WRITTEN TESTIMONY

SUBMITTED BY LEAH PINNEY
TEXAS CRIMINAL JUSTICE COALITION

REGARDING INTERIM CHARGE 3

HOUSE COMMITTEE ON COUNTY AFFAIRS

NOVEMBER 16, 2010

TEXAS CRIMINAL JUSTICE COALITION

The Texas Criminal Justice Coalition is committed to identifying and advancing real solutions to the problems facing Texas' juvenile and criminal justice systems. We provide policy research and analysis, form effective partnerships, and educate key stakeholders to promote effective management, accountability, and best practices that increase public safety and preserve human and civil rights.

Contact Information

Ana Yáñez-Correa, Executive Director
Phone: (w) 512-441-8123, ext. 109; (m) 512-587-7010
acorrea@criminaljusticecoalition.org

Dear Members of the Committee,

My name is Leah Pinney. I work for the Texas Criminal Justice Coalition (TCJC). Thank you for allowing me this opportunity to present testimony on Charge 3: *Study county oversight related to pretrial release on bond in criminal cases.*

Please find attached TCJC's recently released report, *Costly Confinement & Sensible Solutions: Jail Overcrowding in Texas*. It offers more than 60 front-end and corrections-level solutions to help system stakeholders identify smart-on-crime strategies that will reduce jail populations among Texas' 245 jails.

INTRODUCTION

With approximately 70,000 individuals incarcerated in Texas county jails – almost 11,000 of which are misdemeanants – Texas has six of the 50 largest national jail populations. At an average per-inmate cost of $45 per day, counties are spending drastic portions of their budgets on the confinement of oftentimes low-risk, nonviolent individuals.

As noted in TCJC's report, **excessive pre-trial detention is a significant contributor to jail overcrowding.** In fact, as of April 1, 2010, more than half (52%) of Texas' jail population was inmates awaiting trial.[1] This number is staggering – the result of rising pre-trial detainee numbers throughout much of the decade. Just between 2000 and 2007, the number of such detainees increased by 49.2%, while the overall jail population only increased 18.6% during that time.[2]

Pre-trial detention is caused by a variety of factors, including the inability of defendants to afford bond or bail costs. Not only do pre-trial detainees take up beds while they wait (sometimes for several months) for trial or other services, but some may eventually end up serving more time than required by law. In August 2009, at least 500 individuals in Harris County had been jailed for more than a year awaiting trial, while approximately 1,200 had been incarcerated six months or more – including for such nonviolent offenses as bouncing checks, credit card fraud, trespassing, and civil violations. Approximately 200 of these individuals had served more than the minimum amount of time for the crime they were accused of.[3]

Ultimately, taxpayers are spending more and more to house individuals who have not yet been convicted of a crime – those awaiting programming, services, or trial. Especially in light of an ongoing statewide budget shortfall, it is crucial that state and local leadership implement public safety-driven, cost-effective policies that tackle the root causes of crime and deliver taxpayers a return on their investment.

POLICY RECOMMENDATIONS

A large contributor to pre-trial delays derives from the inconsistent setting of bond. In some courts, judges are inclined to seem more "tough on crime." As a result, they favor cash bonds (which must be paid in full to the court but are refunded to defendants after appearing in court) over personal bonds (which are either a small monetary amount or a small percentage of the full bond, marking a promise to appear before the judge). Without necessary funds to pay bond – and an unwillingness to simply plead guilty – indigent defendants must sit in jail until their trial. Over time, cash bond

amounts have also grown very high, leading to "punitive" bonds that even non-indigent defendants have difficulty paying.

Bond and bail amounts pose particular difficulties for defendants lacking counsel, who must attempt to negotiate deals or reduce the amount owed on their own, often to poor results. Many end up in jail awaiting trial: they lack knowledge about pre-trial services or their bond options, and they consequently fail to secure their own release.

Even in instances when individuals do make bond, extra conditions can be imposed on their release – including urinalysis tests, mandatory ignition interlock and electronic monitoring, and evening curfews – which increases the likelihood of revocations.[4] Often these conditions are in place for extended periods.

Individuals arrested for nonviolent offenses who are likely to remain law-abiding and appear before the judge for a scheduled hearing should be eligible for low bail or inexpensive personal bonds – not sitting in jail wasting taxpayer dollars and valuable space.[5]

Note: For each recommendation below, we have provided the corresponding report page number(s) for easy reference.

(1) Counties should create and rely on pre-trial services divisions to identify defendants who are eligible for release on low bail or personal bonds *[page 40]*.

