



TEXAS JUDICIAL COUNCIL
COMMITTEE REPORT
and
RECOMMENDATIONS
June 2018



CRIMINAL JUSTICE

In June 2017, the Texas Judicial Council charged the Criminal Justice Committee with:

- Continuing to evaluate and monitor implementations of the recommended pretrial bail reforms.
- Studying the impact of opioid drug use on the Texas judiciary and recommending any reforms necessary to curb the impact of opioid drug use in Texas.
- Working in conjunction with the Governor's Criminal Justice Division and the Governor's Specialty Courts Advisory Council, reviewing the need for assistance to the state's problem-solving courts and recommending any necessary reforms to improve the courts.
- Overseeing the study required by SB 47 regarding the public availability of fine-only criminal offense records and recommending any necessary reforms.

Members of the Committee are:

Honorable Kelly G. Moore, Chair
Senator Brandon Creighton
Honorable Bill Gravell, Jr.
Honorable Scott Jenkins

Presiding Judge Sharon Keller
Representative Andrew Murr
Mr. Carlos Amaral

The Texas Judicial Council's Criminal Justice Committee met September 1, 2017, January 26, 2018, and May 9, 2018.

Recommendations in Brief

Opioid Abuse and Dependency Crisis

Recommendation 1: The Legislature should establish a statewide Opioid Task Force to promote communication and collaboration between local and state leaders, experts, and advocates in confronting the opioid abuse and dependency epidemic as it crosses Texas.

Recommendation 2: The Judicial Council should collect relevant case level data from all court levels including magistrates, to generate more timely and detailed information to support policy, planning, management, and budget decisions for the justice system. The collection of the relevant case level data should be fully funded by the Legislature.

Pretrial Decisionmaking Processes

Recommendation 1: The Legislature should 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.

→ Recommendation 2: The Legislature should 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.

Recommendation 3: The Legislature should amend the Texas Constitution and enact related statutes to provide that defendants 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.

→ Recommendation 4: The Legislature should provide funding to ensure that pretrial supervision is available to defendants released on a pretrial release bond so that those defendants are adequately supervised.

Recommendation 5: The Legislature should provide funding to ensure that magistrates making pretrial release decisions are adequately trained on evidence-based pretrial decisionmaking and appropriate supervision levels.

Recommendation 6: The Legislature should ensure that data on pretrial release decisions is collected and maintained for further review.

Recommendation 7: The Legislature should expressly authorize the Court of Criminal Appeals to adopt any necessary rules to implement the provisions enacted by the Legislature pursuant to these recommendations.

Recommendation 8: The Legislature should provide for a sufficient transition period to implement the provisions of these recommendations.

Specialty Court Oversight

Recommendation 1: The Legislature should amend Title 2, Subtitle K of the Government Code to provide the Judicial Branch with increased oversight of specialty courts.

Recommendation 2: The Legislature should appropriate funds to the Office of Court Administration for the development of a statewide specialty court case management system.

Firearms

Recommendation 1: The Legislature should direct the Office of Court Administration to develop a statewide case management system to assist with National Instant Criminal Background Check System (NICS) entry and transparency, and provide full funding for the system.

Recommendations in Detail

Opioid Abuse and Dependency Crisis

Background

According to the Centers for Disease Control and Prevention (CDC), between 1999 and 2016 more than 350,000 people died from an overdose involving an opioid. This includes more than 42,000 people in 2016 alone. The CDC estimates that, on average, 115 Americans die every day from an opioid overdose. This rash of deaths and the consequence wreaked by opioid abuse and addiction are referred to as the Opioid Epidemic, which can trace its roots to the overprescription of opioids and the increased use of heroin and synthetic opioids.¹

Although Texas appears to fare better than many other states, it has not proven immune to the opioid crisis.² According to a recent survey issued to Texas courts regarding opioid addiction, Texas judges indicated opioid addiction was the third most prevalent type of addiction for people appearing in court. This comports with documented Texas substance abuse trends in 2017.³

Just over half of respondents suggested opioids had a moderate impact on their communities, while nearly a fifth stated that opioids were having a major impact on the community. To better tackle the opioid crisis as it crosses Texas, the Criminal Justice Committee recommends the Legislature create an Opioid Task Force to coordinate a multidisciplinary, multisystem response to the crisis. The collection of case level data would also help in formulating policy in this area.

Recommendations

Recommendation 1: The Legislature should establish a statewide Opioid Task Force to promote communication and collaboration between local and state leaders, experts, and advocates in confronting the opioid abuse and dependency epidemic as it crosses Texas.

Opioid-involved persons enter Texas courthouses with great regularity. According to a survey issued to Texas courts regarding opioid dependency, nearly one quarter of respondent judges stated they saw an opioid-addicted person in court every week. Nearly another quarter reported seeing an opioid-addicted person at least once a month. But courts are rarely front-end participants in the opioid epidemic, and typically

¹ CTRS. FOR DISEASE CONTROL AND PREVENTION, *Opioid Basics: Understanding the Epidemic*, <https://www.cdc.gov/drugoverdose/epidemic/index.html>.

