and “doing time is just easier.”

To create a successful probation system as one alternative to Texas’ state jail system, the Legislature and courts should 1) require only essential probation conditions that promote a real path for success, eliminating conditions that are unrelated or excessive when considering the offense; 2) reduce the out-of-pocket costs charged to individuals for their supervision or program participation; and 3) reduce the length of probation to allow people to become fully productively in their communities sooner. Ultimately, the effectiveness of community supervision should not be measured by how tough it is but rather by the number of people who become stable and self-sufficient in their communities.

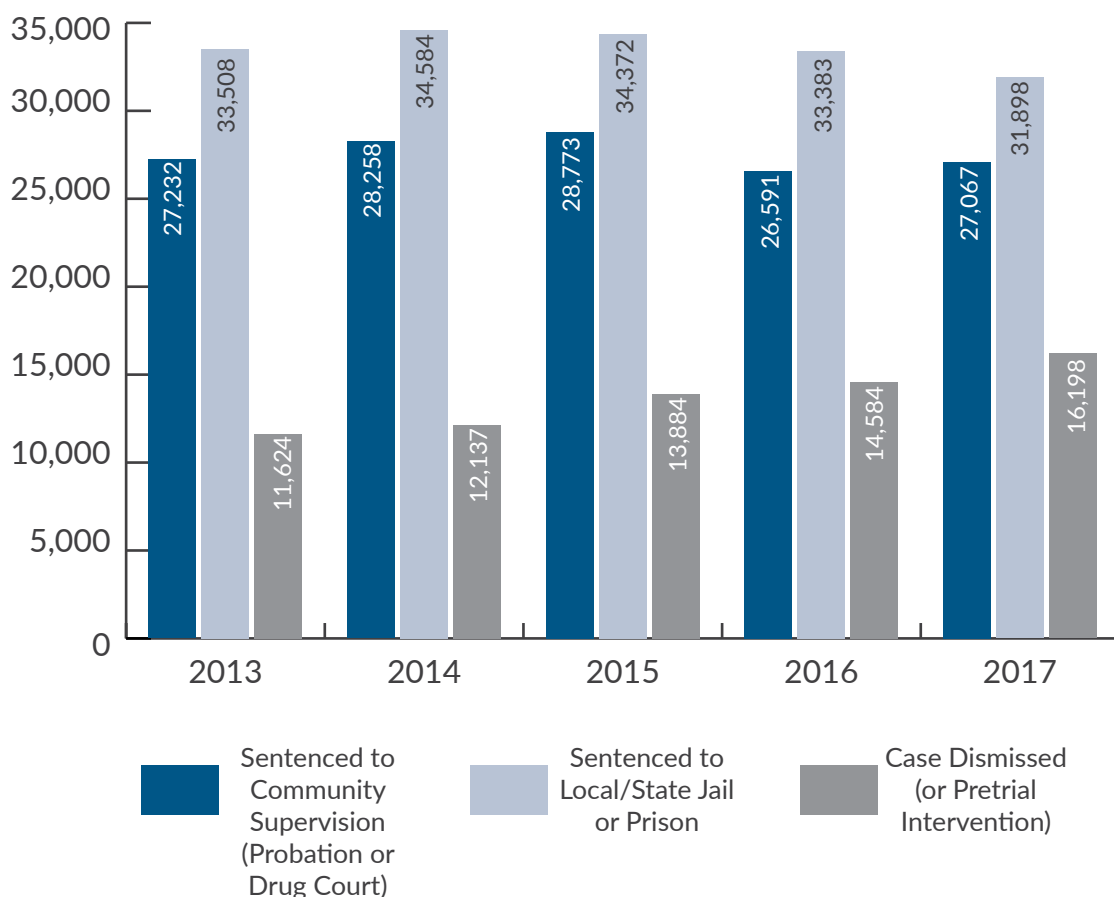
RECAP: Current Criminal Justice Practices Lower the Likelihood of Diversion from Incarceration

