Pretrial Services operates on the constitutional presumption of innocence, the National Association of Pretrial Services Agencies Pretrial Standards, and approved court orders. Using the most recent, evidence-based practices, the *Assessment* Pretrial team provides timely, unbiased reports to the presiding judicial authority so he/she can make sound release decisions for qualified defendants, allowing them to maintain life commitments while out of custody. If release is granted, the *Supervision* Pretrial team ensures these defendants abide by the least restrictive conditions that have been imposed by the court, with the goal of reducing failure-to-appear rates and re-offense.

PRETRIAL SERVICES

Heather Condon, Program Manager

A- 6-28-16 #6

History of Pretrial – Washoe County

- Established in 1983
- 1994
- 2007
- 2016

3 LOCATIONS

WCSO (Parr Blvd.)

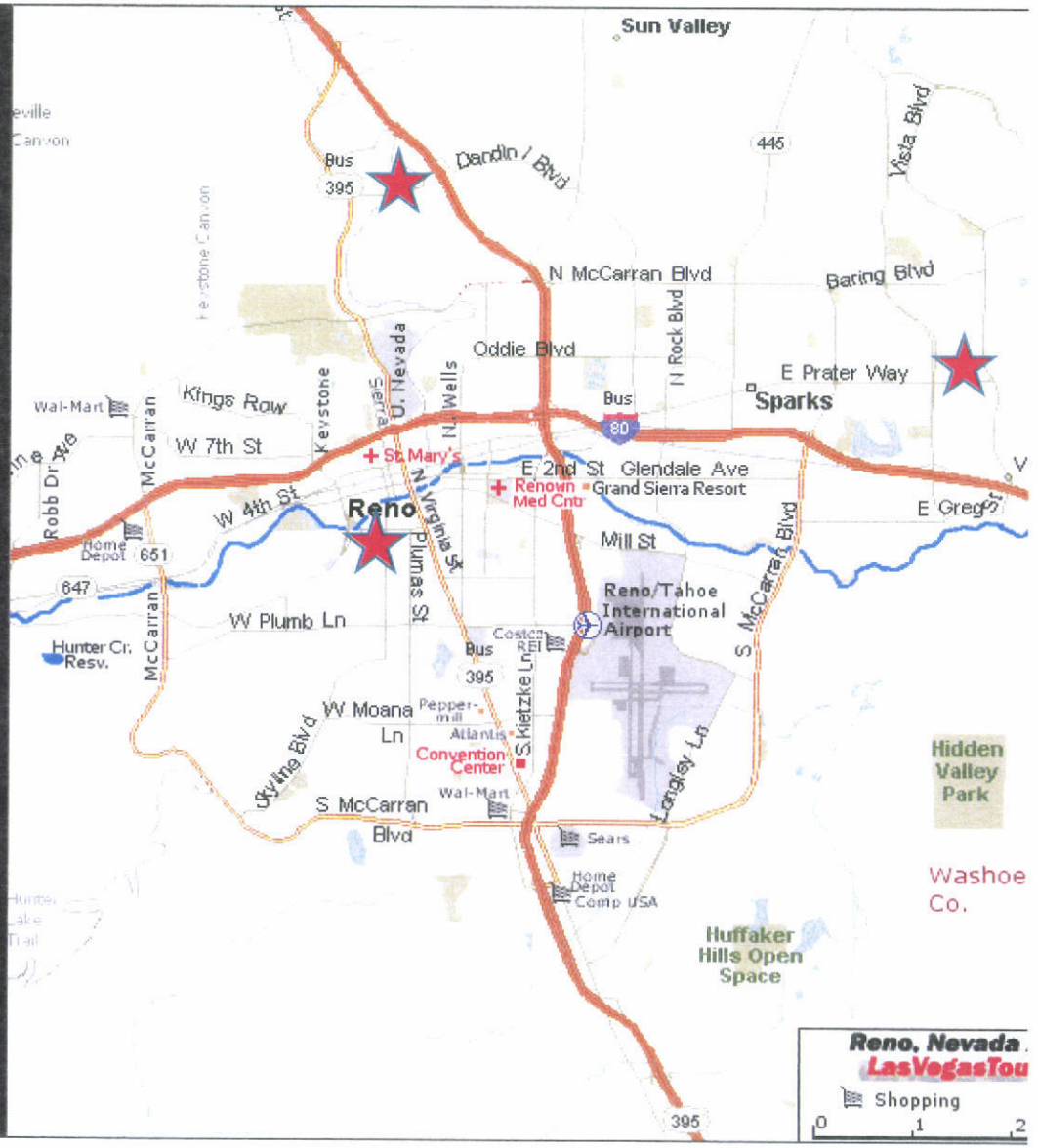
- Assessment
- Evening and weekend alcohol testing

Sparks Justice Court

- Supervision

Second Judicial District Court

- Supervision



Assessment Team

7 Full-time employees / 5 intermittent

- Assess and release defendants
- Provide written reports to the court
- Reinterviews – limited jurisdiction
- After hours TPO entry
- Alcohol test – all agencies
  - Evening & weekends
- Approximately 1800 screenings/mo.

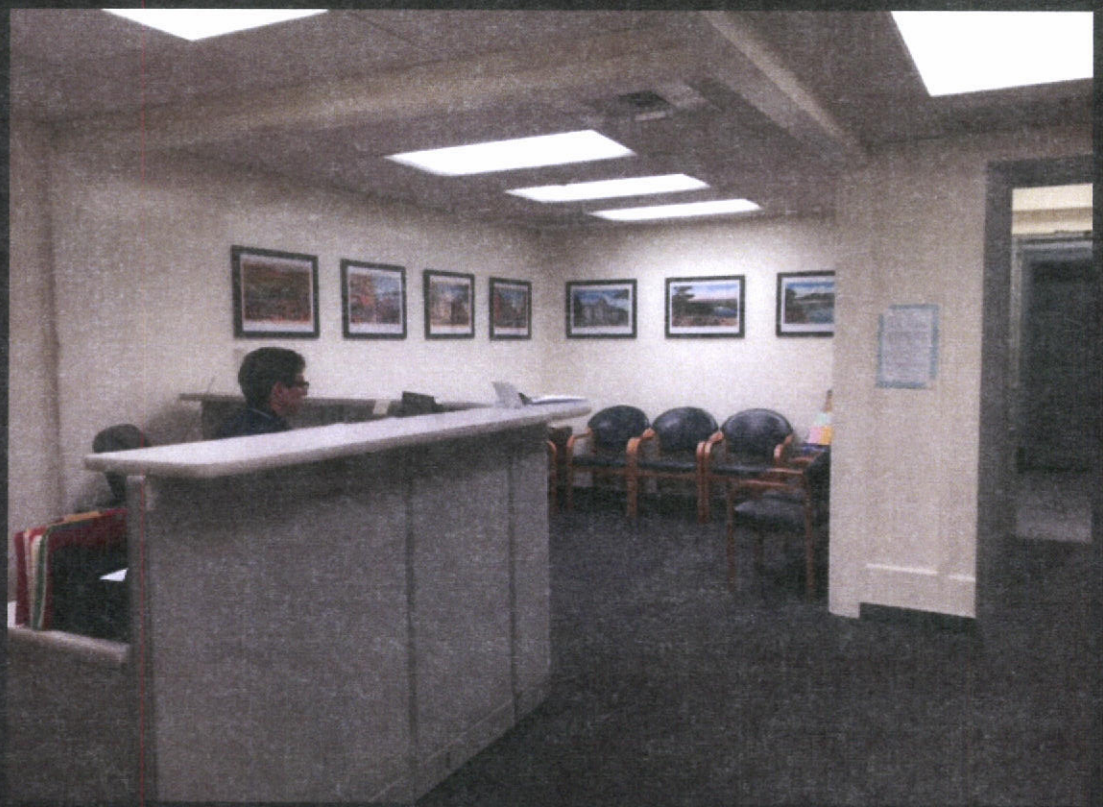
Assessment Team Statistics - May

- 1600 Assessment reports a month
- Reinterviews – 25
- After-hours TPO – 8

SUPERVISION TEAM

8 Full-time employees – 2 locations

- Assess & assign conditions
- Social Services eligibility
- Court notes
- Violations & recommendations
- 2JDC reinterview requests
- Approximate caseload 120-140/PSO



Supervision Team Statistics - May

- Currently Supervise 971

- New cases – 371
- Check-ins –
  - In person (PBT & UA) – 2894
  - REM's (Court Reminders) – 726
  - All other (fax, email, telephone, etc.) - 3479

- Closed cases – 379
  - Successful 288 / 76%
  - FTA rate – 31 / 8%
  - Rearrest rate – 10 / 3%
  - Revocation rate – 50 / 13%

Pretrial Services Budget

- Salaries & Benefits - $1,478,844.95
  - Intermittent salaries included - $38,096.00
- Supplies - $43,438.28

Pretrial Goals

- Streamline processes
- Implement evidence-based practices
- To operate on the constitutional presumption of innocence

Reform Initiated

- July 2015
  - NIC assessment
    - Advised
    - Encouraged

Process Improvements

- Scanning morning court paperwork
- Provide consistent work for each court
- Creating statistical reports - working with WCSO
- Implemented random drug/alcohol testing January 2016

NPRA – Risk Assessment Implementation

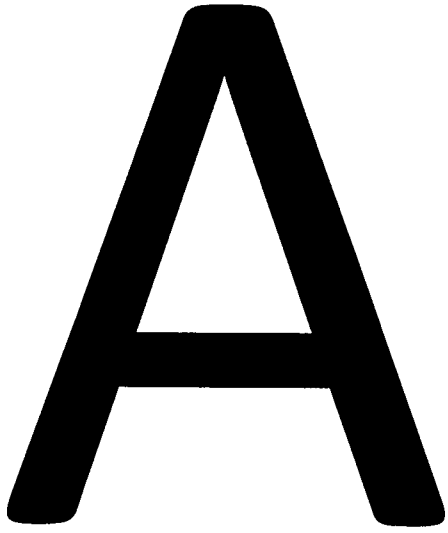
- August 2015 - Committee to Study Evidence Based Pretrial Release
  - Implementation of a validated risk assessment tool
    - 2014 case study – approximately 1500 cases
    - Adoption of tool – May 2016
    - Training and pilot to begin

Washoe County Strategic Plan

- Safe, secure & healthy communities

Appendix Guide:

A – Pretrial Services Assessment Report (example)
B – NIC Schedule for Technical Assistant Audit – May 2015
C – NIC Technical Assistance Report – June 9, 2015
D - Jail Population as of 6-1-16 and WCSO supporting docs for data collection
E – Random drug/alcohol testing statistics – May
F – Nevada Pretrial Risk Assessment (NPR) – Draft
G – Applicable Articles
- Pretrial Services: An Effective Alternative to Monetary Bail
- 2012-2013 Policy Paper Evidence-Based Pretrial Release - COSCA
- Risk-based Pretrial Systems Serve Victims' Needs Better than Current Practice
- Glossary of Terms and Phrases Relating to Bail and the Pretrial Release or Detention Decision – PJI



Washoe County Pretrial Services
Assessment Report

Case Filing

Filed Name
[redacted]

Arrest

Booked Name	Arresting Agency	Booking Number	Arrest Date
[redacted]	UNIV OF NEVADA POLICE DEPT	[redacted]	06/06/2016

Case Number	NOC	Type	Description	Counts	Court	Bail Amt/Type
[redacted]	51127	F	POSS SCH I, II, III, IV C/S, (1ST/2ND)	1	RJC	5,000 B

Defendant Information

Sex	Race	Birthdate	Age	Height	Weight	SS Number
M	WHITE	[redacted]	[redacted]	6' 01"	230	On File

