

SUBJECT: Modifying bail setting process and eligibility

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 6 ayes — Collier, K. Bell, Cason, Cook, Murr, Vasut

3 nays — Crockett, Hinojosa, A. Johnson

WITNESSES: For — Greg Glod, Americans For Prosperity; Andy Kahan, Crime Stoppers of Houston; Richard Jankovsky, DPS Officers Association; Nicholas Chu and Rick Hill, Justices of the Peace and Constables Association of Texas; Kaden Norton, Prison Fellowship Ministries; Derek Cohen, Texas Public Policy Foundation; Jason Vaughn, Texas Young Republican Federation; Kasey Allen; Doug Deason; Rebecca Reaves; (*Registered, but did not testify*: Jennifer Szimanski, CLEAT; Jennifer Tharp, Comal County Criminal District Attorney; Timothy Head, Faith and Freedom Coalition; David Sinclair, Game Warden Peace Officers Association; Bradford Shields, Harris County Commissioner, Pct. 3, Cactus Jack Cagle; Tom Ramsey, Harris County Precinct Three; Justin Keener, Libre Initiative; Luis LaRotta, Republican Liberty Caucus of Texas; John Baucum, Republicans Against Marijuana Prohibition and Texas Young Republican Federation; Jimmy Rodriguez, San Antonio Police Officers Association; Drew Lawson, Texans for Lawsuit Reform; Megan Herring, Texas Association of Business; Mia McCord, Texas Conservative Coalition; Donald Garner, Texas Faith and Freedom Coalition; John Wilkerson, Texas Municipal Police Association; Linda Nuno, Travis Dem Party District Chair #268 and Dem Party; Julie Renken, Washington County District Attorney's Office; Chance Hardwick; Kim Hardwick; David Kohler; Tony LaMarr; Jeanine Rains)

Against — Nick Hudson, American Civil Liberties Union of Texas; Tiara Cooper and Akilah Wallace, Faith in Texas; Jim Bethke, Harris County Justice Administration Department; Krishnaveni Gundu, Jail Project of Texas dba Texas Jail Project; Chad Seay, Lubbock County Commissioner; Roger Moore, PBT; John A. Convery, David Gonzalez, and Michael Gross, Texas Criminal Defense Lawyers Association; Amelia Casas,

Texas Fair Defense Project; Ken Good, The Professional Bondsmen of Texas; Lauren Rosales, The Bail Project; Amanda Marzullo, Vera Institute of Justice; Donna Broom; Desira Brown; Mario Gonzalez; (*Registered, but did not testify*: John T Floyd, Alliance for a New Justice System; Chas Moore, Austin Justice Coalition; John Zavala, Bail Bondsmen; Melissa Shannon, Bexar County Commissioners Court; Jennifer Toon, Coalition of Texans with Disabilities; Jeff Miller, Disability Rights Texas; Daniel Collins, El Paso County; Scott Miller, Financial Casualty and Surety; Thamara Narvaez, Harris County Commissioners Court; Kathy Mitchell, Just Liberty; Greg Hansch and Matthew Lovitt, National Alliance on Mental Illness Texas; Alison Mohr Boleware, National Association of Social Workers - Texas Chapter; Debbie Byrd, Mike Byrd, Rene Farias, Gage Gandy, Cindy Hammons, Ronnie Long, John McCluskey, Glenn Meeker, Charlie Pickens, Paul Schuder, and Kathleen Woods, PBT; Maggie Luna, Statewide Leadership Council; Betty Blackwell and Shea Place, Texas Criminal Defense Lawyers Association; Emily Gerrick, Texas Fair Defense Project; Diana Claitor, Texas Jail Project; Gary Bledsoe, Texas NAACP; Koretta Brown, Texas Organizing Project; Linda Nuno, Texas Travis Co Dem Party; Mary Sue Molnar, Texas Voices for Reason and Justice; Alex Cogan, The Arc of Texas; Bella Sanford, The Save Jeff Wood Campaign; Julie Wheeler, Travis County Commissioners Court; 19 individuals)

On —David Slayton, Texas Judicial Council; Michael Fields; Jean Skinner; (*Registered, but did not testify*: Tom Maddox, Sheriffs Association of Texas; Nathan Hecht, Texas Judicial Council)

BACKGROUND: Texas Constitution Art. 1, sec. 11 and Code of Criminal Procedure (CCP) art. 1.07 state that all prisoners shall be bailable unless accused of a capital offense when proof is evident. Texas Constitution Art. 1, sec. 11 established circumstances under which bail can be denied. Under these provisions, bail may be denied in cases with repeat offenders accused of certain felonies and in cases of individuals accused of certain offenses involving family violence and protective orders.

