

## **BILL ANALYSIS**

C.S.S.B. 1338  
By: Whitmire  
Criminal Jurisprudence  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

Interested parties contend that despite the presumption of innocence, many criminal defendants in Texas are detained in jail before and during trial because they cannot post monetary bail. These parties call for revisions to bail practices in Texas with the goal of increasing public safety, decreasing costs, and minimizing the adverse impacts of extended pretrial detention for those who are a low risk to society. C.S.S.B. 1338 seeks to address these issues by revising bail practices in Texas.

### **CRIMINAL JUSTICE IMPACT**

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

### **ANALYSIS**

C.S.S.B. 1338 amends the Code of Criminal Procedure to require the judges of the county courts, statutory county courts, and district courts trying criminal cases in each county to adopt not later than January 1, 2019, an instrument to be used in conducting a pretrial risk assessment of a defendant charged with an offense in that county and requires the instrument adopted to be the automated pretrial risk assessment system developed under the bill's provisions or another instrument that is objective, validated for its intended use, and standardized and based on an analysis of empirical data and risk factors relevant to the risk of a defendant failing to appear in court as required and to the safety of the community or the victim of the alleged offense if the defendant is released. The bill requires a magistrate considering the release on bail of a defendant charged with an offense punishable as a Class B misdemeanor or any higher category of offense to order that the personal bond office for the county in which the defendant is being detained, or other suitably trained person, use the adopted instrument to conduct a pretrial risk assessment with respect to the defendant and to order that the results of the assessment be provided to the magistrate without unnecessary delay to ensure that the magistrate is able to make a bail decision within the required period. The bill prohibits a magistrate from ordering, without the consent of the sheriff, a sheriff or sheriff's department personnel to conduct the pretrial risk assessment but authorizes a magistrate to personally conduct the assessment using the adopted instrument. The bill requires the magistrate to consider the results of the pretrial risk assessment before making a pretrial release decision.

C.S.S.B. 1338 requires a magistrate, without unnecessary delay but not later than 48 hours after a defendant is arrested, to order after considering all circumstances and the results of the pretrial risk assessment that, unless otherwise prohibited by law, the defendant be released on personal

bond or monetary bail bond without conditions or released on personal bond or monetary bail bond with any condition the magistrate determines necessary. The bill authorizes a magistrate to release a defendant arrested under a warrant that was issued in a county other than the county in which the defendant was arrested if a bail decision has not previously been made by another magistrate and if the magistrate would have had jurisdiction over the matter had the warrant been issued in the county of arrest and, if applicable, requires the magistrate to forward a copy of the bail order to a personal bond office in the county in which the arrest warrant was issued. The bill requires the magistrate in making a bail decision to impose, as applicable, the conditions and amount of bail, whether personal bond or monetary bail bond, necessary to reasonably ensure the defendant's appearance in court as required and the safety of the community and the victim of the alleged offense. The bill prohibits a magistrate from requiring a defendant to provide a monetary bail bond for the sole purpose of preventing the defendant's release on bail. The bill requires the magistrate, if the magistrate determines that a defendant is not indigent and is able to pay any costs related to a condition of the defendant's bail, to assess the costs as court costs or order the costs to be paid directly by the defendant as a condition of release. The bill prohibits a judge from adopting a bail schedule or entering a standing order related to bail that is inconsistent with the bill's provisions relating to bail decisions or that authorizes a magistrate to make a bail decision for a defendant without considering the results of the defendant's pretrial risk assessment. These provisions relating to bail decisions expressly do not prohibit a sheriff or other peace officer or a licensed county jailer from accepting bail in misdemeanor or felony cases before a pretrial risk assessment has been conducted with respect to the defendant or before a bail decision has been made by a magistrate.

C.S.S.B. 1338 prohibits a defendant who appears before a magistrate as ordered by citation from being temporarily detained for purposes of conducting a pretrial risk assessment or for a magistrate to issue a bail decision. The bill requires the magistrate, after performing the duties imposed by statutory provisions relating to the duties of an arresting officer and magistrate, to release the defendant on personal bond, unless the defendant is lawfully detained on another matter. The bill requires a magistrate to release on personal bond a defendant who was released on personal bond and subsequently arrested on a warrant issued for the defendant's failure to appear as ordered if the defendant shows good cause for the failure to appear and authorizes the magistrate, if good cause is not shown, to release the defendant in accordance with the bill's provisions relating to bail decisions.