Address	Residence	Born
NONE FIXED RENO, NV	County: 47 Yr 00 Mo	RENO, NV, UNITED STATES
Telephone [redacted]1	Time at Current Address	Primary Language: ENGLISH
Lives With	Relationship	ID Number / Type / Expiration Date
Marital Status: DIVORCED	How Long	Military Service: NONE / Discharge
Employment/Support Status: Employed	Employer: [redacted]	How Long: 00/00
Occupation: ROOFER		Employer Telephone: (775) -

Defendant Justice Identifier Codes/Criminal History

FBI Number	SID Number	

Arrests	Violent Fels	Felonies	Violent Misd	Misdemeanors	MMSD	Traffic	DUI	Pending

Comments

SUCCESSFUL SUPERVISION WITH MATT IN 2007
THE DEFENDANT HAS LIVED IN THE AREA 47 YEARS. HE IS CURRENTLY HOMELESS. THE DEFENDANT HAS BEEN WORKING AT A CONSTRUCTION JOB FOR 1 WEEK. THE DEFENDANT HAS AN EXTENSIVE CRIMINAL HISTORY. JUDICIAL REVIEW SUGGESTED PRIOR TO RELEASE CONSIDERATION.
LB

Assessment Status

Risk Score	Assessment	Initials
22	FELONY NR	SKIMBERL

B

05/12/15 (T)	Department	Representative Name(s)
0800 - 0845	Supreme Court	Chief Justice Hardesty
0900 – 0950	Pretrial (Jail) – (PRT)	Tour – Jail, Booking, PRT (@ WCSO)
1000 – 1050	Reno Justice Court (RJC) ARR	RJC - Video Arraignments (@ WCSO)
1100 – 1150	Washoe County Sheriff's Office (WCSO) / Research & Develop. (R&D)	Captain Howe, Captain Lee, Shannon Hardy, Karen Burch (@ WCSO)
Lunch	----------	
1300 – 1350	DC	Judge Sattler, Judge Stiglich, Jackie Bryant
1400 – 1450	Alternate Public Defender's Office (APD)	Jennifer Lunt
1500 – 1550	Public Defender's Office (PD)	Jeremy Bosler, Ryan Sullivan
1600 - 1650	RJC	Judge Pearson, Steve Tuttle, Tami Neville

05/13/15 (W)	Department	Representative Name(s)
0800 - 0830	District Court (DC)	Pretrial Tour (Courts) / Meet & Greet
0830 – 0950	DC ARR	Dept. 8 – Court docket (Judge Stiglich)
1000 – 1050		
1100 – 1150		
Lunch	----------	
1300 – 1350	Reno Municipal Court	Judge Howard, Cassandra Jackson (@ RMC)
1400 – 1450	Sparks Municipal Court	Judge Barbara McCarthy (telephone conference)
1500 – 1550	Sparks Justice Court	Judge Wilson, Anita Whitehead
1600 - 1650	District Attorney's Office	Bruce Hahn

05/14/15 (TH)	Department	Representative Name(s)
0800 - 0850	DC – Court Tech	Craig Franden
0900 – 0950	Assist. County Manager	Joey Orduna Hastings (9th & Wells, Building A)
1000 – 1050		Debrief
1100 – 1150	Lunch?	
1200 - 1300	CJAC - All Stakeholders	Wrap up – NIC Presentation (Dept.10)

C

Pretrial System Analysis for the Second Judicial District Court, Washoe County, Nevada

Technical Assistance Report

by
Barb Hankey
Don Trapp

June 9, 2015

National Institute of Corrections Technical Assistance No. RFQP0700COBO150067

Contents

Disclaimer

RE: NIC Technical Assistance No. RFQP0700COBO150067

This technical assistance activity was funded by the Community Corrections Division of the National Institute of Corrections. The Institute is a Federal agency established to provide assistance to strengthen state and local correctional agencies by creating more effective, humane, safe and just correctional services.

The resource person who provided the on-site technical assistance did so through a cooperative agreement, at the request of the Second Judicial District Court, Washoe County, Nevada, and through the coordination of the National Institute of Corrections. The direct onsite assistance and the subsequent report are intended to assist the jurisdiction in addressing issues outlined in the original request and in efforts to enhance its overall effectiveness.

The contents of this document reflect the views of Ms. Barb Hankey and Mr. Don Trapp. The content does not necessarily reflect the official views or policies of the National Institute of Corrections.

Pretrial System Analysis for the Second Judicial District Court, Washoe County, Nevada

Introduction

This report summarizes the primary findings and recommendations from a pretrial system analysis for Washoe County, Nevada. Heather Condon, Pretrial Services Program Manager acted on behalf of multiple justice system stakeholders in the county to request technical assistance in the analysis of the county's pretrial practices, with regard to its alignment with evidence based practices, and with specific regard to implementing a validated pretrial risk assessment into the decision-making process. It will also include discussions with all stakeholders so as to have clear, measurable, and attainable objectives, such as:

- The type of risk assessment or related criteria to be utilized
- How the risk information will be incorporated into the release decision process
- How will this impact the pretrial services program
- How will this impact the jail population, and related case processing issues

Method

Barb Hankey, Community Corrections manager for Oakland County, Michigan, and Don Trapp, Pretrial Supervision Program Manager for Multnomah County, Oregon provided the technical assistance to Washoe County (See Appendix A for Bios). Jail data, applicable statues, policies and procedures, related documents and background information were reviewed prior to the on-site visit. The site visit was conducted on May 12 – 14, 2015, during which time meetings with the major stakeholders were held including: Chief Justice of Nevada Supreme Court, County Managers, Washoe County Sheriff's staff, District Attorney's staff, District and Municipal Court Judges, and Public Defenders. In addition, the jail facility was toured with specific attention to the booking and pretrial processes, and defendant's first court appearances were observed (see Appendix B for agenda).

Findings and Recommendations

The findings and recommendations are organized into three groups: an overview of the current system including administrative practices, infrastructure, challenges and opportunities; jail population and process analysis; and specific recommendations regarding pretrial practices and next steps. References are appended to the report, some of which will be referred to in the body of the report; and others that may serve as a resource. Other documents may be cited within the text of the report. The source of information for the recommendations are the federal and state constitutional, statutory, and case law, national pretrial standards from the American Bar Association (ABA) and National Association of Pretrial Services Agencies (NAPSA), and recent empirical research from the social sciences/criminal justice field.

Washoe County Overview

Washoe County, at over 422,000, is the second most populous county in Nevada. Over the past 10 years, the county has experienced a 24% increase in population. In the 10-year period from 1999 to 2008, the county experienced a 25% increase in crime. During that time, the 1265-bed jail was frequently at or over capacity. The past 3 years have seen a downward trend in reported crime, a consistent annual number of bookings into custody, and an average daily population in the jail that is 85% of capacity. Washoe County has operated a pretrial services program since 1989, and in the past 10 years has developed other programs to function as alternatives to incarceration. In addition, Washoe County is served by a Criminal Justice Coordinating Committee and operates several specialty courts that focus on the specific criminogenic risk factors within the defendant population. There is evidence to suggest that the system is operating at the high-end of optimal functioning at this time. This means that incremental changes in crime, bookings, or lengths of stay in custody could cause an imbalance in the system.

However, that balance does not exist around the state, particularly in Clark County, where the 3800-bed facility (recently increased from 2800 due to overcrowding) is often over-capacity. Neither is this balance without its more pressing challenges, such as managing mentally-ill defendants in a specially designated pod at the jail, where mental assessments—or reassessments can take weeks; or defendants held without charge for 72-hours, only to be detained an additional 72 hours or longer. Despite the efforts to address the jail population by Washoe County officials, the management and case processing of pretrial defendants remains an important issue—locally and state-wide.

Recently, the Nevada Legislature, with strong backing from the Chief Justice of the Nevada Supreme Court, is taking up a measure to address this issue. Senate Bill 454 would require the use of a uniform pretrial risk assessment where a court conducts a pretrial risk assessment of a defendant. The measure would require the courts to use this assessment in court proceedings. This is part of an effort by the Supreme Court to examine sentencing practices, including the risk assessments used by the Division of Parole and Probation. This legislation would provide an important tool to ensure that every defendant is objectively evaluated as to their pretrial risk when issues of bail are considered. Further, that the conditions of release would be the least restrictive to manage or mitigate the specific pretrial risk of each defendant. The risk-informed process would prioritize public safety and equity in access and treatment.

If this legislation is passed, the state would have to identify or develop a risk assessment instrument that is standardized and validated for Nevada. This process would require at least 12 months to identify a risk assessment, develop research protocol, collect and analyze data, and develop scoring levels and associated release decision matrix. Washoe County, with its fully functioning pretrial program and coordination among criminal justice partners, is in a position to lead this effort and serve as a model for the state.

Administrative Practices

Criminal Justice Advisory Committee

Washoe County has maintained a Criminal Justice Advisory Committee (CJAC) for over twenty years. The committee meets regularly reviews an impressive range of system data reports. While originally convened to coordinate processes and activities across the county criminal justice system, in recent years its charter has narrowed with a goal "to effectively and efficiently

manage the jail population." These coordinating committees can be very effective in aligning system practices to achieve harm reduction and maximize available resources. They function most effectively when agency heads are engaged in policy teams to examine current practice with regard to their actual impact and the supporting empirical evidence.

Diversion/Specialty Courts

Washoe County operates a wide range of specialty or diversion courts, which are focused on specific risk areas. These programs include: Family Drug Court, DUII Court, Re-entry Court, Drug Court, Misdemeanor Court, Veterans Court and Mental Health Court. The Court provides successful defendants a number of considerations from dismissal of charges to reduced incarceration and a reduction in the level of conviction. No data on the number of participants in each program or outcome data was available.

Specialty courts can facilitate the entry of defendants into appropriate "tracks" or programs, which can greatly impact case processing in a system. The Court's consideration of sentencing alternatives, e.g. dismissal, can provide the initial motivation to engage defendants into these programs. However, sentencing alternatives must be viewed with respect to their viability. Specifically to diversion or specialty courts, are these programs successful in real crime reduction. Despite the variance in the structure and function of programs both within and across jurisdictions, there are principles of effective intervention to which successful programs adhere. These are the principles of risk, need, and responsivity:

- Risk: Programs assess potential candidates as to their level of risk and appropriateness for the program. The program should focus on high and medium risk defendants. Lower risk defendants, if included, should be managed separately and differently based on their level of risk.
- Need: Program curriculum and administration should focus on the assessed criminogenic needs of the defendants. Prescriptive programs that do not focus on these needs or have variance for levels of risk are not effective interventions.
- Responsivity: The delivery of treatment service must be cognitive-behaviorally based, taking into consideration the special needs and differences within the subject population including: gender, ethnicity, and motivation. Reliance on drug/alcohol education and 12-step models are contraindicated.

Finally, outcome data should be collected and analyzed to assess the performance of these programs, both in regard to general effectiveness, and a review of who (and why) some subjects are not successful.

Pretrial Services

Washoe County maintains a fully functioning and high performing pretrial services program providing assessment, release recommendations, and pretrial supervision, in addition to a number of ancillary services including the completion of an affidavit of indigency. The 15-staff program manages an average daily caseload of over 1000 defendants, and completes over 500 pretrial assessments per month. Pretrial supervision manages over 8000 defendant check-ins per month, approximately 8 per defendant per month. Pretrial Services maintains a station in the jail's open booking area, and has a presence in the arraignment/bond hearings. Outcome data for the past 6 months indicate a commendable 79% successful closure rate, which includes: 8.26% FTA rate, 9.46% Revocation rate, and a 2.8% Re-arrest rate.