² *Opioid Related Deaths in Texas*, TEX. DEP'T OF STATE HEALTH SERVICES CTR. FOR HEALTH STATISTICS, <http://healthdata.dshs.texas.gov/Opioids/Deaths>.

³ JANE MAXWELL, *SUBSTANCE ABUSE TRENDS IN TEXAS 2017: A REPORT TO THE NATIONAL DRUG EARLY WARNING SYSTEM 1-2*, <https://socialwork.utexas.edu/dl/ari/texas-drug-trends-2017.pdf>.

come into contact with opioid-involved persons when dependency is already established.

State leaders have a tremendous opportunity to holistically plan for and confront the opioid epidemic before it impacts Texas the way it has other states. Charges filed against an opioid-dependent person can quickly ricochet through the court system, triggering child welfare cases, a divorce or custody dispute, guardianships — the list goes on and on. And across the country, state judges and policy leaders are acknowledging the cascade effect of opioid-based court appearances: prisons must carry more treatment and overdose medication, crime labs must expand substance testing, and the foster care system inevitably grows under increased placements due to parental substance abuse.⁴ Working across disciplines and institutions, a statewide Opioid Task Force would better position Texas to identify training and education needs, prioritize services and resources, and strategically plan for the strain caused by the opioid epidemic.

Recommendation 2: The Judicial Council should collect relevant case level data from all court levels including magistrates, to generate more timely and detailed information to support policy, planning, management, and budget decisions for the justice system. The collection of the relevant case level data should be fully funded by the Legislature.

The Judicial Council does not currently collect case level data, and there is no court data available to assess the volume of or outcome of cases involving opioids. The Council’s Data Committee has recommended the collection of case level data from all court levels, including magistrates, and the Criminal Justice Committee likewise recommends case level data collection to support policy, planning, management, and budget decisions for the justice system.

Pretrial Decisionmaking Processes

Background

“In our society, liberty is the norm, and detention prior to trial . . . is the carefully limited exception.” Chief Justice William H. Rehnquist, *United States v. Salerno*, 481 U.S. 739, 755 (1987).

The Criminal Justice Committee’s 2016 Report and Recommendations laid out recommended reforms to Texas’ pretrial bail decisionmaking system. In that report, the Committee noted that current pretrial practices leave an undeniable mark on county budgets, impact case outcomes,

⁴ NAT’L CTR. FOR STATE CTS., TRENDS IN STATE COURTS: THE OPIOID EPIDEMIC AND THE COURTS (2017), <http://www.ncsc.org/sitecore/content/microsites/trends/home/Monthly-Trends-Articles/2017/Opioid-Epidemic-and-the-Courts.aspx>

play a role in recidivism and jail population racial disparities, and hobble the economic stability of detained defendants' families.⁵ For this 2018 Report and Recommendations, the Committee repeats its 2016 recommendations, guided by the bedrock principle that all arrested persons are presumed innocent until proven guilty.

During the 85th Legislative Session, the Committee's reform agenda received a boost from the comparative pretrial release study *Liberty and Justice: Pretrial Practices in Texas*, authored by the Public Policy Research Institute at Texas A&M University, the Texas Indigent Defense Commission, and the Office of Court Administration. The study indicated that pretrial risk assessment could save money, strengthen public safety, and improve outcomes for defendants, and found empirical support for the Criminal Justice Committee's pretrial reform agenda.⁶ Within days of the report's release, Senator Jon Whitmire and Representative Andrew Murr filed SB 1338, SJR 50, HB 3011, and HJR 98 in their respective chambers in support of the study's findings. The Senate passed CSSB 1338 in early May, but the reform legislation died in the House a few weeks later.

Efforts to reform pretrial decisionmaking practices now exist outside the legislative sphere, as Texas pretrial detainees are launching their own attempts to force changes in court. At least in Harris County, these litigants are seeing success.⁷ At the time of this report's drafting, pretrial detainees in Dallas County and Galveston County had pending complaints alleging that local pretrial bail practices are unconstitutional.⁸ In considering the time, cost, and effects of these suits, the Committee points to the words of Chief Judge Lee Rosenthal in her opinion in *ODonnell v. Harris County*: "If enacted as proposed, the [State's] legislation would likely address many of the plaintiffs' concerns."⁹

Recommendations

Recommendation 1: The Legislature should 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.

⁵ TEX. JUDICIAL COUNCIL, CRIMINAL JUSTICE COMMITTEE 2016 REPORT AND RECOMMENDATIONS 2-4, <http://www.txcourts.gov/media/1436204/criminal-justice-committee-pretrial-recommendations-final.pdf>.

⁶ PUB. POLICY RESEARCH INST., LIBERTY AND JUSTICE: PRETRIAL PRACTICES IN TEXAS xiii (2017), <https://ppri.tamu.edu/pretrial-practices/>.

⁷ E.g., *ODonnell v. Harris County*, No. 4:16-cv-01414 (S.D. Tex. Apr. 28, 2017), available at https://www.gpo.gov/fdsys/pkg/USCOURTS-txsd-4_16-cv-01414/pdf/USCOURTS-txsd-4_16-cv-01414-5.pdf; *ODonnell v. Harris County*, 882 F.3d 528 (5th Cir. 2018), available at <http://www.ca5.uscourts.gov/opinions/pub/17/17-20333-CV0.pdf>.