Given the limitations of the state jail system as a means of addressing the rehabilitative needs of incarcerated people, it is imperative that a greater proportion of people arrested for state jail felonies are quickly diverted away from incarceration and into *successful* alternative community-based programs that support treatment and provide other needed assistance. The data indicate that

the rate of diversion from incarceration has remained relatively stable over the past five years, with fewer than 50 percent of people arrested for drug or property offenses placed on probation or in diversionary court programs.³²

There appear to be three primary barriers to diversion, each of which has been stated previously. First, pretrial policies make it difficult for people without resources or who have a prior criminal history to be released on bond. As discussed, people take 12.44 plea agreements because they are incarcerated in county jail when those offers are made, and “time served” will allow them to be released immediately. Research confirms that pretrial detention increases the likelihood that defendants will be convicted and sentenced to a term of incarceration versus community supervision;³³ per a 12.44 agreement, that sentence is shortened but the state jail felony conviction stands. Second, people are less likely to be offered probation when they have prior prison or state jail commitments. Third, probation itself is viewed as overly costly and burdensome. All three factors are keeping the rate of diversion from increasing.

Drug Possession/Property Crimes Case Outcomes: 2013 - 2017



Emerging Model: Responsive Interventions for Change

Harris County (Houston), Texas, began directly addressing the three above barriers to diversion through its Responsive Interventions for Change (RIC) court docket. Unlike a specialty court, which supervises defendants in programming based on certain criminogenic risk factors, the RIC docket is geared towards rapid case processing, assessment, and referral to appropriate programming and supervision levels. The target offenses are primarily state jail felonies, including possession of a controlled substance and prostitution (with three prior offenses). Third degree drug possession cases, which involve amounts up to four grams, are also included. The program is funded by Harris County and the MacArthur Foundation, and is intended to address three goals:

1. Increase the proportion of cases that are placed into treatment and community supervision rather than into county jail, state jail, or prison;
2. Decrease disproportionate confinement of racial minorities; and
3. Decrease the amount of time people are confined in county jail.³⁴

All parties involved in the RIC docket, including the judge, probation department, defense, and prosecution, clearly understand that improving treatment placement can only be accomplished by reducing the time of confinement post-arrest. Therefore, individuals arrested for one of the targeted offenses are seen by the court within one day of referral to the RIC. Defendants receive assessment and are offered appropriate treatment.

The RIC docket addresses the second barrier to diversion discussed above — previous prison or state jail commitments — by directing all targeted cases to the docket regardless of the number of prior offenses. People with no prior offenses are offered the opportunity to participate in pretrial intervention, which includes short-term treatment, dismissal of the charge upon successful completion, and assistance with expunction of the arrest record. Those with prior offenses are offered treatment and a term of deferred adjudication community supervision. Higher-risk cases are offered drug court placement.

The RIC docket is perhaps most innovative in the way that it addresses the third barrier to diversion — overly burdensome probation conditions — by utilizing peer recovery coaches and reinforcing Core Correctional Practices.³⁵ A peer recovery coach is someone who has lived experience of substance use and/or mental illness, and who is trained to provide evidence-based guidance and motivation to assist people through the recovery process.³⁶ Recovery coaches help people initiate and maintain recovery by providing emotional support, assistance in finding employment and housing, and referral to recovery supports within the community. When utilized in the criminal justice system, connection to peer recovery coaches has been shown to reduce criminal involvement, as well as drug and alcohol use.³⁷

