



**WRITTEN TESTIMONY**

**TRAVIS LEETE, J.D.  
TEXAS CRIMINAL JUSTICE COALITION**

**REGARDING INTERIM CHARGE:**

*Study the law governing the Texas bail bond industry and determine local practices for the pretrial release of the accused. Determine the financial impact of various pretrial release options for the accused, and the financial impact on counties for the failure to release pretrial.*

**TO BE CONSIDERED BY THE SENATE COMMITTEE  
ON CRIMINAL JUSTICE**

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## TEXAS CRIMINAL JUSTICE COALITION

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The Texas Criminal Justice Coalition is committed to identifying and advancing real solutions to the problems facing Texas' juvenile and criminal justice systems. We provide policy research and analysis, form effective partnerships, and educate key stakeholders to promote effective management, accountability, and best practices that increase public safety and preserve human and civil rights.

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## INTRODUCTION

*In our society, liberty is the norm and detention prior to trial ... is the carefully limited exception.*<sup>1</sup>  
- Chief Justice William Rehnquist

In 1964, Attorney General Robert Kennedy welcomed members of the National Conference on Bail and Criminal Justice Pretrial by voicing concern that “one of the most surprising—and troubling—disclosures of recent studies is that whether or not a man makes bail has a vital effect on whether, if innocent, he will be acquitted and whether, if guilty, he will receive equal opportunity for probation.”<sup>2</sup> Today, the negative consequences resulting from pretrial deficiencies are still ubiquitous in our criminal justice system and pretrial investment has garnered recent attention from groups like the Texas Public Policy Foundation (TPPF) and Right on Crime.<sup>3</sup> Last year, when U.S. Attorney General Eric Holder spoke at the National Symposium on Pretrial Justice he recognized:

[M]any Americans accused of nonviolent or petty offenses remain in jail before trial simply because they cannot afford to post bail of even a few hundred dollars. Nearly two-thirds of inmates in county jails are awaiting trial, many for nonviolent crimes, at a huge cost to taxpayers.... And inmates who lose their jobs can also become ineligible for health benefits, relying on emergency rooms for routine treatment after their release.<sup>4</sup>

In 2010, these pretrial detainees cost taxpayers about \$9 billion.<sup>5</sup> Realizing that it is a significant and unnecessary drain on taxpayers to detain individuals who present little risk of flight and pose no danger to public safety, the American Bar Association (ABA) continues to urge investment in pretrial services and bail reform.<sup>6</sup> Recently, the Texas House Committee on County Affairs also considered the issue of pretrial oversight, and their report to the Legislature espouses the integral role pretrial services plays in the criminal justice system and **lauds the use of pretrial programs as an effective strategy to reduce jail overcrowding while maintaining public safety.**<sup>7</sup> This Committee’s desire and dedication to undertake a more thorough examination of pretrial release and detention in Texas is further testament to the importance of pretrial improvement. Other supporters of pretrial improvements include the U.S. Department of Justice (DOJ), the Bureau of Justice Assistance (BJA), the International Association of Chiefs of Police (IACP), the National Institute of Corrections (NIC), the American Probation and Parole Association (APPA), the American Jail Association (AJA), and the American Council of Chief Defenders (ACCD).<sup>8</sup>

While Attorney General Kennedy first acknowledged a systemic problem, he continued in his welcoming speech to the National Conference on Bail and Criminal Justice Pretrial by opening up a dialogue on pretrial reform, expressing hope that improvements in the bail system and implementation of developing techniques and programs for releasing accused persons prior to trial would result in substantial cost savings, increased efficiency, and “save countless citizens from needlessly or unjustly spending days or weeks or months in jail.”<sup>9</sup> Similarly, contemporary pretrial modifications will significantly improve the overall criminal justice system and we are counting on this Committee’s leadership to develop solutions to address the burdens of already strained budgets while preserving public safety.

## OVERVIEW OF PRETRIAL RELEASE ISSUES IN TEXAS

Pretrial detention has become an unsustainable practice both in terms of financial and human costs. Every year America spends close to \$66 billion to keep people behind bars. Almost 500,000 of the 2.3 million prisoners are pretrial detainees, individuals who have not been convicted of any crime and are simply awaiting trial.<sup>10</sup> Pretrial detention is costly and often unnecessary. The human cost is difficult to quantify, but collateral damage from pretrial detention can have a lasting impact on both the individual and society; pretrial detention deprives one of fundamental liberties, removes individuals from their community, separates families, compromises a person’s ability to meet financial obligations, jeopardizes employment, and cripples other aspects of daily life. Fiscally speaking, pretrial detainees are housed in county jails at an average cost of \$59 a day,<sup>11</sup> but the state can also incur additional costs as a result of initial pretrial detention. Research indicates that detained defendants often get harsher sentences, are offered worse plea bargains and are more likely to be sentenced and incarcerated.<sup>12</sup> Some experts have also linked pretrial release—as opposed to awaiting trial in jail—to lower recidivism rates.<sup>13</sup> Ultimately, it is the taxpayer who bears the burden of longer sentences and increased re-incarceration rates. Further, it would be imprudent to build more facilities to house additional detainees; the cost to develop additions to existing facilities would be \$40,000 per bed, and the cost to build a new facility would be \$80,000 per bed.<sup>14</sup> Pretrial detention compounds the problem of incarceration by perpetuating a practice that overburdens an already strained system.

Recent figures show that 62% of the inmates in Texas county jails were simply sitting in detention waiting for trial. A snapshot of March 2012 figures reveals that roughly 35,000 of the over 60,000 incarcerated persons in county jails were pretrial detainees.<sup>15</sup> Pretrial misdemeanors account for 11%, while pretrial felons and state-jail felons account for 51% of that total population.<sup>16</sup> Table 1a provides the numbers of pretrial detainees in March of this year.

<b>TABLE 1a: Total Population of Texas County Jails by Offense<sup>17</sup></b>							
<b>MISDEMEANORS</b>		<b>STATE JAIL FELONY</b>			<b>FELONY</b>		
<b>Pretrial</b>	<b>Convicted</b>	<b>Pretrial</b>	<b>Convicted Co. Jail</b>	<b>Convicted State Jail</b>	<b>Pretrial</b>	<b>Convicted</b>	<b>Sent to Co. Jail</b>
<b>5,961</b>	3,662	<b>4,846</b>	632	1,435	<b>24,286</b>	5,360	1,061

  

<b>TABLE 1b: Total Population of Texas County Jails<sup>18</sup></b>		
<b>LOCAL FACILITY</b>	<b>CONTRACT FACILITY</b>	<b>TOTAL</b>
<b>55,157</b>	7,939	63,096

Given the average statewide cost to house an individual in a county facility, \$59 a day, those 35,000 pretrial detainees in the month of March cost taxpayers over \$2 million a day. By way of comparison, table 2 below contrasts counties with the highest general populations and their corresponding county jail populations with the counties that have the highest pretrial detainee population. Ostensibly, counties with higher populations would have correspondingly higher arrest rates, higher jail populations, and higher pretrial detention populations. However, table 3 shows counties that, relative to their high overall county population, rank fairly low with respect to pretrial detainee population. This represents a departure from common assumptions linking high population with high detention rates.

**TABLE 2: Highest County Jail & Pretrial populations<sup>19</sup>**

TOP 10 PRETRIAL POPULATION†	RANK IN COUNTY POPULATION‡	AVERAGE DAILY JAIL POPULATION*	PRETRIAL POPULATION**	PRETRIAL DAILY COST***	PRETRIAL ANNUAL COST
<b>Harris</b>	1 <sup>st</sup>	8,842	5,092	\$300,000	\$110 million
<b>Dallas</b>	2 <sup>nd</sup>	6,452	4,294	\$253,000	\$92 million
<b>Bexar</b>	4 <sup>th</sup>	3,829	2,083	\$123,000	\$45 million
<b>Tarrant</b>	3 <sup>rd</sup>	3,340	1,799	\$106,000	\$39 million
<b>Travis</b>	5 <sup>th</sup>	2,364	1,625	\$96,000	\$35 million
<b>El Paso</b>	6 <sup>th</sup>	1,581	1,061	\$63,000	\$23 million
<b>Hidalgo</b>	8 <sup>th</sup>	1,110	827	\$49,000	\$18 million
<b>Cameron</b>	11 <sup>th</sup>	1,133	764	\$45,000	\$16 million
<b>Denton</b>	9 <sup>th</sup>	1,187	749	\$44,000	\$16 million
<b>Collin</b>	7 <sup>th</sup>	980	691	\$41,000	\$15 million
<b>Fort Bend</b>	10 <sup>th</sup>	867	550	\$32,000	\$12 million

† *Fort Bend* County is in Top Ten total county population but is not in Top Ten highest pretrial populations. *Cameron* County is not in highest county population, but is included in the highest pretrial populations.

‡ The numbers in this column represent ranking with respect to total county population, based on 2010 Census.

\* Average Daily populations, based on average January-December 2011 population reports minus contract facilities.

\*\* Based on 12-Month Average.<sup>20</sup>

\*\*\* Based on average \$59.00 per day.

**TABLE 3. Big Movers in Pretrial Detainees<sup>21</sup>**

COUNTY	RANK IN POPULATION	RANK IN PRETRIAL POPULATION
<b>Williamson</b>	12 <sup>th</sup>	25 <sup>th</sup>
<b>Midland</b>	28 <sup>th</sup>	38 <sup>th</sup>
<b>Guadalupe</b>	29 <sup>th</sup>	47 <sup>th</sup>
<b>Gregg</b>	32 <sup>nd</sup>	20 <sup>th</sup>
<b>Navarro</b>	66 <sup>th</sup>	49 <sup>th</sup>
<b>Bowie</b>	40 <sup>th</sup>	26 <sup>th</sup>

Despite the importance of pretrial release, there is little guidance or established standards for any of Texas’ 254 counties wishing to implement a model pretrial services program. Furthermore, the laws related to bail and personal bond need to be improved to allow the release of more low risk individuals. Investment in pretrial services provides an opportunity to improve the situation for many individuals involved the criminal justice system, and it can also save the state money. Ultimately, improving pretrial services will ensure that individual needs are met, pretrial incarcerations are reduced, accused individuals are able to maintain stability in their life, and public safety is preserved.

### OVERVIEW OF THE BAIL PROCESS

The bail process, and the right against excessive bail, reflects the fundamental precept “innocent until proven guilty” insofar as it provides a mechanism through which a person who is not yet convicted of an alleged crime may be released from detention. So important is the right against excessive bail, it is enumerated in the Eight Amendment of the U.S. Constitution, providing: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>22</sup> Further, Article I, section 11 of the Texas Constitution states in pertinent part: “All prisoners shall be bailable by sufficient sureties....”<sup>23</sup> While Texas upholds the general

edict against excessive bail, which would include bail set unreasonably high or a flat denial of bail, there are various exceptions under Texas laws that allow courts to deny bail in limited circumstances.<sup>24</sup>

□ **How bail is defined.** Read in conjunction with the U.S. and Texas Constitutions, the primary authority governing bail in Texas—setting bail, denial of bail, release and conditions of bail, etc.—is codified in Chapter 17 of the Texas Code of Criminal Procedure. The regulation of the bail bond business in counties with a bail bond board also falls within the purview of sections 1704.001-1704.306 of the Texas Occupations Code.<sup>25</sup> Defined in statute, bail is simply a security provided by the accused (the defendant) to ensure that he will appear before the proper court to answer the accusations brought against him.<sup>26</sup> Bail includes either a “bail bond” or a “personal bond,” although these two terms are often conflated.<sup>27</sup> To be clear, bail bond and personal bond are both simply means of achieving release through bail. Bail is the process whereby an individual may be released from detention in exchange for an assurance that she will appear before the proper court at the proper time.<sup>28</sup>

□ **Types of bail.** There are three types of bonds contemplated in statute:

- **Cash Bond.** A cash bond occurs when the defendant, or someone on the defendant’s behalf, executes the bond himself as the principal and posts the whole amount of the bond with the “custodian of funds of the court.”<sup>29</sup>
- **Surety Bond.** A “surety bond” is executed by the defendant as the principal and one or more sureties who post bond for the defendant in exchange for compensation, typically about 10% of the bond amount, though it may vary.
- **Personal Bond.** In contrast, a “personal bond”<sup>30</sup> is a mechanism to release a defendant, on her personal bond, without sureties or other security, although in some instances a small fee may be charged.<sup>31</sup> Release is predicated on the court’s satisfaction that the defendant will comply with any conditions imposed and will appear back in court at the set time.