However, the commendable performance of the Pretrial Services Program must be viewed with respect to the fact that less than 30% of pretrial defendants are assessed. Of the 70% who are not assessed, 45% are released pretrial. The performance of those defendants on pretrial release is not known. Further, Pretrial Services is currently utilizing a subjectively weighted scale of pretrial release criteria (outlined in statute) and not a validated risk assessment in conducting pretrial reviews. The courts have established eligibility criteria for pretrial release, effectively limiting the number of defendants eligible for pretrial screening. Thus, the 30% of defendants eligible for screening, of which 69% are released, represent the system's tolerance for risk. It must be noted again that 45% of the defendants not screened by Pretrial Services are released pending trial. This raises the question of by what criteria do these defendant gain release and how do they perform with regard to re-arrest or failure to appear.

The use of a validated risk assessment, as supported by the Chief Justice and recommended in legislation under consideration, would provide the means to make valid distinctions between high and low risk defendants across the range of defendants and charges. A validated assessment would provide the court with objective, risk-informed release recommendations, including conditions or levels of supervision that are the most targeted, yet least restrictive, to manage the defendant's risk if released. There was general consensus among the stakeholders that more complete information is provided at the defendant's initial appearance. A discussion of standards for pretrial services programs follows. A risk- informed process would not only be more valid, but more efficient in terms of having a pretrial assessment at the earliest court appearance.

Expanding the pretrial process to include a full assessment and release recommendation on a larger percentage of defendants would be more than in incremental increase in workload. The expansion of services would have to be part of a deliberate effort to ensure that all pretrial releases were the result of careful assessment and the full range of release options were available. While there are some efficiencies to be gained through examining the structure of pretrial supervision, this could not be done without further investment into Pretrial Services.

Jail Analysis

Washoe County operates a 1351-bed jail facility, 1265 functional capacity, which receives an average of 20,822 bookings annually. The jail utilizes an open booking model, that includes stations for pretrial and medical. While beyond the scope of this assessment, the jail's operations appeared quite efficient, professional and orderly. The jail analysis presented her is a cursory review allowing for the identification of major trends and characteristics. The jail's population is a barometer for general system practices, including charging, booking, detention/release, and sentencing. Jail data were provided by the Washoe County Sheriff's Office, with addition information available through minutes of the CJAC meetings.

In terms of utilization, the jail's 1265 functional capacity and 20, 822 average annual bookings could be effectively managed within an average length of stay (LOS) not exceeding 22.17 days. According to data reported to CJAC, the March 2015 average LOS was 14.02. At that rate, the Washoe County Jail is utilizing 65% of the maximum available jail bed days. This is consistent with an average daily population (1077 over the past three years) that is 85% of rated capacity. Optimum capacity is generally considered to be between 90 – 95% depending on

facility size and number of bookings. Optimum capacity provides that the facility can effectively administer a classification system to ensure the safety and security for all inmates and staff. At 90%, or 1139 beds, maximum utilization for Washoe County would occur when the average LOS equaled 19.95. The current level of utilization is sustainable and can withstand modest increases or variance in either the number of bookings or the average length of stay.

Data were provided on all releases from the Washoe County Jail by type covering the period 6/1/14 to 5/31/15. A review of these data allowed for the estimate of the pretrial release rate, and the dynamics of the inmate population. A total of 20773 inmates were included in the data (99.76% of the annual average bookings). Inmates that were transferred to other facilities or jurisdictions, excluding prison transfers, comprised a relatively low 6.36% (1322 inmates). These were excluded from estimates of release and detention rates, as they are generally outside the normal process. This resulted in a subtotal of 19451 inmates.

The analysis indicated that 54% of pretrial defendants are released pending disposition of their cases (average. Recognizance release is exercised in 56% of the cases, and bond is used in 44% of these cases. While the average lengths of stay vary by type, the range is not large and follows predictable trends. For example, defendants sentenced to prison would be expected to remain in custody the longest (96.75 days), where defendants released on their own recognizance would be expected to have the shortest stay (1.4 days). Inmates release to prison can be considered a proxy measure of the highest risk defendants. The data indicate this is a relatively low percentage (5.4%). The vast majority of sentenced defendants (69.8%) were released time served, and their average length of stay was relatively short (23.39 days). This could relate to the practice of defendants being released after pleading, but prior to sentencing.

Release and Detention Practices, 2014 - 2015 (data from Washoe County Sheriff's Office)

TYPE OF RELEASE	NUMBER	PERCENT	Avg. Length of Stay
	Total Inmates = 19451		
Pretrial	10506	54%	10.58 Days
Court Services OR	2701	13.88%	1.4 Days
Judge OR	3188	16.3%	19.77 Days
Bail/Bond	4616	23.73%	5.45 Days
Sentenced	6197	31.85%	21.9 Days
Time Served	4328	22.25%	23.39 Days
Prison	1050	5.39%	96.75 Days
Dismissed	564	2.89%	23.76 Days
Time Pay (fines)	518	2.66%	6.51 Days
Judge Release	1348	6.93%	14.27 Days
Total	**19451**	**93.74%**	**13.64 Days**

Mentally Ill Defendants:

Washoe County, like many jurisdictions around the country is struggling to manage the population of mentally ill persons who become involved in the criminal justice system. There is a lack of community-based resources and there is only one residential program for persons committed by the court. That facility is not secure and not staffed or equipped to handle residents who may be in crisis or are acting out. In those situations, police are called to respond and extract the resident from the facility. These are high risk situations for both the police and the resident.

In terms of case processing, there is also a considerable wait time to be evaluated for competency by a state-certified examiner. At the time of this report, there were 18 defendants waiting for an evaluation. In response, the Washoe County Jail has allocated a pod for use as a Mental Health Unit. At the time of this report there were 51 inmates in that unit. In addition, the Nevada Legislature is considering a bill, SB 10, which would allow for jail-based mental health treatment. The source of sustained funding for that treatment remains unclear.

Despite the laudable goal of providing a safe, custodial setting and jail-based mental health treatment, efforts should be focused on developing community-based resources that effectively divert mentally ill persons from the criminal justice system. The current model imposes physical and legal barriers for persons with mental illness to return to the community. Moreover, it does not lessen the need for a range of community-based treatment and related services. It is this lack of community-based resources that makes the current model necessary.

The treatment of criminally-involved, mentally-ill persons lies along the continuums of both the criminal justice and mental health treatment systems. A collaborative effort that effectively triages subjects for appropriate placement in services based on their risk and needs will yield the most positive, long term benefits. Efforts to develop resources for community based treatment, with coordinated case management from both systems, and facilitated access are recommended. Additionally, the development of a crisis triage center, where persons experiencing acute symptoms or acting out can go for stabilization, instead of jail, is strongly recommended. This will improve the safety of subjects, staff, and law enforcement.

Recommendations

The following recommendations are presented to provide a framework from which the stakeholders in Washoe County can work in order to address issues surrounding pretrial services and case processing. Included in the recommendations are sources of contact for further information on each subject.

As with any agency, Washoe County faces challenges and opportunities within their criminal justice system. These challenges and opportunities are identified below as they set the context for the recommendations which follow. The following themes will be referenced repeatedly; collaboration, information sharing, data driven decision making and outcome focused measures. These are structures and characteristics that will serve to strengthen the relationships between stakeholders and that will be necessary to improve and guide decision-making.

- **Coordination and collaborative decision-making:** ongoing criminal justice issues, from arrest to disposition, should be overseen by a coordinating committee. This committee should be comprised of stakeholders from across the system, Court, Sheriff, District Attorney, Public Defenders, Pretrial/Probation, and Court Administrator. The committee should be charged with overall justice system practices and policies. Accordingly, committee members should be able to make policy decisions, or otherwise represent their agency. Operational committees, working groups, special projects, etc. should all be chartered by this group. The purpose would be to ensure that all proposed policy changes are examined for their potential impact on other system partners and resources.

- **Data driven decisions:** Policy decision impacting the system should be based on available data as to their impact and efficacy. The above referenced steering committee as well as agency heads should regularly examine data related to their agency's performance and impact on the system. Data should be used to develop benchmarks from which programs and policies may be evaluated. Measurement and the means to gather, maintain, and report data should be included in all policy/program discussions.

- **Outcome Measures:** Related to data-driven decisions. The County's agencies utilize a variety of information systems to manage individual programs. However, there is a consistent lack of major outcome measures that are entered or reported. These are central to an understanding of how well a program or policy functions, and how to address performance issues. Data entry of outcomes is a necessary, but insufficient first step. Outcomes and strategies to maintain or improve them must become part of the culture of the organization---from the County Commissioners, to agency heads, to program supervisors. This culture helps to ensure that all business practices are focused on improving both service delivery and improving outcomes. This promotes effective use of resources and public accountability. The Criminal Justice Advisory Committee should work to define what these outcome measures are, how will they be measured, and by whom (see Measuring What Matters in References). These data should be developed to answer specific questions regarding program effectiveness, resource utilization, and service delivery.

1. Revise the charter of the Criminal Justice Advisory Committee.

The Criminal Justice Advisory Committee has been an important force for change and for the coordination and delivery of criminal justice services in Washoe County. It is recommended that the charter for this committee be expanded to include policy review and development across the system, requiring the presence of all agency heads. Additionally, the committee should adopt a decision making model that is firmly supported by data and informed by the research in effective interventions. Specific issues or areas, such as pretrial services, can be addressed through the formation of smaller committees. Recommendations and / or solutions are then presented to the full CJAC for passage and implementation. The documents *Guidelines for creating a Criminal Justice Coordinating Council* by Robert C. Cushman (2002) and *Keeping your Criminal Justice Coordinating Council Going Strong* by Michael R. Jones (2013) are both excellent sources of information for CJACs.

2. The CJAC should develop benchmarks, performance measures and objectives for the criminal justice system.

The CJAC should be focused on policy-level issues, which matches well with member qualifications and positions. In order for the members to effectively evaluate the impact of policy on local systems, empirical data is needed. The system needs to know "where it is" and "where it wants to go" before policy decisions are made. The use of empirical data to drive decisions helps to ensure that anecdotal and politically charged decision-making is kept to a minimum. The CJAC should craft objectives for the system which are designed to achieve required and agreed upon outcomes. These might include objectives such as maintaining the jail population at to particular target number or reducing recidivism by a certain percentage. In order to achieve these objectives the CJAC needs to establish clear, specific, and transparent baseline and performance measurements. These measures may include but certainly are not limited to:

- number of cases by case type;
- number of pending cases;
- age of pending cases;
- number of cases at different stages in the case processing continuum;
- number of cases that proceed or "fall out" by decision point;
- number and type of dispositions by case type;
- number and type of release decisions by case type;
- average sentence length;
- number of probation revocations for technical violations and for new offenses;
- number of bench warrants issued or failures to appear;
- number of continuances;
- length of time between initial appearance and disposition by case type.

For more information on setting performance measures, determining outcomes and establishing objectives see *Evidenced Based Decision Making: A Starter Kit & Measuring What Matters: Outcome and Performance Measures for the Pretrial Services Field* both published by the National Institute of Corrections.

In addition, CJAC should consider the development of a "data warehouse" for program and system measures. Questions or concerns often arise after data tracking measures or reports are developed. The data warehouse would serve as a system-wide resource to answer these questions. Issues such as minority overrepresentation, special offense categories such as domestic violence, firearms, or driving under the influence, or special indicators such as: gang affiliated, mental health issues, etc.