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 20 would require the development and use of a public safety assessment to be used when setting bail, require those making bail decisions to receive training, and restrict to magistrates with specified qualifications the authority to release certain defendants on bail. The bill also would require those setting bail to take certain actions, prohibit the release on personal bond for some offenses, modify the statutory rules governing the bail setting process, and require notice of bond conditions to be sent to local law enforcement authorities. Contingent on approval of a constitutional amendment, the bill would expand the circumstances under which bail could be denied and would require bail to be denied for some offenses.

The bill would be called the Damon Allen Act.

Denial of bail for some offenses. CSHB 2 would authorize magistrates and judges to deny bail in certain circumstances and would require bail to be denied for some offenses.

Bail could be denied under the bill if an individual was accused of committing a violent or sexual offense as defined by Texas Constitution Art. 1, sec. 11a. For bail to be denied in these cases, judges or magistrates would have to determine that requiring bail and conditions of release were

insufficient to reasonably ensure the person's appearance in court or the safety of the community, law enforcement, or the victim of the alleged offense.

Bail would have to be denied to individuals accused of committing capital murder and those accused of committing sex offenses, as defined by Texas Constitution, art 1, sec. 11a, with a victim younger than 17 unless a judge or magistrate made a specific determination. To give bail in such a case, the judge or magistrate would have to determine by clear and convincing evidence that, based on the existence of extraordinary circumstances, they were able to set bail and conditions of release sufficient to reasonably ensure the person's appearance in court and the safety of the community, law enforcement, and the victim of the alleged offense.

Judges and magistrates who denied bail under these circumstances would have to prepare a written order that included findings of fact and a statement explaining the reason for the denial.

Development, use of public safety assessment. CSHB 20 would require the development and use of a public safety assessment for decisions about release on bond.

Development of public safety assessment. The Office of Court Administration (OCA) of the Texas Judicial System would be required to develop and maintain a validated pretrial public safety assessment that was standardized for statewide use and available for use when setting bail.

The assessment would have to:

- be objective, validated for its intended use, and standardized;
- be based on an analysis of empirical data and risk factors relevant to the risk of a defendant intentionally failing to appear in court as required and the safety of the community, law enforcement, and the victim of the alleged offense;
- not consider factors that disproportionately affected persons who

were members of racial or ethnic minority groups or who were socioeconomically disadvantaged;

- have been demonstrated to produce results that were unbiased with respect to the race or ethnicity of defendants and did not produce a disproportionate outcome; and
- be designed to function in a transparent manner with respect to the public and defendants to whom it was applied.

OCA would have to provide access to the assessment to county officials at no cost and would be required to collect data relating to the use and efficiency of the assessment. OCA would have to create and provide access to the assessment by December 1, 2021. A sample result from the assessment would have to be placed on the OCA's website along with an explanation of the data used by the assessment.

OCA would be required to change or update the assessment by November 1 of each even-numbered year to ensure it complied with requirements of the bill. OCA also would have to report by December 1 of even-numbered years to the governor and legislative leaders on the data collected and changes or updates made to the assessment.

Use of public safety assessment. Magistrates considering the release on bail of a defendant charged with a class B misdemeanor or higher category of offense would have to order the county's personal bond office or another trained person to use the pretrial public safety assessment 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 would be required to consider the results of the assessment before making a bail decision.

Magistrates could conduct the assessment themselves but they could not, without the consent of the sheriff, order a sheriff or sheriff's department personnel to conduct the assessment.

Training, qualifications to make bail decisions. OCA would be required to develop or approve training courses on a magistrate's duties established

by the bill and duties related to setting bail in criminal cases. The courses would have to include a four-hour training course for a magistrate who was licensed to practice law in Texas, a 16-hour training course for a magistrate who was not licensed to practice law in Texas, and a four-hour continuing education course for all magistrates. The bill would establish deadlines for magistrates to complete required courses. OCA would have to make the training courses available by December 1, 2021.

Only magistrates who met certain qualifications established in the bill could release on bail defendants charged with felonies or misdemeanors that carried potential terms of confinement. Such magistrates would have to be Texas residents, reside in one of the counties they served, and be in compliance with training requirements

Actions on bail decision. The bill would require magistrates to take certain actions regarding bail within 48 hours of an individual's arrest. Within this time frame, a magistrate would be required to order, after considering all circumstances and the results of the pretrial public safety assessment, that a defendant be:

- released on personal bond with or without conditions;
- released on monetary bond with or without conditions; or
- denied bail in accordance with the Texas Constitution and other law.

In making bail decisions, magistrates would be required to impose the least restrictive conditions and minimum amount of bail, whether personal bond or monetary bond, necessary to reasonably ensure the defendant's appearance in court and the safety of the community, law enforcement, and the victim. Unless specifically provided by another law, there would be a rebuttable presumption that bail, conditions of release, or both bail and conditions of release were sufficient to reasonably ensure the defendant's court appearance and the community, law enforcement, and victim safety.