Cash and surety bonds are distinguishable from personal bond because a personal bond does not require the same type of surety or security to be deposited as a condition of release, but all three serve a similar function, *i.e.*, a guarantee to appear when required.

□ **How bail is set and determined.** The decision to release someone on bail involves two countervailing interests, preserving fundamental liberty rights and ensuring that someone who poses a risk of flight or safety is not released. The rules for setting bail must comport with the U.S. and Texas Constitutions, both of which explicitly proscribe excessive bail.<sup>32</sup> In Texas, bail determinations are at the discretion of the person authorized to fix bail, a magistrate or judge (hereinafter the terms will be used interchangeably), although many counties provide a non-binding bond “schedule” as a guide for determining bail amounts.<sup>33</sup> A magistrate is governed in the exercise of her discretion by the Constitution and the following rules promulgated in Texas code: (1) bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with; (2) the power to require bail is not to be used as an instrument of oppression; (3) the nature and circumstances of the offense are to be considered; (4) the ability to make bail is to be regarded, and proof may be taken at that point; and (5) the future safety of a victim of the alleged offense as well as the community shall be considered.<sup>34</sup>

- **How the bail industry is regulated in bail bond board counties.** If a county has a bail bond board, Chapter 1704 of the Occupations Code controls. The board supervises and regulates bond business in its respective county by adopting rules and issuing licenses to qualified applicants.<sup>35</sup> The administrative and regulatory authority of the board include the power to issue licenses, deny licenses, adopt and post rules, post lists of current bail bond sureties, and deposit fees.<sup>36</sup> Under code, the board may also conduct investigations of license holders in relation to certain complaints of rule violations.<sup>37</sup> The licensing requirements in a bail bond board county, as well as security regulations, prohibited conduct, exemptions, and other restrictions are all set forth in statute. The licensing criteria to be a surety, as set forth in the Occupations Code, include financial requirements, employment for a specified time by a licensed bondsmen, completion of eight hours of legal education in criminal law or bail bond law courses within two years prior to application, and various other requirements.<sup>38</sup>
- **If outside of bail bond counties.** There are very few restrictions or regulation on bondsmen outside of bail bond counties. In addition to the laws governing bail bond boards, the law governing sureties (bondsmen) can be found in Chapter 17 of the Code of Criminal Procedure. To be a surety for compensation (a bail bondsmen) in a county not regulated by a bail bond board, a person simply needs to satisfy minimal educational requirements and meet established financial standards.<sup>39</sup> Corporations may act as sureties, but only those duly authorized by the Texas Department of Insurance.<sup>40</sup>

## OVERVIEW OF PRETRIAL SERVICES

Distinguishable from bail or bond, “pretrial services” is a term used to describe a larger process that can encompass anything from screening arrestees and providing release recommendations based on risk assessments to supervising individuals released on bond. Undergirding pretrial programs and services are six well established legal principles: (1) the presumption of innocence, (2) the right to counsel, (3) the right against self-incrimination, (4) the right to due process of law, (5) the right to equal protection under the law, and (6) the right against bail that is excessive.<sup>41</sup>

- **Texas pretrial services laws.** The authority controlling pretrial programs is codified in two sections of the Texas Code, section 17.42 of the Code of Criminal Procedure and section 76.011 of the Government Code. The Texas Code of Criminal Procedure permits counties to establish personal bond offices to gather information to assist courts determine personal bond release and conditions of release, while the Government Code furnishes Community Supervisions and Corrections Departments (CSCDs) the authority to supervise individuals released pretrial. Therefore, “pretrial services” ordinarily perform one or both of the following services: intake evaluations and pretrial release supervision.
- **Model Pretrial Program.**<sup>42</sup> In a recent conference hosted by the ABA and the University of Houston Law Center, Criminal Justice Institute Conference, the Executive Director of the Pretrial Justice Institute listed the following components of an effective pretrial justice system:
  - (1) Impartial universal screening of all arrestees;
  - (2) verification of interview information, criminal history checks;
  - (3) objective risk assessments and bail recommendations to court;

- (4) second review of those unable to meet conditions of release; and
- (5) accountable and appropriate supervision of those released, as well as proactive court date notification.<sup>43</sup>

□ **Facts of pretrial in Texas.** Given the size of Texas, 254 counties, there are a disappointingly low number of pretrial services programs created; only 11 counties have established a “pretrial supervision division.”<sup>44</sup> A recent survey conducted by TCJC identified a broad range of pretrial related services offered in only 47 counties.<sup>45</sup> Over half the programs identified in TCJC’s survey indicated that their program was located within a CSCD.<sup>46</sup> Ultimately, there is no uniformity in how services are structured in each respective county; not all pretrial programs are offered through CSCDs, not all perform supervision or monitoring of defendants, and many do not provide initial interviews or make recommendations regarding release on personal bond or conditions of release. Amid the incongruent practices, there is one consistent requirement that any personal bond office, regardless of how it is structured, submit an annual report providing specific statistical data regarding internal operations as well as details on each person interviewed, released, and supervised. This helps monitor success rates and final case dispositions of all individuals served by the office. Still, there is a general sense that pretrial services programs lack continuity across counties, and there are many variances in how pretrial services are structured and what they provide, as illustrated below.

- **Pretrial supervision through CSCD without personal bond office function.** Some counties, like Fannin County, primarily perform supervision through Pretrial Diversion and Bond Supervision Programs. There, the prosecuting attorneys review cases and refer them to the CSCD to determine if they qualify to participate in their diversion program. Upon completion of the diversion program the case is dismissed.<sup>47</sup>
- **Pretrial services entity outside of CSCD.** In another pretrial organizational scheme, Harris County Pretrial Services investigates and compiles information on individuals who are charged with a felony or Class A or B misdemeanor. This report is sent to the courts to assist with release and detention decisions, especially to determine eligibility for personal bond. Harris County Pretrial Services also monitors and enforces defendants’ compliance and reports non-compliance to the court.<sup>48</sup>
- **Personal bond office/pretrial services entity established in tandem with CSCD.** In Travis County, the Pretrial Services Division, in partnership with the Travis County CSCD, perform the following functions: conducts interviews and collects relevant data from the defendant including residence, employment, references, and criminal history to assess release options; screens for indigent status and collects information that can assist courts in determining whether a defendant qualifies for court-appointed counsel; prepares personal bond applications; and makes recommendations related to bond release and conditions.<sup>49</sup> Pretrial Officers may also obtain input from complaining witnesses concerning the defendant’s possible release in most victim-oriented offenses.<sup>50</sup> Data collected is provided to the court so that the judge may make a decision regarding release on personal bond. Finally, regarding individuals released, the Travis County’s case management Pretrial Officers perform various supervision/monitoring tasks, including: (1) monitoring compliance with release conditions, including court-ordered treatment requirements; (2) ensuring that defendants report to court; (3) connecting defendants with community resources that will help them maintain stability while awaiting trial, like treatment referrals and employment

assistance; and (4) providing information to the court about defendants' compliance with conditions of release.

To illustrate the efficacy of pretrial services, in Fiscal Year 2011 (October 2010 to September 2011), the Travis County Annual Report indicates that 19,726 individuals were released on supervised or unsupervised bond after review by the Travis County Pretrial Services Office. Significantly, they had an appearance rate of nearly 90%. The total number of persons who failed to attend a court appearance, resulting in a bond forfeiture, was 2,081 (10.55%). Additionally, the rearrest rate of releasees was roughly 14%, 2,771 individuals were arrested for another offense while on personal bond and only 691 of those were on supervised bond.<sup>51</sup>

Finally, the figure represented in Table 4a, from the House Committee on County Affairs Interim Report to the 82nd Texas Legislature, reveals a wide discrepancy in performance between personal bond and surety bond outcomes in Travis County. With further research, TCJC was able to update these figures with population numbers from 2010 and 2011, Tables 4b and 4c respectively, to show the change over the last three years. Table 4a-4c depicts a far greater number of individuals released on personal bond and, in comparison to those released on surety bonds, a much lower percentage of rearrests and bond forfeiture.

<b>TABLE 4a: Travis County FY 2009 Pretrial Release Statistics<sup>52</sup></b>		
<b>Total Number of Individuals <i>Booked</i> in Travis County Jail*</b>	61,365	
	PERSONAL BOND**	SURETY BOND†
<b>Number Released</b>	18,275	4,198
<b>Number Re-Arrested After Release</b>	1,535 (8.4%)	2,630 (62.6%)
<b>Number Forfeiting Bond After Release</b>	2,613 (14.3%)	899 (21.4%)
<b>TABLE 4b: Travis County FY 2010 Pretrial Release Statistics</b>		
<b>Total Number of Individuals <i>Booked</i> in Travis County Jail*</b>	60,735	
	PERSONAL BOND**	SURETY BOND†
<b>Number Released</b>	19,269	3,880
<b>Number Re-Arrested After Release</b>	2,568 (13.3%)	2,193 (56.5%)
<b>Number Forfeiting Bond After Release</b>	2,242 (11.6%)	829 (21.4%)
<b>TABLE 4c: Travis County FY 2011 Pretrial Release Statistics</b>		
<b>Total Number of Individuals <i>Booked</i> in Travis County Jail*</b>	58,454	
	PERSONAL BOND**	SURETY BOND†
<b>Number Released</b>	19,726	3,700
<b>Number Re-Arrested After Release</b>	2,771 (14%)	1,705 (46.1%)
<b>Number Forfeiting Bond After Release</b>	2,081 (10.5%)	638 (17.2%)

\* Source: Travis County Sheriff's Office.<sup>53</sup>

\*\* Source: Travis County Pretrial Services.<sup>54</sup>

† Source: Travis County Criminal Courts.<sup>55</sup>

Effective pretrial services programs are critical to preserving fundamental rights, and investments in such services can also help reduce costly jail overcrowding. In Attorney General Eric Holder's remarks to the 2011 National Symposium on Pretrial Justice, he aptly described pretrial detainees by pointing out:

Almost all of these individuals could be released and supervised in their communities—and allowed to pursue or maintain employment, and participate in educational opportunities and their normal family lives—without risk of endangering their fellow citizens or fleeing from justice.<sup>56</sup>

In its Interim Report examining pretrial practices, the Texas House Committee on County Affairs concludes: **“Where they exist, pretrial services agencies are organized to best meet the needs of the local community.”**<sup>57</sup> By establishing robust pretrial programs throughout the state—incorporating proper assessments and imposing appropriate conditions—many individuals awaiting trial in county jails would have the opportunity for release and be able to resume their lives in the community rather than wasting taxpayer dollars sitting in pretrial confinement.

## POLICY RECOMMENDATIONS

### (1) Save taxpayer dollars and avoid unnecessary pretrial detention by encouraging the use of cite and summons release practices already adopted by the Legislature.

According to recent figures, nearly 6,000 of the inmates detained in jail as of March 2012 were pretrial detainees arrested for a misdemeanor offense (see table 1a above).<sup>58</sup> Table 5 below shows the five counties with the highest pretrial population and the number of misdemeanor arrestees they detain. In lieu of custodial arrest for certain low-level offenses, law enforcement should be given the proper tools to effectively implement “cite and release” practices already established in statute.