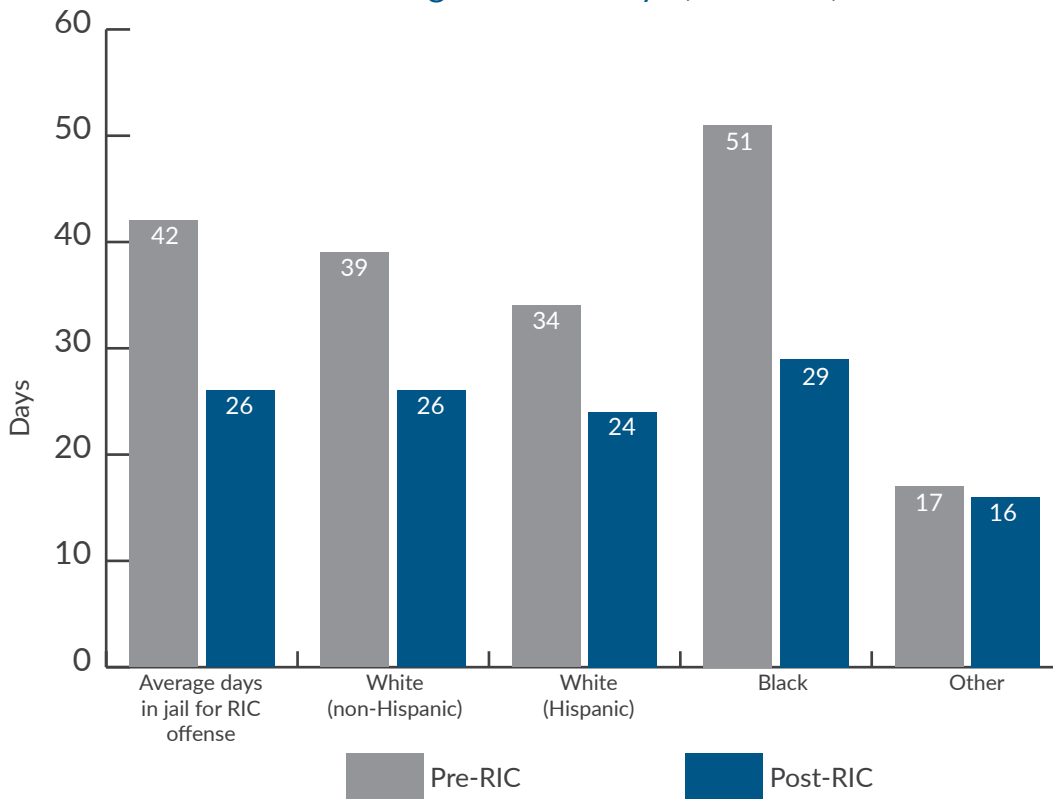
The RIC program also addresses the perception that probation is overly burdensome by ensuring that each of its 35 case officers is trained in Core Correctional Practices.³⁸ These practices include an array of service delivery skills intended to increase the therapeutic benefit of probation.³⁹ Core Correctional Practices reinforce pro-social thinking, help people develop problem-solving skills, promote cognitive restructuring, and improve relationship skills. The RIC's use of these practices is evidence that it is oriented towards participants' treatment success, not merely their compliance with probation conditions.

Within the first year of the RIC's implementation, the average days spent in jail for a targeted offense dropped from 42 to 26. The effect for African American defendants was especially significant, dropping from 51 to 29, a 43.1 percent decrease. This was the largest decrease in jail bed days of any racial group.⁴⁰

Moreover, the RIC program increased the number of people accepting community supervision and treatment by 25 percent within the first year.⁴¹

Most importantly, Harris County is diverting people from its county jail, state jail, and prison. In its first year of implementation, Harris County sent 424 fewer people to prison for drug possession, 600 fewer people to state jail, and 485 fewer people to county jail.⁴² The County also dismissed 1,412 more drug possession cases in 2017 than in 2016,⁴³ an astonishing figure that is likely due to the emphasis on pretrial diversion for first-time offenses.

