

MMHPI COVID-19 Response Briefings

Planning Guide for County Officials Seeking to Reduce Jail Demand During Pandemic – Diversion Prioritization and Admission Protocol Considerations *March 24, 2020 Version*

For questions or help implementing these recommendations, please contact the MMHPI Justice Policy Team: Dr. Tony Fabelo, Senior Fellow, and Jessy Tyler, Senior Director for Justice Research.

Introduction

The accelerating COVID-19 emergency is spreading rapidly, requiring major changes to standard operating protocols by both governmental entities and private agencies. For counties, a “hotspot” is the county jail. In response to numerous requests from Texas counties for guidance on the operation of jails during a pandemic, the Justice Policy Team at the Meadows Mental Health Policy Institute (MMHPI) developed this briefing to provide a guide for county officials to inform their efforts to prioritize jail bed use and admissions protocols in order to promote public safety by reducing the demand for jail space during the emergency.

The primary goal of these recommendations is to prepare Texas jails to have more space to better control the spread of the virus within the jail and, just as importantly, have the ability to protect the jail staff, who need to stay healthy for the jails to operate efficiently. This would also allow the jail to more safely address the needs of inmates with underlying health needs, including severe mental illness.

The secondary goal is for jails to have enough capacity in the next few months to detain a higher rate of violent and serious offenders, under the assumption that violent crime and domestic abuse crimes (including child abuse), among others, seem to already be increasing¹ due to both the pandemic and the dramatic economic consequences of suppression efforts.² Additionally, the enhancement of certain offenses during an emergency under Texas Penal Code Section 12.50 alone may increase the influx of more severe offenders.³

¹ Lopez, R. (2020, March 20). *Domestic violence calls increase as people shelter in place during COVID-19 outbreak*. KVUE-TV. <https://bit.ly/33JEQg7>

Clarridge, E. (2020, March 20). *Adults stressed by coronavirus assaulted six children, Fort Worth hospital says*. Star Telegram. <https://www.star-telegram.com/news/coronavirus/article241382431.html>

² MMHPI will be releasing a COVID-19 Briefing Paper later this week with projections on expected increases in violence related to the pandemic and the economic consequences of suppression efforts. Will update this footnote with a reference, once it is released.

³ These offenses include Assault, Arson, Robbery, Burglary of a Coin Operated Machine, Burglary, Burglary of Vehicles, Criminal Trespass, and Theft.

Public safety, defined as making jail space available in the future for violent and severe offenders and maintaining a healthy jail staff to operate jails effectively in the near future, has to be the immediate and clear goal at this time of crisis. However, conditions on the ground in each county – including the rate of community transmission of the illness, the local economic consequences of the suppression measures, the community’s broader public safety priorities, and the availability of post-release services – all need to be taken into account by local leaders. For counties that determine they need to lower their jail population to promote public safety, the recommendations in this briefing provide a guide for minimizing the public safety risks to communities as enhanced diversion and release procedures are implemented.

This document provides a general guide to inform planning by county officials choosing to reduce baseline demand for jail space during the pandemic to consider as they prioritize specific jail bed use and admissions protocols. The priority levels detailed below provide a conceptual framework to inform these decisions, but county officials should consider all the recommendations in accord with their priorities and implement them accordingly. MMHPI recognizes that it remains the responsibility of local officials both to determine the level of local need for enhanced diversion and/or release procedures, as well as to identify the specific target populations for potential jail release or admissions diversion and to get agreement among local officials on the specific protocols by which to implement those temporary practices. This emergency has already resulted in orders by the Governor and state agencies to change standard operating procedures. For example, the Texas Commission on Jail Standards issued guidance regarding the internal operations of the jails, and the Supreme Court of Texas and Criminal Court of Appeals have both issued guidance to the courts, including orders to reduce person-to-person contacts and operate with on-line processes.

Level One Priority: Presume that Cutting Jail Time is Appropriate During the Pandemic

Level One presumes that certain people in jail can have their time reduced without a public safety risk. Policies to review include:

- **Serving a Sentence:** A county should consider releasing a person convicted to county jail time with only a certain number of days remaining until discharge. Article 42.032, Code of Criminal Procedure, grants a sheriff the power to credit good time to people sentenced to county jail time.
- **Child Support:** A county should consider releasing a person who is incarcerated only for contempt of court because they have not been paying child support. The county should find an alternative, working with the Texas Attorney General Child Support Division, to encourage payment. This category of offenders may increase significantly with worsening economic conditions related to pandemic suppression efforts. People who are unemployed will be unable to pay child support and incarceration does not remedy the problem.

