

SUBJECT: Modifying bail setting process, using pretrial risk assessment tool

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 7 ayes — Collier, Zedler, K. Bell, Hunter, P. King, Moody, Murr

2 nays — J. González, Pacheco

WITNESSES: For — Gerald Yezak, Sheriff's Association of Texas; Kasey Allen;
(*Registered, but did not testify*: Ricky Allen; Sue Allen; Jimmy Allen;
Lisa Allen)

Against — Jeffrey Clayton, American Bail Coalition; Michael Lozito, and Michael Young, Bexar County; Randy Adler, Ken Good, Roger Moore, and Kim Porter, Professional Bondsmen of Texas; Emily Gerrick, Texas Fair Defense Project; (*Registered, but did not testify*: Nick Hudson, American Civil Liberties Union of Texas; Michael Byrd, Baail bond; Deborah Farmer, Bail Bonds; Marshall Kenderdine, Bankers Insurance Company; Melissa Shannon, Bexar County Commissioners Court; Steven Sondag, Come and Train It K9; Jerry Sondag, Conroe Insurance Agency; Latesia Ganos, Discount and A1 Bail Bond; Joe Flack, Financial Casualty and Surety, Inc.; Gale Lilliman, Gulf Coast Bail Bonds; Ender Reed, Harris County Commissioners Court; Rene Anzaldua, Hidalgo County Bail Bond Association; Kathleen Mitchell, Just Liberty; Tammy Stephens, League City Bail Bonds; Joseph Williams, Lexington National Insurance Corp.; Steve Cruz, Lone Star Bonding Harris County; John McRae, McRae Bail Bonds; Michael Oconnor, Rene Ortega, Charlie Pickens, Charlie Pickens III, and Ray Vaughn, PBT; Blanca Aregullin, Gage Gandy, and Irene Villarreal, PBTX; David Fregia, John Mccluskey, Domingo Rodriguez, Sr., James Bear, Ricardo Canales, Claudia Cantu-Flores, Christopher Embrey, Luis Garcia, Elida Garza, Chad Heck, Camille Hodnett, Jamal Qaddura, Domingo Rodriguez, Paul Schuder, Joseph Villareal, Angela Villareal, Michael Whitlock, John Zavala, and Ramona Salinas, Professional Bondsmen of Texas; Debbie Byrd, Ptbx; Alexis Tatum, Travis County Commissioners Court; and 48 individuals)

On — Chad Wilbanks, Galveston County Commissioners Court; David Slayton, Office of Court Administration, Texas Judicial Council; Derek Cohen, Right on Crime; Vincent Giardino, Tarrant County Criminal District Attorney's Office; Mary Mergler, Texas Appleseed; Michael Barba, Texas Catholic Conference of Bishops; Nathan Hecht, Texas Judicial Council; Marc Levin, Texas Public Policy Foundation; Matthew Alsdorf; Doug Deason; Chris Harris; Mollee Westfall; (*Registered, but did not testify*: Justin Keener, Americans for Prosperity, Libre Initiative, Concerned Veterans for America, Doug Deason)

BACKGROUND: Code of Criminal Procedure art. 17.15 establishes rules for setting bail amounts, specifying that the amount of bail is to be governed by the Constitution and by the following rules:

- it must be sufficiently high to give reasonable assurance that the undertaking will be complied with;
- the power to require bail is not to be so used as to make it an instrument of oppression;
- the nature of the offense and the circumstances under which it was committed are to be considered;
- the ability to make bail is to be regarded, and proof may be taken upon this point; and
- the future safety of a victim of the alleged offense and the community shall be considered.

DIGEST: CSHB 2020 would create the Bail Advisory Commission to work with the Office of Court Administration (OCA) to develop a pretrial risk assessment tool to be used when setting bail, modify the statutory rules governing the bail setting process, and restrict the authority to release certain defendants on bail to magistrates with specified qualifications.

The bill would be called the Damon Allen Act.

Bail Advisory Commission. CSHB 2020 would create the Bail Advisory Commission to work with OCA to develop recommendations for a pretrial risk assessment tool to be used by courts when setting bail. The tool

would have to be validated and standardized for statewide use and meet certain criteria in the bill. The commission also would develop recommendations on best practices for personal bond offices.

Membership and operation. The commission would have 11 members:

- three members appointed by the governor, one with law enforcement experience, one with experience as a criminal defense attorney, and one with experience in a prosecutor's office;
- the chair of the Senate Committee on Criminal Justice;
- two senators appointed by the lieutenant governor;
- the chair of the House Committee on Criminal Jurisprudence;
- two House members appointed by the House speaker;
- one member appointed by the chief justice of the Texas Supreme Court; and
- one member appointed by the presiding judge of the Texas Court of Criminal Appeals.