TABLE 5: Top Counties Average Misdemeanor Population		
TOP FIVE PRETRIAL POPULATION	PRETRIAL DETAINEE POPULATION	MISDEMEANOR DETAINEES
Harris	5,092	488
Dallas	4,294	443
Bexar	2,083	404
Tarrant	1,799	266
Travis	1,625	361

Anyone arrested and accused of a crime must be taken before a magistrate or judge within a time specified by law. However, rather than take a person before a magistrate, and in lieu of custodial arrest, a peace officer may issue a citation to a person charged with certain misdemeanor offenses.<sup>59</sup> With respect to class A and B misdemeanors, the cite and release practice is limited to a select group of enumerated offenses, such as graffiti, theft of service, or driving with an invalid license.<sup>60</sup> This practice is permissive for any Class C misdemeanors other than Penal Code section 49.02 (public intoxication).<sup>61</sup> The citation issued must contain specific information including a notice of the time and place the person must appear before the magistrate, the name of the person charged, and the offense charged. Texas Code further provides, under rare circumstances when the court is not in session or the magistrate is unavailable, that a sheriff or peace officer may take bail in such amount as the officer considers reasonable without the amount first being fixed by the court.<sup>62</sup>

In codifying this practice, the Legislature gives credence to a viable option that will keep low-level offenders out of costly detention, further underscoring the utility in allowing individuals to

be released without having to wait in jail simply as a matter of procedure. As a matter of public policy Texas must continue to encourage law enforcement to use this cite and release mechanism as an alternative to confining individuals accused of low-level offenses, who pose no legitimate risk to public safety, in county jail at taxpayer expense. Moreover, Texas must provide law enforcement adequate funding and necessary technical assistance to manage cases through this cite and release practice; many jurisdictions would implement this cite and release process if they had proper assistance. One way to accomplish this is by creating a pilot program to serve as a learning site to provide training and technical support for agencies wishing to implement this practice in the most effective way. Additional financial and technical assistance could be offered with the guidance and support of the Governors Criminal Justice Division. Citation and release in lieu of incarceration is a recommendation endorsed by the ABA,<sup>63</sup> and in Texas, the cite and release practice would not have been made possible without the leadership of the Texas Sherriff's Association.

**(2) Improve the efficacy of pretrial services programs statewide by studying and identifying evidence-based pretrial practices proven to work and providing proper funding and technical assistance to support those practices.**

There are no uniform pretrial standards; as a result there are great variations among the different pretrial services programs available in different counties. Furthermore, there are not enough qualitative or quantitative evaluations in Texas to provide a comprehensive picture of what practices work best in specific locales. Without identifying programs that work and are currently in place, it is nearly impossible to effectively allocate appropriate resources to meet community needs. To foster continuity in pretrial practice and develop consistent expectations with respect to outcomes, policymakers must insist on more extensive studies of programs that work.

It is imperative that pretrial services programs are provided financial support as well as proper technical assistance. Adequate funding, training, and technical assistance depend on accurate knowledge of community needs, which is best identified through comprehensive reporting and monitoring. For example, the Community Justice Assistance Division (CJAD), under Government Code section 76.011, maintains discretion to fund departments that provide pretrial release supervision, but without any knowledge of what programs are working or what operational needs exist, there is no way to effectively allocate necessary funds or resources. Despite CJAD's discretionary power to allocate funds, many counties that participated in TCJC's survey of pretrial services indicate that inadequate financial support presents the most significant barrier to implementing a full pretrial services program.<sup>64</sup>

Many counties are still underfunded, incapable of hiring qualified pretrial staff, and unable to provide adequate technical assistance or training. Furthermore, as best practices continue to develop, pretrial programs must be capable of evolving to adopt new methods based on current evidence. This will require adequate staffing and training through proper funding and support. When the Texas Department of Criminal Justice (TDCJ) submits its Legislative Appropriations Requests (LARs), it should include a line item to provide targeted technical assistance and funds to pretrial programs administered by CSCDs.

With respect to pretrial services agencies and personal bond offices not associated with CSCDs, the Governor's Criminal Justice Division could provide financial and technical support, similar to the way drug courts are funded. Developing standards for measuring desired outcomes, as

well as establishing how counties can meet uniform requirements, will provide those in charge of allocating funds, like CJAD, the information necessary to request proper funding to support such programs.

### **(3) Help counties trying to implement pretrial services by providing clarity in the statutes controlling “personal bond offices” and “pretrial services” entities.**

The Code of Criminal Procedure provides that any county or judicial district with more than one county may establish a “personal bond office” to gather and review information related to an accused that may have bearing on whether he or she will comply with conditions of a personal bond.<sup>65</sup> Current law also permits counties to develop “pretrial services” programs through various organizational means, but there are no guidelines regarding implementation; counties may do so through the local sheriff’s office, by forming an independent pretrial entity/personal bond office, or by partnering with CSCDs. However, there is little consistency among available pretrial services programs, which may be a result of deficiencies in the governing authority. At present, the law does not adequately provide a comprehensive set of standards to guide counties wishing to establish and develop a robust pretrial services program. Additionally, agency obligations are obfuscated by broad statutory language that makes it unclear whether an entity comes under the statutes controlling personal bond offices or pretrial services divisions. This leads to inconsistent application of the laws governing three critical functions: (1) recording and reporting practices; (2) funding; and (3) the authority to supervise pretrial releasees.<sup>66</sup>

**Standards and Requirements.** If a pretrial services program falls under the purview of the personal bond office statute, specific reporting requirements apply. A personal bond office is required to maintain and update records related to personal bond releases, such as Failures to Appear (FTAs), and keep such records in the office of the county clerk.<sup>67</sup> The personal bond office must report on its general operations including budget, staff positions, etc., and submit this report to the Commissioners Court or district and county judges that established the office.<sup>68</sup> Similar reporting requirements are not imposed on pretrial supervision divisions created under the Government Code as part of a CSCD.

**Funding.** Funding schemes under both provisions are also distinguishable. Current statute provides that the personal bond office may charge a fee—the greater of \$20 or three percent of the amount of bail fixed—for release on bond based on the bond office’s recommendation.<sup>69</sup> In contrast, the Government Code authorizes CJAD to use discretionary funds to support departments, municipalities, or counties operating pretrial and presentencing services.<sup>70</sup> Depending on which provision applies, the ability to procure financial support can have a dramatic impact on the ability to provide adequate services.

**Authority to Supervise.** The authority to supervise individuals released on bond is set forth in statute, but it only applies to CSCDs. Personal bond offices created under section 17.42 of Code of Criminal Procedure are not explicitly granted statutory authority to supervise pretrial releasees. Government Code section 76.011 authorizes CSCDs to operate programs for the supervision of persons released on bail and rehabilitation of individuals in pretrial intervention programs. Specific to CSCD pretrial intervention (diversion) programs, CSCD supervision is expressly limited to two years under statute.<sup>71</sup> Legislation ratified during Texas’ 82nd Legislative Session (2011) amended this provision of the Government Code to clarify the explicit authorization to supervise persons released on bail under various

programs and provisions in Texas Code.<sup>72</sup> While there are no laws that specifically authorize pretrial services agencies to administer the pretrial supervision, it is important to note that there are several Texas statutes in which the judiciary may impose a variation of court-ordered conditions to the pretrial release but with no specific agency to supervise those conditions of release.<sup>73</sup> These **statutes coupled with the request of the Courts/Judges provide pretrial services agencies with the “indirect” authority** to supervise pretrial defendants. So in many instances, this supervision function has been taken on by pretrial services agencies at the request of the courts.

A lack of specificity in the statutory authority can lead to inconsistent practices within many agencies providing pretrial services. For instance, one county uses the fee assessment scheme prescribed in the personal bond office statute, but it does not follow any other requirements—such as reporting—because it does not define itself as a personal bond office. Governing statutes must be amended to expressly define what obligations and requirements pretrial services entities must meet. Moreover, the language must be clarified so it is easy to recognize whether an agency falls within the scope of a specific provision. Additionally, policymakers must indicate which agency has supervisory power over individuals released pretrial. Amending these laws will provide cohesion among the statutes governing personal bond offices and pretrial services provided through CSCDs.

**(4) Support county efforts to reduce jail populations, lower costs, and increase public safety by developing comprehensive pretrial services programs that include pretrial supervision and diversion programs.**

Counties should be given the opportunity, through proper funding and technical assistance, to shift expenditures away from costly incarceration by focusing efforts toward a comprehensive pretrial services program. An ideal program will incorporate evidence-based practices, validated risk assessments, provide objective release recommendations that will reduce jail overcrowding while preserving public safety, and incorporate supervision and diversion programs.

□ **Model pretrial program.** At the outset, an effective pretrial services program should employ evidence-based practices that are likely to result in both cost savings and increased public safety. Within the context of pretrial services and community corrections, the term evidence-based practices means using the best evidence available to inform decisions about the supervision of individuals, “as well as the design and delivery of policies and practices, to achieve the maximum, measurable reduction in recidivism.”<sup>74</sup>

An effective pretrial services program, while respecting the legal status of the accused, will incorporate contemporary, validated assessment instruments, evaluate a defendant’s risks, determine the necessity for further evaluation or needed services/treatment—identifying, for instance, individuals with special needs, mental health issues, or substance abuse issues—and facilitate frequent communication between service providers and court officials. More specifically, a comprehensive program should undertake each of the following:

- (1) Screen and collect data on all persons arrested and charged with a criminal offense, incorporating an evaluation as to indigency, making a determination as to whether the individual qualifies for a court appointed attorney,<sup>75</sup> and compiling detailed information about a person’s mental and physical health;

- (2) interview the accused and investigate specific information related to the accused—such as any previous convictions, employment status, family information, etc.—prior to an appearance before a magistrate;
- (3) use research-based risk assessment instruments to guide appropriate decisions regarding release, conditions of release, and post-release supervision;
- (4) provide supervision to defendants when appropriate and provide reports to the appropriate court; and
- (5) maintain communication with the defendant and court regarding the defendant's obligations to appear at the appropriate place and time.<sup>76</sup>

□ **Evidence supporting pretrial investment.** Consistent with ABA endorsed recommendations, many states are investing more resources in the pretrial stage of the judicial process, focusing particular attention on increasing pretrial release. There are few specific cost benefit analyses available today, but studies suggest that properly implemented pretrial services programs can result in significant savings.<sup>77</sup> Additionally, some studies have correlated improved pretrial release to important derivative benefits such as more court appearances and fewer subsequent arrests.<sup>78</sup> Recently, the Broward County Sheriff's office in Florida examined the cost-savings of its pretrial program by measuring the difference between the cost of the program and how much the county would spend on keeping participants in jail.<sup>79</sup> There, pretrial expansion helped the county realize a decrease of 1,000 inmates in jail and a reduction in the average length of detention.<sup>80</sup> Moreover, the Broward Sheriff evaluation observed that between 2005 and 2010, pretrial savings increased dramatically, from \$30 million in savings to \$104 million.<sup>81</sup> Additionally, Miami-Dade County in Florida cut costs by supervising defendants outside jail—using Global Positioning System (GPS) electronic monitoring ankle bracelets and house arrest—at a cost of about \$400 per defendant per year, in contrast to the \$20,000 to incarcerate individuals. In Iowa, alternatives to pretrial detention saved the state's Southern District \$1.7 million in 2008-2009.<sup>82</sup> Some experts assert that diverting defendants into pretrial supervision programs as an alternative to incarceration can reduce costs for defendants from up to \$45,000 per year in jail to \$432 for pretrial release.<sup>83</sup>

Research also suggests that jurisdictions that implement pretrial services programs see a decrease in FTAs and recidivism. The Southern District of Iowa, through the proper implementation of alternates to incarceration, released 15% more defendants with an increase appearance rate and decrease rate of arrests for new crimes.<sup>84</sup> Furthermore, research demonstrates that people who remain in prison before trial tend to have longer prison sentences and are less frequently sentenced to probation in lieu of jail time which only compounds the cost and risks associated with recidivism.<sup>85</sup> Thus, taxpayers foot the bill for a process that increases the likelihood that they will be paying in the future.