Pre-trial services divisions are imperative in reviewing the eligibility of defendants for bond release. However, not all defendants are eligible for personal bond review, including the following:

- those with bond forfeitures
- those with probation warrants
- those for whom the Court has set the bond at cash or surety only[6]
- those with out-of-county and out-of-state felonies
- those held in jail by an external agency, including Immigration and Customs Enforcement (ICE)
- those held by the U.S. Marshall's Service
- federal detainers
- those with TDCJ bench warrants
- parole violators
- felony probation violators
- those on contempt charges
- those on writ charges[7]
- those with capital offenses
- those with civil commitments[8]

In other cases, pre-trial services divisions assess whether individuals meet various criteria for pretrial bond release. The criteria can include employment, current housing, retention of counsel, family support, and ties to the community, which point to a relatively low flight risk or likelihood of recidivism.[9]

Pre-trial services division staff provide courts and attorneys with this information prior to magistration, which helps inform release and detention decisions. In the case of an individual's pre-trial release, staff are also responsible for supervising him or her in the community prior to trial. Effective supervision can minimize criminal behavior and reduce failure to appear rates, in turn reducing law enforcement time spent making warrant arrests.[10] Pre-trial services division staff can also match individuals suffering from mental illness, substance abuse, and/or

homelessness to needed services – especially through utilization of a validated risk/needs assessment tool – which, again, lowers the risk of re-offending. **The critical role of pre-trial services divisions is noted by the American Probation and Parole Association (APPA): "The bail bond industry is simply unable to provide such service to the community."**[11]

In some counties, pre-trial services divisions do not exist, leaving judges to make bond decisions with often limited available information. In other counties that do have such divisions, staff recommendations for bond, bail, or conditions upon release are frequently ignored.[12]

Counties that have the ability to pre-screen defendants for flight risk and recidivism – and whose judges who rely on those screenings – can reduce costly pre-trial jail overcrowding (especially through increased personal bond usage), while keeping public safety intact. Equally important, they allow released individuals to maintain crucial support networks in the community. Counties that cannot currently afford such valuable offices should look into alternatives, including multi-county programs, partnerships with community- and faith-based organizations, or an incorporation of pretrial services within jail administration or probation departments.[13]

Note: Measuring a pre-trial services division's success in reducing the local jail population should include the following: (a) the percentage of the county's arrestees interviewed, (b) the rate of and time to release based on those recommended for release, (c) the rates of compliance with pre-trial release conditions, (d) the appearance rates for all court events, and (e) crime-free rates for those on release.[14]

(a) Invest in additional staff at pre-trial services divisions *[page 41].*

Providing more staff for pre-trial services divisions will expedite screenings and go further towards reducing jail overcrowding. Likewise, **additional staff will enable a quicker identification of those eligible to participate in volunteer manual labor programs** in lieu of awaiting trial in jail, as authorized by Article 43.101, Code of Criminal Procedure:

> (a) **A defendant who is confined in county jail before trial**, after conviction of a misdemeanor, or after conviction of a felony or revocation of community supervision, parole, or mandatory supervision and awaiting transfer to the Texas Department of Criminal Justice may volunteer to participate in any work program operated by the sheriff that uses the labor of convicted defendants.
>
> (b) The sheriff may accept a defendant as a volunteer under Subsection (a) **if the defendant is not awaiting trial for an offense involving violence** or is not awaiting transfer to the Texas Department of Criminal Justice after conviction of a felony involving violence, and if the sheriff determines that the inmate has not engaged previously in violent conduct and does not pose a security risk to the general public if allowed to participate in the work program.

As with required manual labor, this policy allows each day of volunteer labor to be deducted from the person's sentence. Especially given the state's 36,000 pre-trial defendants in

detention in Texas' county jails,[15] participation in labor programs and the resulting credit for time served could drastically ameliorate several counties' overcrowding dilemmas.

(b) Encourage judges to adhere to pre-trial services divisions' recommendations *[page 41]*.

Judges who override a pretrial services division's recommendation for release should be required to track each override and report that data to the county, along with an explanation of why jail time was warranted.

(2) Increase the use of personal bonds *[pages 41-42]*.

Again, personal bonds allow eligible, low-risk individuals to pay an administrative fee (a small monetary amount or a small percentage of the full bond) to the court, as a promise to appear before the judge. **This ensures that individuals can continue their lives in the community – maintaining employment and supporting their families – prior to their trial. It also increases the likelihood that the money saved through the low bond amount can be put towards counsel or court costs, as necessary.**

In Travis County, 61% of eligible pre-trial defendants interviewed for personal bonds in 2009 (18,568 out of 30,643 individuals) were released on personal bond[16] – 75% of whom were misdemeanants.[17] This high bonding rate ensured that thousands of individuals (many charged with low-level offenses) did not unnecessarily consume jail beds.