Level Two Priority: Presume that Jail is Inappropriate During the Pandemic

Level Two presumes that incarceration is inappropriate during the pandemic for persons who are: not posing a risk to public safety; in jail for low-level offenses; low-risk; having statutory entitlement to release; or at high risk of health problems if exposed to the coronavirus. Policies for county leaders to review and consider include:

- Municipal Holds, Misdemeanor C, and Municipal Offenses:** A county should consider releasing from jail persons held on a Class C Misdemeanor or Municipal Offenses. If a person is jailed because the person owes fines, the county should consider requiring community service hours in lieu of the fine or obtaining a waiver for indigence, as allowed by Texas law. The parameters surrounding community service will need to take into account the specific local restrictions on activity related to the pandemic.
- Cite and Release:** A county should consider releasing people from jail who are charged with an offense that qualifies for cite and release to pretrial services for the office to monitor the person. 80(R) HB 2391, passed in 2007, allows for cite and release at the misdemeanor Class B level for the following offenses: criminal mischief; graffiti; theft; hot checks; theft of service; driving with an invalid license; possession of contraband in a correctional facility; and possession of marijuana, for which Class A misdemeanors are also eligible.
- Medical Choices:** A county should consider directing people age 50 years or older (which is considered geriatric for the criminal justice system) and pregnant women charged with nonviolent offenses to pretrial services for appropriate supervision. A county should also consider release options for inmates with underlying medical conditions that put them at higher risk of COVID-19, including cancer, heart disease, hypertension, diabetes, respiratory conditions, renal failure, weakened immune systems, or other conditions identified by the Texas Department of State Health Services or the federal Centers for Disease Control as at higher risk.⁴
- People with Mental Illnesses or Intellectual or Developmental Disabilities:** A county should consider accelerated assessments for people screened at jail intake who may have a mental illness or intellectual or developmental disability to determine if an immediate release to pretrial mental health supervision and appropriate services can be safely carried out. The county should also recognize that arrangement of appropriate services will be more challenging given the pandemic and take steps to heighten coordination with local mental health authorities and other post-release service providers or, in the absence of that, take independent action to ensure that post-release needs are met (for example, releasing people in need of medication with 30 to 90 day supplies, depending on the specific limitations in a given county). People with mental

⁴ Please see the following sites for current information about at-risk groups:

<https://www.dshs.state.tx.us/coronavirus/> and <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html>

illnesses who have been incarcerated 96 hours or longer should be subject to Section 17.032, Code of Criminal Procedure, processes for release from jail. If the county has a mental health court, jurisdictional issues could be addressed by consolidating the review of these cases through this court.

- **Timely Trial:** A county should consider releasing people who meet the criteria under Article 17.151, Code of Criminal Procedure, for personal bond and pretrial supervision, or conduct an immediate bond review hearing to determine if the person can bond out on a lower bond.

Article 17.151, Code of Criminal Procedure, Section. 1, states:

A defendant who is detained in jail pending trial of an accusation against him must be released either on personal bond or by reducing the amount of bail required, if the state is not ready for trial of the criminal action for which he is being detained within:

- (1) 90 days from the commencement of his detention if he is accused of a felony;*
 - (2) 30 days from the commencement of his detention if he is accused of a misdemeanor punishable by a sentence of imprisonment in jail for more than 180 days;*
 - (3) 15 days from the commencement of his detention if he is accused of a misdemeanor punishable by a sentence of imprisonment for 180 days or less; or,*
 - (4) five days from the commencement of his detention if he is accused of a misdemeanor punishable by a fine only.*
- **Capias Pro Fine:** Counties should consider bringing persons incarcerated only for outstanding fines or fees immediately before the court that issued the capias and then releasing them from jail. These persons can be required to report to the probation department or other designated local agency to determine an alternative collection strategy, short of jail time.

Level Three Priority: Improved Processes Would Reduce Jail Time

Level Three presumes that improving certain processes may help reduce the burden with the present jail population and with future jail admissions. Policies to review for possible modification include:

- **Blue Warrants:** Since 2015, persons in violation of parole being held in jail for technical violations have been allowed to have their bond set, but these persons typically sit in jail waiting to hear if their parole will be revoked. A county should review warrants for bond eligibility and consider releasing persons eligible under Section 508.254, Government Code. The county would need to work with the Texas Department of Criminal Justice regarding the issuance of a summons instead of a warrant, which is allowed under Section 508.251, Government Code, as long as a person is not on intensive supervision, an absconder, or a threat to public safety. A summons is even possible for persons with

only Class C misdemeanor charges if those charges occurred more than one-year post release and did not involve family violence.

- **Probation:** Probation departments should consider implementing more aggressive policies to find alternatives to filing technical revocation for probationers. Probationers should have been subjected to the progressive model required by the state. Progressive sanctions refer to the state policy of encouraging the use of various risk management strategies and programs (like Day Reporting Treatment) before a violation report is filed in court, particularly for rule violations (and not commissions of new crimes).⁵ If a technical revocation is filed, the District Attorney should prioritize the case for processing.