The governor, lieutenant governor, and House speaker would be required to coordinate to ensure that the commission reflected, to the extent possible, the ethnic, racial, and geographic diversity of the state. The governor would designate the presiding officer of the commission.

OCA would have to provide administrative support for the commission, and funds for operations of the commission would have to be provided through an appropriation to OCA.

Development of risk assessment tool. The commission would be required to develop and approve a validated pretrial risk assessment tool that was standardized for statewide use in the bail-setting process.

The tool would have to meet specific criteria, and must:

- be objective, validated for its intended use, and standardized;
- be based on analysis of empirical data and factors relevant to the risk of a defendant failing to appear in court and the safety of the

- community or the victim of the alleged offense; and
- not consider factors that would disproportionately affect persons who were members of racial or ethnic minority groups or who were socioeconomically disadvantaged.

Other duties. The commission also would have to:

- develop recommendations on best practices for personal bond offices to use for pretrial services;
- collect and analyze information about pretrial release practices and distribute it to courts, personal bond offices, and other organizations; and
- collect information about defendants released on bail, including the rate of failure to appear and commission of new offenses.

Adoption of tool. The commission would have to report its recommendations by March 1, 2020, to the governor, lieutenant governor, legislators, chief justice of the Supreme Court, presiding judge of the Court of Criminal Appeals, and the Texas Judicial Council.

The Texas Judicial Council would be required to review the report and could recommend to the commission changes to the tool by June 1, 2020. The commission would be required to revise the tool in accordance with any recommendations and prepare another report by August 1, 2020.

By August 31, 2020, the Texas Judicial Council would have to adopt the validated pretrial risk assessment tool, and OCA would have to provide the tool to magistrates at no cost. The tool would have to be available on OCA's website by September 1, 2020.

By January 1, 2023, the commission would have to report on the implementation of the assessment tool and its effect on pretrial recidivism rates and the rates at which defendants failed to appear in court.

The commission would be abolished September 1, 2023.

Use of risk assessment tool, other factors. The bill would require magistrates considering a release on bail for a defendant charged with a class B misdemeanor or higher offense to order the personal bond office or another trained person to use the pretrial risk assessment tool developed under the bill to assess the defendant. The results of the assessment would have to be given to the magistrate within 48 hours of the defendant's arrest. Magistrates could use the tool to conduct the assessment themselves but could not, without the consent of the sheriff, order a sheriff or sheriff's department personnel to conduct the assessment.

The bill would require magistrates to consider the results of the pretrial risk assessment before making decisions about bail.

The bill would include the pretrial risk assessment tool in the list of considerations that govern the process of setting bail. The bill also would include in the list a defendant's criminal history, including acts of family violence, the future safety of peace officers, and any other relevant fact or circumstance to be considered.

Authority to release on bail. CSHB 2020 would allow only magistrates who met qualifications established in the bill to release on bail defendants charged with felonies or sex offenses and assault offenses that were class B misdemeanors or higher.

Magistrates setting bail for these defendants would have to be residents of one of the counties in which they served and would have to:

- have been an attorney licensed in Texas for at least four years;
- have not been removed from office by impeachment or other specified means; and
- have not resigned from office after being notified of certain formal misconduct or disability proceedings by the State Commission on Judicial Conduct before final disposition of the proceedings.

The establishment of the Bail Advisory Commission would take effect September 1, 2019. Provisions establishing criteria for magistrates making

certain bail decisions would apply to persons arrested on or after September 1, 2019.

Other provisions would take effect September 1, 2020, and would apply only to those arrested after that date.

**SUPPORTERS
SAY:**

CSHB 2020 would reform the bail-setting process in Texas to improve public safety and to make the process more fair. The current system often results in magistrates setting bail amounts that do not reflect the threat that those accused of crimes pose to the public or the likelihood that they will appear in court. The results of these decisions have harmed public safety, been unfair to large numbers of defendants without financial means, and been costly for jails that house those awaiting trial.

The current system has resulted in bail decisions that allow high-risk and dangerous defendants with financial means out on the streets. This has resulted in tragedies such as 2017 killing of Department of Public Safety trooper Damon Allen, for whom the bill would be named. Trooper Allen was shot during a traffic stop by someone who had been released on bail despite being a repeat offender with a violent past.

The current system also keeps many non-violent, low-risk defendants without money in jail before trial. Around three-quarters of those in local jails are awaiting trial, many unnecessarily remaining there because they were assessed bail they could not pay. Defendants who are jailed for low-level offenses but are unable to raise a few hundred dollars for bail illustrate the problem. Pretrial incarceration can have undesirable consequences, including loss of jobs, missed schooling, delinquent bills, family separations, and more.