Impact of Responsive Interventions for Change (RIC) Docket on Average Jail Bed Days (First Year)



You Shouldn't Have To Wear Handcuffs To Get Help

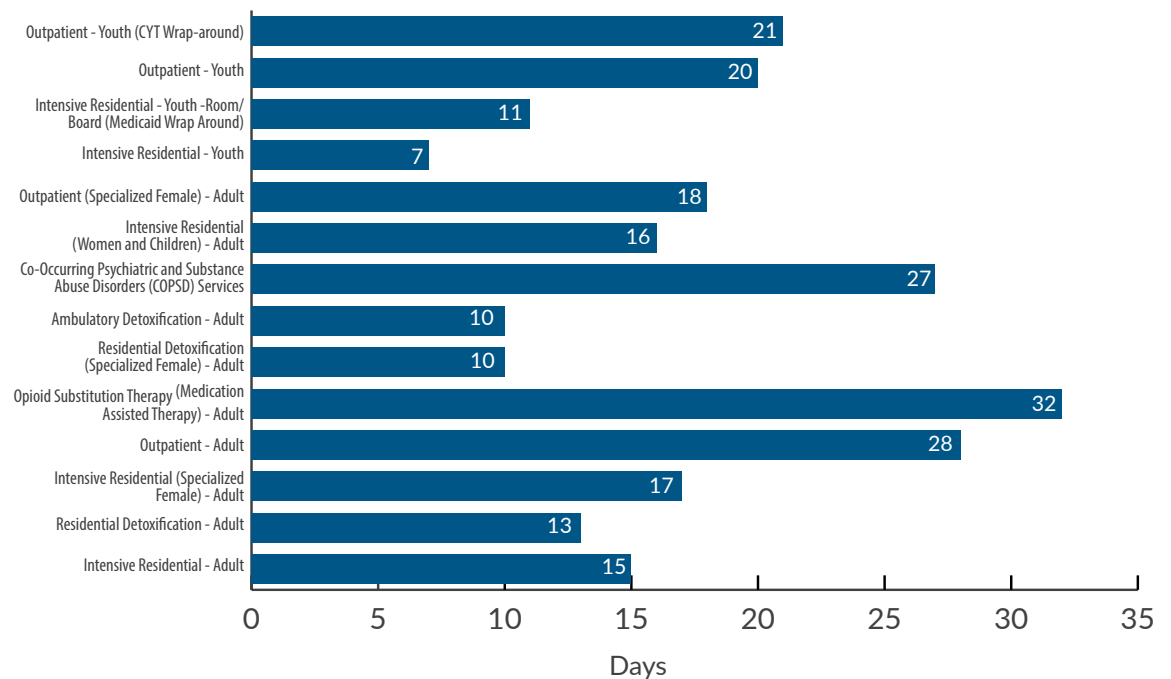
Treatment Outside the Justice System is Critical

While the innovation in Harris County is remarkable, it does not entirely address a core problem with underlying behaviors — like possession of a controlled substance — that we classify as a criminal offense: **A significant proportion of arrestees are dealing with inherent public health issues, not criminal justice issues.** According to the Diagnostic and Statistical Manual of Mental Disorders, “Substance use disorders occur when the recurrent use of alcohol and/or drugs causes clinically and functionally significant impairment, such as health problems, disability, and failure to meet major responsibilities at work, school, or home.”⁴⁴ According to the National Institute of Health, nearly one in ten people in the U.S. has had a drug use disorder at some point in their lives.⁴⁵

With adequate treatment and support, substance use disorder is manageable and recovery is possible, with relapse rates comparable to other chronic diseases like diabetes, asthma, and hypertension.⁴⁶ Unfortunately, nearly 75 percent of people with drug use disorder receive no treatment nationally.⁴⁷ Similarly, in Texas, it is difficult to find help for substance use disorder.