⁸ See, e.g., *Daves v. Dallas Cnty.*, No. 3:18-cv-154 (N.D. Tex. filed Jan. 30, 2018), available at <https://static1.squarespace.com/static/57fd58f937c581b957965f8e/t/5a70ce4a8165f55a56cacc1f/151734228340/6/Daves%2BFirst%2BAmended%2BComplaint.pdf>; *Booth v. Galveston Cnty.*, No. 3:18-cv-00104 (S.D. Tex. filed Apr. 8, 2018), available at https://www.aclutx.org/sites/default/files/field_documents/complaint_-_booth_v._galveston_county.pdf.

⁹ See *ODonnell*, *supra* note 7, at 125.

Most judges or magistrates in Texas make pretrial bail decision without adequate information to determine the defendant's risk of flight or risk to the public safety. The lack of information results in decisions by magistrates that may result in the release of individuals who pose a great deal of risk to the community. At the same time, a significant number of individuals who may not have the financial resources to make a monetary bond but who pose low risk of flight or risk to public safety may remain in jail pending trial. The pretrial detention of low- to moderate-risk defendants is costly to local governments and may result in more negative outcomes for defendants and for future public safety.

The advent of validated pretrial risk assessments that provide information to magistrates predictive of risk of flight and to public safety have great potential to ensure that individuals who pose high risk to public safety are held in jail and those posing low- to moderate-risk are not held pretrial. Several Texas jurisdictions have implemented pretrial risk assessments, including Bexar County, Harris County and Travis County. It is the committee's opinion that all magistrates should have access to the risk analysis for defendants before bail-setting proceedings.

Many validated pretrial risk assessments require an interview of the defendant. While the committee has no doubt in the utility of the interview-based assessments, the committee recognizes that implementing an interview-based risk assessment in most counties in Texas would require the addition of trained interviewer staff at a significant cost to counties. In addition, research shows that quantitative risk assessment instruments combined with subjective judgment, as opposed to qualitative risk assessment instruments that gather subjective information from interviews alone, provide more accurate information about a defendant's risk of failure to appear or risk to the community.¹⁰ Research has also shown that this quantitative risk assessment information can be gathered without the need for an interview without diminishing the predictive nature of the risk assessment.¹¹

Rather than advocating an interview-based risk assessment approach, the committee recommends that the State implement a non-interview based validated pretrial risk assessment and seek to automate the risk assessment using technology. The committee has studied the Laura and John Arnold Foundation's Public Safety Assessment (PSA) that has been or is being implemented in over 20 cities and states. It is the committee's view that the PSA should be automated by the state and made available to jurisdictions

¹⁰ See, e.g., CYNTHIA MAMALIAN, STATE OF THE SCIENCE OF PRETRIAL RISK ASSESSMENT (2011), https://www.bja.gov/publications/pji_pretrialriskassessment.pdf; CHARLES SUMMERS & TIM WILLIS, PRETRIAL RISK ASSESSMENT: RESEARCH SUMMARY (2010), <https://www.bja.gov/Publications/PretrialRiskAssessmentResearchSummary.pdf>.

¹¹ MARIE VANNOSTRAND & CHRISTOPHER T. LOWENKAMP, ASSESSING PRETRIAL RISK WITHOUT A DEFENDANT INTERVIEW (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_no-interview_FNL.pdf.

across the state should they choose to use that validated pretrial risk assessment. The Office of Court Administration is developing a risk assessment tool called the Pretrial Risk Assessment Information System or PRAISTX that will be available to jurisdictions across the state. It uses 9 objective factors about arrested individuals to determine a defendant's risk for failure to appear and risk to commit a new crime. Those factors are: current offense, pending charges at time of current offense, age at current arrest, prior misdemeanor conviction(s), prior felony conviction(s), number of violent convictions, number of pretrial failure to appears in the last 2 years, number of pretrial failure to appears in cases older than 2 years, and whether the individual has previously been sentenced to jail/prison for more than 14 days. The Office of Court Administration, as of publication of this report, was working with potential pilot jurisdictions and expects to have data on PRAISTX before the start of the 2019 Texas Legislative Session.

It is not the committee's recommendation that there be a single mandated validated pretrial risk assessment should a jurisdiction choose another validated assessment tool.

Recommendation 2: The Legislature should 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.

Recommendation 3: The Legislature should amend the Texas Constitution and enact related statutes to provide that defendants 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.

It is committee's firm belief that pretrial detention decisions should be made based upon risk of flight and to public safety, and that it is important to orient the Constitution and statutory framework to this approach. Studies and information from other states reveal that the majority of individuals arrested for misdemeanor and felony offenses are low- or moderate-risk of flight and to public safety. A small percentage of those individuals are high-risk. Therefore, the committee believes that the Texas Constitution and related bail statutes should provide for a presumption that individuals arrested for a misdemeanor or felony offense should be released on personal bond. However, the committee believes that magistrates should retain the discretion to utilize all existing forms of bail as the magistrate deems appropriate. The magistrate would have the discretion to determine the appropriate method of pretrial release based upon the risk assessment information provided to the magistrate at the bail-setting proceeding.

