



Lindsey Linder, Policy Attorney

Work: (512) 441-8123, ext. 110

llinder@TexasCJC.org

www.TexasCJC.org

FACT SHEET 2017

Preventive Detention

Preventive Detention Should Be The Carefully Limited Exception, Not The Rule

Preventive detention involves holding a person in jail without bail prior to his or her trial. This practice should be an exceptional measure, and the application of preventive detention must be necessary and limited. According to a comprehensive 2016 report on bail reform, “There is no guarantee that authorizing judges to use preventive detention will reduce the number of individuals detained pretrial—and if the standards are open-ended enough, or define pretrial risk broadly enough, a toll intended to reform excessive jail populations could have the opposite effect.”¹ Keeping that in mind, **jurisdictions that consider using or expanding preventive detention in conjunction with a risk assessment should do so with extreme care.**

KEY FINDINGS

Currently in Texas, a person may be denied bail and preventively detained under each of the following circumstances:

- A defendant has been twice convicted of a felony and is now accused of a felony.²
- A defendant is accused of a felony less than a capital offense while on bail for a prior felony.³
- A defendant is accused of a felony less than a capital offense involving the use of a deadly weapon after being convicted of a prior felony.⁴
- A defendant is accused of a violent or sexual offense committed while under supervision for a prior felony.⁵
- A defendant violates an order for emergency protection issued after an arrest for an offense involving family violence, or violates an active protective order issued in a family violence case, or engages in conduct that constitutes an offense involving the violation of such an order.⁶
- A defendant commits an offense under section 25.07, Penal Code, related to a violation of a condition of bond set in a family violence case, and bail in the case is revoked for a violation of a condition of bond after a judge determines by a preponderance of the evidence that the person violated a condition of bond related to the safety of the victim or community.⁷
- A defendant commits an offense under section 25.07, Penal Code (violations of certain court orders or conditions of bond in a family violence, sexual assault or abuse, stalking, or trafficking case), other than an offense related to a violation of a condition of bond set in a family violence case, and a judge determines by a preponderance of the evidence that the person committed the offense.⁸
- A defendant is charged with a felony under Penal Code chapters 21 (sexual offenses), 25.02 (prohibited sexual conduct), 43.25 (sexual performance by a child), or 20A.02 (trafficking of persons), committed against a child younger than 14, and subsequently has his or her case revoked for violating a condition of bond.⁹

RECOMMENDATIONS

Preventive detention under certain circumstances already exists in Texas, and any efforts to expand the circumstances under which a person can be detained prior to being convicted should be carefully considered, focusing on narrow parameters and procedural safeguards.

Continued on reverse.

Statutes in other states require the court to impose the *least onerous* or *least restrictive* conditions that will ensure the defendant's appearance at trial and protect public safety.¹⁰

In addition to recommending that Texas adhere to that practice, we also make the following recommendations:

- If an expansion of preventive detention must be considered, ensure it will be limited to only the most serious offenses. It is incredibly costly to detain a defendant prior to trial; detaining people accused of low-level offenses is especially inefficient – hurting taxpayers and potentially causing the defendant to lose employment and housing.
- Ensure that any defendant who is preventively detained has access to an automatic, expedited, and meaningful detention hearing within 72 hours of the denial of bond, with the assistance of counsel, where a judge must make an affirmative finding of fact in order to further detain the defendant. It must also be ensured that the defendant has the opportunity to appeal the decision, and the county must provide compensation for indigent defense.
- Similarly, require any expansion of preventive detention to include a provision that protects a defendant's constitutional right to a speedy trial.
- Adopt risk-assessment factors that are proven to be predictive and non-discriminatory.
- Strictly abide by both the United States Constitution and the Texas Constitution when drafting any additional preventive detention measures.

Citations

¹ Criminal Justice Policy Program at Harvard Law School, *Moving Beyond Money: A Primer on Bail Reform*, October 2016, 25, <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>.

² Texas Constitution, Art. 1, Sec. 11a, <http://www.statutes.legis.state.tx.us/Docs/CN/htm/CN.1.htm>.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Texas Constitution, Art. 1, Sec. 11c, <http://www.statutes.legis.state.tx.us/Docs/CN/htm/CN.1.htm>.

⁷ Texas Constitution, Art. 1, Sec. 11b, <http://www.statutes.legis.state.tx.us/Docs/CN/htm/CN.1.htm>.

⁸ Texas Code of Criminal Procedure, Art. 17.152(b) <http://www.statutes.legis.state.tx.us/Docs/CR/htm/CR.17.htm>.

⁹ Texas Code of Criminal Procedure, Art. 17.153(a) <http://www.statutes.legis.state.tx.us/Docs/CR/htm/CR.17.htm>.

¹⁰ Shima Baradaran and Frank L. McIntyre, *Predicting Violence* (Vol. 90:497, 2012), American Bar Association, http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/Baradaran_predictingviolence.authcheckdam.pdf.