C.S.S.B. 1338 prohibits a judge or magistrate in whose court a criminal action is pending from ordering an accused to be rearrested or requiring the accused to give another bond in a higher amount because the accused is formally charged with the same offense for which the accused was initially arrested and bond was given without first providing notice to each party to the action and, on request of any party, an opportunity for a hearing.

C.S.S.B. 1338 requires a magistrate authorizing a defendant's release on bail to provide, if applicable, written notice to the defendant of the conditions of the defendant's release and the penalties of violating a condition of release, including the defendant's arrest. The bill requires such notice to be provided in a manner that is sufficiently clear and specific to serve as a guide for the defendant's conduct while released.

C.S.S.B. 1338 includes a determination by a court that a defendant is indigent or demonstrates an inability to pay among the conditions under which the court may waive or assess a lesser fee than the personal bond fee if a court releases the defendant on personal bond on the recommendation of a personal bond office. The bill authorizes the court to require that any such fee be paid before the defendant is released, as a condition of release, or as court costs. The bill prohibits the court or jailer from refusing to release a defendant based solely on the defendant's failure to pay a personal bond fee if the defendant is indigent or demonstrates an inability to pay the fee. The bill authorizes a magistrate to reduce or waive the cost of electronic monitoring or testing for controlled substances ordered as a condition of release on bond for such a defendant if the magistrate determines that the defendant is indigent or demonstrates an inability to pay.

C.S.S.B. 1338 repeals provisions relating to a court's authority to order certain requirements of a personal bond fee assessed on the release of an accused on personal bond on the recommendation of a personal bond office; a magistrate's authority to release a defendant on personal bond where the complaint and warrant for arrest does not originate in the county in which the accused is arrested; and the exemption of certain personal bond pretrial release offices from certain record and annual reporting requirements.

C.S.S.B. 1338 amends the Government Code to authorize funds appropriated for any fiscal year to the judicial and court personnel training fund to be used to provide continuing legal education regarding bail practices to any master, magistrate, referee, or associate judge as required by the court of criminal appeals under statutory provisions relating to education programs for judges and court personnel. The bill requires the Office of Court Administration of the Texas Judicial System (OCA), not later than January 1, 2019, to develop an automated pretrial risk assessment system and to make the system and automated and nonautomated pretrial risk assessment instruments available to judges and magistrates in Texas at no cost to a county, municipality, or magistrate. The bill's provisions apply only to a person who is arrested on or after January 1, 2019.

C.S.S.B. 1338 repeals the following provisions of the Code of Criminal Procedure:

- Article 17.03(g)
- Article 17.031
- Sections 5(c) and 6(c), Article 17.42

### **EFFECTIVE DATE**

September 1, 2017.

### **COMPARISON OF SENATE ENGROSSED AND SUBSTITUTE**

While C.S.S.B. 1338 may differ from the engrossed in minor or nonsubstantive ways, the following comparison is organized and formatted in a manner that indicates the substantial differences between the engrossed and committee substitute versions of the bill.

#### SENATE ENGROSSED

SECTION 1. Chapter 17, Code of Criminal Procedure, is amended by adding Articles 17.027, 17.028, 17.029, and 17.034 to read as follows:

Art. 17.027. PRETRIAL RISK ASSESSMENT. (a) The judges of the county courts, statutory county courts, and district courts trying criminal cases in each county shall adopt an instrument to be used in conducting a pretrial risk assessment of a defendant charged with an offense in that county. The instrument adopted must be the automated pretrial risk assessment system developed under Section 72.032, Government Code, or another instrument that is:

(1) objective, validated for its intended use,

#### HOUSE COMMITTEE SUBSTITUTE

SECTION 1. Chapter 17, Code of Criminal Procedure, is amended by adding Articles 17.027, 17.028, 17.029, and 17.034 to read as follows:

Art. 17.027. PRETRIAL RISK ASSESSMENT. (a) The judges of the county courts, statutory county courts, and district courts trying criminal cases in each county shall adopt an instrument to be used in conducting a pretrial risk assessment of a defendant charged with an offense in that county. The instrument adopted must be the automated pretrial risk assessment system developed under Section 72.032, Government Code, or another instrument that is:

(1) objective, validated for its intended use,

and standardized; and  
(2) based on an analysis of empirical data and risk factors relevant to:  
(A) the risk of a defendant failing to appear in court as required;  
(B) the safety of the community or the victim of the alleged offense if the defendant is released; and  
(C) the lawful immigration status of the defendant.  
(b) A magistrate considering the release on bail of a defendant charged with an offense punishable as a Class B misdemeanor or any higher category of offense shall order that:  
(1) the personal bond office for the county in which the defendant is being detained, or other suitably trained person, use the instrument adopted under Subsection (a) to conduct a pretrial risk assessment with respect to the defendant; and  
(2) the results of the assessment be provided to the magistrate without unnecessary delay to ensure that the magistrate is able to make a bail decision under Article 17.028 within the period required by Subsection (a) of that article.  
(c) A magistrate may not, without the consent of the sheriff, order a sheriff or sheriff's department personnel to conduct a pretrial risk assessment under Subsection (b).  
(d) Notwithstanding Subsection (b), a magistrate may personally conduct a pretrial risk assessment using an instrument adopted under Subsection (a).  
(e) The magistrate must consider the results of the pretrial risk assessment before making a bail decision under Article 17.028.  
Art. 17.028. BAIL DECISION.  
(a) Without unnecessary delay but not later than 48 hours after a defendant is arrested, a magistrate shall order, after considering all circumstances and the results of the pretrial risk assessment conducted under Article 17.027, that, unless otherwise prohibited by law, the defendant be released on:  
(1) personal bond or monetary bail bond without conditions; or  
(2) personal bond or monetary bail bond with any condition the magistrate determines necessary.  
(b) A magistrate may release a defendant arrested pursuant to a warrant that was issued in a county other than the county in which the defendant was arrested if a bail

and standardized; and  
(2) based on an analysis of empirical data and risk factors relevant to:  
(A) the risk of a defendant failing to appear in court as required; and  
(B) the safety of the community or the victim of the alleged offense if the defendant is released.

(b) A magistrate considering the release on bail of a defendant charged with an offense punishable as a Class B misdemeanor or any higher category of offense shall order that:  
(1) the personal bond office for the county in which the defendant is being detained, or other suitably trained person, use the instrument adopted under Subsection (a) to conduct a pretrial risk assessment with respect to the defendant; and  
(2) the results of the assessment be provided to the magistrate without unnecessary delay to ensure that the magistrate is able to make a bail decision under Article 17.028 within the period required by Subsection (a) of that article.  
(c) A magistrate may not, without the consent of the sheriff, order a sheriff or sheriff's department personnel to conduct a pretrial risk assessment under Subsection (b).  
(d) Notwithstanding Subsection (b), a magistrate may personally conduct a pretrial risk assessment using an instrument adopted under Subsection (a).  
(e) The magistrate must consider the results of the pretrial risk assessment before making a bail decision under Article 17.028.  
Art. 17.028. BAIL DECISION. (a)  
Without unnecessary delay but not later than 48 hours after a defendant is arrested, a magistrate shall order, after considering all circumstances and the results of the pretrial risk assessment conducted under Article 17.027, that, unless otherwise prohibited by law, the defendant be released on:  
(1) personal bond or monetary bail bond without conditions; or  
(2) personal bond or monetary bail bond with any condition the magistrate determines necessary.  
(b) A magistrate may release a defendant arrested pursuant to a warrant that was issued in a county other than the county in which the defendant was arrested if a bail

decision has not previously been made by another magistrate and if the magistrate would have had jurisdiction over the matter had the warrant been issued in the county of arrest. If applicable, the magistrate shall forward a copy of the bail order to a personal bond office in the county in which the arrest warrant was issued.

(c) In making a bail decision under this article, the magistrate shall impose, as applicable, the least restrictive conditions and the minimum amount of bail, whether personal bond or monetary bail bond, necessary to reasonably ensure the defendant's appearance in court as required and the safety of the community and the victim of the alleged offense.

(d) A magistrate may not require a defendant to provide a monetary bail bond for the sole purpose of preventing the defendant's release on bail.

(e) If the magistrate determines that a defendant is not indigent and is able to pay any costs related to a condition of the defendant's bail, the magistrate shall assess the costs as court costs or order the costs to be paid directly by the defendant as a condition of release.

(f) A judge may not adopt a bail schedule or enter a standing order related to bail that:

(1) is inconsistent with this article; or  
(2) authorizes a magistrate to make a bail decision for a defendant without considering the results of the defendant's pretrial risk assessment.

(g) This article does not prohibit a sheriff or other peace officer, or a jailer licensed under Chapter 1701, Occupations Code, from accepting bail under Article 17.20 or 17.22 before a pretrial risk assessment has been conducted with respect to the defendant or before a bail decision has been made by a magistrate under this article.