On the other hand, Harris County judges released 5.3% of felony and misdemeanor defendants on personal bond during Fiscal Year 2008-9. Out of 102,949 total defendants, only 5,416 were released on personal bond (and of the subcategory of felony defendants, only 520 of 41,838 were released).[18] Yet almost 15,000 defendants who underwent pre-trial interviews were deemed low-risk in 2008.[19]

Especially for low-risk misdemeanants, personal bonds should routinely be an option offered by judges. **Whenever possible, jail beds should be reserved for housing the dangerous – not the indigent**. As reiterated by the American Bar Association, which advocates for the least restrictive means of release, "Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support."[20]

(3) Reduce bond and bail amounts *[page 42]*.

For low-risk, nonviolent individuals who are likely to appear before the judge, the refundable bond and bail amounts that promise those appearances should be low. Keeping the amounts reasonable can prevent the following: (a) untrue guilty pleas with harsh sentences or probation terms (agreed to solely to secure eventual release by defendants who may not understand the collateral consequences of convictions), and (b) unnecessary pre-trial waits in jail by those unwilling to plead guilty.[21] County leaders should encourage judges to set low bond and bail amounts, in keeping with the nature of the offense and reflective of each individual's likelihood of appearing later. Pre-trial services divisions are key in assisting judges in determining this likelihood.

Reduce Reliance on Bail Bondsmen

Some defendants rely on bail bondsmen for assistance in paying bail amounts. They pay the bondsman a percentage of the bail owed (typically 10%), which serves as a nonrefundable fee for the loan. The bondsman secures the defendant's release by promising to pay the court in full if the defendant does not appear for a scheduled hearing. In the case of a no-show, the bondsman can legally track down the defendant and force him or her to repay what the bondsman fronted to the court.

Over time, use of bondsmen has become increasingly controversial. The APPA notes that "the bond industry serves as the de facto decision maker of who is released from jail and these decisions are based on monetary considerations." On the other hand, "pretrial supervision agencies' decisions are based on likelihood of court appearance and community safety considerations." Leadership throughout the nation have agreed: some take issue with the bond industry's profiting from crime; some feel the bail bonding system discriminates against lower-income individuals who cannot afford a bondsman's fee; others feel that because defendants' money goes towards the bondsmen, they often cannot later afford counsel – and so taxpayers foot the bill for indigent defense. As a result of these various concerns, some states (Illinois, Kentucky, Oregon, and Wisconsin) have banned commercial bail bonding outright. However, in Texas, bondsmen are permitted to contribute to elected officials' campaigns, which incentivizes their continued business. Ultimately, this also keeps indigent defendants waiting in overcrowded jails – suffering the collateral consequences and costing significant taxpayer dollars – while those who can afford bondsmen's payments are released. A state-mandated reduction in bond and bail amounts would reduce the use of profit-making bondsmen and allay stakeholder concerns.

(4) Allow defendants to pay partial cash bonds *[page 43]*.

Under existing law (Article 17.02, Code of Criminal Procedure), counties are not authorized to accept partial cash bonds from defendants who are unable to pay the full amount (though some counties have been allowing the practice[22]). Permitting defendants to pay a partial amount would go far towards reducing jail overcrowding in counties where personal bonds are not used as frequently. Furthermore, counties could deposit these bond payments into an interest-bearing account that could serve as a funding source to either offset the administrative costs of operating a pre-trial screening program, or assist in implementing a partial bond policy. Another advantage is that **defendants who are allowed to submit such bonds will have a greater ability to pay for their own private representation**, saving the county additional indigent defense expenses.

(5) Allow eligible, indigent defendants to return to the community during the pre-trial phase *[pages 43-44]*.