According to the Texas Health and Human Services Commission (HHSC), low-income people with substance use disorder must wait more than two weeks for intensive residential treatment, four weeks for outpatient treatment, and almost five weeks for Medication-Assisted Treatment.⁴⁸ People in need of co-occurring psychiatric and substance abuse treatment, who are already underserved, must wait almost four weeks for specialized services.⁴⁹

Average Days On Waitlist for HHSC-Funded Substance Use Services

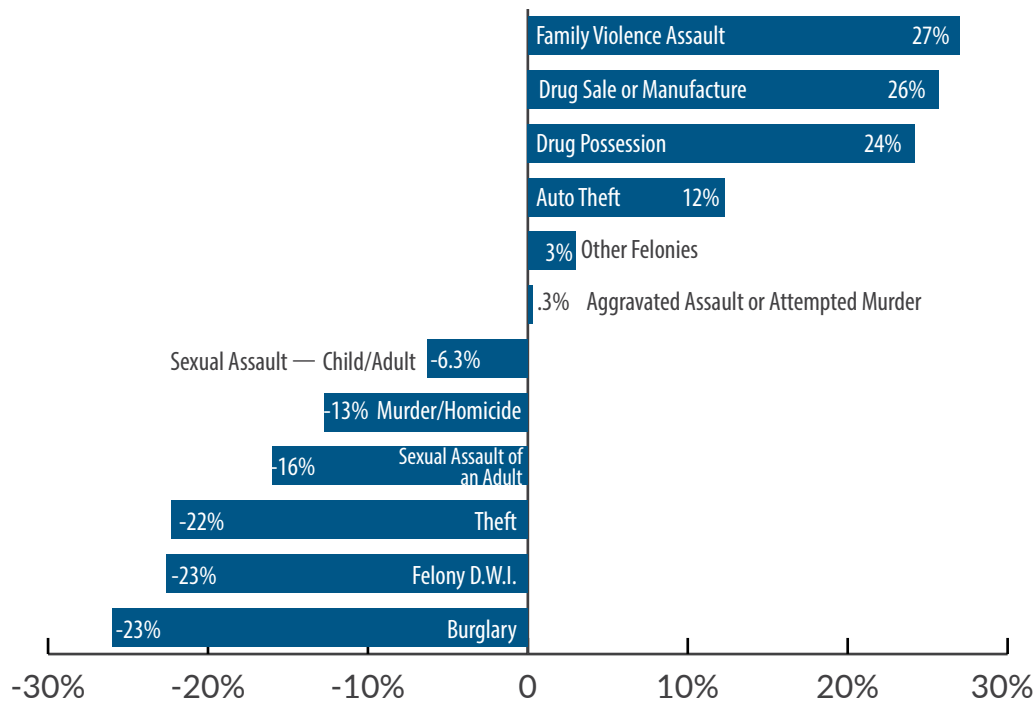


Even when people are able to access the wait list for treatment services, homelessness can increase the likelihood of attrition off the wait list; this is true even where there are relatively short delays between assessment and treatment admission.⁵⁰ And substance use is the largest cause of homelessness among single adults.⁵¹ For instance, in Travis County (Austin), Texas, more than 300 of its 1,900 homeless people on any given day have been diagnosed with a substance use disorder.⁵²

Even when low-income adults do have access to Medicaid, accessing services for substance use disorder is difficult. Texas has the third-lowest ratio of substance use disorder providers in the country, making access challenging even for those with Medicaid and private insurance.⁵³ Only nine percent of people with substance use disorder with Medicaid received treatment.⁵⁴

As a result, people with drug use problems are far more likely to be arrested than receive treatment in Texas. Over the past five years, nearly every category of serious and violent offense has declined significantly in this state, whereas drug possession cases have increased nearly 25 percent.⁵⁵

Change in Felony Case Filings 2013 - 2017



The Atlanta/Fulton County Pre-Arrest Diversion Initiative

relies on community-based, trauma-informed care systems to increase public safety. Prosecutors and police officers work closely with Care Navigators to take an individualized approach to law violations, diverting people from the justice system into social service systems that address unmet needs, including supportive/transitional housing, drug treatment, and mental health services; these services are less costly and more effective at creating behavioral health changes than incarceration, and the program has been successful in reducing further intersection with the criminal justice system. The Pre-Arrest Diversion Initiative is modeled after a similar approach in Seattle, Washington, wherein participants were 58 percent less likely to be arrested than individuals who went through regular criminal justice processing.