The bill would establish requirements for bail schedules. Judges would be

prohibited from adopting a bail schedule or entering a standing order related to bail that was inconsistent with the bill or authorized a magistrate to make a bail decision for a defendant without considering the results of the defendant's pretrial public safety assessment.

The bill would not prohibit a sheriff, other peace officer, or a licensed jailer from accepting bail under current provisions that allow these actions before a pretrial public safety assessment had been conducted or before a bail decision had been made by a magistrate under the bill.

Prohibited release on personal bond. CSHB 20 would prohibit the release of certain defendants on personal bond, under which courts establish a bail amount but defendants do not give the court money or other security and agree to return to court and to other conditions. Release on personal bond would be prohibited for those charged with the following offenses: murder, capital murder, human trafficking, continuous human trafficking, continuous sexual abuse of a young child or children, indecency with a child, aggravated sexual assault, aggravated promotion of prostitution, compelling prostitution, or sexual performance by a child.

Statutory rules for setting bail. The bill would revise the provisions in Code of Criminal Procedure 17.15 that establish the rules for setting bail. In addition to the current requirement that the nature of the offense and circumstances under which it was committed must be considered, the bill would require that the defendant's criminal history, including acts of family violence, also be considered. The bill would establish an exception to this for misdemeanors or offenses under the Texas Controlled Substance Act that occurred more than 10 years before the current offense. Such offenses could not be considered unless the previous offense involved the manufacture or delivery of a controlled substance, caused bodily injury to another, or good cause otherwise existed for considering the offense.

In addition to current requirements that the future safety of victims and the community be considered, the bill would require that the future safety of law enforcement be considered. New requirements also would be

established requiring consideration of results of any pretrial public safety assessment conducted using the validated assessment developed under the bill and authorizing the consideration of any other relevant facts or circumstances.

Notice of bond conditions to local officials. The bill would require courts to notify certain law enforcement officials after a magistrate imposed a condition of release on bond or modified or removed a previous condition. By the next business day after the date a magistrate imposed, modified, or removed a condition of release on bond, the court clerk would have to send a copy of the order to the prosecutor and either the chief of police in the city where the defendant resided or the sheriff of the county where the defendant resided, if the defendant did not reside in a city. If the order prohibited a defendant from going to or near a child care facility or school, the clerk also would have to send a copy of the order to the child care facility or school.

Clerks could delay sending a copy of the order only if they lacked information necessary to ensure service and enforcement. The copy of the order and any related information could be sent electronically or in another manner that could be accessed by the recipient.

Magistrates would have to give defendants written notice of the conditions of release on bond and the penalties for violating a condition of release.

A police chief or sheriff receiving a copy of an order would be required, within 10 days of receiving the order, to enter or modify information about the condition of release into the DPS database.

Effective date, contingency. The bill would take effect December 1, 2021, and would apply only to those arrested on or after that date.

Provisions relating to prohibiting bail for certain offenses would take effect only if voters approved the constitutional amendment proposed by the 87th Legislature to authorize the denial of bail to an accused person if necessary to ensure the person's appearance in court and the safety of the

community, law enforcement, and the victim of the alleged offense, and requiring the denial of bail to a person accused of capital murder or a sexual offense involving children absent extraordinary circumstances.

SUPPORTERS
SAY:

CSHB 20 would reform the bail-setting process in Texas to better protect the public and ensure a more fair and just system for those accused of crimes by placing appropriate parameters on bail, giving more information to those making bail decisions, requiring training of those making such decisions, and ensuring that safety and appearance in court, not wealth, would drive bail decisions.

The current system often results in 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 some defendants without financial means, and been costly for jails that house those awaiting trial.

Decisions under the current system also have resulted in high-risk and dangerous defendants with financial means out on the streets. This has resulted in tragedies such as the 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.

Denial of bail for some offenses. The situations under which judges have discretion to deny bail should be revised to include a narrow, carefully selected list of serious violent and sexual crimes. CSHB 20, in conjunction with changes to the Texas Constitution, would allow bail denials in these reasonable, justifiable circumstances while also requiring judges and magistrates to consider bail and conditions of release in the context of the safety of the public, victim, and law enforcement and the defendant's appearance in court. The bill would impose a safeguard and ensure transparency in situations in which judges and magistrates would be required to deny bail by requiring written findings of fact about why bail was denied.

Development, use of public safety assessment. CSHB 20 would improve bail decisions by giving magistrates more information about those accused of crimes. Currently, 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.