Furthermore, the ABA favors the development of pretrial services across the state, urging “every jurisdiction [to] establish a pretrial services agency or program to collect and present the necessary information, present risk assessments, and ... make recommendations” regarding release decisions.<sup>86</sup> While a statutory mandate may not be a viable option in Texas, some states have ratified laws to create a statewide pretrial system, requiring all jurisdictions to provide some form of service to pretrial detainees. By way of example, in 1976, Kentucky

did away with the commercial bail bondsmen business and elected to create a uniform statewide pretrial services system.<sup>87</sup> Kentucky law provides that “All trial courts in this Commonwealth having jurisdiction of criminal causes shall provide such pretrial release investigation and services as necessary....”<sup>88</sup> Pretrial services in Kentucky have saved the state millions in incarceration costs, and by reducing in court dockets through release and subsequent dismissal of charges. Since its inception, the program has interviewed more than 2.7 million people.<sup>89</sup> After implementation, Kentucky realized an increase in release rates, an increase in court appearances (*i.e.*, a reduction in FTA’s), and increased public safety rates.<sup>90</sup> A recent ABA report on Kentucky’s success, asserts that Kentucky’s Monitored Conditional Release (MCR) program saw 90% of its participants attend all subsequent court appearances, and 90% of released defendants did not commit new crimes while on pretrial release. In 2007, MCR saved over 500,000 jail beds.<sup>91</sup>

Investing in pretrial release, diversion, and supervision is critical to a meaningful pretrial services program, and diverting individuals away from detention, allowing them to participate in rehabilitative programs, provides a cost effective alternative to incarceration.<sup>92</sup> In an effort to support counties implementation of pretrial services programs, Texas should first attempt to eliminate any potential barriers by providing initial support on the front end. In addition to financial and technical support, Texas may want to explore viable options to develop a well-functioning tracking system. Establishing a proper tracking system at the state level that is accessible to local counties will aid counties in adopting pretrial services programs in their local jurisdictions. A statewide computer database that is available to each jurisdiction will enable easy monitoring, and ensure continuity and communication among all counties.

In addition to preserving public safety, the benefits of pretrial investment are innumerable: (1) it keeps people in the community where they can maintain stability and employment; (2) individuals can maintain relationships with family and friends, an important support group for successful rehabilitation; (3) individuals can meet financial obligations; (4) it provides defendants the ability to have more meaningful participation in their defense; and (5) it lowers costs by reducing jail overcrowding, as many individuals sitting in jail are as of yet un-convicted of the crime for which they have been arrested and present a low risk for pretrial misconduct. Furthermore, allowing an individual to participate in a pretrial diversion program with the expectation that the case against him will be dismissed upon completion of the program avoids residual effects that can arise from a criminal record. Proper implementation of a program likely to achieve the best results depends on further support and encouragement from the Texas Legislature and local government authorities. Communities must work with the Legislature to inform policymakers about local needs and how to best support jurisdictions wishing to develop a pretrial program.

**(5) Facilitate the most informed bail decisions and help counties increase appropriate pretrial releases and decrease reliance on bail schedules by providing training to judges regarding the significance and mechanics of pretrial services recommendations.**

In considering pretrial recommendations regarding release and conditions, judges should adhere to pretrial practitioner’s guidance while retaining discretion in rendering final bail decisions. In order to make a properly informed, appropriate bail determination, judges should be trained on the methodologies used by pretrial services including risk assessment instruments and how correlative conditions can produce optimum results in terms of public safety risk mitigation. By

way of illustration, as part of its pretrial services, Kentucky adopted accountability measures that include inter-disciplinary training and education for all judges, clerks and pretrial officers.<sup>93</sup>

Simply following offense-based bail schedules, or gut feelings, does not necessarily provide an accurate prediction of flight or public safety risk. Instead, any bail setting should be informed by the evaluations and recommendations of experienced, trained professionals. Relying on proven methodologies, pretrial practitioners are best positioned to properly assess individual risks and determine appropriate conditions that best suit individual needs. If judges are properly informed about assessment tools and how correlative conditions can produce optimum results in terms of public safety and other risks, pretrial release can be more effectively utilized.

This will help counties eliminate overreliance on predetermined money bail schedules. While bail schedules enable rapid disposal of an individual's case, they remain problematic because they focus on the offense charged to the exclusion of individualized assessments. This contravenes the concept of bail, which should be based on an evaluation of individual circumstances and the risks associated with flight and public safety particular to each defendant. The Supreme Court captured the spirit of bail in *Stack v. Boyle*, asserting: "Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of *that defendant*."<sup>94</sup> Bail schedules based on offense fail to take into account relevant information that may form the basis of a reasonable release or detention recommendation. Relying on the charge alone, and predicating release on the ability to pay, also undermines public safety because individuals who pose a greater threat to themselves or others may be released more easily simply because they can afford bail, while low risk individuals must sit in jail at taxpayer expense simply because they do not have sufficient funds.

Adopting these changes will also encourage judges to consider risk over ability to pay in the setting of bail and, where appropriate release more people on personal bond. Implementing these recommendations will encourage lower bonds and increase releases, which will allow more people to continue to participate in their community, support their family, maintain employment prior to trial, meet financial obligations, and reduce costs associated with pretrial detention. With adequate assessments and appropriate conditions, paired with a well-informed judiciary, these recommended changes will not jeopardize public safety. These are easily attainable practices that will produce the best outcomes with respect to bail decisions.

**(6) Help counties maximize the efficacy of pretrial services by assisting pretrial services divisions to develop and incorporate validated risk assessment tools to be used in bail setting and release recommendations.**

Public safety is often pointed to as the foremost concern from critics of pretrial release, but by implementing proper risk assessments and educating the judiciary on best-practices, these fears can be quelled and public safety can be preserved. Using validated risk assessments that incorporate evidence-based practices can help mitigate potential risk of flight or danger to the public. Research shows that defendants in locales that rely on risk assessments are less likely to fail to appear in court, and counties using risk assessments perform better than others in reducing recidivism.<sup>95</sup> By using proper risk assessment tools for pretrial evaluations, trained practitioners can identify risks and needs that will better inform their decision to recommend appropriate conditions that a judge can impose to address those risks and needs.

Assessment tools identify trends that indicate which individuals are most likely to be a flight risk, and which pose the greatest dangers to themselves or the public. These instruments evaluate risk factors and predictors that are based on empirical evidence, and take into account various mitigating factors that may affect release recommendations or conditions. For instance, age, medical factors, stable employment, and family support are all factors that may impact the decision to release on personal bond.<sup>96</sup> The Pretrial Justice Institute recently conducted a study of pretrial risk assessments; identifying the following six most common validated risk factors: (1) prior failure to appear; (2) prior convictions; (3) present charge a felony; (4) being unemployed; (5) history of drug abuse; and (6) having a pending case.<sup>97</sup> Currently, TDCJ is considering the potential statewide implementation of the Ohio Risk Assessment System (ORAS) for each of its departments and divisions; the ORAS is intended to provide a risk assessment mechanism that can apply at various points in the criminal justice system, including pretrial.<sup>98</sup>

As a caveat, however, careful consideration must be taken when developing and implementing a risk assessment tool. While a universally applied risk assessment tool may prove useful, locally validated instruments, tailored to specific county needs, are ideal.<sup>99</sup> Moreover, haste in developing an assessment instrument and lack of proper training on its proper usage could have adverse consequences. It is important that all stakeholders, including defense attorneys and judges, are part of the conversation when assessment tools are being considered. Practitioners must guard against unintended consequences by remaining mindful of potential assumptions that could be associated with labels arising out of a risk evaluation, and how categorization of individuals in terms of risk may impact a person's case. Furthermore, because knowledge of human behavior is constantly expanding, these tools must be malleable, capable of being reconfigured and adjusted in response to developing evidenced-based practices. Stakeholders must also determine how often the instrument will be validated, and by whom.

Additionally, proper education and training on the appropriate administration and use of assessment tools are critical to ensuring positive results. Practitioners, and decision-makers who rely on recommendations provided as a result of the use of risk assessments, must understand the science behind what risk assessment tools measure, how they function, and how they are limited. Practitioners must be properly educated on how to tailor conditions of release to adequately meet individual needs and allow appropriate releases, while simultaneously mitigating any potential risks.

Finally, over-reliance on an instrument must be avoided. How much weight is given to the assessment must be balanced against additional relevant information that may mitigate or alter an overall evaluation. The important role of counsel cannot be emphasized enough, and judges should consider any information provided by an attorney. For instance, certain criteria like a change of residency multiple times during a year may score low in an evaluation, but an attorney may be able to provide important information—for instance, the defendant was trying to avoid a harmful circumstance—that would justify the defendant's actions/situation and therefore be weighed more favorably. The court must seek balance in rendering a decision and not blindly accept a recommendation without considering all factors unique to that individual.

Unfortunately, many counties have yet to adopt a proper risk assessment instrument, or proper mechanism to evaluate pretrial detainees for release on bond. In TCJC's survey of pretrial services, only two county programs identified the type of risk assessment used or intended to be

used.<sup>100</sup> Harris County currently uses a risk assessment and Travis County is planning for the implementation of its risk instrument—as part of its bond evaluation process. Assessment tools should be encouraged in any pretrial services program. While it is not required, Legislators have already acknowledged the importance of assessment tools by urging their use by probation departments and other divisions within TDCJ. For instance, Government Code section 509.016 requires a probation assessment tool and Government Code Section 493.0151 mandates that TDCJ use a dynamic risk assessment tool developed by professionals. A validated risk assessment tool, and proper evaluation conducted prior to a bail setting is paramount in a meaningful pretrial services program.

**(7) Lower costs and increase the likelihood of pretrial release success by reevaluating statutes governing bail and encouraging release on personal bond under the least restrictive conditions.**

Unlike the federal laws governing bail, Texas law does not require a judge or magistrate to use the least restrictive means when imposing conditions on a person released on bond.<sup>101</sup> Conditions can encompass a myriad of different restrictions, including curfew, wearing a GPS monitoring device, or participation in a rehabilitation program. In addition, they may be adjusted to accommodate victim safety issues.<sup>102</sup> However, nothing currently requires judges to impose the least restrictive pretrial release conditions, nor does Texas Code explicitly state that release on personal bond is the preferential means of release. Rather, the language relied upon to establish bail and personal bond is permissive. Texas should encourage its judges to release defendants under the least restrictive conditions necessary to mitigate any flight risk and ensure that public safety is protected.

Texas should urge judges to adopt an initial presumption that a person should be released under the least restrictive conditions possible (release on personal bond), and then offer an option to impose certain conditions if a judge determines that conditions are necessary to preserve public safety and ensure the individual returns to court. The court should then seek to impose the least restrictive means possible. With the help of pretrial services, judges will be able to assess the least restrictive means of release that will also provide the most assurance that an individual will return to court. Furthermore, judges should evaluate noncompliance with bond conditions on a case-by-case basis: minor infractions (as opposed to willful noncompliance) may not necessitate immediate revocation and jail time.

This practice complies with ABA recommended practices, encouraging judges to impose the least restrictive conditions of release and asserting that it should be presumed that defendants are entitled to release on personal recognizance.<sup>103</sup> Other states following this practice include, Arizona, Kentucky, Oregon and Wisconsin. Kentucky law provides:

[A]ny person charged with an offense *shall* be ordered released by a court....on his personal recognizance or upon the execution of an unsecured bail bond...unless the court determines ... that such a release will not reasonably assure the appearance of the person as required.<sup>104</sup>

Oregon also provides that if a magistrate releases a defendant, “the magistrate *shall* impose the least onerous condition reasonably likely to ensure the safety of the public and the victim and the person’s later appearance....”<sup>105</sup>

**(8) Judges should make greater use of pretrial diversions for those suffering from substance abuse or mental illness, and expand specialty dockets to meet the needs of such populations.**

About 68% of the jail population experiences alcohol or drug abuse or dependence,<sup>106</sup> compared to up to 18.4% of the general U.S. adult population.<sup>107</sup> Moreover, individuals with substance abuse issues are more likely to commit non-violent offenses such as burglary, drug possession, and driving while intoxicated. According to the Bureau of Justice Statistics, three quarters of convicted jail inmates with substance abuse or dependence committed a non-violent crime.<sup>108</sup> The city of Houston alone arrests 19,000 people per year for public intoxication, costing \$4-6 million in jail costs.<sup>109</sup> In 2011, nearly 20% (almost 10,000 people) of the misdemeanor arrestees interviewed by Harris County Pretrial Services were charged with misdemeanor drug offenses. Over 30% of the felony arrestees interviewed were charged with a drug offense; significantly, nearly 24% (over 7,000) of those felony arrestees interviewed were charged with drug possession, not sale or manufacture.<sup>110</sup> The table below estimates the annual cost of incarcerating individuals with alcohol or drug addiction.