3. Adopt and implement a pretrial risk assessment

Knowing the risk a defendant poses to the community is essential for a judge to make a sound release / detention decision. NRS 178.4853 (1-10) lists factors that a judge must take into consideration when setting bail. However, the statute does not indicate how these factors are linked to pretrial misconduct or if one factor may be more predictive than another. While these factors must be taken into consideration that doesn't mean they are all predictive of pretrial misconduct. Risk assessment research has now identified those factors that are most associated with pretrial failure. These factors have been turned into pretrial assessment tools that determine the probability a defendant will return to court and remain arrest free during the pretrial period. These probabilities are assigned levels which assist in identifying basic risk categories of defendants:

a) Low risk defendants that can be safely released into the community pending trial without additional interventions.
b) Moderate risk defendants whose risk can be minimized through the use of appropriate release conditions, community resources, and / or supervision
c) High risk defendants for whom no condition or combination of conditions can reasonable assure the safety of the community or appearance in court, and need to be detained pending trial.

Implementing a pretrial assessment has substantial benefits for the criminal justice system. It increases the public safety by assuring that those defendants who pose a danger to the community are detained. Additionally, specialized assessments for specific risk issues, e.g., domestic violence, mental illness, etc, can be utilized to further assist in release decision-making and supervision (See an example of a domestic violence assessment in Appendix E). It can help manage the jail population by identifying defendants that do not need to be detained, thereby more effectively using scarce jail beds. It reduces disparity in bail decisions for similarly situated defendants and it helps to advance a release / detention decision that is based on risk rather than socio-economic status.

There are many pretrial assessment tools within the public domain that could be adopted for use by Washoe County (see Appendix C for example). Washoe County also has the option of contracting with a researcher to develop their own pretrial risk assessment tool. Any tool selected should be validated on the local population to ensure that the tool is predicting pretrial misconduct within probability percentages acceptable to Washoe County. A comprehensive sample of risk assessment tools may be viewed on the Pretrial Justice Institute (PJI) or the National Criminal Justice Association (NCJA)

websites at www. Pretrial.org/solutions/risk-assessment/ or www.ncjp.org/pretrial/risk-assessment-instruments-validation respectively.

4. Expand the pretrial interview to include all bail eligible defendants

Standard 3.3 (a) of the National Association of Pretrial Services Agencies (NAPSA) indicates "***In all cases in which a defendant is in custody and charged with a criminal offense***, (emphasis added) an investigation about the defendant's background and current circumstances should be conducted by the pretrial services agency or program prior to a defendant's first appearance in order to provide information relevant to decisions concerning pretrial release that will be made by the judicial officer presiding at the first appearance." The application of the NAPSA Standards, and any resulting policy recommendations must of course be consistent with applicable state statutes.

NRS 178.484 (1) indicates that "a person arrested for an offense other than murder of the first degree must be admitted to bail." Section (4) goes on to say that "a person arrested for murder of the first degree may be admitted to bail unless the proof is evident or the presumption great by any competent curt or magistrate authorized by law to do so in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense." Therefore virtually every person booked into the Washoe County jail is bail eligible and should be afforded a pretrial interview and risk assessment. The pretrial program is not currently conducting an assessment on all bail eligible defendants. Every attempt should be made to assess any defendants that are statutorily eligible for release. Providing judicial officers with information pertaining to the defendant's risk for pretrial misconduct allows for better release / detention decisions to be made. Providing this information on all defendants, at the earliest possible time, ensures that unnecessary detention (which can lead to jail crowding) is avoided.

5. Discourage the use of financial bond

NAPSA Standard 1.4 (a) indicates that "each jurisdiction should adopt procedures designed to promote the release of defendants on personal recognizance." Standard 1.4 (c) goes on to say that "Release on financial conditions should be used only when no other conditions will provide reasonable assurance that the defendant will appear for court proceedings. *Financial conditions should never be used in order to detain the defendant*" (emphasis added). Research has shown that financial bond does not affect public safety or court appearance but does have a substantial effect on jail bed use. Two-thirds of the nation's jails are filled with pretrial defendants many being detained not because they pose a threat to the community, but because they cannot afford to post even a few hundred dollars. When a defendant is unable to post a financial bond and remains in jail, the cost of their detention is the sole responsibility of the county. In addition there are other negative consequences to the use of financial bond.

The research "shows that defendants detained in jail while awaiting trial plead guilty more often, are convicted more often, are sentenced to prison more often and receive harsher prison sentences than those who are released during the pretrial period. These relationships hold true when controlling for other factors, such as current charge,

prior criminal history and community ties."[1] Further low risk defendants who are held pretrial for as little as 2-3 days are 40% more likely to commit a new crime before trial and 22% more likely to fail to appear than those held no more than 24 hours. The longer low risk defendants are held, the more intense the effect. Those held 31 days or more are 74% more likely to commit new crimes pretrial and 31% more likely to fail to appear. The negative effects of pretrial detention also carry forward to long term recidivism with those defendants being up to 51% more likely to recidivate post adjudication. By holding low risk defendants simply due to their socio-economic status the system, albeit unwittingly, is contributing to community harm.

But perhaps most importantly, the use of financial bond takes the detention / release decision away from the judge and places it with a third party. The defendant's continued detention or release is decided by someone outside of the criminal justice system. The definition of who is a "good risk" for these third parties often greatly differs from that of the criminal justice system. This discrepancy can lead to the release of dangerous criminals while those who pose minimal risk are detained. Limiting the use of financial bond and determining released based on risk, through a pretrial assessment, reclaims that judicial decision making authority.

On a final note, the Department of Justice filed a *Statement of Interest* on February 13, 2015 in the case of Varden v. City of Clanton. The Statement supports the use of fair, individualized determinations for release based on risk of dangerousness and flight and calls the constitutionality of fixed bail schemes that rely solely of the defendant's ability to pay into question.

6. Develop supervision strategies based on risk

The pretrial assessment tool will identify defendants who fall into the probability of low, moderate and high risk. In keeping with the "risk principle" of evidenced based practices supervision strategies should match the level of risk posed by the defendant. This means prioritizing supervision and treatment services for the higher risk defendants. This would include the frequency with which defendants are required to check-in. Not all risk levels require the same amount of supervision, and in fact research shows that over-supervision of low risk defendants can increase recidivism. Washoe County should consider differential levels of supervision where the frequency of contact is driven by the level of risk.(See Appendix D for an example of a pretrial case management matrix)

Conditions of bond should also be the *least restrictive* while achieving the pretrial goals of court appearance and remaining arrest free during the pretrial period. Managing risk is not about the number of conditions imposed, but rather the appropriateness and efficacy of those conditions. Moderate to high risk defendants are appropriate for supervision if the risks they pose can be mitigated through appropriate interventions. A discussion of pretrial conditions and their efficacy can be found in the document *State of the Science of Pretrial Release Recommendations and Supervision* (VanNostrand, Rose,

[1] *Rational and Transparent Bail Decision Making: Moving From a Cash-Based to a Risk-Based Process*, (PJI / MacArthur Foundaiton.2012).

Weibrecht, 2011). While more research needs to be done regarding conditions of release, the research does show that the one of best way to increase court appearance is through court reminder notifications. Pretrial should incorporate court reminder notices / calls for all defendants on supervision as a way to combat fail to appear. Expanding the use of electronic monitoring, especially for high risk defendants who might not otherwise gain release, should also be explored.

The implementation of the risk tool may result in an increased number of defendants being placed on supervision. Incorporating differentials levels of supervision may assist in managing caseloads but pretrial supervision may require more staff as demand for their services increases.

7. **Develop and communicate the process for handling violations of pretrial supervision.**

Policies and procedures governing pretrial supervision practices should be developed and communicated across the stakeholders. This should include the release recommendation guidelines (or matrix) based on risk, special considerations for specific risk issues, e.g., domestic violence, mental illness, etc., contact standards and expectations, and response to violations. Clarity in these practices will improve the consistency in their application and increase confidence in their administration.

In addition, as the rate of pretrial revocations exceeded the FTA rate, this practice warrants further examination as well. Pretrial misconduct is generally comprised of two categories; failing to appear and being arrested or alleged to have committed new criminal behavior while on release. Most agencies have policies dictating how defendants with these types of misconduct are to be handled. However, supervision agencies must also deal with a third type of behavior; technical violations. A technical violation occurs when the defendant fails to comply with a condition of release such as failing to check-in as directed, or having a positive drug test. Many agencies struggle with how to handle technical violations. The reasoning behind this struggle is often posed through a question; if a defendant is appearing in court as directed and has not engaged in new criminal behavior (the two stated purposes of bond) should a technical violation matter?

Of course each jurisdiction must answer this question for themselves. Standard 4.3 (a) of the NAPSA indicates that, "The selection of an appropriate sanction for violation of conditions should take account of the seriousness of the violation, whether it was "willful", and whether what the defendant did (or failed to do) actually impaired the administration of the court or heightened a risk to public safety". In reply to this standard many jurisdictions have begun to develop violation response guides. These guides list the types of violations and the possible sanctions that could be imposed for the differing violations. The key to making these response guides work, is the policy that is developed in conjunction with the guide. The policy addresses details such as who may give the sanction, under what circumstances sanctions are given, who receives notification of sanctions and when revocation or warrant is appropriate. Some jurisdictions give pretrial services limited authority in determining sanctions for low level

violations. Often referred to as an "administrative sanctions", this method allows for a swift response to a violation without the use of expensive resources like jail and court time. Jurisdictions need to be thoughtful about policy that requires the incarceration of defendants solely for technical violations. This practice can lead to unnecessary detention of defendants and jail crowding.

8. **Define and develop the coordination of pretrial supervision between Pretrial Services and the Department of Alternative Sentencing.**

Pretrial supervision in Washoe County is currently conducted by two agencies. Consistent with the recommendations above, guidelines for supervision by risk level should be developed to include the coordination between the Pretrial Services Program and the department of Alternative Sentencing. There is an opportunity to utilize the strengths of each program to provide a full continuum of risk-based supervision that will minimize duplication of efforts and maximize available resources while ensuring positive outcomes.

9. **Administrative Practices with regard to Pretrial Services**

Administrative practices can in some cases, albeit unintentionally, contribute to jail crowding, delays in case processing or inefficiencies / inequities within the system. The following administrative practices are brought to your attention as they may warrant consideration in the future.

- Currently defendants are ordered to pretrial supervision via a court order. However many conditions of release are subsequently determined by Pretrial Services. Absent specific statutory authority, this practice is vulnerable to challenge. In the case *People v. Rickman*, 178 P.3d 1202 (Co.2008) the court found that the setting of bail conditions is part of the court's judicial function and as such may not be delegated to another party even with their consent. NRS 178.484 (11) indicates that the "court" may impose reasonable conditions on a defendant prior to their release as deemed necessary. No statutory authority for Pretrial Services performing the function could be found.

- There is an order from the Reno Municipal Court dated January 22, 2015 indicating that Washoe County Pretrial Services may not release defendants who are charged with certain offenses on their own recognizance. While current charge has been shown to be predictive of pretrial misconduct in several risk assessments, it is not the only factor. As Washoe County moves to implement a pretrial risk assessment tool, this order may warrant reexamination. Moving the emphasis from charge, to level of risk, will as the order indicates "...adequately protect the health, safety and welfare of the community and/ or the nature and seriousness of the danger to alleged victim(s) of crime and good cause appearing."

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Appendix A

Bio for Don Trapp

Don Trapp is the manager for the Pretrial Supervision Program in Multnomah County, Oregon. He has worked in community correction in Oregon since 1988, and is an Associate Faculty of Criminal Justice at Portland State University. He has served as the Project Manager for the Department of Community Justice's evidence-based practices initiative, and continues to provide training to staff in Multnomah and other Oregon counties on evidence-based case management practices. Don has served as a consultant with the Crime and Justice Institute and has provided technical assistance to local jurisdictions through the National Institute of Corrections. Don has a Master's Degree in Psychology from Portland State University, has conducted workshops and provided trainings for corrections agencies on implementing evidence-based practices, managing offender risk, and organizational change and development, and is the author of several papers in these subjects.