CSHB 2020 would address these problems and improve the bail-setting process in Texas by giving those setting bail the relevant information to make decisions and by establishing qualifications for magistrates setting bail in the most serious cases. Lawsuits challenging the system in some Texas counties have resulted in changes in those counties, and courts could intervene throughout Texas if statewide changes are not made.

Bail Advisory Commission. The commission that would be created by CSHB 2020 would be broad-based and include members from throughout the criminal justice system. With its expertise, it would be able to develop and adopt an appropriate risk assessment tool and disseminate information to help all areas of the state. Appointments by the governor and others could ensure that any group not named in the bill had representation. The commission could have public meetings in which anyone could give input and could solicit information in other ways, such as work groups.

Pretrial risk assessment. CSHB 2020 would improve bail decisions by giving magistrates full information about those accused of crimes. Currently, bail decisions can be made by magistrates who do not know a defendant's full criminal history or other vital information such as their history of appearing in court or history of violence.

CSHB 2020 would give magistrates a tool that has been shown to help make accurate decisions about these factors. The bill would ensure the assessment tool was fair by requiring that it be objective, validated, and standardized, and prohibiting it from considering factors that would disproportionately affect persons who were members of racial or ethnic minority groups or who were socioeconomically disadvantaged. The tool would be studied to determine if it predicted outcomes accurately and fairly, and it would be revalidated to ensure it remained fair.

CSHB 2020 would not reduce judicial discretion. Bail decisions would continue to be made by magistrates with no decision predetermined. Decisions would be more reasonable and transparent, and public safety would be improved because magistrates would have information from the assessment tool as well as authorization to consider criminal history, family violence, and safety to law enforcement. CSHB 2020 would not eliminate bail schedules.

The bill would require one assessment tool to be used statewide for uniformity and fairness to defendants throughout the state. The tool would be provided free to counties and would be quick and easy to use.

Authority to release on bail. The bill would require that those setting bail in the most serious cases were experienced attorneys with a deep understanding of the law. This would result in more informed decisions that protected public safety and promoted fairness.

OPPONENTS
SAY:

CSHB 2020 would reduce the ability of counties to design their own bail systems and would require the use of a pretrial assessment tool that could have negative effects. The current system works well in many cases to support appropriate bail decisions, and the bill could interfere with procedures some counties have adopted in response to litigation.

Bail Advisory Commission. The commission should include representation from the professional bail industry. The industry is an important part of the criminal justice system and could provide valuable information to the commission and help in its work.

Pretrial risk assessment. The statewide requirement to use a pretrial risk assessment tool could unfairly result in the detention of some defendants who otherwise would be released. Under current practices, some defendants, especially ones accused of non-violent, low-level misdemeanors, might be released automatically under a personal bond that does not require cash. Under the bill, these defendants could be assessed bail and held in jail because they could not pay it. If risk assessments are to be mandated, they should be coupled with a presumption of release on personal bond and support for pretrial services.

By mandating a single tool for use throughout the state, the bill would reduce counties' flexibility. Jurisdictions might prefer another tool that would meet the specified criteria but be tailored to their needs or a better tool than the statewide mandated one could become available.

CSHB 2020 would, in effect, eliminate the ability of a county to use bail schedules, which can be helpful in making appropriate and timely releases from jail. Under a bail schedule, a standing order allows magistrates to set bail based on the factors in the schedule, and this would be precluded if

magistrates had to use and consider a risk assessment tool.

Risk assessment tools are unproven, can be unreliable and biased, and can perpetuate or introduce unfair disparities into the bail-setting process. There are no assurances that the assessment mandated by CSHB 2020 would not exacerbate problems with these issues. A better approach would be to ensure that magistrates directly received criminal history and any other information needed to make bail decisions without the information being filtered through a risk assessment.

Authority to release on bail. Restricting who can make bail decisions in certain cases could be burdensome and costly for counties, especially small or rural ones. In some counties, current magistrates would not meet the qualifications that would be established by the bill and district judges or county court judges could have to step in and make the decisions. This could be difficult to schedule, and it could be hard to find magistrates with the qualifications to hire. In some cases, defendants might have to wait for a qualified magistrate to get to their cases, resulting in longer detentions, which would be harmful to defendants and costly to jails. If these challenges could not be overcome within the required 48-hour window for magistration, counties could face liability for not meeting the deadline.

Under the current system, magistrates are qualified, experienced, and capable to continue making bail decisions, and any concerns about their capabilities could be addressed through additional training.

OTHER
OPPONENTS
SAY:

CSHB 2020 would not go far enough in addressing issues raised by courts about systems of bail in Texas that keep in jail those who do not have the means to pay.

NOTES:

According to the Legislative Budget Board, the bill would have a negative impact of \$1 million to general revenue related funds through fiscal 2020-21 as well as an annual cost of about \$208,000 in fiscal 2022 and in fiscal 2023.