Additional Issues Related to Managing Future Admission Processes

In addition to the three priorities noted above, there is an additional set of policies that should be considered for implementation to safely reduce the demand for jail admissions more broadly. These include the following:

- **First Bail Hearing, Code of Criminal Procedure 15.17:** A county should consider granting persons bond if they are arrested for a misdemeanor (except for family violence, second degree DWI, and simple assault). The pretrial department should conduct a risk assessment to recommend who in this group should go to pretrial supervision. Conducting a risk assessment here does not necessarily require a risk assessment tool; an interview that determines criminogenic risk elements will serve this purpose. The Supreme Court of Texas has ordered that magistration is an essential proceeding that must continue during the pandemic.⁶
- **Cite and Release:** A county should consider implementing this policy immediately for people who qualify and do not pose a substantial risk, in the judgment of local officials.
- **Class C Misdemeanors and Municipal Cases:** A county should consider processing these types of violations without a jail admission for people who do not pose a substantial risk, in the judgment of local officials.
- **District Attorney Screening of Cases:** During this critical time, it is important for District Attorneys to consider if only the highest, sustainable charge should be made to conserve precious resources and expedite case processing. District Attorney offices may want to enhance processes for screening charges early and speed up processes for filing charges.

⁵ For more information, see the Texas Progressive Interventions and Sanctions Bench Manual, 2017, at https://www.tdcj.texas.gov/documents/cjad/CJAD_Bench_Manual.pdf

⁶ State of Texas Judicial Branch. (2020, March 19). *Court procedures for the 2019 novel coronavirus (COVID-19)*. , *updated guidance*. <https://www.txcourts.gov/media/court-procedures-for-the-2019-novel-coronavirus-covid-19/> Examples of essential functions include: criminal magistration proceedings, child protective services removal hearings, temporary restraining orders/temporary injunctions, juvenile detention hearings, and family violence protective orders.

Issues to Consider Related to Indigent Defense

There are also issues related to indigent defense that should be considered for implementation to safely reduce the demand for jail admissions more broadly. These include the following:

- **Blue Warrants (Parole Violation Arrests Warrants):** This involves immediate review of whether or not the person is eligible for bond release, which is noted on the warrant by statute under Section 508.254, Government Code. Although Blue Warrants do not invoke the right to counsel, during this emergency, having defense counsel review warrants for bond eligibility could be a good use of resources, even if counsel does not represent the parolee.
- **Appointed Counsel or Public Defender Role in Timely Trial:** Defense counsel must monitor the number of days their clients have been held in jail against the time limits in Article 17.151, Code of Criminal Procedure, and submit bond reduction or personal recognizance (PR) bond consideration motions.
- **Overcome Jurisdictional Issues:** Consider a habeas writ if a defense counsel wishes to obtain a release hearing for persons magistrates outside the jurisdiction.
- **Virtual Visits for Client:** Jail systems and the defense bar should work together to figure out how clients and counsel can continue to meet using virtual options. As courts are moving online to use video conference platforms (such as Zoom) for the foreseeable future, the two technical planning conversations (for the defense bar and for courts) should occur concurrently.

Issues to Consider Related to Mental Health and Reentry

There are also issues related to mental health that should be considered for implementation to safely reduce the demand for jail admissions more broadly. These include the following:

- **Population Awaiting Mental Health Competency Hearings:** Local jail officials, working with local mental health authorities, should examine how to implement an emergency protocol to review competency issues locally, with outpatient strategies, to reduce the number of people waiting in jail for competency restoration. In most Texas counties, this population consumes unnecessary jail space due to their long stays in jail, and strategies to cut this time are essential during the emergency period. It should be recognized that, during the pandemic, local mental health authority capacity will likely be strained by increased demand and other constraints related to the pandemic, so additional coordination or independent action by the county will be necessary.
- **Jail Reentry Population:** Local jail officials, working with health and mental health agencies, should perform an immediate review of policies related to supplying continuity of care medications to persons released from jail. On a temporary basis during the pandemic, jail official should provide a larger allowance of psychotropic medications (up to 30 to 90 days, depending on local conditions, to the extent safely possible), given the strain on the local health delivery infrastructure and to ensure that

people are not exposed to the virus during a clinic or pharmacy visit to refill prescriptions.

- **Pretrial Services:** Attention should be given to ways to enhance pretrial services agencies. These agencies would need to have sufficient staffing to provide timely information about persons accused of a crime in order to help the magistrate make a determination about the least restrictive form of release that is consistent with public safety. Once a defendant is released, pretrial service agencies would also need sufficient staff and technological capacity to monitor the defendant (consistent with social distancing and related suppression requirements), employ clear protocols to assure that the defendant appears in court, and provide the appropriate level of supervision more broadly while they are released. Pretrial agencies may also need to provide guidance to defendants as to how they will now be expected to interact “virtually” with the court system, especially for defendants who lack internet access.