Bio for Barb Hankey

Ms. Hankey started her career in criminal justice in 1988 with Oakland County Pretrial Services. While there she worked as a line staff investigator interviewing felony and misdemeanor defendants within various secure settings. In January 1993 she took the position of Chief Probation Officer for the Troy District Court. She rejoined Pretrial Services in 1995 as the Supervisor; she was promoted to Chief of Field Operations for Community Corrections and currently holds the position of Manager for Community Corrections.
Ms. Hankey's experience includes the development, design, and implementation of programs which act as alternatives to incarceration. She also has expertise in the area of pretrial services, and has spoken on these topics at many state, local, and national conferences. Ms. Hankey has been an instructor with the American Jail Association (AJA), the National Institute of Corrections (NIC), and has acted as a consultant for the Pretrial Justice Institute. Ms. Hankey is a member of the National Association of Pretrial Service Agencies, Americvan Probation and Parole Association, and the NIC Network for Pretrial Executives.

Ms. Hankey earned both her Bachelor of Arts Degree and her Master's in Administration from Central Michigan University.

Appendix B

Agenda for Washoe County Site Visit
May 12-14, 2015

05/12/15 (T)	Department	Representative Name(s)
0800 - 0845	District Court (DC)	Pretrial Tour (Courts) / Meet & Greet
0900 – 0950	Pretrial (Jail) – (PRT)	Tour – Jail, Booking, PRT (@ WCSO)
1000 – 1050	Reno Justice Court (RJC) ARR	RJC - Video Arraignments (@ WCSO)
1100 – 1150	Washoe County Sheriff's Office (WCSO) / Research & Develop. (R&D)	WCSO Rep., Shannon Hardy, Karen Burch (@ WCSO)
1300 – 1350	DC	Judge Sattler, Judge Stiglich, Jackie Bryant
1400 – 1450	Alternate Public Defender's Office (APD)	Jennifer Lunt
1500 – 1550	Public Defender's Office (PD)	Jeremy Bosler, Ryan Sullivan
1600 - 1650	RJC	Judge Pearson, Steve Tuttle, Tami Neville

05/13/15 (W)	Department	Representative Name(s)
0800 - 0830	DC – Court Tech	Craig Franden
0830 – 0950	DC ARR	Dept. 8 – Court docket (Judge Stiglich)
1300 – 1350	Reno Municipal Court	Judge Howard, Cassandra Jackson (@ RMC)
1400 – 1450	Sparks Municipal Court	Judge Barbara McCarthy (telephone conference)
1500 – 1550	Sparks Justice Court	Judge Wilson, Anita Whitehead
1600 - 1650	District Attorney's Office	Bruce Hahn

05/14/15 (TH)	Department	Representative Name(s)
0900 – 0950	Assist. County Manager	Joey Orduna Hastings (9th & Wells, Building A)
1000 – 1050		Debrief
1200 - 1300	CJAC - All Stakeholders	Wrap up – NIC Presentation (Dept.10)

Appendix C

REVISED VIRGINIA PRETRIAL RISK ASSESSMENT TOOL

Risk Factor	Criteria	Assigned Points	Score
1. Charge Type	If the current offense is a drug offense (MCS, DCS, PCS, including attempts) or is an offense charged under ORS Chapter 166 or 181.	1 Point	
2. Pending Charges	If the defendant had one or more charge(s) pending in court at the time of arrest.	1 Point	
3. Outstanding Warrant(s)	If the defendant had one or more warrant(s) outstanding in another locality for charges unrelated to the current arrest.	1 Point	
4. Criminal History	If the defendant had one or more misdemeanor or felony convictions.	1 Point	
5. Two or more Failure to Appear Events	If the defendant had two or more failure to appear events.	2 Points	
6. Current Residence	If the defendant has had three or more address changes in the past 12 months.	1 Point	
7. Employment	If the defendant is employed, in school, or otherwise engaged as a primary caregiver for a child for less than 20 hours per week.	1 Point	
8. History of Drug Abuse	If the defendant has a history of drug abuse.	1 Point	
SCORE			

Risk Score	0 – 2	3 – 4	5 - 6	7 - 9
Appearance Rate	92%	87%	75%	48%
Safety Rate	100%	93%	93%	89%
Success Rate	82%	70%	59%	26%

Presumptive Release Decision	Release on Recognizance	Release to PRS	Refer to PRS	Detain
Risk Level	Low	Medium	High	
Supervision	None	Basic Monitoring	Pretrial Supervision	
		-Phone Reporting -Check-in physically after court appearances -LEDS Monitoring -Case management meetings as needed	Phone Reporting weekly -Check-in physically after court appearances -LEDS Monitoring -Case management meetings as needed -Substance testing if ordered -Electronic monitoring -Home/field visits	

ASSESSMENT:
The defendant's risk score of ___ is consistent with defendants with a success rate of _____ and safety rate of ____. The defendant's criminal history includes ___ (similar, varied, unrelated) offenses in the past 3 years and ____ lifetime. The defendant has ___ prior FTA's in the past 3 years, and ____ lifetime.

Factors to consider indicating the possibility of violations if released:

RECOMMENDATION:

☐ Defendant be released on their own Recognizance

☐ Defendant be released to Pretrial Release Services, with the following special conditions:

- o _____
- o _____
- o _____

☐ Defendant be referred to PRS for further investigation, e.g., establish victim safety plan, verify alternate housing and/or treatment resources,

☐ Release be denied. It does not appear any conditions of supervision would be adequate to assure that the defendant would comply with the terms of pretrial release.

_____ _____

Pretrial Case Manager **Date**

Appendix D

Pretrial Services Program
RISK/NEEDS CASE MANAGEMENT MATRIX

RISK LEVEL	DEFENDANT ABILITY TO MANAGE BEHAVIOR	RECOMMENDED SUPERVISION STRATEGY
HIGH Scores 8 – 9 on Revised VPRA	LOW Recommend Detained in Custody	RISK CONTROL: Monitoring of required activities to mitigate risk, including: Electronic Monitoring, MH medication, Treatment, case managed housing, victim contact. (home/community/office) weekly Face to face contacts
MEDIUM Scores 5 – 7 on Revised VPRA	MODERATE Conditionally Release	SUPERVISION: Reporting via phone (weekly), collateral contacts Monitoring of A & D use, or other prohibited activities
LOW Scores 0 – 4 on Revised VPRA	HIGH Presumptively Release	MONITORING: Reporting via phone (bi-weekly) Report in person after court

PSP
RISK/NEEDS CASE MANAGEMENT MATRIX

The PSP Case Management matrix is intended as a guide to developing and administering supervision to pretrial defendants. The following will provide operational definitions for the matrix as well as conditions under which the case manager should modify the supervision strategy.

Definitions:

Risk Level: The assessed risk of pretrial misconduct based on the results of the revised-VPRA.

Defendant Ability to Manage Behavior: Assessment of factors indicating the defendant's ability to manage his/her own behavior in the community, including the extent of supervision and or support. These factors may provide the basis to over-ride the risk tool. These factors may change during the course of pretrial supervision, which may require modifications to the supervision plan. These factors may be pro-social or pro-criminal, and include:

- Current/Chronic alcohol/drug issues
- Mental Health Issues (and extent to which they are currently being treated)
- Family/Social support
- Score on the ODARA (for DV Cases)
- Demonstrated propensity for violence
- Proximity/access and relationship to victim
- Issues regarding housing that significantly impact (positively or negatively) the defendant's ability to abide by release conditions
- Personality issues, Physical/medical issues, degree of impulsivity, maturity, etc., that may impact ability/willingness of defendant to comply with release conditions

Recommended Supervision Strategy: These are strategies that should be considered given the level of risk and the ability of the defendant to manage their own behavior in the community. It is not an exhaustive list; nor is it a required list of conditions.

- **Reporting Requirements:**
  - The purpose of reporting generally is to
    - Verify that the defendant is physically within the jurisdiction, and thus able to comply with the conditions of release
    - Verify that the defendant resides where he/she reported they would, that the residence is appropriate, and that the defendant is able to comply with all release conditions while residing there
    - Facilitate the monitoring of other conditions such as, taking prescribed MH medication, abstaining from alcohol and/or drugs, curfew, or Treatment attendance
  - The mode of reporting, phone, office, home, etc., should be commensurate with the defendant's level of risk and be the most appropriate to accomplish the above purpose(s).
  - Contact standards for pretrial defendants are one (1) contact per week, generally by phone. Exceptions may be made for higher risk or special cases.

Appendix E

ONTARIO DOMESIC ASSAULT RISK ASSESSMENT – FORM

3/2007

Score 1 if 'yes' Score 0 if 'no' Score 'MI' if missing item

__ __ 1. Before this time, have police ever come because he was assaulting the victim (or threatening with a weapon) victim's children, his children, or his former partner?

____ 2. Before this time, have police ever come to deal with him for any other kind of violence?

____ 3. Before this, has he ever been sentenced to prison or jail for at least 30 days, even if he didn't serve the whole time?

____ 4 Has he ever had bail, probation, parole, or a no-contact, AND disobeyed the conditions?
(PROMPT: fail to turn up, breach probation, break the law again, violate the "no-contact" order)

____ 5 This time, did he threaten to harm or kill the victim or anyone else?

____ 6. This time, did he do anything to prevent the victim from leaving the location?
(PROMPT: lock the doors, take her car keys, hold onto her)

____ 7 Is victim concerned that he will assault her or the children in the future?

____ 8. How many children does the victim have? How many does he have?
(include minor or adult children: biological, step or adopted; living anywhere)
score 1 if there are at least 2 children together

____ 9 Does the victim have any children from relationships before this partner?

____ 10. Is he violent to people other than the victim and the children?
(PROMPT: fights with, hits, even if no police come)

____ 11. SUBSTANCE ABUSE: ask these questions until the second 2nd 'yes response then score 1 for this item
a. Did he consume alcohol immediately before or during the index incident?
b Did he use drugs immediately before or during the index incident?
c. Did he abuse drugs and/or alcohol in the days or weeks, prior to index incident?
d Did he noticeably increase his abuse of drugs and/or alcohol in the days or weeks, prior to index incident?
e Has he been more angry or violent when using drugs and/or alcohol prior to the index incident?
f. Has he consumed alcohol before or during a criminal offence prior to the index incident?
g. Has his alcohol use prior to the index but since age 18 resulted in some problems or interference in his life?
h Has his drug use prior to the index but since age 18 resulted in some problems or interference in his life?
(PROMPT: for "problems" *THAT HAPPEN AS A RESULT OF SUBSTANCE ABUSE:* financial problems, job loss or job problems, loss of relationships or relationship problems, trouble with the law, health problems, withdrawal symptoms, or inability to stop or decrease use)

____ 12. Has he ever assaulted the victim when she was pregnant?

____ 13 VICTIM BARRIERS TO SUPPORT: ask these questions until the first "yes" response then score 1 for this item
a. Does the victim have children at home aged 18 or under?
b Does the victim live in a home with *no* phone?
c. Does the victim live where there is *no* access to transportation? (PROMPT: no bus, no money for taxi, partner takes car; if victim has no access score as "yes")
d Does the victim live in a home with *no* people living close by? (If victim feels geographically isolated score as "yes")
e. Did the victim consume alcohol or drugs just before or during the index incident, or does she have a history of alcohol or drug abuse? *If present, score 1 for this item*

____ = RAW SCORE
____ = ADJUSTED SCORE

ODARA - C © MHCP Research Dept 2005
Use Only With Scoring Instructions

Accused: _____ _____ _____ Incident # _____
LAST NAME First name Middle name(s)

Victim: _____ _____
LAST NAME First name

Offence date: ___/___/20___
dd mm yy

The *Ontario Domestic Assault Risk Assessment* (ODARA) is an actuarial risk assessment tool that ranks men with respect to risk for domestic violence recidivism. The higher the ODARA score, the more likely the man is to assault a female cohabiting partner again, the more frequent and severe future assaults will be, and the sooner he will reassault. The ODARA was developed on a study of 589 men known to police in Ontario for physically assaulting their female partners. In an average follow up of approximately five years after an index incident of domestic violence, 30% of men recidivated; recidivism occurred an average of 15 months after the index incident. The ODARA consists of 13 unique predictors of domestic violence recidivism, including domestic and non-domestic criminal history, threat and confinement during the most recent incident, children in the relationship, substance abuse, and barriers to victim support.