Counties with a large number of jail beds consumed by indigent defendants should consider the pilot program recently implemented in Coryell County. There, the commissioners court and justices of the peace (JPs) collaborated to create the Supervised Pretrial Services Program, which

allowed sworn-indigent defendants to remain out of jail prior to trial, provided they met the following requirements:

- had a permanent residence;
- provided positive identification;
- were willing to appear in court;
- were in jail for a Coryell County offense;
- were not on parole and did not have a prior felony conviction;[23]
- did not have more than two prior convictions of a Class A misdemeanor within the preceding three years;
- did not have a history of bond forfeiture or failure to appear; and
- were not at that time incarcerated on a charge related to a sex crime, a crime against children, a crime involving family violence, murder, a first degree felony, or a 3(g) offense.[24]

In addition to these requirements, an investigator would screen each defendant to make a determination on bond,[25] including "flight risk, risk of re-offending, and ability to succeed,"[26] which was based on such things as employment, substance abuse, family and dependent status, and references.[27] Any program participants who subsequently failed to (a) report to Pretrial Services, (b) provide requested information, (c) provide required documentation, or (d) comply with other conditions of release could face a bond revocation and possible arrest warrant.[28]

Given the collaborative, intersecting nature of a local criminal justice system, other stakeholders – in addition to Coryell County's Commissioners and JPs – came to the table and agreed to the program. In fact, the county received the support of the District Judge and the County Court at Law Judge, who signed an "order" stating the kind of cases they felt should be considered.[29] Likewise, because Pretrial Services worked with eligible post-indictment and post-information defendants, program approval from the judges for those cases was necessary.[30]

As created, the program, which ran from May 31 – July 31, 2010,[31] and cost the county approximately $150 per week to implement,[32] was intended to address overcrowded jails through decreased pre-trial populations.[33] As of June 30, 2010, County Attorney Brandon Belt stated, "Our program is working. We still have plenty of people in jail, but they are mostly the ones that need to be there."[34] By the program's conclusion, Pretrial Services had released 17 eligible defendants on personal bond. **Their diversion from jail saved the county $25,622 per month**, using a $50.24 inmate cost-per-day. Extending that figure out, year-long cost-savings would total $307,464.[35]

Other counties could tailor such a program to fit their particularized needs, keeping indigent defendants and other nonviolent violators from consuming jail beds unnecessarily.

Note: The monthly data elements collected to monitor the program's efficacy included the number of individuals reviewed for initial eligibility, the number who qualified for program participation, the number released from jail into the program, the number denied release, and the number who bonded out of jail of their own means.[36] Other monthly data focused on outcomes: the number of individuals who ultimately (a) were sentenced to community supervision, (b) had their case dismissed, (c) were revoked from pretrial services, (d) were

sentenced to incarceration, (e) had a bond forfeiture or failure to appear violation, (f) continued to have a case pending, or (g) fell into the "Other" category.[37]

(6) Eliminate harsh conditions imposed for release on bond *[page 44].*

As mentioned above, some individuals have numerous conditions imposed upon them when released on bond, which can increase the likelihood of revocations. *Note:* These are over and above the standard supervision requirements.

In addition to drug testing, electronic monitoring, use of an ignition interlock device, and curfews, these enhanced conditions could include mandatory participation in drug and alcohol counseling, or participation in family violence or stress management counseling.[38] For individuals with a multitude of employment and family obligations, these conditions can be difficult to meet. Judges should make great effort to ensure they impose the least restrictive conditions upon defendants while still ensuring that public safety is protected.[39]

Separately, judges should evaluate noncompliance with bond conditions on a case-by-case basis. Minor infractions (as opposed to willful noncompliance) may not necessitate immediate revocation and jail time. As with probation conditions, **judges should impose graduated sanctions so that small technical violations are not penalized by time in already overcrowded jails.**

* * *

Thank you for allowing me the opportunity to provide information on the need for improvements to the bond and bail systems in Texas. As county leaders and other system stakeholders examine strategies to address swelling jail populations, they should take serious consideration of the problems posed by rising pre-trial detainee numbers. In the absence of jail population management strategies, further costly jail construction will become a reality, and it will necessitate significant, additional resources at both the county and state levels.