Source: Atlanta/Fulton County Prearrest Diversion Initiative, www.prearrestdiversion.org

It can be accurately stated that the failures of the state jail felony system have contributed to substance use disorder becoming a public health crisis. With such high re-arrest rates among individuals with state jail offenses — a large percentage of whom were initially incarcerated on a drug-related charge — the cycle of substance use, arrest, and incarceration simply continues, at a massive cost to taxpayers and communities. This underscores the need to address public health issues *outside* the criminal justice system. Despite the heavy reliance on incarceration to address drug offenses, there is no empirical evidence that it will prevent future substance use⁵⁶ or the associated justice system involvement.

Already, 20 cities across the country have implemented harm-reduction interventions for drug and drug-related offenses.⁵⁷ **Pre-arrest** diversion approaches, which involve the use of community-based services rather than arrest and jail, are founded on the evidence-based principles of harm reduction, where participants' needs are addressed in a non-coercive manner. Where these strategies have been implemented, communities have seen a remarkable drop in re-arrest rates. Specifically, participants in these programs were 58 percent less likely to be arrested after enrollment compared to those who went through the traditional criminal justice process — arrest, booking, detention, prosecution, conviction, and incarceration. Program participants also saw a long-term, decreased likelihood of being charged with a felony offense.⁵⁸

A public health/harm-reduction approach to illegal drug use can achieve far greater results with respect to public safety and health than the current criminal justice process. And, in fact, providing incentives to counties to implement pre-arrest diversion approaches for drug possession and other drug- and mental health-related state jail felony offenses would offer multiple benefits.

First, it is a matter of scale. There were 45,016 arrests in Texas for possession of a controlled substance (less than one gram, Penalty Groups 1 and 2) between May 2017 and April 2018.⁵⁹ Innovations such as the Responsive Interventions for Change docket shift a greater proportion of cases into treatment, but doing so strains limited treatment resources within the criminal justice

system. The Legislature should increase state and community funding to expand and undergird the continuum of substance use treatment and supports: This will ensure that more people can access help outside the costly justice system, and it will allow the criminal justice system to focus on more serious cases.

Second, pre-arrest diversion models require extensive local coordination between law enforcement, district attorneys, county and city elected officials, and local treatment providers. Such coordination necessitates an evaluation of gaps in treatment capacity that will vary region to region, and it expands the community discussion about how to handle illicit drug use to stakeholders outside of the criminal justice system. This community-driven process is vital, helping counties develop a strategic plan to improve the health of the community and reduce the incidence of arrests.

Third, while pre-arrest diversion models benefit the state by reducing the number of arrests and possible referrals to state jail and prison, they strongly benefit counties. Detaining someone with substance use disorder for a nonviolent offense like possession of a controlled substance is expensive and massively inefficient. For instance, Austin Police Department spends between \$55 and \$97 per person to arrest and book someone into county jail, and the Travis County Sheriff's Office incurs another \$153 per booking and \$97 per jail bed day.⁶⁰ Taxpayers foot the bill for these costs, when the squandered expenses could have gone toward expanding the continuum of care for substance use disorder, thereby preventing future costly arrests.

Recommendations

I. The Legislature Should Expand the Community Collaborative Model to Decrease Arrests and Improve Treatment Capacity.

In 2017, the Texas Legislature passed Senate Bill 292, which created a mental health matching grant program for justice system-involved individuals to reduce recidivism, arrests, and incarceration among people with mental illness.⁶¹ Grant applications were submitted by community collaboratives, which included a wide array of local stakeholders inside and outside the criminal justice system who identified specific community needs with respect to treatment capacity and local coordination. Grants included a local-match requirement. The Legislature should expand this model to address the rising rate of arrest in Texas for possession of controlled substance, as well as the high recidivism rate for state jail felonies. Grant recipients should be required to develop a strategic plan, identify treatment and coordination gaps, set state and county jail reduction targets, implement locally driven programming like pre-arrest diversion initiatives or other programs, and achieve targeted goals. Ultimately, the county and state will recoup costs through reductions in state jail and county jail commitments.