In the study, only acts of physical violence (including, but not limited to, actual or attempted use of a weapon) met the definition of domestic violence recidivism. Of the men who recidivated, most assaulted the same partner as before.

Adjusted Scores for Missing Items *(circle score used)*

Raw Score					
0	0	0	0	0	0
1	1	1	1	1	2
2	2	2	3	3	3
3	3	4	4	4	5
4	4	5	5	6	7+
5	5	6	7+	7+	7+
6+	7+	7+	7+	7+	7+

ODARA Raw Score for the Accused: ☐

ODARA Adjusted Score for the Accused: ☐

Check	ODARA score	Percent Recidivism*	Percent in this range of scores	Percent scoring lower	Percent scoring higher	Remarks
	0	5	11	0	89	Men with this score have a 5% likelihood of recidivism.* Approximately 90% of wife assaulters score higher on the ODARA.
	1	10	16	11	73	Men with this score have a 10% likelihood of recidivism.* Approximately 70% of wife assaulters score higher on the ODARA.
	2	20	21	27	52	Men with this score have a 20% likelihood of recidivism.* Approximately 50% of wife assaulters score higher on the ODARA.
	3	27	19	48	33	Men with this score have approximately a 30% likelihood of recidivism.* Approximately 30% of wife assaulters score higher on the ODARA.
	4	41	13	67	20	Men with this score have approximately a 40% likelihood of recidivism.* Approximately 20% of wife assaulters score higher on the ODARA.
	5-6	59	13	80	7	Men in this range of scores have approximately a 60% likelihood of recidivism.* Fewer than 10% of wife assaulters score higher on the ODARA.
	7-13	70	7	93	0	Men in this range of scores have a 70% likelihood of recidivism.* No wife assaulters score higher on the ODARA.

* Recidivism: a new assault against a female domestic partner, identified in police records.

Note: The higher the ODARA score, the sooner, more frequent, and more serious the recidivism.

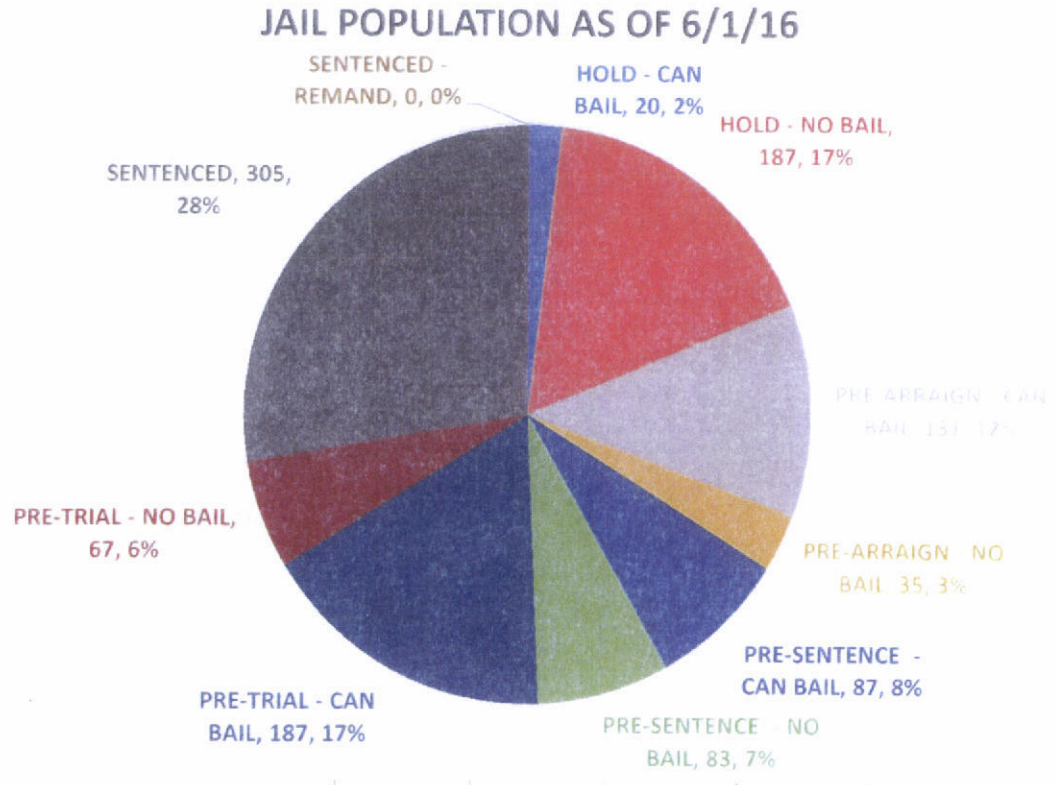
Completed by: _____ Date: ___/___/20___ ___:___

Reviewed by: _____ Date: ___/___/20___ ___:___
dd mm yy hr min

NOTE: Use only with full scoring criteria. Based on ODARA-LE used by police in Ontario Pilot Project, modified by MHCP.

D

	A	B
1	Daily In Custody Snapshot Totals	
2	HOLD - CAN BAIL	20
3	HOLD - NO BAIL	187
4	PRE-ARRAIGN - CAN BAIL	131
5	PRE-ARRAIGN - NO BAIL	35
6	PRE-SENTENCE - CAN BAIL	87
7	PRE-SENTENCE - NO BAIL	83
8	PRE-TRIAL - CAN BAIL	187
9	PRE-TRIAL - NO BAIL	67
10	SENTENCED	305
11	SENTENCED - REMAND	0
12	TOTAL IN CUSTODY	1102
13	TOTAL BAILABLE	425
14		
15	* MISC TOTAL 4	
16	(3 N/A, 1 PRE-ARR PEND RLS)	



WASHOE COUNTY
SHERIFF
Commitment to Community

Chuck Allen
Sheriff

To: Heather Condon

Date: February 11. 2016

Subject: In Custody Inmate Status Report

Research and Development received a request from the Washoe County Pretrial Services for statistical reports based on the Washoe County Detention inmate database. The goal of the reports was to categorize bookings based on a top charge hierarchy each day in order to analyze averages and trends related to the inmate population.

Two reports were identified for development:

1. A daily snap of the physical in custody inmate population (DailyInCustodySnap)
    a. Report filters were applied to exclude inmates that are currently housed off site. such as Lakes Crossing. Nevada State Prison (boot camp or safekeeping) and House Arrest. Inmates temporarily moved to the hospital are included.
    b. To include categorization by top charge based on applied hierarchy of the individual charge status in the following order
        i. HOLD
        ii. PA – Pending Arraignment
        iii. PH – Pending Preliminary Hearing
        iv. PS – Pending formal Sentencing
        v. PT – Pending Trial
        vi. SJ – Sentenced to jail time
        vii. SN – Sentenced to prison
        viii. SE – Sentenced (typically already time served)
        ix. BO – Bailed Out
        x. CL – Closed
        xi. RH – Pending Revocation Hearing
        xii. NA – Not Applicable (typically applied to juvenile matters. In Transit bookings. etc.
    c. Secondary category determines eligibility to bail
        i. If a charge is active and has been flagged as Not Allowed to Bail. then they are categorized as NO BAIL
    d. Report output includes the custom categories. along with a full list of all charges and status codes

e. A third report that only contains the custom categories was also developed for excel in order to create graphs and charts. This eliminates the issue with Crystal trying to summarize by charge rather than overall category.

2. A daily report that summarizes the current status of inmates that were booked four days prior (Daily Booking Status Report)
    a. Categorizes inmates as follows:
        i. In Custody
        ii. In Custody – CTSVS
            1. Ex. Bail reduced and must report to court services on release
        iii. In Custody – IAP
            1. Ex. Release on own recognizance when IAP (Inmate Assistance Program) can transport to program
        iv. Relsd /
            1. Bail or Bond
            2. CSOR-CTVS
                a. Court services O/R or supervision
            3. JOR
                a. Judge O/R
            4. JRL
                a. Judge release – typically mandated sentences by specialty courts
            5. Other release reasons can include
                a. TS – Time Served
                b. DISM – Dismissed
                c. SUSP – Suspended Sentence
                d. NF – Not Filed
                e. DROP- Dropped
                f. TRAN – Transferred
    b. A second summary categorizes inmates with the additional information of judicial status and bail eligibility
        i. Judicial Status is based on the top charge based on applied hierarchy
            1. HOLD – inmate has an active hold
            2. PRE-ARRAIGN – waiting for arraignment
            3. PRE-SENTENCE – pending formal sentencing
            4. PRE-TRIAL – pending trial
            5. SENTENCED – charge sentenced
            6. SENTENCED – REMAND – serving a specified sentence pursuant to court remand i.e. Specialty Court

KB0658

E

SECOND JUDICIAL DISTRICT COURT
STATE OF NEVADA
WASHOE COUNTY

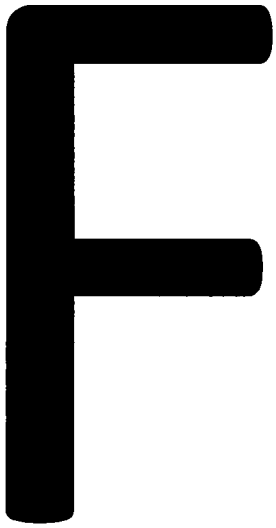
PRETRIAL SERVICES
75 COURT STREET, ROOM 127
RENO, NV 89520
(775) 325-6600

Random drug/alcohol testing - May statistics

Currently there are 166 defendants assigned to random testing (e.g. color-code)
Approximately 1690 PBT's were completed during the month
Approximately 285 drug tests were completed during the month
- Admitted – 9
- ETG – 17
- Oral drug tests – 16
- Lab confirmations - 13

Applicable Notes:

- Defendants are required to alcohol test by 11:00 AM unless they show valid proof of work/valid reason
- "Admitted" means the defendant either admitted to recent use upon being questioned or tested positive on a presumptive test and admitted recent use after
- "ETG" is an 80-hour alcohol urine test that is sent to the lab and can show the presence of alcohol within an 80-hour timeframe
- Oral drug tests are used on occasion and separate amphetamine and methamphetamine – less expensive than sending to the lab if valid RX for an amphetamine
  - Can also be used for defendants with medical issues preventing them from providing a urine sample
- Lab confirmation - urine samples are sent to the lab, Redwood Toxicology:
  - To confirm the presence of an illegal drug and/or valid RX
  - If the defendant tests positive but denies recent use
  - To monitor THC levels with regular marijuana use



NEVADA PRETRIAL RISK ASSESSMENT (NPR)

Name: _____ Assessment Date: ____/____/____
Case #: _____ County: _____ Assessor: _____
DOB: ____/____/____ Gender: __Male ___ Female # of Current Charges: _____
Most Serious Charge: _____ Initial Total Bail Set: $ _____
Race: ___ Hispanic ___White ____ Black ___ Asian __ Nat. Amer. ___ Other _____
Verified Cell Phone #: _____ Address: _____ _____ _____
Deadly Weapon Charge: ___ Yes ____ No City State Zip