CSHB 20 would address this issue by giving magistrates a public safety assessment tool developed by the Office of Court Administration to help make accurate decisions about these factors. The bill would ensure the assessment tool was fair by establishing requirements for it, including that it be objective, validated, and standardized. Other requirements to make sure the tool was fair would include prohibiting it from considering factors that disproportionately affected persons who were members of racial or ethnic minority groups or who were socioeconomically disadvantaged, while requiring it to produce results that were unbiased. The tool would be studied and changed if needed, and transparency with the public would be created through access to a sample assessment on OCA's website.

The use of a public safety assessment would not reduce judicial discretion but simply give those making decisions more information as quickly as possible. Judges and magistrates would continue to be able to make individual decisions in every case. The tool would be free to counties and should be quick and efficient to use so it should not slow down bail decisions, which would have to be made within 48 hours of an arrest.

Training, qualification. Required training and demonstrated competency by those making bail decisions would ensure that qualified individuals were acting in this complex and important area. Since these decisions affect public safety and the liberty of those accused of crimes, it is especially important that everyone making them understands their duties.

Actions on bail decision. CSHB 20 would address concerns that the current system unfairly keeps some non-dangerous defendants with limited financial means in jail pretrial. It would specifically direct judges and magistrates to impose the least restrictive conditions and the

minimum amount of bail, either personal or money, to ensure court appearance and protect public safety. These directives would ensure defendants were properly assessed and received fair conditions on any bond. The bill would not eliminate cash bail but make sure that if it were used, it was used appropriately.

The bill would not prohibit bail schedules, only require that they be consistent with state law and that their use take into account the public safety assessment.

Prohibited release on personal bond. CSHB 20 would better protect the public by limiting the use of personal bonds for those accused of certain serious offenses, including human trafficking and aggravated sexual assault. The prohibition on personal bonds would apply to a narrow, select group of serious offenses, making it appropriate if someone was going to be released pretrial to require money bail and more than the promise on a personal bond to appear in court.

Statutory rules for setting bail. Under the bill, decisions about bail would be more reasoned and public safety would be improved because magistrates and judges would have information from the assessment tool as well as revised rules that required the consideration of criminal history, family violence, and safety to law enforcement. The bill would treat those accused of crimes fairly by establishing a narrow, limited exception to considering information on some misdemeanors or drug offenses so that minor brushes with the law that were over a decade old would not have an outsized influence on a current bail decision.

Notice of bond conditions to local officials. The bill would help protect the public and law enforcement authorities by making sure information about bond conditions was sent to the community where a defendant lived.

CRITICS
SAY:

CSHB 20 would expand too far when bail could be denied, require the use of a pretrial public safety assessment that could have negative effects, reduce local discretion in setting bail, and could interfere with procedures

some counties have adopted in response to litigation.

Denial of bail for some offenses. CSHB 20 would be too broad an expansion of when bail can be denied and would erode the tenant that bail should not be denied except in the most limited cases. Preventative detention should be a rare exception, not something available for multiple offenses or mandated for specific offenses. The mandates for no bail in the bill could result in many defendants being locked up before trial, when they are presumed innocent, regardless of the evidence or their threat or flight risk.

Pretrial public safety assessment. A statewide requirement to use a pretrial public safety assessment could unfairly delay pretrial release for some defendants and could result in the detention of some who otherwise would be released. Some counties' current practices allow certain low-level, nonviolent, and low-risk defendants to be released quickly, perhaps on a personal bond that does not require cash. Having to conduct a public safety assessment in all cases would slow down such processing, keeping defendants in jail and possibly crowding jails.

Assessment tools have been criticized for being unreliable and biased, and perpetuating or introducing unfair disparities into the bail-setting process, including racial disparities. There are no assurances that the assessment mandated by the bill would not exacerbate problems with these issues, even with the bill's requirements that the tool demonstrate unbiased results. An assessment tool would likely lean heavily on information in a DPS database, which could be inaccurate.

Actions on bail decisions. Current law guiding bail decisions works well, and the statutory requirement in the bill to impose the least restrictive conditions and minimum amount of bail could be used to avoid the commercial bond industry, which contributes to public safety and saves taxpayer dollars by monitoring those released and ensuring they appear in court.

Prohibited release on personal bond. CSHB 20 would reduce judicial

discretion and local control by prohibiting certain defendants from being released on a personal bond. Eliminating this option for categories of offenses would not contribute to public safety since there is no consideration of risk. Individuals excluded from personal bonds under the bill could be given money bonds, allowing those with money to buy their pretrial release from jail while keeping those without resources locked up.

OTHER
CRITICS
SAY:

Denial of bail for some offenses. Provisions of CSHB 20 that would allow some individuals to be held without bail are contingent on a constitutional amendment that is not before legislators. Passing CSHB 20 without an accompanying amendment to the Constitution could allow parts of the bill to be enacted without this important component.

NOTES:

According to the Legislative Budget Board, CSHB 20 would result in a negative impact of \$1.1 million in fiscal 2022-23 to the general revenue dedicated statewide electronic filing system account.