**TABLE 6: Cost of Jailing Individuals with Substance Abuse Issues<sup>111</sup>**

COUNTY	AVERAGE DAILY POPULATION	ESTIMATED SUBSTANCE ABUSE POPULATION†	ESTIMATED DAILY COST*	ESTIMATED ANNUAL SUBSTANCE ABUSE COST
Harris	8,842	6,013	\$355,000	\$130 million
Dallas	6,452	4,387	\$259,000	\$95 million
Bexar	3,829	2,604	\$155,000	\$56 million
Tarrant	3,340	2,271	\$134,000	\$49 million
Travis	2,364	1,608	\$95,000	\$35 million
El Paso	1,581	1,075	\$63,000	\$23 million

† This number represents the total number of incarcerated persons, including pretrial and convicted.

\* Based on average \$59.00 per day.

With respect to persons with mental health issues, the number of individuals with mental illness in jails and prisons has been on the rise since the 1980s. Eight times as many individuals with mental illness are admitted into prisons and jails as mental hospitals,<sup>112</sup> and those in state hospitals are more likely than in the past to have criminal records.<sup>113</sup> Between 25% and 40% of all Americans with mental illness will pass through the criminal justice system at some point, many of those will serve time in county jails without treatment.<sup>114</sup> According to a report by the Bureau of Justice Statistics, 64% of jail inmates nationally suffer from a mental illness,<sup>115</sup> oftentimes such individuals are considered “frequent flyers.”<sup>116</sup> A team of researchers in Florida observed that the 97 individuals who most frequented the Miami-Dade Jail all suffered from schizophrenia; together they were arrested almost 2,200 times and cost taxpayers \$13 million within a five-year period.<sup>117</sup> Until very recently, the Harris County Jail was the largest mental health care provider in the state.<sup>118</sup> According to Travis County Sheriff Greg Hamilton, the average stay of a person with mental illness in the county jail is about 50-100 days.<sup>119</sup> Just one individual with mental illness costs Travis County taxpayers up to \$8,968.<sup>120</sup> Moreover, with minimal access to treatment, that person is also more likely to return to jail. Table 7 shows the high cost of warehousing individuals with mental illness in county jails.

**TABLE 7: Cost of Jailing Individuals with Mental Illness<sup>121</sup>**

COUNTY	AVERAGE DAILY POPULATION	ESTIMATED MENTAL ILLNESS POPULATION	ESTIMATED DAILY COST*	ESTIMATED ANNUAL MENTAL ILLNESS COST
Harris	8,842	5,659	\$334,000	\$122 million
Dallas	6,452	4,129	\$244,000	\$89 million
Bexar	3,829	2,451	\$145,000	\$53 million
Tarrant	3,340	2,138	\$126,000	\$46 million
Travis	2,364	1,513	\$89,000	\$33 million
El Paso	1,581	1,012	\$60,000	\$22 million

\* Based on average \$59.00 per day.

Policymakers should consider the vast amount of resources being used to manage individuals who suffer from addiction and those suffering with mental illness. Texas should encourage the increased use of special release mechanisms and diversion programs that safely reduce jail populations while addressing the root causes of criminality.

Some mechanisms already exist to divert special needs individuals away from pretrial detention. Article 17.032 of the Code of Criminal Procedure describes specific conditions requiring certain persons with a mental health issue to be released on personal bond. It provides that a magistrate must release a defendant on personal bond *unless good cause is shown otherwise* if the defendant meets various statutory criteria and a proper evaluation is conducted by a mental health authority. To be released through this provision, however, appropriate community-based mental health or mental retardation services for the defendant need to be made available through an approved mental health and mental retardation services provider.<sup>122</sup>

As stated above, the Legislature has also given CSCDs authority to create pretrial diversion programs including programs specifically tailored to substance abuse. If programs are properly implemented, and pretrial services adequately identify persons suffering with substance abuse, we can effectively place individuals in needed programming to address their condition.

A well-developed pretrial services program can identify and screen out individuals who suffer from substance abuse or with mental health issues. With proper evaluations, and an adequately supported diversion and supervision program, individuals may safely be diverted from costly detention and will attain the services and assistance they need. Because proper identification and services are critical to individual success and increased public safety, Texas must support pretrial services supervision and implementation of mental health and substance abuse programs. Additionally, Texas must encourage judges to use their present authority to release individuals into appropriate programs. This is especially important as we begin to understand more about mental health and substance abuse issues, and we begin to realize that our jails and prisons are ill-suited for people suffering from a mental illness.

**(9) Ensure that counsel is appointed at the beginning of the pretrial phase, including bail setting.**

Pretrial is an integral component of any adversarial proceeding and Texas should ensure that counsel is appointed at a defendant’s first appearance in court. Under Article 15.17 of the Code of Criminal Procedure, bail setting occurs at a defendant’s first appearance before a magistrate—

often referred to as an Article 15.17 hearing—and therefore representation should be required. Moreover, the pretrial phase, and in particular bail setting and release, can play a critical role in the outcome of any case. Studies suggest that individuals charged with low-level offenses are more likely to be detained pretrial if they do not have representation at a bail setting.<sup>123</sup>

Additionally, an attorney can help provide useful information necessary to making the proper bail and release determination. As the foregoing recommendations indicate, a proper assessment instrument and evaluation can help ensure judges make the most informed pretrial determinations regarding bail and release on personal bond. But caution must be taken when relying on assessment tools, lest we create a problem akin to bail schedules—which obviate the importance of evaluating each individual circumstance to make a bail decision. An initial interview and assessment are important, but the data collected and provided to a court can often be augmented with important information from counsel. Attorneys are often privy to additional information that may not be available to pretrial service providers, or are inaccessible at the time an intake interview is conducted. An attorney can provide the court with important factors to consider for the purpose of releasing an individual on personal bond or setting a more reasonable amount of bail. However, many attorneys are appointed after bail is fixed, which can adversely influence the outcome of a case and may increase the amount of time spent in prison. A defendant can argue for reduction in bail at subsequent hearings but judges are less likely to overturn a colleague's previous determination. Attorneys can assist defendants in navigating the pretrial process, leading to significant reductions in the number of days spent in jail awaiting trial and resulting in overall cost savings through lower per-case expenses and jail avoidance.

**(10) Level the playing field between for-profit bond businesses and pretrial bond offices by amending current statutes governing bail to reduce incentives that jeopardize public safety, raise the level of accountability, and create overall consistency in bail practices, pretrial release, pretrial services, and the bail bond business.**

This recommendation addresses inconsistencies in monitoring, reporting, and the rules governing surrender between bondsmen and departments providing pretrial services. Personal bond offices, pretrial services divisions, and bondsmen, differ in operation, but there must be consistency where they perform overlapping functions. Ultimately, pretrial releasees will either be released to a supervision program operated by a specialized entity like a personal bond office, or they will be released on the basis of a surety bond issued by a bondsman. While bondsmen do not provide extensive supervision by qualified professionals like pretrial services divisions, they are nonetheless interested in tracking individuals to ensure that they appear in court. Importantly, pretrial services agencies like CSCD pretrial services divisions and bondsmen retain the power to send someone back to jail to await trial through the surrender process.

**Create congruent recording and monitoring requirements.** Under any release mechanism, pretrial releasees will be monitored to a certain extent by either professionals or bondsmen. Despite the fact that each entity shares responsibility with respect to keeping track of individuals, reporting and monitoring functions are inconsistent. Personal bond offices are required to record and report on their operating procedures, business administration, and even the outcomes of each participant—such as FTAs and rearrests. The personal bond offices must submit an annual report on its operations to the commissioners court or district and county judges that established the office.<sup>124</sup> Contrastingly, the bondsmen business regulations do not have similar requirements. If a

bondsmen falls within the jurisdiction of a bail bond board county, the bond license holder must maintain a record of bonds executed, including: the name of the defendant; the amount of bail set in the case; the amount and type of security held by the license holder; and a statement of whether the security held by the license holder is for the payment of a bail bond fee or to assure the principal's appearance in court.<sup>125</sup> In terms of reporting, the records need only be made available for inspection and copying on demand by the board or an authorized representative of the board and maintained for not less than four years after the conclusion of the case for which the bond was given.<sup>126</sup> More scrutiny should be employed in monitoring actual outcomes and measures in the bail bond business in order to follow the progress and performance of individuals released through a pretrial services agency or released through a surety bond issued by a bondsman.

Finally, with respect to record keeping, the primary record keeping function, outside of personal bond offices, is performed by the magistrate who determines bail. A magistrate or other officer who sets the amount of bail or who takes bail is responsible for recording the name of the person released, the bail amount, the date bail is set, the official who sets bail, the offense or other cause for which the appearance is secured, the official who takes bail, the date the person is released, and the name of the bondsman, if any.”<sup>127</sup> The only description of how this record is to be kept provides that it must be recorded in “a well-bound book.” One expert on bail in Texas observes that this antiquated practice is inefficient and burdensome for all parties. These records can be hard to procure, as many officials do not keep records in this format. Some records are kept in a computer bank and others are not. Efforts to retrieve this information can present many difficulties and, given various difficulties and miscommunication, may not be fruitful for requesting parties. Experts have suggested that potential legislation could amend this section to provide that records be kept in a computer-generated, or electronic file, rather than a “well-bound book.”<sup>128</sup>

Additionally, counties are inconsistent with respect to how they match magistrate records with defendants’ files. At the time of magistration, a case file and number has yet to be created. Sometimes the magistrate records are sent to the clerk to be matched with a case file once an indictment or information is filed and the case is transferred to a trial court. As one expert explains, best practice would require including the magistrate records in the case file promptly, and making these records available to the public.<sup>129</sup> Indeed, under the Code of Criminal Procedure, magistrates are required to deliver a sealed copy of proceeding records to the clerk of the proper court, without delay, including any testimony, bail bonds, and any other proceeding in the case.<sup>130</sup>

- **Create continuity in surrender practice.** Some experts claim that it has become more commonplace for bondsmen to discharge their liability by surrendering the defendant before the bond can be forfeited. The rules controlling forfeiture of bail in general can be found in the Code of Criminal Procedure, and is largely governed by Chapter 22 and Chapter 17.<sup>131</sup> Surrendering the defendant prior to forfeiture is more prevalent in counties that aggressively pursue bond forfeitures, but it may also be used as a tool for the purpose of collection—if, for instance, a person is behind on payments.<sup>132</sup> This practice is allowable under both the Code of Criminal Procedure and the Government Code. As presently tailored, the surrender provisions in the Government Code are distinguishable from parallel provisions in the Code of Criminal Procedure. The process is slightly more onerous under the Code of Criminal

Procedure. The Code of Criminal Procedure provides that a surety may, before forfeiture, relieve himself of his undertaking by: (1) surrendering the accused into the sheriff's custody, or (2) delivering an affidavit to the sheriff of the county where prosecution is pending stating that the accused is incarcerated in federal or other custody.<sup>133</sup> A surety may also surrender the principal if the surety provides an affidavit showing good cause to be released, and the court determined there is cause for surrender.<sup>134</sup> Under both Codes, a surety may surrender a defendant by notifying the principal's attorney of the person's intention to surrender the principal and filing an affidavit with the court containing various details including the reason for surrender.<sup>135</sup> The rules for a bail bond board are less stringent insofar as the burden to show cause or challenge cause differs. In a non-bail bond board county, a surety must provide cause for the surrender, and the magistrate must find that there is cause for the surrender. Bail bond board counties must show cause, but the law maintains that the principal or an attorney must raise the issue of reasonableness and contest cause for surrender. Given the ease with which one may be absolved of his or her surety obligations by surrendering the defendant, one expert contends that it would be wise to consider "a time period that must elapse between the time of notice to counsel for the State and counsel for the principal that would allow either counsel time to contest the surrender prior to the authorization of the surrender."<sup>136</sup>

- **Maintain consistent accountability for forfeited bonds and reduce negative incentives.** If a bond is forfeited the surety must pay, but there are certain limitations to this requirement and, as currently situated, the Code is set up to incentivize re-incarceration. While sureties are required to pay, there are numerous instances where payment is delayed or uncollected. For example, a three-part examination by the *Star-Telegram* discovered hundreds of bond forfeitures that have been delayed, dismissed, or settled for a fraction of the amount; millions of dollars have gone uncollected in Tarrant County due to legal machinations or mishaps such as losing track of cases. Tarrant County collects less than 20% of the forfeited bonds.<sup>137</sup> In addition to problems with collection, under the Code of Criminal Procedure, a surety may be exonerated of liability on a forfeiture if the defendant is incarcerated.<sup>138</sup> This creates a perverse incentive for bondsmen to have their clients reoffend so that they are no longer responsible for the original bond amount.