SCORING ITEMS	SCORE
1. Does the Defendant Have a Pending Case at Booking? a. Yes - 3 pts. b. No- 0 pts.	_____
2. Age at First Arrest First Arrest Date____/___/_____ a. Under age 21 yrs. 2 pts. b. 22-35 yrs. 1pts. c. 36 Plus. 0 pts.	_____
3. Prior Misdemeanor Arrests. Total # Misd. Arrests: _____ Total # Misd. Convict:_____ a. Two or less- 0 pts. b. 3- 5 – 1 pt. c. 6 plus – 2 pts.	_____
4. Prior Felony/Gross Misd Arrests Total # Felony/GM Arrests: ____ Total # Felony/GM Convict: ____ a. None or One – 0 pts. b. 2 - 4 – 1 pt. c. 5 plus – 2 pts.	_____
5. Prior Arrests – Violence: Total # Arrests_____ Total # Convict: _____ a. None – 0 pts. b. 1 or more – 2 pts.	_____
6. Prior FTAs Past 24 Months Date of last FTA Warrant: ___/___/_____ a. None – 0 pts. b. 1 FTA Warrant – 1 pt. c. 2 or more FTA Warrants – 2 pts.	_____
7. Employment Status at Arrest List Employer: _____ a. Employed or Student or Retired – 0 pts. b. Unemployed – 2 pts.	_____
8. Residential Status Date of Residency: ___/_____ a. Living in current residence 6 mos. or longer – 0 pts. b. Not lived in same residence 6 mos. or longer – 1 pt. c. Homeless – 3 pts.	_____
9. Substance Abuse a. No evidence of drug abuse/alcoholism – 0 pts. b. Some evidence – current charge – 1pt. c. Prior multiple arrests for drug possession/alcohol/drunkenness - 2 pts.	_____
Total Score:	_____

Risk Level: (Circle One): 0-3 pts. LOW 4 – 6 pts. MODERATE 7+ pts. HIGHER
Over-Ride? _____ Yes ___ No
Over Ride Reason(s): ___ Mental Health ____ Disability ____ Gang Member ____ Flight Risk

Other Reason: _____

Final Recommended Risk Level; _____ LOW _____MODERATE _____ HIGHER

FOLLOW-UP DATA

Booking Date: _____/_____/_____ Release Date: _____/_____ /_____

Method of Release: _____ Cash Bail _____ Surety Bond ____Court OR

Other Release Method: _____

Was Defendant Re-Arrested Prior to Court Disposition? _____ Yes ____No

If Yes, Date of Re-Arrest _____/_____/_____ Most Serious Charge: ___ _____

Did Defendant FTA and Have a Warrant Issued? _____ Yes _____ No

If Yes, date of FTA _____/_____/_____

Was Defendant Re-Booked to Jail? ____ Yes ____ No

If Yes, date of Re-Booking: _____/_____/_____

Final Court Dispositions:

Charge	Disposition Date	Disposition	Sentence Length
1			
2			
3			
4			
5			

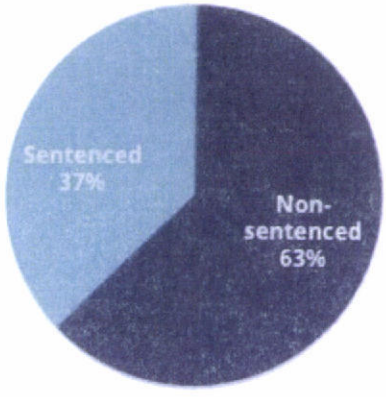
PRETRIAL SERVICES: AN EFFECTIVE ALTERNATIVE TO MONETARY BAIL

Courtney Lam, Post-Graduate Fellow
Center on Juvenile and Criminal Justice

JULY 2014 Research Report

California's Public Safety Realignment Act, which shifted the responsibility of adults convicted of low-level offenses from the state to the counties, was intended to encourage counties to employ innovative and effective alternatives to incarceration.[1] Many California counties, however, have continued to rely heavily on incarceration, pushing their jails to capacity. In an attempt to reduce jail overcrowding, attention is turning to the 63 percent of people held in county jails who have not been convicted of a crime. Many of these people are waiting for their day in court in jail — not because they pose a risk to public safety, but simply because they cannot afford to post bail.

Most people held in California's jails have not had their day in court.



Average California jail population. Source: BSCC, 2013.

This high pretrial population is due, in large part, to California's over-reliance on a monetary bail system. Under such a system, people who have been arrested for certain crimes must await trial in jail, unless they deposit a set amount of money ("bail"), which is then returned to them when they appear in court. This cash-dependent system allows those who are wealthy to purchase their release from jail while those without the means remain incarcerated.

The jails of 17 counties in California, including Fresno, have Federal population caps due to overcrowding (LHC, 2013). These counties must not exceed maximum capacity, even if they must release people before they have completed their sentences to comply. The Fresno County Sheriff told the Little Hoover Commission she releases 40-60 people early every day due to lack of capacity (LHC, 2013). In 2013, between the 45 counties reporting to the Board of State and Community Corrections, an average of 10,300 people were released early from jail every month due to lack of capacity — more than half had been sentenced, while the remainder were pretrial (BSCC, 2013).

[1] Under Realignment (Assembly Bill 109), which went into effect on October 1, 2011, counties must manage people convicted of non-violent, non-serious, non-sexual felonies at the local level, rather than sentencing them to state prison. Although Realignment encourages counties to employ alternatives to incarceration, many have experienced jail overcrowding, resulting in significant discussion regarding the appropriate use of jail bed space.

This publication examines the challenges of relying on a monetary bail system and highlights existing solutions, such as pretrial services, that save money, reduce racial disparities, alleviate jail bed space, and promote public safety.

Background on the Monetary Bail System

Although "bail" is often associated with money, the term refers generally to the process of releasing people from custody, while reasonably ensuring they appear for their trial and do not commit any crimes. In addition to cash bonds, the various forms of release include own recognizance (OR), unsecured bond, conditional release, and release to pretrial services (see "Bail Release Definitions").

Nationally, the use of monetary bail has increased dramatically in recent years, while other forms of release have become less common. In 1990, 25 percent of people charged with felonies were given monetary bonds, while 42 percent were released on their own recognizance (OR). In 2006, however, these percentages are inverted: Bonds accounted for 43 percent of felony cases, while only 25 percent were released on OR (Pepin, 2013).

The commercial bail industry, which will post a defendant's bond in exchange for a non-refundable 10 percent fee, profits from the use of money bonds. The industry also invests heavily in lobbying on the state and federal levels, and may have had a significant influence on these trends (Gullings, 2012).

Bail Release Definitions

Own Recognizance (OR) Defendant assumes responsibility to appear in court.

Unsecured bond Defendant is released but if he or she fails to appear in court they are liable for the entire bond amount

Cash bond Defendant posts entire bail amount, **deposit bond** (percentage of the bail), **property bond** (using property as collateral), or a **commercial/surety bond** (defendants pay a 10 percent nonrefundable fee to a bail agency, which posts bail). In most cases, if the defendant appears for court, the entire payment is returned, with the exception of a nonrefundable fee of a surety bond.

Conditional or Pretrial Release Defendant is released after being assessed and agreeing to certain conditions, including drug tests, court reminders, check-ins, and GPS monitoring.

Use of Monetary Bail Creates Income and Racial Disparities

Under a monetary bail system, release is not based on the likelihood to appear in court or commit another crime, but access to funds. The frequent use of monetary bail in recent years has exacerbated the systemic economic and racial disparities in the criminal justice system.

The population most impacted by the justice system — low-income communities of color — has limited means to secure release by purchasing a commercial bail bond for the non-refundable 10 percent fee, let alone covering the entire set bail. In fact, in New York City, 11,000 of the people charged with misdemeanor offenses within a one-year period were incarcerated while awaiting trial because they could

not raise bail of $100 or less (PJI, 2012). Even in cases where defendants are able to post bail, they may need to deplete funds for necessities like rent, groceries, transportation to work, or child support.

Numerous studies have also shown racial disparities that are independent of economic status. For example:

- The average bail amount in California for Latino defendants in a 2005 analysis was $53,031, compared to $28,340 for White defendants (CSJ, 2014).
- African Americans are less likely to be released on OR, are more likely to be detained pretrial, and receive significantly higher bail than White defendants (Wooldredge, 2012, cited in JPI, 2012, Kutateladze & Andriloro, 2014).
- A national study of felony cases from 40 of the largest 75 counties found that 27 percent of White defendants were held in jail pretrial because of their inability to post bail, compared to 36 percent of African American defendants and 44 percent of Latino defendants (PJI, 2012).
- The Bureau of Justice Statistics showed that in 75 of the largest counties only 55 percent of Latino defendants were released pretrial, compared to 68 percent of White individuals (Cohen & Reaves, 2007).

Pretrial Detention Results in Adverse Outcomes

Studies suggest that those who are detained while awaiting trial have worse outcomes than those released pretrial. They are more likely to be convicted and receive harsher penalties, even when all other factors are equal (ACCD, 2011). For example, a 2013 study by Laura and John Arnold Foundation found that those detained pretrial are:

- 4 times more likely to be sentenced to jail
- 3 times more likely to receive longer jail sentences
- 3 times more likely to be sentenced to prison
- 2 times more likely to receive longer prison sentences
- 40 percent more likely to recidivate if held for two to three days, and 74 percent more likely if held for 31 days or more, compared to those held 24 hours (LJAF, 2013)

Collateral Consequences

Anthony Dorton was accused of assaulting and pimping a woman in San Francisco. His bail was set at $300,000, which he could not afford. He sat in jail for 10 months while awaiting trial, and was eventually acquitted. During his 10-month detention, he was evicted, his car was repossessed (incurring him a $2,000 impound fee), and his credit was damaged due to late credit card and car payments. His 10 months in jail had cost the

The Bureau of Justice Statistics found 60 percent of defendants who are released pretrial are convicted, compared to 78 percent of those who are detained (Cohen & Reaves, 2007). Although the reasons for this difference are unknown, possible factors include the defendants having a difficult time meeting with lawyers, being away from family or other support systems, and having to appear in court in jail-issued uniforms — at times shackled.

Pretrial detention may also cause people to lose their jobs, homes, default on car payments, fall behind on child support, and lose custody of dependent children or community ties (See "Collateral Consequences"). By losing a job, a home, or being denied other pro-social activities that promote civic engagement, the person is more likely to recidivate and become further involved with the justice system.

A Cash-Dependent System Does Not Promote Public Safety

Monetary values are not linked to public safety. There is no cash value that can ensure an individual will appear in court or deter him or her from committing a crime (Neal, 2012). Although people who are charged with more serious crimes receive higher bail amounts, those with significant means can pay for their release. In the case of the commercial bail industry, bail bondsmen do not administer validated risk assessments to determine their clients' risk of re-offending— rather, they evaluate only the clients' ability to pay. Research shows most people will return to court without having to pay a bondsman's non-refundable fee (Bradford, 2012). Even with bail increasing dramatically, failure to appear rates have not altered substantially (Neal, 2012).

Since bondsmen run profit-driven businesses and receive higher fees for higher bail amounts, cases with larger bonds are more attractive, even though these bonds are generally placed on individuals charged with more serious crimes. Bondsmen have no incentive to ensure the safety of the public: if their clients are rearrested for new offenses, they may even receive more money for posting an additional bail. Commercial bond companies are liable for the bond if their client does not appear in court, but they often default on their payments to the courts with little consequence. In 2010, bail bond agencies owed counties in California $150 million in 2010 (Sullivan, 2010).

Pretrial Services are Effective Alternatives to Monetary Bail

The ineffective commercial bail industry operates in a justice system that already has alternatives, which can reduce the injustices described above. A variety of pretrial services are more beneficial to the community, to the economy, and to those who have been charged with crimes.