At least 27 states and the District of Columbia, as well as the federal system, have statutes or constitutional provisions that authorize detention without bail in non-capital cases. These preventive detention provisions are in recognition that there are some defendants for which there are no conditions of release which would reasonably ensure the defendant's appearance at court and the safety of the community. Except for very limited circumstances, the Texas Constitution and statutory framework do not provide

magistrates with this preventive detention authority, even when the defendant before the magistrate poses the highest risk of flight or to public safety. Reaffirming its belief that pretrial detention decisions should be made based upon risk of flight and to public safety, the committee believes that the Texas Constitution and related statutes should be amended to provide magistrates with the authority to use preventive detention to hold defendants posing a high flight risk and/or high risk to community safety.

Some may find that the concept of preventive detention is concerning and apt to potential abuse by magistrates. Therefore, the committee recommends that magistrates who determine to hold a defendant in jail pending trial be required to make written findings regarding their reasons for the preventive detention. Such findings may include information on the risk of flight and/or risk to public safety of the defendant. In addition, the committee believes that the defendant should be afforded a detention hearing within 10 days where the preventive detention could be reviewed. As an additional safeguard, the defendant should continue to have the ability to seek appellate review of the bail determination through an expedited review procedure.

Recommendation 4: The Legislature should provide funding to ensure that pretrial supervision is available to defendants released on a pretrial release bond so that those defendants are adequately supervised.

While most low- to moderate-risk individuals released from jail pending trial will not need significant supervision, there will be times when there is a need for increased levels of supervision. At the very least, best practices for pretrial supervision indicate that court date phone reminders are effective in ensuring the presence of the defendant at court settings.¹² In addition, judges and magistrates will be reassured with releasing moderate-risk defendants if there are adequate supervision resources available.

Unfortunately, most counties do not have personal bond supervision offices available to supervise individuals released on personal bond. While counties may fund supervision offices or seek to have the offenders pay for the supervision, most counties have not been able to fund the offices. In the late 2000s, state funding for pretrial supervision was limited when adult community supervision (probation) officials were informed that state funding could only be used to fund 1/10 of one fulltime equivalent employee in the department. This restriction applies at the same level regardless of the size of the department.

¹² See, e.g., JENNIFER ELEK, SARA SAPIA, & SUSAN KEILITZ, THE NAT'L CTR. FOR STATE CTS. PRETRIAL JUSTICE CTR. FOR CTS., PRETRIAL JUSTICE BRIEF: USE OF COURT DATE REMINDER NOTICES TO IMPROVE COURT APPEARANCE RATES 1-4 (2017), <http://www.ncsc.org/~media/Microsites/Files/PJCC/PJCC%20Brief%2010%20Sept%202017%20Court%20Date%20Notification%20Systems.ashx>; Timothy R. Schnacke, Michael R. Jones, & Dorian M. Wilderman, *Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Resulting Court Date Notification Program*, 48 Ct. Rev. 86, 91-94 (2012), <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1396&context=ajacourtreview>.

The committee believes that pretrial supervision should be available in every county for individuals released on personal bond and that the existing structure of community supervision and corrections departments (CSCD) is best suited to provide the supervision. Every county has a CSCD responsible for supervising individuals on probation.

The committee has conducted preliminary research into the costs of providing pretrial services statewide. The state of Kentucky and Washington DC's Pretrial Services Agency are helpful points of reference in this regard. The Kentucky General Assembly appropriates nearly \$13 million to the Kentucky Supreme Court annually to support its statewide pretrial program, which offers a full range of supervision and related services and is centrally administered by the Administrative Office of the Courts. The program handles approximately 185,000 arrests annually, meaning that the average cost for supervision is \$70.27 per arrest. The highly-regarded Pretrial Services Agency (PSA) of the Court Services and Offender Supervision Agency for the District of Columbia is funded by appropriation from Congress. PSA was appropriated just over \$60 million in 2015.

Both of these programs use a standardized risk assessment tool and make extensive use of data to ensure that screening is conducted and releases are made timely, supervision levels are proportionate to risk of failure to appear or risk to the community under the least restrictive terms necessary, and staff are allocated properly.

Translating the costs of operating pretrial programs from one jurisdiction to another can be challenging, and the committee acknowledges that the actual costs of establishing and operating pretrial release programs in Texas that are oriented to making the greatest use of personal bonds as possible will be highly dependent on the following:

- screening tools and processes used;
- rates of release;
- supervision terms required, including supervision levels ordered;
- the cost of services (not paid by the defendant) ordered as a condition of release;
- local administrative costs, including staffing, travel, and overhead costs; and
- any efficiencies that may be achieved through centralizing some portion of these activities at the local, regional, or state level.

Nonetheless, planning for program development and program improvements can be informed by considering the costs associated with rates of pretrial release and the number of community service officers (CSOs) needed to supervise released individuals.

