

LEGISLATOR'S GUIDE TO THE ISSUES 2021-2022

Pretrial Justice and Indigent Defense

The Issue

Some one million people are booked into Texas jails annually. Texas counties face significant expenses associated with pretrial detainees, who account for nearly 60% of county jail inmates. Additionally, for any offense that carries the potential of jail time, such as possession of the smallest amounts of marijuana, counties are constitutionally required to bear the cost of providing counsel for the indigent.

However, promising alternatives to arrest and jail in appropriate cases give police more tools to exercise within their discretion.

Diversion program models such as the Law Enforcement Assisted Diversion (LEAD) program in Seattle, the 24-hour crisis center for the mentally ill in San Antonio, and the First Chance Intervention Program in Houston have proven that empowering police to divert appropriate individuals without bringing them to jail can not only save taxpayers millions of dollars on jail costs but also lead to greater public safety. Research has found that, as each 24 hours goes by in jail, defendants are more likely to lose their job, family, and home, and in the case of mentally ill individuals, to decompensate.

Texas's current approach results in many low-risk defendants remaining in jail simply because they cannot afford low bail amounts while others who are extremely dangerous obtain release because they are wealthy. One problem is that the Texas Constitution currently prevents courts from denying bail in nearly all cases. For example, this provision permits holding a defendant without bail for capital murder, but not ordinary murder. Even then, the defendant can be kept in jail for only 60 days prior to trial, but few trials can begin within this time.

In addition to allowing dangerous defendants who can pay high bail amounts to be released, the current system results in low-risk defendants languishing in jail for minor charges that carry low bail amounts. For example, in Tarrant County, according to a study by the Judicial Council and Texas A&M, more than 9,000 low-risk defendants over a 3.5-year period from 2013 to 2016 remained in jail on bail of \$2,000 or less, meaning they could not afford to pay a bondsman a nonrefundable premium that is typically 10% of the total, in this case \$200.

Counties across the state are inconsistent when it comes to promptly assessing pretrial defendants' risk level and mental health status as well as expeditiously providing counsel. These steps are vital to ensuring that costly jail space is prioritized. Prompt administration of an actuarial risk assessment is the equivalent of a prompt diagnosis by a doctor and is essential to making an informed decision about whether someone should be released prior to trial, and if so what, if any, conditions are necessary. Actuarial instruments, such as the Public Safety Assessment, that do not require an interview, and account of factors such as any prior

serious offenses and instances of absconding, can be administered within minutes.

Rapidly providing competent counsel to defendants is not only constitutionally required, but it also ensures that the defendant has a voice in pretrial proceedings, bringing to the court's attention factors such as strong community ties that suggest the defendant is likely to return to court and not be re-arrested. A pilot program proposed by the Texas Public Policy Foundation in 2009 and subsequently funded by the Texas Indigent Defense Commission allows indigent defendants in Comal County to choose their attorney among a list of qualified counsel maintained by the county. This consumer choice model provides greater fidelity in the attorney-client relationship rather than having the judge, who works for the government, appoint the counsel. An independent published evaluation found that this program has improved client satisfaction.

Similarly, Lubbock's managed assigned counsel program where a private defender office, rather than the court, appoints a private attorney has partnered with case managers to expeditiously connect defendants with addiction and mental health treatment and convince prosecutors that a greater share of cases should be dismissed or diverted.

The Facts

- As of July 2020, there were 61,496 individuals in county jails, of which 32,775 were pretrial defendants. Jails are among the largest items in county budgets—Harris County spends more than \$170 million each year on its jail while Dallas County spends in excess of \$110 million.
- Approximately 30% of Texas county jail inmates are receiving mental health services.
- On an annual basis, attorneys are provided in about 460,000 cases to indigent defendants at a cost of \$238 million.

Recommendations

- Enhance use of police diversion. Police diversion efforts can be strengthened by expanding Texas's cite and summons law to additional offenses such as criminal trespass. Also, it should be clarified to ensure prosecutors treat these cases similarly to those in which a custodial arrest is made, thereby delivering on the original intent to make sure all police agencies have the citations with court dates indicated on them so they can exercise this option. The statute should also be revised to include a presumption that the authority should be exercised if the existing criteria are met, unless the officer determines the person is a danger to public safety or a flight risk.

- Amend the Texas Constitution to allow for denial of bail, also known as preventive detention, in a wider range of cases after an adversarial hearing if the court determines there are no conditions under which the defendant can be safely supervised in the community and there is clear and convincing evidence, not just probable cause, that the defendant committed the charged offense.
- Require rapid use of risk assessment and provision of counsel for pretrial defendants. If the court determines the defendant is not too dangerous to be released, existing law should be changed to require that any financial conditions imposed be affordable for the defendant.
- Increase reliance on alternatives to court-appointed counsel, including voucher pilot program and managed assigned counsel.

Resources

[Improving Indigent Defense in Texas](#) by Vikrant Reddy, Texas Public Policy Foundation (July 2012).

[Bringing Balance to Pretrial Proceedings: Solutions for Early Representation of Indigent Defendants](#) by Marc Levin, Texas Public Policy Foundation (April 2015).

[Public Safety and Cost Control Solutions for Texas County Jails](#) by Marc Levin, Texas Public Policy Foundation (March 2012).

[Open Roads and Overflowing Jails: Addressing High Rates of Rural Pretrial Incarceration](#) by Marc Levin and Michael Haugen, Texas Public Policy Foundation (May 2018).