NOTES

[1] TCJS, *Jail Population Report*.
[2] Dr. Tony Fabelo, *Managing Jail Population Growth*, slide 21.
[3] Lise Olsen, "Thousands languish in crowded jail: Inmates can stay locked up more than a year waiting for trial in low-level crimes," *Houston Chronicle*, August 23, 2009.
[4] Barry Mahoney and Walt Smith, "Pretrial Release And Detention In Harris County: Assessment And Recommendations," The Justice Management Institute, June 2005, pg. 12.
[5] *Ibid.*, pg. 5.
[6] The above three bullets are from Irma G. Guerrero, Director of Travis County's Pretrial Division, in email correspondence to Ana Yáñez-Correa, Texas Criminal Justice Coalition, May 28, 2010. Note additionally: Less than half of felony and misdemeanor defendants booked into Travis County jail (49%) are eligible for a personal bond review.
[7] The above nine bullets are from Urban Institute – Justice Policy Center, *Jail Population Management Initiative*, pg. 5.
[8] The above two bullets are from Irma Guerrero, "Overview of Travis County Pretrial Services," November 6, 2009, slide 8.
[9] *Ibid.*, slide 11.
[10] Urban Institute – Justice Policy Center, *Jail Population Management Initiative*, pg. 12.
[11] American Probation and Parole Association (APPA), Press Release: "APPA Supports Pretrial Supervision Services," June 15, 2010, pg. 1.
[12] Scott Henson, "Counties that rejected new jails must now get serious about diversion," *Grits for Breakfast*, November 7, 2007; http://gritsforbreakfast.blogspot.com/2007/11/counties-that-rejected-new-jails-must.html. Accessed April 21, 2010.
[13] Cherise Fanno Burdeen, "Jail Population Management: Elected County Officials' Guide to Pretrial Services," Pretrial Justice Institute and National Association of Counties, September 2009, pg. 8.
[14] Cherise Fanno Burdeen, *Jail Population Management*, pg. 18.
[15] TCJS, *Jail Population Report*.
[16] Irma Guerrero, *Overview*, slide 9.
[17] Irma G. Guerrero, *email correspondence on May 28, 2010*.
[18] "Harris County Personal Bond Release Statistics: State Fiscal Year (September to August)," compiled for the Office of Court Administration using data from Harris County Pretrial Services Monthly Reports, September 2004 – August 2009. Note additionally: The number of defendants released on personal bond includes those whose cases are not in the pretrial stage, including motions to revoke probation, motions to adjudicate, and cases on appeal.
[19] Lise Olsen, *Thousands languish*.
[20] American Bar Association, "ABA Criminal Justice Standards On Pretrial Release, Third Edition," Approved February 2002, Standard 10-1.1, pg. 1.
[21] Robert C. Boruchowitz, Malia N. Brink, and Maureen Dimino, "Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts," National Association of Criminal Defense Attorneys, April 2009, pgs. 36-37.
[22] Raymond Angelini, State District Judge, and Keith Hampton, Texas Criminal Defense Lawyers Association, in testimony at the Texas Senate Criminal Justice Committee hearing on S.B. 498, April 21, 2009, on practices in Bexar County and Travis County respectively.
[23] All above bulleted requirements are from Taylor Short, *Members OK plans*.
[24] The above three bulleted requirements are listed in Coryell County's "Order" regarding the Supervised Pretrial Services Program, May 19, 2010, provided by Brandon Belt, Coryell County Attorney, in email correspondence to Ana Yáñez-Correa, Texas Criminal Justice Coalition, June 30, 2010.
[25] Taylor Short, *Members OK plans*.
[26] Coryell County, *Order*.
[27] Coryell County Pretrial Services, "Pre-Trial Intervention Program Personal Data Sheet," provided by Brandon Belt, *email correspondence on June 30, 2010*.
[28] Coryell County Pretrial Services, "Special Conditions Of Bond" order, 2010, provided by Brandon Belt, *email correspondence on June 30, 2010*.
[29] Brandon Belt, *email correspondence on June 30, 2010*.
[30] *Ibid.*
[31] "Pretrial Services Program," presentation by Jim Hall, Coryell County, on August 2, 2010, pg. 1, provided by Jean Morrison, Office of the County Judge, in email correspondence to Molly Totman, Texas Criminal Justice Coalition, August 6, 2010.
[32] Implementation costs were restricted to the part-time investigator who reviewed the applicants. Another county employee conducted follow-up with program participants, so no additional costs were accrued there, and the

Compliance Officer who monitored participants after bond only had an increase in duties. From Brandon Belt, Coryell County Attorney, in email correspondence to Molly Totman, Texas Criminal Justice Coalition, July 30, 2010.

[33] Taylor Short, *Members OK plans*.

[34] Brandon Belt, *email correspondence on June 30, 2010*.

[35] *Pretrial Services Program*, pg. 1.

[36] Coryell County Pretrial Release Program, "Statistics Compilation," 2010, provided by Brandon Belt, *email correspondence on June 30, 2010*.

[37] *Ibid*.

[38] Irma Guerrero, *Overview*, slide 6.

[39] Nastassia Walsh, "Baltimore Behind Bars: How to Reduce the Jail Population, Save Money, and Improve Public Safety," Justice Policy Institute, June 2010, pg. 24. Note additionally: "To the extent that special conditions are imposed with the expectation that Pretrial Services will monitor compliance with them, the conditions should be ones that are in fact readily monitorable by agency staff given the level of resources available." From Barry Mahoney and Walt Smith, *Pretrial Release And Detention*, pg. 41.