II. The Legislature Should Provide Additional Funding to Support Pretrial Initiatives, Such as Responsive Interventions for Change (RIC).

In areas where *pre-arrest* diversion programs are not implemented, it is critical to improve local pretrial systems to ensure that people are not sitting unnecessarily in jail but are still held accountable, and that they have access to needed programs and services.

- a. Texas should provide Diversion Program funding — grant funds available from TDCJ’s Community Justice Assistance Division (CJAD) — to help counties implement core pretrial intervention strategies, including:*
- Rapid referral to a specialty docket when someone is arrested for a state jail felony, and quick placement into pretrial programming or deferred adjudication. The longer someone waits in jail, the more likely it is that he or she will be committed to county or state jail instead of treatment and community supervision. Grant funds should include stipulations that courts achieve the following goals:
 - Reduce defendants’ length of confinement in county jail during the pretrial phase;
 - Reduce the number of state and county jail commitments;
 - Reduce the number of probation revocations;
 - Reduce the overall length of probation supervision; and
 - Eliminate racial disparities in pretrial confinement, access to treatment services, and sentencing/revocation outcomes.
 - Connection with peer recovery coaches to help defendants on the path to recovery.
 - Access to community-based treatment or community supervision regardless of the number of prior offenses.
 - Implementation of Core Correctional Practices in the supervision of people charged with state jail felonies.
 - An opportunity for defendants to have their charges dropped upon successful completion of the program.
- b. Separately, the Legislature should adequately fund the supervision of defendants placed in pretrial intervention programs for state jail felonies:* Current statute allows CJAD to provide discretionary grant funding to probation departments to develop and operate pretrial intervention programs.⁶² This funding currently amounts to \$2.5 million per year through the end of 2019, allowing CJAD to support a very limited number of pretrial programs.⁶³ The Legislative Budget Board should include defendants in pretrial intervention programs in the total number

of individuals needing supervision when considering TDCJ's biannual "Basic Supervision Funding" line item, and the State should fund pretrial supervision clients at the same rate as probation clients.

