

STATE OF TEXAS

RESOLUTION

of the

TEXAS JUDICIAL COUNCIL

Criminal Justice Committee Recommendations on Bail

WHEREAS, the Texas Judicial Council is the policymaking body for the Texas Judicial Branch, created under Chapter 71, Texas Government Code; and

WHEREAS, the Council is charged with improving the administration of justice; and

WHEREAS, since the founding of our great state, Texans have recognized that individuals' liberty should not be withheld except in carefully limited circumstances; and

WHEREAS, the United States Supreme Court has found that bail should not be used as "a device for keeping persons in jail upon mere accusation until it is found convenient to give them trial;"¹ and

WHEREAS, the percentage of individuals being held in Texas jails awaiting trial has increased from 32 percent to 75 percent of the total population since 1994; and

WHEREAS, the annual cost to local governments for housing inmates pretrial amounts to almost \$1 billion; and

WHEREAS, individuals who are held in jails awaiting trial are more likely to be convicted, sentenced to longer terms of incarcerations, and pay more in court costs than individuals released from jail; and

WHEREAS, low-risk individuals who are held in jails awaiting trial for two to three days are significantly more likely to commit new crimes before trial than individuals who are quickly released from jail; and

WHEREAS, low-risk individuals who are held in jails awaiting trial between eight and fourteen days are significantly more likely to commit new crimes within two years after completion of their cases than individuals who are quickly released from jail; and

WHEREAS, a 2017 study *Liberty and Justice: Pretrial Practices* in Texas commissioned by the Council showed that validated risk assessment can successfully predict failure to appear and new criminal activity; and

¹ Stack v. Boyle, 342 U.S. 1, 7-8 (1952)

WHEREAS, pretrial bail detention decisions made without objective information tend to produce decisions that may reflect racial disparities in the bail decision; and

WHEREAS, pretrial bail decisions have negative impacts on individuals' ability to retain employment, financial and residential stability, and support of dependent children; and

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

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

WHEREAS, in June 2015 this Council formed the Criminal Justice Committee to "assess the impact of pretrial criminal justice statutes and policies in Texas to determine if there are ways in which Texas courts can enhance public safety and social outcomes when making pretrial confinement decisions, and identify judicial policies or initiatives that could be enacted to further those goals;" and

WHEREAS, the Council has proposed similar improvements to the pretrial decision-making process as these in 2017 and 2019, proposals that have passed one house of the legislature but not the other in each session; and

WHEREAS, the United States Court of Appeals for the Fifth Circuit held in *O'Donnell v. Harris County* (892 F.3d 147) that Harris County's bail-setting procedures—similar to those used in other jurisdictions—were inadequate to protect detainees' Due Process rights and violated indigent arrestees' rights to equal protection; and

WHEREAS, the United States Court of Appeals for the Fifth Circuit stated in *O'Donnell* that “we also agree that the changes proposed by the State would provide a more adequate remedy” and that “should these provisions become law, the need for the court’s intervention must be revisited;”² and

WHEREAS, several counties across the state have made varying policy decisions on pretrial release as a result of local decisions or federal court orders, and the state could benefit from a single legislative framework for those policy decisions; and

WHEREAS, the Council continues to believe that legislative changes will result in meaningful change in enhancing public safety and social outcomes when making pretrial confinement decisions;

NOW THEREFORE, BE IT RESOLVED that the Texas Judicial Council requests that the Legislature:

1. Require defendants arrested for jailable misdemeanors and felonies to be assessed using a validated pretrial risk assessment prior to appearance before a magistrate under Article 15.17, Code of Criminal Procedure;
2. Amend the Texas Constitution bail provision and related bail statutes to provide for a presumption of pretrial release through personal bond, leaving discretion with judges to utilize all existing forms of bail;
3. Amend the Texas Constitution and enact related statutes to provide that defendants charged with a violent crime and posing a high flight risk and/or high risk to community safety may be held in jail without bail pending trial after certain findings are made by a magistrate and a detention hearing is held;
4. Provide funding to ensure that pretrial supervision is available to defendants released on a pretrial release bond so that those defendants are adequately supervised;
5. Provide funding to ensure that magistrates making pretrial release decisions are adequately trained on evidence-based pretrial decision-making and appropriate supervision levels;
6. Ensure that data on pretrial release decisions is collected and maintained for further review;
7. Expressly authorize the Court of Criminal Appeals to adopt any necessary rules to implement the provisions enacted by the Legislature pursuant to these recommendations; and
8. Provide for a sufficient transition period to implement the provisions of these recommendations.



Honorable Nathan L. Hecht
Chair, Texas Judicial Council

² See Footnote 5 of *O'Donnell* opinion. The changes referenced in the opinion refer to the proposed legislation enacting the Council’s recommendations.