More consistency should be insisted upon with respect to monitoring, recording, and reporting responsibilities. Any entity that monitors individuals released on bond, in any capacity, should be required to keep consistent records and be obligated to report on a regular basis. At the very least, those records should be maintained for six years, as required for personal bond offices, and should be accessible to the public. Additionally, more restrictions should be placed on a bondsman's ability to surrender a defendant. The statutory language governing surrender and forfeiture should be amended to ensure that bail bond board surrender rules are consistent with non-bail bond board counties. Continuity among counties with respect to bail and pretrial release is important to administering fair and efficient justice in Texas. Consistency in the bail process and pretrial practices can achieve that end.

\* \* \*

## CONCLUSION

Again, thank you for this opportunity to present testimony on such an important issue. In many respects, the pretrial phase is the most important in the criminal justice system; it lays the foundation for an individual's future involvement in the criminal justice system and can have a dramatic impact on a person's employment, relationships, community involvement, and future. Implementing a comprehensive pretrial services program and amending the bail process is cost effective and likely to enhance public safety. Improving pretrial services will enable individuals to remain in the community, where they can work and maintain familial obligations, without threatening public safety. To fully realize the benefits of improved pretrial services and increased pretrial releases, Texas must reevaluate and modify bail practices and pretrial release mechanisms, the bail bond industry, and pretrial services programs and supervision. With your continued commitment and dedication, this committee will play a crucial role in improving the bail process and pretrial services as a whole, which is a critical phase in the criminal justice system.

## ENDNOTES

<sup>1</sup> *United States v. Salerno*, 481 U.S. 739, 755 (1987).

<sup>2</sup> Robert Kennedy, Attorney General, Welcome Address to the National Conference on Bail and Criminal Justice, at the Department of State Auditorium (27 May 1964), available at <http://www.pretrial.org/1964NationalConference/RFK%20Welcome%20at%201964%20Conference.pdf>.

<sup>3</sup> See generally, Marc Levin, Esq., “Public Safety and Cost Control Solutions for Texas County Jails,” *Policy Perspective*, Texas Public Policy Foundation: Center for Effective Justice, March 2012; Henry Joel Simmons, “Saving Money by Reforming Pretrial Detention,” *Right on Crime*, 3 June 2011, available at <http://www.rightoncrime.com/2011/06/saving-money-by-reforming-pretrial-detention/>.

<sup>4</sup> Associated Press, “Holder: More Non-violent Offenders Should Await Trial at Home, Instead of in Jail,” *The Washington Post*, 1 June 2011, available at <http://www.napsa.org/QuickLink/HolderWashingtonPost.pdf>; to see the video of Eric Holder and other speakers on the subject, visit <http://www.pretrial.org/symposium.html>.

<sup>5</sup> American Bar Association (ABA), Criminal Justice Section, “Pre-Trial Detention: ABA Urges Pre-Trial Release Reform to Save States Money, Reduce Recidivism and Protect the Public,” p. 9 (packet material distributed at the Dialogue on Strategies to Save States Money, Reform Criminal Justice and Keep the Public Safe, Washington, D.C., 6 May 2011), available at [http://www.americanbar.org/content/dam/aba/events/criminal\\_justice/dialogpacket.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/criminal_justice/dialogpacket.authcheckdam.pdf).

<sup>6</sup> *Id.* at 6, 9.

<sup>7</sup> Select Comm. on County Affairs, H.R. Interim Rep. to the 82<sup>nd</sup> Texas Legislature (January 2011) available at <http://www.house.state.tx.us/media/pdf/committees/reports/81interim/House-Committee-on-County-Affairs-Interim-Report-2010.pdf>.

<sup>8</sup> Timothy Murray, Executive Director of the Pretrial Justice Institute, Presentation at the Joint ABA and University of Houston Law Center, Criminal Justice Institute conference: Pretrial Detention in Texas: Strategies for Saving Taxpayer Money While Maintaining Public Safety, John H. Reagan Building, Austin, TX (30 March 2012); see also Pretrial Justice Institute (PJI), *January-December 2011 Annual Report*, 2011, available at <http://pretrial.org/Featured%20Resources%20Documents/PJI%20Annual%20Report%202011.pdf>.

<sup>9</sup> Kennedy, Welcome Address, *supra* note 2.

<sup>10</sup> Shima Baradaran, Op-Ed Contributor, “The Right Way to Shrink Prisons,” *New York Times*, 30 May 2011, available at [http://www.nytimes.com/2011/05/31/opinion/31baradaran.html?\\_r=2](http://www.nytimes.com/2011/05/31/opinion/31baradaran.html?_r=2)

<sup>11</sup> Brandon Wood, Assistant Director of the Texas Commission on Jail Standards (TCJS), e-mail messages to Travis Leete, Texas Criminal Justice Coalition (TCJC), 4, 12, 13, and 16 April 2012; Brandon Wood, Assistant Director of TCJS, telephone conversation with Travis Leete, TCJC, 12 April 2012.

<sup>12</sup> PJI, “Setting Bail and Assessing Risk,” Resources Page, available at <http://pretrial.org/Pages/bail-decision.aspx>; Mary Phillips, Ph.D., “Bail Detention, & Felony Case Outcomes,” Research Brief, New York City Criminal Justice Agency, Inc., September 2008, available at <http://pretrial.org/PerformanceMeasuresDocuments/CJA%2018%20felony.pdf>; Mary Phillips, Ph.D. “Bail Detention, & Nonfelony Case Outcomes,” Research Brief, New York City Criminal Justice Agency, Inc., May 2007, available at <http://pretrial.org/PerformanceMeasuresDocuments/CJA%2014%20misdemeanants%20.pdf>.

<sup>13</sup> Shima Baradaran, “The State of Pretrial Detention,” *The State of Criminal Justice*, ABA, 2011, available at SSRN: <http://ssrn.com/abstract=1907238>, p. 190 (citing Marie VanNostrand, *Alternatives to Pretrial Detention: Southern District of Iowa, A Case Study* (30 June 30 2010)).

<sup>14</sup> Brandon Wood, Assistant Director of TCJS, Presentation at the Joint ABA and University of Houston Law Center, Criminal Justice Institute conference: Pretrial Detention in Texas: Strategies for Saving Taxpayer Money While Maintaining Public Safety, John H. Reagan Building, Austin, TX (30 March 2012).

<sup>15</sup> Wood, e-mail messages, *supra* note 11; TCJS, *Texas County Jail Population*, 1 March 2012, available at <http://www.tcjs.state.tx.us/docs/POPSUMMarch12.pdf>. In March 2012, of the 63,096 total inmates in Texas’ county jails (both local and contracted facilities), 35,093 individuals were designated as pretrial (felons, misdemeanor, state jail felons).

<sup>16</sup> Wood, e-mail messages, *supra* note 11.

<sup>17</sup> TCJS, *Texas County Jail Population*, *supra* note 15.

<sup>18</sup> *Id.*

<sup>19</sup> Wood, e-mail messages, *supra* note 11; information also gleaned from TCJS, *Texas County Jail Population*, averaging reports from January-December 2012. Information available upon request.

<sup>20</sup> Wood, e-mail messages, *supra* note 11. These figures provided by TCJS and may vary slightly from TCJC’s internal calculations based on publicized statistical material from TCJS.

<sup>21</sup> Wood, e-mail messages, *supra* note 11; Wood, Presentation, *supra* note 14.

<sup>22</sup> U.S. CONST. amend. VIII.

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<sup>23</sup> TEX. CONST. art. I, § 11.

<sup>24</sup> *Id.* art. I, §§ 11-11c.

<sup>25</sup> Robert S. Davis, *Bail Bond Handbook for Texas Counties*, created for the Texas Association of Counties, January 2012, pp. 42-43; TEX. OCC. CODE § 1704.052. Bail bond boards regulate and monitor—automatically created in counties with a population over 110,000, although counties with a population of less than 110,000 may also elect to establish a bail bond board.

<sup>26</sup> TEX. CODE CRIM. PROC. art. 17.01.

<sup>27</sup> *Id.* art. 17.01 and art. 17.02.

<sup>28</sup> TEX. OCC. CODE § 1704.001 (explaining that “bail bond” is defined as a “cash deposit, or similar deposit or written undertaking, or a bond or other security given to guarantee the appearance of a defendant in a criminal case”); *see also* TEX. CODE CRIM. PROC. art. 17.02 (providing in part: “A ‘bail bond’ is a written undertaking entered into by the defendant and his sureties for the appearance of the principal therein before some court or magistrate to answer a criminal accusation; provided, however, that the defendant upon execution of such bail bond may deposit with the custodian of funds of the court in which the prosecution is pending current money of the United States in the amount of the bond in lieu of having sureties signing the same.”).

<sup>29</sup> Davis, *Bail Bond Handbook*, *supra* note 25, at 9.

<sup>30</sup> Sometimes this is referred to as a personal recognizance bond, but that is not technically accurate for Texas.

<sup>31</sup> TEX. CODE CRIM. PROC. art. 17.03.

<sup>32</sup> *See, e.g., Id.* art. 1.09.

<sup>33</sup> *See* Harris County Bond Schedule at <http://www.justex.net/BailBondSchedule.aspx>.

<sup>34</sup> TEX. CODE CRIM. PROC. art. 17.15.

<sup>35</sup> TEX. OCC. CODE § 1704.101. Bail bond boards may adopt their own rules to govern the bail bond business. For an example of the rules adopted, see the Harris County Bail Bond Board website at <http://www.hctx.net/cmpdocuments/37/localrules/localrules.pdf>.

<sup>36</sup> *See* TEX. OCC. CODE §§ 1704.101-1704.109. The regulatory authority of the bail bond board is limited to those powers enumerated in statute, *see also* Davis, *Bail Bond Handbook*, *supra* note 25, at 47 fn. 20 (citing Tex. Att’y Gen. No. JM-1057 (1989)).

<sup>37</sup> TEX. OCC. CODE § 1704.251.

<sup>38</sup> *Id.* §§ 1704.151-163. The security requirements for licensure are dictated in TEX. OCC. CODE § 1704.160.

<sup>39</sup> Davis, *Bail Bond Handbook*, *supra* note 25, at 12-13; TEX. CODE CRIM. PROC. art. 17.10, 17.13. Under code, a person must, within two years prior to issuing the bond, complete at least eight hours of continuing legal education in criminal law courses or bail bond law courses and satisfy any jurisdictional requirements regarding the sufficiency of the security offered to any bail bond. The laws describing the sufficiency of the security offered by a surety are in articles 17.11-17.14; *see also* Att’y Gen. No. DM-105 (1998).

<sup>40</sup> Davis, *Bail Bond Handbook*, *supra* note 25, at 11 (citing Op. Att’y Gen. No. MW-321 (1981)); TEX. CODE CRIM. PROC. art. 17.06, 17.07.

<sup>41</sup> *See* Marie VanNostrand, Ph.D., “Legal and Evidence-Based Practices: Applications of Legal Principles, Laws, and Research to the Field of Pretrial Services,” Crime and Justice Institute and the National Institute of Corrections, April 2007, pp. 5-10.