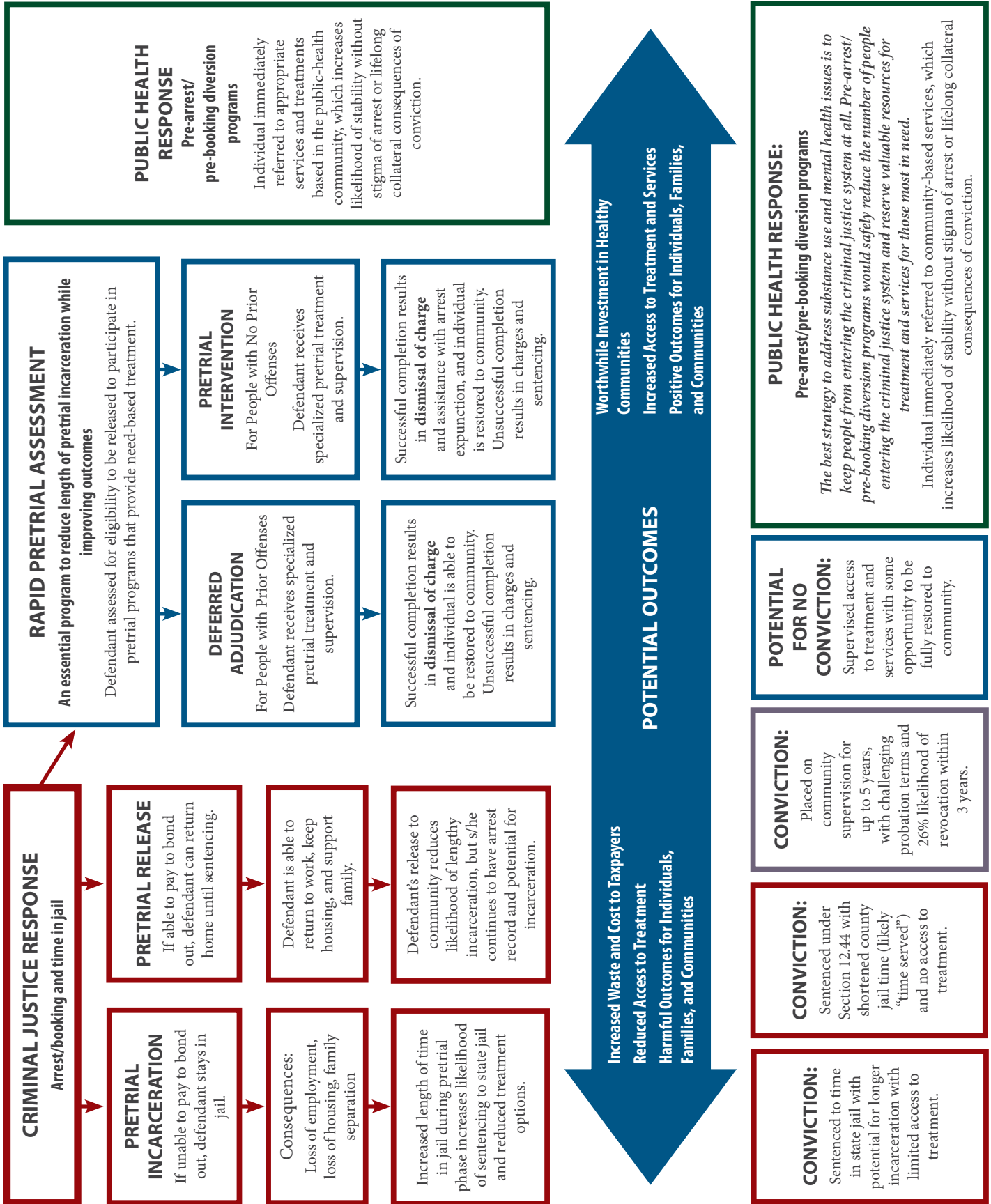
III. The Legislature Should Fund the Reentry Pilot to Improve Employment Prospects.

In 2017, the Texas Legislature passed House Bill 3130,⁶⁴ which created a pilot program allowing courts to sentence people to short-term confinement in a state jail (with a minimum 90-day term), followed by 90 days in a community-based vocational/cognitive behavioral program, and another 90 days of community supervision. This promising model addresses many of the limitations of the state jail system by ensuring that people receive meaningful programming and assistance with job placement, followed by supervision within the community to promote accountability and stability. The pilot closely models the original intent of the state jail model; however, it was not funded during Texas' 2017 Legislative Session. A reasonable investment from the Legislature will help pilot counties realize the many benefits of the program, especially reductions in costly recidivism.

IV. The Legislature Should Improve Rehabilitative Services Within State Jails and Promote Post-Release Reentry Support.

The recommendations listed above provide a strong blueprint for safely reducing state jail populations. But people will still be sent to state jail, and it is imperative that they receive meaningful services while incarcerated, followed by reentry support. The Texas Legislature should provide additional funding to TDCJ to augment vocational and substance use services within state jails, as well as funding for reentry support before and after release. The Legislature should also fund reentry case management for people in state jail who will require mental health services within the community upon release.

Responses to State Jail Felonies



Note: Additionally, defendants have the possibility of not being convicted, which is a decision resulting in no further criminal justice system involvement; however, individuals still have a record of arrest or charges that may reduce opportunities to be fully restored to the community.

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