While a program’s caseload ratio is considered a “mission critical” measure of performance for a pretrial release program,¹³ there is not a national standard with regard to staff to offender ratio. Pretrial supervision caseload sizes nationwide vary significantly (between 0 and 650 according to one national survey),¹⁴ though the average staff to defendant ratio for pretrial programs nationwide is 1:75.¹⁵ In Kentucky, pretrial CSOs have an average caseload of 100 defendants. Washington DC’s Pretrial Services Agency reports an overall staff to defendant ratio of 1:40.¹⁶

A CSO’s caseload will depend on a jurisdiction’s arrest and release rate, the supervision level of defendants released in the jurisdiction, and the resources available to support supervision activities. It may also be impacted by the composition of the CSO’s caseload and workload – i.e., whether officers supervise individuals on release in the pretrial program in addition to individuals on other kinds of community release, both pre- and post-adjudication (e.g., diversion, probation, parole). Workload factors generally may also impact caseloads. CSOs in some jurisdictions may also have responsibility for conducting pretrial risk and need assessments and/or conducting investigations. These arrangements will be individualized across jurisdictions, based on resources, program design, and related factors.

Funding the supervision could be accomplished in multiple ways, and the committee leaves the funding mechanism decision to the legislature:

1. County-only funding

Reduced county jail populations should be the result of an increased pretrial release population. This means that counties will be the primary beneficiaries of decreased jail costs. It is expected that the decreased jail costs will exceed the cost of supervision in most counties. Thus, one mechanism for funding would be that counties fully fund the supervision program.

The drawback of county-only funding is that smaller counties may not realize enough reduced jail population to fully cover the cost of the supervision program. Since adequate supervision is crucial to the success of any pretrial release program, county-only funding presents obstacles to statewide success.

¹³ See NAT’L INST. OF CORR., MEASURING WHAT MATTERS: OUTCOME AND PERFORMANCE MEASURES FOR THE PRETRIAL SERVICES FIELD 7 (2011), <https://www.pretrial.org/download/performance-measures/Measuring%20What%20Matters.pdf>.

¹⁴ See COMMUNITY RESOURCES FOR JUSTICE, WEBINAR SERIES HANDOUT: EVIDENCE-BASED PRACTICES IN PRETRIAL SERVICES 5 (2010), https://b3cdn.net/crjustice/d9ffe8cc0d132af136_jhm6bx455.pdf.

¹⁵ See ABELL FOUNDATION, FINISHING THE JOB: MODERNIZING MARYLAND’S BAIL SYSTEM 2 (2016), <http://www.abell.org/sites/default/files/files/cja-pretrialappentix.pdf>.

¹⁶ See COURT SERVICES AND OFFENDER SUPERVISION AGENCY, FY17 PSA BUDGET SUBMISSION 29, <http://www.csosa.gov/about/financial/budget/2017/FY17-PSA-Budget-Submission.pdf>.

2. State-only funding

State funding for supervision programs would likely result in increased standardization of evidence-based supervision practices through standards promulgated by the state. This would likely increase the effectiveness of pretrial supervision and lower missed court settings and ensure higher public safety. The drawback of state-only funding for supervision programs is that the cost savings from reduced jail populations would be to county governments while state-only funding of supervision would place all of the cost on the state.

3. Offender-only funding

Many supervision programs, including adult probation supervision, require defendants who have an ability to pay to contribute to the supervision costs. This funding mechanism would ensure that general taxpayer funding is not provided and that the users of the system pay for the cost of the system.

The drawback to offender-only funding for supervision programs is that there would not be a sufficient caseload to cover the cost of the program in many counties. Offender-only funding would produce instability in the funding mechanism based upon the supervision population. Lastly, imposing an additional burden on offenders who are unable to pay the costs of supervision due to indigency or an overall lack of financial resources would thwart the goals of pretrial release. Thus, offender funding methods should be limited to diminish the negative impacts that might come from this type of funding.

4. County-state partnership or County-state-offender partnership funding

County-state partnership funding of supervision programs would bring about the advantages of the county-only and state-only funding models. It has been suggested that the state could design a hold-harmless program to ensure that counties who fund supervision programs do not see a negative impact on cost-benefit, which is not expected in most counties.

County-state-offender partnership funding would bring about the advantages of all other funding mechanisms and could ensure greater stability of funding.

Recommendation 5: The Legislature should provide funding to ensure that magistrates making pretrial release decisions are adequately trained on evidence-based pretrial decision-making and appropriate supervision levels.

Art. 2.09 of the Code of Criminal Procedure designates who are magistrates in Texas. Included in that list are justices of the Supreme Court and judges of the Court of

Criminal Appeals, justices of the Courts of Appeals, district judges, county judges, statutory county court judges, statutory probate judges, justices of the peace, municipal court judges, mayors and recorders of the municipal courts, associate judges and magistrates in certain counties, associate statutory probate judges, and other associate judges and magistrates appointed under Chapters 54 and 54A of the Government Code.