Art. 17.029. DEFENDANT APPEARING IN RESPONSE TO CITATION.

Art. 17.034. RELEASE OF DEFENDANT ARRESTED FOR FAILURE TO APPEAR.

SECTION 2. Section 4, Article 17.09, Code of Criminal Procedure, is amended.

SECTION 3. Article 17.20, Code of Criminal Procedure, is amended.

decision has not previously been made by another magistrate and if the magistrate would have had jurisdiction over the matter had the warrant been issued in the county of arrest. If applicable, the magistrate shall forward a copy of the bail order to a personal bond office in the county in which the arrest warrant was issued.

(c) In making a bail decision under this article, the magistrate shall impose, as applicable, the conditions and amount of bail, whether personal bond or monetary bail bond, necessary to reasonably ensure the defendant's appearance in court as required and the safety of the community and the victim of the alleged offense.

(d) A magistrate may not require a defendant to provide a monetary bail bond for the sole purpose of preventing the defendant's release on bail.

(e) If the magistrate determines that a defendant is not indigent and is able to pay any costs related to a condition of the defendant's bail, the magistrate shall assess the costs as court costs or order the costs to be paid directly by the defendant as a condition of release.

(f) A judge may not adopt a bail schedule or enter a standing order related to bail that:

(1) is inconsistent with this article; or  
(2) authorizes a magistrate to make a bail decision for a defendant without considering the results of the defendant's pretrial risk assessment.

(g) This article does not prohibit a sheriff or other peace officer, or a jailer licensed under Chapter 1701, Occupations Code, from accepting bail under Article 17.20 or 17.22 before a pretrial risk assessment has been conducted with respect to the defendant or before a bail decision has been made by a magistrate under this article.

Art. 17.029. DEFENDANT APPEARING IN RESPONSE TO CITATION.

Art. 17.034. RELEASE OF DEFENDANT ARRESTED FOR FAILURE TO APPEAR.

SECTION 2. Same as engrossed version.

SECTION 3. Same as engrossed version.

SECTION 4. Article 17.21, Code of Criminal Procedure, is amended

SECTION 4. Same as engrossed version.

SECTION 5. Article 17.22, Code of Criminal Procedure, is amended

SECTION 5. Same as engrossed version.

SECTION 6. Chapter 17, Code of Criminal Procedure, is amended.

SECTION 6. Same as engrossed version.

SECTION 7. Section 4, Article 17.42, Code of Criminal Procedure, is amended.

SECTION 7. Same as engrossed version.

SECTION 8. Article 17.43(a), Code of Criminal Procedure, is amended.

SECTION 8. Same as engrossed version.

SECTION 9. Article 17.44(e), Code of Criminal Procedure, is amended.

SECTION 9. Same as engrossed version.

SECTION 10. Section 54.737(c), Government Code, is amended.

SECTION 10. Same as engrossed version.

SECTION 11. Section 56.003, Government Code, is amended.

SECTION 11. Same as engrossed version.

SECTION 12. Subchapter C, Chapter 72, Government Code, is amended.

SECTION 12. Same as engrossed version.

SECTION 13. The following provisions of the Code of Criminal Procedure are repealed:

SECTION 13. Same as engrossed version.

- (1) Article 17.03(g);
- (2) Article 17.031; and
- (3) Sections 5(c) and 6(c), Article 17.42.

SECTION 14. Not later than January 1, 2019, the Office of Court Administration of the Texas Judicial System shall develop the automated pretrial risk assessment system and make available automated or nonautomated pretrial risk assessment instruments as required by Section 72.032, Government Code, as added by this Act.

SECTION 14. Same as engrossed version.

SECTION 15. Not later than January 1, 2019, the judges of the county courts, statutory county courts, and district courts trying criminal cases in each county shall adopt a pretrial risk assessment instrument as required by Article 17.027, Code of Criminal Procedure, as added by this Act.

SECTION 15. Same as engrossed version.

SECTION 16. The change in law made by this Act applies only to a person who is arrested on or after January 1, 2019. A

SECTION 16. The change in law made by this Act applies only to a person who is arrested on or after January 1, 2019. A

person arrested before January 1, 2019, is governed by the law in effect on the date the person was arrested, and the former law is continued in effect for that purpose.

SECTION 17. This Act takes effect September 1, 2017.

person arrested before January 1, 2019, is governed by the law in effect immediately before the effective date of this Act, and the former law is continued in effect for that purpose.

SECTION 17. Same as engrossed version.