<sup>42</sup> A more extensive description of a model pretrial program is described in this testimony under Recommendation 4. The model program described here, and in the subsequent recommendations, comports with ABA recommendations favoring the development of a robust pretrial services program. *See* ABA, *Standards for Criminal Justice: Pretrial Release*, 3d ed. (2007) 10-1.10, 10-4.2, available at [http://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/pretrial\\_release.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf).

<sup>43</sup> Murray, *supra* note 8.

<sup>44</sup> PJI, “List of Pretrial Programs,” Resources Page, available at <http://pretrial.org/Resources/Pages/PretrialPrograms.aspx>; *see also* Levin, Policy Perspective, *supra* note 3, at 1.

<sup>45</sup> TCJC, *Developing and Understanding of Diversity in Pretrial Service Program Functions, Practices, Locations, and Administration, A Survey of Pretrial Service Providers in Texas: Preliminary Report Findings*, March 2012, pp. 1-2.

<sup>46</sup> *Id.* at 2.

<sup>47</sup> Fannin County Administrator, telephone conversation with Travis Leete, TCJC, 4 April 2012.

<sup>48</sup> *See* Harris County Pretrial Services at <http://www.hctx.net/Pretrial/faq.aspx>; Tarrant County Pretrial Services at <http://www.tarrantcounty.com/ePretrial/site/default.asp>.

<sup>49</sup> *See* Travis County Pretrial Services website at [http://www.co.travis.tx.us/pretrial\\_services/new\\_pages/pretrial\\_overview.asp](http://www.co.travis.tx.us/pretrial_services/new_pages/pretrial_overview.asp).

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<sup>50</sup> *Id.*

<sup>51</sup> Irma G. Guerrero, Division Director, Travis County Pretrial Services, e-mail messages to Travis Leete, TCJC, May 2012 and 5 July 2012. Information available upon request. Supervised bonds have more restrictions with respect to unsupervised bonds, depending largely on conditions. Some unsupervised bonds—those released on a personal bond without strict supervision requirements—may still have certain restrictions or be monitored for compliance.

<sup>52</sup> Original 2009 table taken from the Select Comm. on County Affairs, H.R. Interim Rep., *supra* note 7, at 46. Recent data reflected in this updated table collected from the following sources: Travis County Sheriff's Office, Travis County Pretrial Services, and Travis County Criminal Courts.

<sup>53</sup> Number of individuals booked gleaned from: Julie Cullen, Planner, Travis County Sheriff's Office: Research, Planning and Response Unit, e-mail message to Travis Leete, TCJC, 24 May 2012. Information available upon request.

<sup>54</sup> Personal bond figures gleaned from: Irma G. Guerrero, Division Director, Travis County Pretrial Services, e-mail message to Travis Leete, TCJC, 11 May 2012. Information available upon request.

<sup>55</sup> Surety figures gleaned from: Kasey Hoke, Sr. Planner, Travis County Criminal Courts, e-mail message to Travis Leete, TCJC, 20 June 2012. Information available upon request.

<sup>56</sup> Associated Press, *The Washington Post*, *supra* note 4.

<sup>57</sup> Select Comm. on County Affairs, *supra* note 7, at 47.

<sup>58</sup> Wood, e-mail messages, *supra* note 11; TCJS, *Texas County Jail Population*, *supra* note 15..

<sup>59</sup> TEX. CODE CRIM. PROC. art. 14.06 and 15.17.

<sup>60</sup> These offenses include: (1) Section 481.121, Health and Safety Code, if the offense is punishable under Subsection (b)(1) or (2) of that section (A or B possession marijuana); (2) Section 481.1161, Health and Safety Code, if the offense is punishable under Subsection (b)(1) or (2) of that section; (3) Section 28.03, Penal Code, if the offense is punishable under Subsection (b)(2) of that section (Class B criminal mischief); (4) Section 28.08, Penal Code, if the offense is punishable under Subsection (b)(1) of that section (Class B graffiti); (5) Section 31.03, Penal Code, if the offense is punishable under Subsection (e)(2)(A) of that section (Class B theft); (6) Section 31.04, Penal Code, if the offense is punishable under Subsection (e)(2) of that section (Class B theft of service); (7) Section 38.114, Penal Code, if the offense is punishable as a Class B misdemeanor (contraband in a correctional facility); or (8) Section 521.457, Transportation Code (driving while license invalid).

<sup>61</sup> TEX. CODE OF CRIM. PROC. art. 14.06.

<sup>62</sup> Robert S. Davis, *Bail Bond Handbook*, *supra* note 25, at 25; TEX. CODE CRIM. PROC. art. 17.20-22.

<sup>63</sup> ABA, *Standards*, *supra* note 42, standards 10-1.3, 10-2.1-4, 10.3.1-3.

<sup>64</sup> TCJC, *Developing and Understanding of Diversity in Pretrial Service Program Functions, Practices, Locations, and Administration, A Survey of Pretrial Service Providers in Texas: Preliminary Report Findings*, March 2012, p. 4.

<sup>65</sup> TEX. CODE CRIM. PROC. art. 17.42. **Note:** Personal bonds are often referred to as “personal recognizance bonds.”

<sup>66</sup> These functions are described in detail in the following: TEX. CODE CRIM. PROC. art. 17.42; TEX. GOV. CODE § 76.011.

<sup>67</sup> TEX. CODE CRIM. PROC. art. 17.42 § 5. **Note:** this does not apply to a personal bond pretrial release office that, on 1 January 1995 was operated by a CSCD.

<sup>68</sup> TEX. CODE CRIM. PROC. art. 17.42 § 6.

<sup>69</sup> *Id.* art. 17.42 § 4(a).

<sup>70</sup> TEX. GOV. CODE § 509.011(b)(1).

<sup>71</sup> *Id.* § 76.011 (funding for this programs is also provided under 76.011(b), providing that “The department may use money deposited in the special fund of the county treasury for the department under Article 103.004(b), Code of Criminal Procedure, only for the same purposes for which state aid may be used under this chapter.”)

<sup>72</sup> See Tex. S.B. 880, 82nd Leg., R.S. (2011), available at

<http://www.legis.state.tx.us/BillLookup/Text.aspx?LegSess=82R&Bill=SB880>.

<sup>73</sup> Texas Code of Criminal Procedure article 17.441 requires, as a condition of release on bond, that defendants install the Ignition Interlock Device on their vehicle or the vehicle they most regularly drive. The same statute permits the Court to designate an agency to verify the installation of the device, to monitor the device and collect a monthly fee. In Travis County, Travis County Pretrial Services is that agency. Further, Texas Code of Criminal Procedure article 17.032 stipulates the release on personal bond regarding certain “Mentally Ill Defendants.” § (b) states: A magistrate shall release a defendant on personal bond unless good cause is shown otherwise.... § (c) states: The magistrate, unless good cause is shown for not requiring treatment, shall require as a condition of release on personal bond under this article that the defendant submit to outpatient or inpatient mental health or mental retardation treatment as recommended.... § (d) states: In addition to a condition of release imposed under subsection (c) of this article, the magistrate may require the defendant to comply with other conditions that are reasonably necessary to protect the community. Texas Code of Criminal Procedures articles 17.43 and 17.44 allow a Magistrate to require home curfew and electronic monitoring as a

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condition of a defendant's release on personal bond. Texas Code of Criminal Procedures articles 17.46 and 17.49 allow a Magistrate to require defendants charged with Stalking or a Family Violence offense to wear a GPS device, thus ordering GPS as a bond condition.

<sup>74</sup> Geraldine Nagy, Ph.D., Director of the Travis County Pretrial Services, Presentation at the Joint ABA and University of Houston Law Center, Criminal Justice Institute conference: Pretrial Detention in Texas: Strategies for Saving Taxpayer Money While Maintaining Public Safety, John H. Reagan Building, Austin, TX (30 March 2012).

<sup>75</sup> Under TEX. CODE CRIM. PROC. art. 26.04(m), the ability to make bail is not supposed to be a consideration in eligibility for an appointed attorney.

<sup>76</sup> See Cherise Fanno Burdeen, PJI, *Jail Population Management: Elected County Officials' Guide to Pretrial Services*, September 2009, p. 8. These recommendations were also supported by the U.S. Department of Justice, the Office of Justice Programs, and the Pretrial Justice Institute, in the National Symposium on Pretrial Justice, see Pretrial Services Recommendations form the National Symposium, p. 39.

<sup>77</sup> Baradaran, "The State of Pretrial Detention," *supra* note 13; see also Krsulich, Lora, "Economics of Pretrial Release: Current Research and Future Directions," Cost Benefit Knowledge Bank for Criminal Justice (CBKB), 14 June 2011, available at <http://cbkb.org/2011/06/economics-of-pretrial-release-current-research-and-future-directions/>.

<sup>78</sup> Baradaran, "The State of Pretrial Detention," *supra* note 13, at 190 (citing Marie VanNostrand, *Alternatives to Pretrial Detention: Southern District of Iowa, A Case Study* (30 June 2010)).

<sup>79</sup> Alex Piquero, College of Criminology and Criminal Justice, Florida State University, "Cost-Benefit Analysis for Jail Alternatives and Jail," Prepared for the Broward Sheriff's Office, Department of Community Control (October 2010) available at <http://www.criminologycenter.fsu.edu/p/pdf/pretrial/Broward%20Co.%20Cost%20Benefit%20Analysis%202010.pdf>; see generally College of Criminology and Criminal Justice, Center for Criminology and Public Policy Research, "Broward County Jail Forecast, Risk Assessment Evaluation, and Cost Benefit Analysis" (accessed 11 May 2-12), available at <http://www.criminologycenter.fsu.edu/p/pretrial-alternatives.php>.

<sup>80</sup> Piquero, *supra* note 79 at 1.

<sup>81</sup> *Id.* at 5.

<sup>82</sup> Baradaran, "The Right Way to Shrink Prisons," *supra* note 10; see also Simmons, *supra* note 3.

<sup>83</sup> Baradaran, "The State of Pretrial Detention," *supra* note 13, at 190; see endnote 46: "Compare *Cost of Pretrial Detention in City Jails Takes Bite Out of Big Apple's Budget*, available at <http://www.ibo.nyc.ny.us/nesfaxnws56pretrialdetention.html> (cost to house a single pretrial detainee in a year in New York City) with Office of Program Policy Analysis & Government Accountability, *Pretrial Release Programs Vary Across the State; New Reporting Requirements Pose Challenges*, Report No. 08-75 (Dec. 2008) (Miami-Dade County supervised 11,101 defendants outside detention facilities).

<sup>84</sup> Baradaran, "The State of Pretrial Detention," *supra* note 13, at 190-191 (citing Marie VanNostrand, *Alternatives to Pretrial Detention: Southern District of Iowa, A Case Study* (30 June 2010)); see also Nagy, Presentation, *supra* note 74.

<sup>85</sup> Simmons, *supra* note 3. (citing Shima Baradaran and Frank McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497 (2012), available at SSRN: <http://ssrn.com/abstract=1756506>); see also Baradaran, "The Right Way to Shrink Prisons," *supra* note 10.

<sup>86</sup> ABA, *Standards*, *supra* note 42, standard 10-1.10.

<sup>87</sup> ABA, Criminal Justice Section, "Pretrial Release: Kentucky: Releasing Defendants while Reducing Recidivism and Saving Money," pp. 10-13 (packet material distributed at the Dialogue on Strategies to Save States Money, Reform Criminal Justice and Keep the Public Safe, Washington, D.C., 6 May 2011), available at [http://www.americanbar.org/content/dam/aba/events/criminal\\_justice/dialogpacket.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/criminal_justice/dialogpacket.authcheckdam.pdf).

<sup>88</sup> KY. REV. STAT. ANN. § 431.515 (2011).

<sup>89</sup> ABA, *supra* note 87, at 10-12.

<sup>90</sup> Tara Klute, Chief Operating Officer of the Kentucky Pretrial Services, Presentation at the Joint ABA and University of Houston Law Center, Criminal Justice Institute conference: Pretrial Detention in Texas: Strategies for Saving Taxpayer Money While Maintaining Public Safety, John H. Reagan Building, Austin, TX (30 March 2012).