Chapters 54 and 54A of the Government Code authorize magistrates and associate judges to be established in counties to assist with the determination of bail. The statutes contemplate that this position may be a full-time or part-time position. Many counties have established part-time positions who assist in the determination of bail during evening or weekend hours.

Texas Government Code Sec. 56.003(b) provides the statutory basis for funds to be appropriated to the Court of Criminal Appeals for the “continuing legal education of judges of the appellate courts, district courts, county courts at law, county courts performing judicial functions, full-time associate judges and masters appointed pursuant to Chapter 201, Family Code, and full-time masters, magistrates, referees, and associate judges appointed pursuant to Chapter 54 as required by the Court of Criminal Appeals.”

Sec. 56.003(c) and (d) of the Government Code provide the statutory basis for funds to be appropriated to the Court of Criminal Appeals for the continuing legal education of judges of the justice courts and municipal courts.

Rules 2, 3, and 5 of the Rules of Judicial Education promulgated by the Court of Criminal Appeals require judicial education for judges of the appellate, district, county, justice and municipal courts. Rule 4 requires “judicial officers” to “complete within one year after taking office, at least 12 hours of instruction in the administrative duties of office and substantive procedural and evidentiary laws. Thereafter, the “judicial officer” is required to complete at least 12 hours of instruction in substantive, procedural and evidentiary laws and court administration. The term “judicial officer” is defined to include full-time masters, magistrates, or referees appointed pursuant to Chapter 54 of the Government Code.

Rules 2, 3, and 5 provide a list of entities authorized to provide training to the judges of the appellate, district, county, justice and municipal courts. Rule 4 provides that the training to “judicial officers” can be provided by any entity listed in Rule 2c, which lists 18 organizations including the Texas Center for the Judiciary, bar associations, and the National Judicial College. Many of the organizations listed in Rule 2c are quite capable of delivery of outstanding education to magistrates regarding evidence-based pretrial decision-making and appropriate supervision levels.

The committee recognizes two issues with the delivery of judicial education to all judges and magistrates making pretrial bail determinations:

1. There is no mechanism to formally train part-time magistrates or associate judges conducting bail determination proceedings.
2. There may be insufficient funding to properly educate all judges and magistrates on the determination of bail and appropriate supervision levels.

The committee recommends that the legislature amend Government Code Sec. 54.003(b) to include part-time and full-time magistrates and associate judges appointed under Chapters 54 and 54A of the Government Code. The committee also recommends that the Court of Criminal Appeals amend the Rules of Judicial Education to require continuing legal education for part-time and full-time magistrates and associate judges under Chapters 54 and 54A of the Government Code.

The committee recommends that the Court of Criminal Appeals examine its funding levels for judicial education and supports the Court's efforts to increase funding to a level sufficient to provide the education discussed above.

Recommendation 6: The Legislature should ensure that data on pretrial release decisions is collected and maintained for further review.

Determining the effectiveness of any changes to the pretrial decision-making process should be continually evaluated to ensure that the changes are having the intended impacts and that there are no unintended consequences. Therefore, the committee recommends that the legislature and the Judicial Council evaluate the data elements required to assess the effectiveness and impact of pretrial decision-making and require the collection and analysis of that data on a regular and continuing basis.

Recommendation 7: The Legislature should expressly authorize the Court of Criminal Appeals to adopt any necessary rules to implement the provisions enacted by the Legislature pursuant to these recommendations.

As with any significant statutory change, there may be a need to develop procedural rules to fully effectuate the intent of the legislative action. This method has been used effectively by the legislature in direction to the Supreme Court of Texas to promulgate rules to implement legislation. The Court of Criminal Appeals could assist in implementing the intent of the legislature with regard to this recommended pretrial decision-making reform initiative. The rulemaking process by the Court of Criminal Appeals should be inclusive of stakeholders in an advisory process similar to the Supreme Court's Rules Advisory Committee.

Recommendation 8: The Legislature should provide for a sufficient transition period to implement the provisions of these recommendations.

Other states implementing new pretrial release procedures have found it useful to have a delayed implementation period to allow rules, processes, and infrastructural needs to be in place prior to the effective date of the change. The committee believes that approach is wise in this transition and recommends a delayed effective date to January 1, 2022. Jurisdictions who wish to implement portions of the law prior to the effective date of the act would be able to do so, as many of these recommendations could be implemented under existing law. However, the mandatory compliance with the recommendations should be sufficiently delayed to provide jurisdictions ample time to comply.

Specialty Court Oversight

Background

Texas specialty courts are “problem-solving” trial courts that seek to treat the underlying issues that bring people into court. Over 190 specialty court dockets operate across Texas, including DWI court, drug court, family drug court, veterans court, mental health court, and commercially sexually exploited persons court. Funding for specialty courts comes from a variety of sources, but the largest amount comes from the Texas Governor’s Criminal Justice Division (CJD).¹⁷ Although specialty court dockets are judicially supervised, Title 2, Subtitle K of the Government Code charges the Governor’s CJD with certification and oversight of specialty court programs.¹⁸ This approach is out-of-step with national practice, as Texas is one of only two states with specialty court oversight housed under its Governor.