<sup>91</sup> ABA, *supra* note 87 at 12.

<sup>92</sup> This also comports with ABA recommendations related to pretrial release, see ABA, *Standards*, *supra* note 42, standards 10-1.2, 10-1.5.

<sup>93</sup> Klute, Presentation, *supra* note 90.

<sup>94</sup> *Stack v. Boyle*, 342 U.S. 1, 5 (1951) (emphasis added).

<sup>95</sup> Nagy, Ph.D., Director of the Travis County Pretrial Services, Presentation, *supra* note 74.

<sup>96</sup> Travis County Pretrial Services Handout and Harris County Risk Assessment Tool (conference materials distributed at the Joint ABA and University of Houston Law Center, Criminal Justice Institute conference: Pretrial Detention in Texas:

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Strategies for Saving Taxpayer Money While Maintaining Public Safety, John H. Reagan Building, Austin, TX (30 March 2012) pp. 18, 64, Appendix A.

<sup>97</sup> Cynthia Mamalian, Ph.D., “State of the Science of Pretrial Risk Assessment,” PJI, March 2011, p. 9.

<sup>98</sup> Senate Open Records Response, *System-Wide Assessment Tools Used by the Texas Department of Criminal Justice*, 11 January 2012, p. 1, information available upon request; *see also*, Edward Latessa, Ph.D., et al., *Creation and Validation of the Ohio Risk Assessment System*, Final Report, 2009.

<sup>99</sup> Mamalian, *supra* note 97, at 35. This study notes, in footnote 91, that this practice of adopting localized tools may be cost prohibitive, as validation could cost anywhere from \$20,000 to \$70,000.

<sup>100</sup> TCJC, *Developing and Understanding of Diversity in Pretrial Service Program Functions, Practices, Locations, and Administration, A Survey of Pretrial Service Providers in Texas: Preliminary Report findings*, March 2012, p. 2.

<sup>101</sup> 18 U.S.C. § 3142 available at

[http://www.law.cornell.edu/uscode/pdf/uscode18/lii\\_usc\\_TI\\_18\\_PA\\_II\\_CH\\_207\\_SE\\_3142.pdf](http://www.law.cornell.edu/uscode/pdf/uscode18/lii_usc_TI_18_PA_II_CH_207_SE_3142.pdf).

<sup>102</sup> *See, e.g.*, TEX. CODE CRIM. PROC. art. 17.40, 17.44, 17.441, 17.152.

<sup>103</sup> ABA, *Standards*, *supra* note 42, standards 10-1.2, 10-1.4, 10-5.1.

<sup>104</sup> KY. REV. STAT. ANN. § 431.520 (2011) (emphasis added); *see also* ABA, *supra* note 87 at 10-13 and ABA Criminal Justice Section, “Kentucky Bail Statutes” p. 15 (packet material distributed at the Dialogue on Strategies to Save States Money, Reform Criminal Justice and Keep the Public Safe, Washington, D.C., 6 May 2011), available at [http://www.americanbar.org/content/dam/aba/events/criminal\\_justice/dialogpacket.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/criminal_justice/dialogpacket.authcheckdam.pdf), p. 15.

<sup>105</sup> OR. REV. STAT. § 135.245(3) (2011) (emphasis added).

<sup>106</sup> Bureau of Justice Statistics (BJS), “Substance Dependence, Abuse, and Treatment of Jail Inmates, 2002,” U.S.

Department of Justice, Office of Justice Programs, July 2005, p. 1, available at

<http://bjs.ojp.usdoj.gov/content/pub/pdf/sdatj02.pdf>. *See also* Matt DeLisi, “Who Is More Dangerous? Comparing the Criminality of Adult Homeless and Domiciled Jail Inmates: A Research Note,” *International Journal of Offender Therapy and Comparative Criminology*, 44, no. 1, 2000, p. 64.

<sup>107</sup> U.S. Department of Health and Human Services, “Alcohol Alert,” no. 76, July 2008, available at

<http://pubs.niaaa.nih.gov/publications/AA76/AA76.htm>. Alcohol abuse or dependency is its peak among adults age 18-24, at 18.4%, this rate is much higher than the rate of substance abuse or co-morbid disorders among individuals of any age.

<sup>108</sup> BJS, “Substance Dependence, Abuse, and Treatment,” *supra* note 106 at 7.

<sup>109</sup> Scott Henson, “The Legacy of Otis Campbell and Houston’s proposed ‘sobering center,’” *Grist for Breakfast*, 1 March 2012, available at <http://gritsforbreakfast.blogspot.com/2012/03/legacy-of-otis-campbell-and-houstons.html>.

<sup>110</sup> Pretrial Services, Harris County, Texas, *2011 Annual Report*, April 2011, available at

<http://www.hctx.net/CmpDocuments/59/Annual%20Reports/2011%20Annual%20Report-0410.pdf>, p. 12.

<sup>111</sup> The annual substance abuse cost is based on an 68% substance abuse or dependence rate in county jails, the average daily population for 2011 (minus contract detainees), and the cost of incarceration per year. Data available upon request. *See also* TCJS, “Abbreviated Population Report,” January-December 2011, data available upon request; Brandon Wood, Assistant Director of TCJS and Diana Spiller, Research Specialist with TCJS, e-mail message to Sarah V. Carswell, TCJC, 30 November 2011.

<sup>112</sup> Marc Levin, “Mental Illness and the Criminal Justice System,” Texas Public Policy Foundation, May 2009, p. 1, available at <http://www.texaspolicy.com/pdf/2009-05-PP15-mentalillness-ml.pdf>.

<sup>113</sup> Harris Chaiklin, “Current and Prior Mental Health Treatment of Jail Inmates: The Use of the Jail as an Alternative Shelter,” *Journal of Social Distress and the Homeless* 10, no. 3, July 2011, p. 256.

<sup>114</sup> National Alliance on Mental Illness (NAMI), “Spending Money in All the Wrong Places: Jails & Prisons,” [http://www.nami.org/Template.cfm?Section=Fact\\_Sheets&Template=/ContentManagement/ContentDisplay.cfm&ContentID=14593](http://www.nami.org/Template.cfm?Section=Fact_Sheets&Template=/ContentManagement/ContentDisplay.cfm&ContentID=14593).

<sup>115</sup> Doris J. James and Lauren E. Glaze, “Mental Health Problems of Prison and Jail Inmates,” U.S. Department of Justice Bureau of Justice Statistics, September 2006, p. 1,

[http://www.nami.org/Template.cfm?Section=Press\\_September\\_2006&Template=/ContentManagement/ContentDisplay.cfm&ContentID=38175](http://www.nami.org/Template.cfm?Section=Press_September_2006&Template=/ContentManagement/ContentDisplay.cfm&ContentID=38175).

<sup>116</sup> Over half of the prisoners in the country with mental illness report having served three or more sentences. Doris J. James and Lauren E. Glaze, “Mental Health Problems of Prison and Jail Inmates,” U.S. Department of Justice: Bureau of Justice Statistics, September 2006, p. 1,

[http://www.nami.org/Template.cfm?Section=Press\\_September\\_2006&Template=/ContentManagement/ContentDisplay.cfm&ContentID=38175](http://www.nami.org/Template.cfm?Section=Press_September_2006&Template=/ContentManagement/ContentDisplay.cfm&ContentID=38175). *See also* National Alliance on Mental Illness (NAMI), “Spending Money in All the Wrong Places: Jails & Prisons,” [nami.org](http://www.nami.org),

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[http://www.nami.org/Template.cfm?Section=Fact\\_Sheets&Template=/ContentManagement/ContentDisplay.cfm&ContentID=14593](http://www.nami.org/Template.cfm?Section=Fact_Sheets&Template=/ContentManagement/ContentDisplay.cfm&ContentID=14593).

<sup>117</sup> National Public Radio (NPR), “Nations Jails Struggle with Mentally Ill Prisoners,” npr.org, 4 September 2011, available at <http://www.npr.org/2011/09/04/140167676/nations-jails-struggle-with-mentally-ill-prisoners>.

<sup>118</sup> As of FY 2011, the largest mental health provider in Texas is Harris County Mental Health Mental Retardation Authority (MHMRA), due to the implementation of recent jail diversion programs and increased funding for MHMRA. MHMRA of Harris County, “Healthy Community: Annual Report 2011,” available at <http://www.mhmraharris.org/documents/AnnualReports/2011AR/AR%20for%20Web.pdf>. Also see Healthcare for the Homeless Houston, “Jail Inreach Project,” available at <http://homeless-healthcare.org/program/jail-inreach-project/>.

<sup>119</sup> NPR, *supra* note 117.

<sup>120</sup> *Id.* Based on the per person per day Travis County Jail cost of \$89.68. *See also* Brandon Wood, Assistant Director of TCJS and Diana Spiller, Research Specialist with TCJS, e-mail message to Sarah V. Carswell, TCJC, 30 November 2011.

<sup>121</sup> The annual mental illness cost is based on a 64% mental illness rate in county jails, the average daily population for 2011 (minus contract detainees), and the cost of incarceration per year. Data available upon request. *See also* TCJS, “Abbreviated Population Report,” *supra* note 111; Wood and Spiller, e-mail message, *supra* note 111.

<sup>122</sup> TEX. CODE CRIM. PROC. art. 17.032. **Note:** This provision should be read in conjunction with Article 16.22, described in the endnote below Texas Code of Criminal Procedure, Article 16.22 requires the sheriff, “not later than 72 hours after receiving credible information that may establish reasonable cause to believe that a defendant committed to the sheriff’s custody has a mental illness or is a person with mental retardation,” to notify the magistrate, whereupon the magistrate must, with limited exception, order the local mental health authority to gather more information and conduct and assessment of the defendant

<sup>123</sup> Douglas Colbert, “Do Attorneys really matter, The Empirical and Legal Case for Right of Counsel at Bail,” 23 CARDOZO L. REV. 1719 at 1720 (2002), available at SSRN: <http://ssrn.com/abstract=387802>.

<sup>124</sup> TEX. CODE CRIM. PROC. art. 17.42.

<sup>125</sup> TEX. OCC. CODE § 1704.202.

<sup>126</sup> *Id.* § 1704.202.

<sup>127</sup> TEX. CODE CRIM. PROC. art. 17.39.

<sup>128</sup> Davis, *Bail Bond Handbook*, *supra* note 25, at 37.

<sup>129</sup> Andrea Marsh, Executive Director, Texas Fair Defense Project, e-mail messages to Travis Leete, TCJC, April 2012. Information available upon request.

<sup>130</sup> TEX. CODE CRIM. PROC. art. 17.30.

<sup>131</sup> *Id.* art. 17.16, 22.01-22.18; Article 22.01 explains when bail can be forfeited (generally for failure to appear), and article 22.02 explains the manner in which forfeiture can be taken. Chapter 22 goes on to explain how citation for forfeiture is issued, to whom it must be issued, rights of sureties, exoneration from liability resulting from forfeiture, judgment, etc.

<sup>132</sup> Davis, *Bail Bond Handbook*, *supra* note 25, at 26-27.

<sup>133</sup> TEX. CODE CRIM. PROC. art. 17.16.

<sup>134</sup> *Id.* art. 17.19.

<sup>135</sup> TEX. OCC. CODE § 1704.207(a).

<sup>136</sup> Davis, *Bail Bond Handbook*, *supra* note 25, at 66.

<sup>137</sup> Yamil Berard, “Millions of dollars go uncollected in Tarrant County bail bond system,” *Star-Telegram*: Special Reports, 1 April 2012, available at <http://www.star-telegram.com/2012/04/01/3850904/millions-of-dollars-go-uncollected.html>; Scott Henson, “Bail Fail: Tarrant collected less than 20% of forfeited bonds on absconders.” *Grits for Breakfast*, 3 April 2012, available at <http://gritsforbreakfast.blogspot.com/2012/04/bail-fail-tarrant-collected-less-than.html>.

<sup>138</sup> TEX. CODE CRIM. PROC. art. 22.13.