To better assist with specialty court administration, the Criminal Justice Committee recommends amending the Government Code to increase judicial branch oversight of specialty courts. In this same vein and mirroring its sister Committees’ concerns with robust data collection, the Criminal Justice Committee also recommends the appropriation of funds to the Office of Court Administration for the creation of a statewide specialty court case management system.

Recommendations

Recommendation 1: The Legislature should amend Title 2, Subtitle K of the Government Code to provide the Judicial Branch with increased oversight of specialty courts.

Title 2, Subtitle K of the Government Code charges the Governor’s Criminal Justice Division (CJD) with certification and oversight of specialty court programs, which are specialized dockets that aim to treat the underlying causes that brought a person into the court system. Part of the Governor’s CJD work with these courts includes identifying

¹⁷ See LEGIS. BUDGET BOARD, ISSUE BRIEF: SPECIALTY COURTS (2016), http://www.lbb.state.tx.us/Documents/Publications/Issue_Briefs/3015_Specialty_Courts_0701.pdf.

¹⁸ See TEX. GOV’T CODE §121.002.

best practices (with the Specialty Court Advisory Council), managing court performance reporting, increasing specialty court access to training and technical assistance, and providing financial support for specialty courts.¹⁹

What began as one drug court in 1990 has since grown to over 190 specialty court programs throughout Texas.²⁰ Nationally, centralized administration of specialty courts has increased to better advance quality assurance, training, funding, research and evaluation, technology, and advocacy goals.²¹ Providing the Texas Judicial Branch with increased oversight of specialty courts would move Texas closer to national practices and would equally tap into the judiciary's expertise in courts policy and court management issues.

Recommendation 2: The Legislature should appropriate funds to the Office of Court Administration for the development of a statewide specialty court case management system.

During the 85th Legislative Session the Legislature passed SB 1326, which directs the Office of Court Administration to collect certain information from specialty courts regarding the outcomes of specialty court participants with mental illness.²² At present, there is no statewide data collected on specialty courts. The Legislature could satisfy its research needs, promote statewide coordination of specialty court resources, and improve the administration of justice in specialty court cases by appropriating funds for the development of a statewide specialty court case management system.

Firearms

Background

Just after 11AM on Sunday November 5, 2017, Devin Kelley approached the First Baptist Church of Sutherland Springs with a semi-automatic rifle and opened fire on the building. He then entered the church and methodically unloaded his weapon on unsuspecting Sunday worshipers. Within minutes 25 Texans lay dead, with 20 more left wounded. Investigators soon learned that Kelley purchased the gun used during the massacre in April 2016 — four years after being court-martialed for multiple counts of domestic violence-type assault while serving in the United States Air Force. During the gun purchase process Kelley lied about his convictions on his background check application, and the Air Force failed to report his convictions to the federal background check system.²³ Because Kelley's name did not appear in the National

¹⁹ See *id.*; see also *Specialty Court Programs*, OFFICE OF THE TEX. GOVERNOR, https://gov.texas.gov/organization/cjd/specialty_courts

²⁰ See LEGIS. BUDGET BOARD, *supra* note 17.

²¹ CTR. FOR CT. INNOVATION, STATEWIDE COORDINATION OF PROBLEM-SOLVING COURTS: A SNAPSHOT OF FIVE STATES, https://www.bja.gov/Publications/CCI_ProblemSolvingCoord.pdf.

²² TEX. GOV'T CODE § 121.003.

²³ See David Montgomery, Richard A. Opiel Jr., & Jose A. Del Real, *Air Force Error Allowed Texas Gunman to Buy Weapons*, N.Y. TIMES, Nov. 6, 2017, <https://www.nytimes.com/2017/11/06/us/texas-shooting-church.html>.

Instant Criminal Background Check System (NICS), he was not disqualified from purchasing the weapon he would later use for mass murder.

NICS is a national system that checks records in three databases to determine if individuals are prohibited from receiving firearms, including the transfer purchase of firearms. If the NICS does not return a disqualifying record match on an applicant, then the transfer may proceed. The NICS databases are populated with entries from multiple sources, including courts. At present, the reporting system in Texas is not fully automated. While some counties have sophisticated case management systems to assist in NICS entry, other counties must rely on manual entry processes to input system information. The NICS databases are only as good as the records they contain. One way the Legislature can advance accurate, reliable data into the NICS is by mandating the development of a statewide case management system to assist with NICS entry and transparency. As the Sutherland Springs incident highlights, failure of the background check system can have devastating consequences.

Recommendations

Recommendation 1: The Legislature should direct the Office of Court Administration to develop a statewide case management system to assist with National Instant Criminal Background Check System (NICS) entry and transparency, and provide full funding for the system.

The National Instant Criminal Background Check System (NICS) relies upon several systems to run background checks in pending firearm transactions to determine if a person seeking a firearm is disqualified from the transfer. NICS searches span three databases: the Interstate Identification Index (III), the National Crime Information Center (NCIC), and the NICS Index. Records in these databases are populated with potentially prohibiting records from local, state, tribal, and federal levels. Entries come from multiple actors, including law enforcement, jails, and courts. Federally-mandated disqualifiers cover a wide variety of categories, including felony convictions, misdemeanor convictions for domestic violence, mental health commitments, and protective orders.²⁴ In Texas, information about arrests and prosecutions for various criminal offenses are entered by law enforcement, jails, prosecutors, and courts into the Criminal Justice Information System (CJIS), which populates portions of the NICS. Information about mental health disqualifiers, including persons under guardianship, individuals found incompetent to stand trial, individuals found not guilty by reason of insanity, and individuals involuntarily committed for inpatient mental health services are submitted by court clerks to CJIS and then forwarded to the NICS database.²⁵

²⁴ See *About NICS*, FED. BUR. OF INVEST., <https://www.fbi.gov/services/cjis/nics/about-nics>.

²⁵ *Texas Crime Information Center (TCIC)*, TEX. DEP'T. OF PUB. SAFETY, https://www.dps.texas.gov/administration/crime_records/tcic/index.htm.

The NICS databases are only as good as the records they contain, and over the last decade Texas established itself as a leader in NICS reporting improvements. After the passage of the federal NICS Improvement Amendments Act (prompted by the 2007 Virginia Tech massacre), the 81st Legislature passed HB3352 to bring Texas closer to compliance with the new NICS reporting requirements on mental health records. HB3352 requires court clerks to report information on disqualifying mental health adjudications and commitments plus all relevant cases in which a mental health order issued going back to September 1989.²⁶ In 2011, Texas launched the NICS Mental Health Record Improvement Project to improve the quality and availability of the mental health records entered into the NICS index.²⁷ Both the US General Accountability Office and the US Department of Justice’s Bureau of Justice Statistics recognized Texas for its efforts to improve the accuracy and completeness of NICS.²⁸ And in 2013, the Office of Court Administration’s Protective Order Record Improvement Project set out to increase reporting of protective orders to NICS. The Project identified obstacles, inconsistencies, and complexities in protective order entry, and helped hone reporting recommendations rolled into SB737 (2015).²⁹ Even with these great strides — and as the Sutherland Springs shooting gravely reminds us — room for improvement in NICS reporting remains.³⁰

The NICS system must get accurate, complete, up-to-date information for the background check system to function effectively, and the state development and funding of an automated, statewide case management system to assist in NICS entry would alleviate many problems posed by the decentralized system currently in place. Consider the following:

- Many clerks across Texas do not have an advanced case management system, but instead must use manual entry process to drop information into the system. This approach is both time-consuming and subject to entry inconsistencies, as there is no uniform approach. A statewide case management system would promote entry predictability, consistency, and expediency. It would reduce

²⁶ SENATE RESEARCH CENTER, H.B. 3352 Bill Analysis, 81st Leg., R.S., <https://capitol.texas.gov/tlodocs/81R/analysis/pdf/HB03352E.pdf#navpanes=0>

²⁷ TEX. OFFICE OF CT. ADMIN., TEXAS NICS MENTAL HEALTH RECORD IMPROVEMENT PLAN PROGRESS, CHALLENGES, AND RECOMMENDATIONS (2012), <http://www.txcourts.gov/media/273989/nics-record-improvement-plan-final.pdf>.

²⁸ See U.S. GEN. ACCOUNT. OFFICE, GUN CONTROL: SHARING PROMISING PRACTICES AND ASSESSING INCENTIVES COULD BETTER POSITION JUSTICE TO ASSIST STATES IN PROVIDING RECORDS FOR BACKGROUND CHECKS (JULY 2012), www.gao.gov/products/GAO-12-684; U.S. DEP’T OF JUSTICE BUR. OF STAT., NICS IMPROVEMENT AMENDMENTS ACT OF 2007: PROMISING PRACTICES FOR IMPROVED RECORD REPORT, <https://www.bjs.gov/content/pub/pdf/practices/Texas.pdf>.

²⁹ *Domestic Violence Resource Program*, TEX. OFFICE OF CT. ADMIN., <http://www.txcourts.gov/dvrp/>.

³⁰ See Letter from Tex. Gov. Greg Abbott and Tex. Att’y Gen. Ken Paxton to Tex. Law Enforcement, (Apr. 11, 2018), https://www.texasattorneygeneral.gov/files/epress/2Texas_Gov_and_AG_Letter_to_TX_law_enforcement_4-11-18.pdf. In April 2018, Governor Abbott and Attorney General Paxton sent a letter to the Office of Court Administration and other criminal justice data stakeholders stressing the need for improved reporting of final case dispositions, noting that incomplete data can have serious consequences.

potential data conflict and omissions and lessen the need for follow-up correction.

- Under the present system it is difficult to conduct research on the local data entered into NICS, which lends to uncertainty in accuracy of information. To review whether criminal history records have made it into the NICS, one must query searches *one-by-one*. Texas' population will surpass 30 million in the coming years, making such an approach near pointless.
- Better, more reliable data entry would increase safety and accountability. Mismanaged NICS reporting played an unfortunate role in Sutherland Springs. Use of an automated case management system would decrease the risk of transferring firearms to persons who are disqualified from holding them.