Pretrial services also provide targeted intervention, programs, and supervision that fit a defendant's needs, including drug rehabilitation and varying forms of supervision like GPS monitoring, court call reminders, drug tests, and check-ins. Risk assessments can determine whether pretrial services are appropriate. These tools evaluate diverse factors — including residency status, employment, and mental health or substance abuse issues — that can help predict a person's flight risk and potential danger to the community (Bradford, 2012).

Many counties across the nation are already using pretrial services, with great success. For example, Montgomery County, MD, increased the use of pretrial services from 20 percent to 52 percent of defendants, without any change in rates of re-arrests or court appearances (PII, 2012). Also in Washington DC, where commercial bail bonds are no longer practiced, pretrial services have resulted in an 88% appearance rate (Chung, 2012, p. 25).

County	Appearance Rate	Re-arrest Rate
Santa Cruz	89%	8%
Santa Clara	88%	2%
Yolo	92%	5%
Marin	91%	9%
San Francisco	97%	-
Commercial Bail Bond (National Average)	**82%**	**16%**

In California, five counties have evaluated the success of their pretrial services (see Table). All experienced higher court appearance rates and lower re-arrest rates than the national average for commercial bail bond agencies. (LHC, 2013; Neal, 2012; Aungst, 2012; Dooley-Sammuli, 2013; Cohen and Reaves, 2007).

Not only have pretrial services maintained court appearance and re-arrest rates comparable to those of commercial bail bonds, they are also more efficient uses of money. Detaining people pretrial incurs extensive monetary costs. In California, the average cost of incarcerating a person in county jail is $100 per day, while pretrial services cost a mere $2.50 per day (Neal, 2012).

Conclusion

In the post-Realignment era, counties are taking on more responsibility for people involved with the justice system. Although Realignment encourages counties to develop and implement alternatives to incarceration for people convicted of low-level offenses, many counties continue to rely on incarceration, resulting in widespread jail overcrowding.

A key area of unnecessary incarceration is the pretrial population: People held in jail due to their financial status rather than their risk to public safety. By increasing the use of pretrial services and decreasing the use of monetary bail, counties could reduce income and racial disparities, save money, lower incarceration rates, give defendants the targeted help they need, and protect public safety.

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2012-2013 Policy Paper
Evidence-Based Pretrial Release

Final Paper

Conference of State Court Administrators

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Table of Contents

Glossary of Terms

Bail – Bail refers to a deposit or pledge to the court of money or property in order to obtain the release from jail of a person accused of a crime. It is understood that when the person returns to court for adjudication of the case, the bail will be returned in exchange. If the person fails to appear, the deposit or pledge is forfeited. There is no inherent federal Constitutional right to bail; a statutory right was first created in the 1960s.

Bond – A term that is used synonymously with the term "bail" and "bail bond." (*See above*).

Citation release – a form of nonfinancial pretrial release in which the defendant is issued a written citation, usually at the time of arrest, and signs the citation pledging to appear in court when required.

Commercial bail agent/bondsman – a third party business or person who acts as a surety on behalf of a person accused of a crime by pledging money or property to guarantee the appearance of the accused in court when required.

Compensated surety – a bond for which a defendant pays a fee to a commercial bail agent, which is nonrefundable.

Conditional release – a form of nonfinancial pretrial release in which the defendant agrees to comply with specific kinds of supervision (e.g., drug testing, regular in-person reporting) in exchange for release from jail).

Deposit bond - a bond that requires a defendant to post a deposit with the court (usually 10% of the bail amount), which is typically refunded upon disposition of the case.

Full cash bond – a bond deposited with the court, the amount of which is 100% of the bail amount. The bond can be paid by anyone, including the defendant.

Pretrial - The term "pretrial" is used throughout this paper to refer to a period of time in the life of a criminal case before it is disposed. The term is a longstanding convention in the justice field, even though the vast majority of criminal cases are ultimately disposed through plea agreement and not trial.

Property bond – a bond that requires the defendant to pledge the title of real property valued at least as high as the full bail amount.

Release on recognizance – a form of nonfinancial pretrial release in which the defendant signs a written agreement to appear in court when required and is released from jail.

Surety–a person who is liable for paying another's debt or obligation.

Surety bond – a bond that requires the defendant to pay a fee (usually 10% of the bail amount) plus collateral if required, to a commercial bail agent, who assumes responsibility for the full bail amount should the defendant fail to appear. If the defendant does appear, the fee is retained by the commercial bail agent.

I. Introduction

Pretrial judicial decisions about release or detention of defendants before disposition of criminal charges have a significant, and sometimes determinative, impact on thousands of defendants every day while also adding great financial stress to publicly funded jails holding defendants who are unable to meet financial conditions of release. Many of those incarcerated pretrial do not present a substantial risk of failure to appear or a threat to public safety, but do lack the financial means to be released.[1] Conversely, some with financial means are released despite a risk of flight or threat to public safety, as when a bond schedule permits release upon payment of a pre-set amount without any individual determination by a judge of a defendant's flight risk or danger to the community. Finally, there are individuals who, although presumed innocent, warrant pretrial detention because of the risks of flight and threat to public safety if released.

Evidence-based assessment of the risk a defendant will fail to appear or will endanger others if released can increase successful pretrial release without financial conditions that many defendants are unable to meet. Imposing conditions on a defendant that are appropriate for that individual following a valid pretrial assessment substantially reduces pretrial detention without impairing the judicial process or threatening public safety. The Conference of State Court Administrators advocates that court leaders promote, collaborate toward, and accomplish the adoption of evidence-based assessment of risk in setting pretrial release conditions. COSCA further advocates the presumptive use of non-financial release conditions to the greatest degree consistent with evidence-based assessment of flight risk and threat to public safety and to victims of crimes.

II. The Law

The Supreme Court of the United States has said, "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[2] The right to bail has been a part of American history in varying degrees from the beginning -- 1641 in Massachusetts and 1682 in Pennsylvania. Other state constitutions adopted the Pennsylvania provision as a model.[3] Nine states and Guam follow the pattern of the United States Constitution by prohibiting "excessive bail" without explicitly guaranteeing the right to bail.[4] Forty state constitutions, as well as the Puerto Rico Constitution and the District of Columbia Bill of Rights, expressly prohibit excessive bail.[5] One state, Maine, had a constitutional provision prior to 1838 that expressly provided the right to bail, but by amendment that year the Maine Constitution now only prohibits bail in capital cases, without otherwise addressing the matter.[6] However, the Maine Supreme Judicial Court held that the current language continues the guarantee of the right to bail that was express prior to 1838.[7] The Federal

Judiciary Act of 1789 provided for the absolute right to bail in non-capital cases. The Eighth Amendment prohibition on excessive bail was adopted in 1791 as part of the Bill of Rights.[8]

Freedom before conviction permits unhampered preparation of a defense and prevents infliction of punishment before conviction. Without the right to bail, the presumption of innocence would lose its meaning.[9] The purpose of bail is to ensure the accused will stand trial and submit to sentencing if found guilty.[10] Another legitimate purpose is reasonably to assure the safety of the community and of crime victims.[11]

Twelve states, the District of Columbia, and the federal government have enacted a statutory presumption that defendants charged with bailable offenses should be released on personal recognizance or unsecured bond unless a judicial officer makes an individual determination that the defendant poses a risk that requires more restrictive conditions or detention.[12] Six other states have adopted this presumption by court rule.[13] However, it is common in many states to have bail schedules, adopted statewide or locally, that establish a pre-set amount of money that must be deposited at the jail in order for a defendant to obtain immediate release, without any individual assessment of risk of flight or danger to the community. In a 2009 nationwide survey of the 150 largest counties, among the 112 counties that responded, 64 percent reported using bond schedules.[14]

Despite the common use of bond schedules (also commonly termed "bail schedules"), they seem to contradict the notion that pretrial release conditions should reflect an assessment of an individual defendant's risk of failure to appear and threat to public safety. Two state high courts have rejected the practice of imposing non-discretionary bail amounts based solely on the charge, as in a bail schedule. The Hawai'i Supreme Court found an abuse of discretion for a trial court to apply a bail schedule promulgated by the senior judge that ignored risk factors specific to the defendant.[15] The Oklahoma Court of Criminal Appeals overturned a statutory mandate for a particular bail amount attached to a specific crime: "[The statute] sets bail at a predetermined, nondiscretionary amount and disallows oral recognizance bonds under any circumstances. We find the statute is unconstitutional because it violates the due process rights of citizens of this State to an individualized determination to bail."[16]

In the United States in the twenty-first century, it is common to require the posting of a financial bond as the means to obtain pretrial release, often through procuring the services of a commercial bond company, or bail bondsman. Bonding companies typically require a non-refundable premium payment from the defendant, usually 10 percent of the bail set by the court. Many companies also require collateral sufficient to cover the full bond amount.[17] In 2007 the DOJ Bureau of Justice Statistics reported that an estimated 14,000 bail agents nationwide secured the release of more than 2 million defendants annually.[18] The United

States and the Philippines are the only countries that permit the widespread practice of commercial bail bonds.[19] In countries other than these two, "[b]ail that is compensated in whole or in part is seen as perverting the course of justice."[20]

III. The Consequences of Pretrial Release versus Incarceration

From the perspective of the defendant, who is presumed innocent, pretrial release mitigates the collateral consequences of spending weeks or months awaiting trial or a plea agreement. Jail time can result in job loss, home loss, and disintegrated social relationships, which in turn increase the likelihood of re-offending upon release.[21]

In 2010 the United States had the world's highest total number of pretrial detainees (approximately 476,000) and the fourth-highest rate of pretrial detention (158 per 100,000).[22] A study of felony defendants in America's 75 largest urban counties showed that in 1990, release on recognizance accounted for 42% of releases, compared to 25% released on surety bond. By 2006, the proportions had been reversed: surety bonds were used for 43% of releases, compared to 25% for release on recognizance.[23] Taking into account all types of financial bail (surety bond, deposit bail, unsecured bond, and full cash bond), it is clear that the majority of pretrial release requires posting of financial bail.

The same study of felony defendants showed that 42% were detained until disposition of their case.[24] Pretrial incarceration imposes significant costs on taxpayer-funded jails, primarily at the local government level. In 2010, "taxpayers spent $9 billion on pre-trial detainees."[25] The increased practice of requiring financial bonds has contributed to increased jail populations, which has produced an extraordinary increase in costs to counties and municipalities from housing pretrial detainees. The most recent national data indicates that 61% of jail inmates are in an un-convicted status, up from just over half in 1996.[26]

In addition to the financial costs from increased pretrial detention, the cost in unequal access to justice also appears to be high. The movement to financial bonds as a requirement for pretrial release, often requiring a surety bond from a commercial bond seller, makes economic status a significant factor in determining whether a defendant is released pending trial, instead of such factors as risk of flight and threat to public safety. A study of all nonfelony cases in New York City in 2008 found that for cases in which bail was set at less than $1,000 (19,617 cases), in 87% of those cases defendants were unable to post bail at arraignment and spent an average of 15.7 days in pretrial detention, even though 71.1% of these defendants were charged with nonviolent, non-weapons-related crimes.[27] In short, "for the poor, bail means jail."[28] The impact of financial release conditions on minority defendants reflects disparate rates of poverty among different ethnic groups. A study that sampled felony cases in 40 of the 75 largest counties nationwide found that, between 1990 and

1996, 27% of white defendants were held in jail throughout the pretrial period because they could not post bond, compared to 36% of African-American defendants and 44% of Hispanic defendants.[29]

The practice of conditioning release on the ability to obtain a surety bond has so troubled the National Association of Pretrial Services Agencies (NAPSA) that, in its Third Edition of Standards on Pretrial Release (and in previous editions beginning in 1968), Standard 1.4(f) provides that "[c]onsistent with the processes provided in these Standards, compensated sureties should be abolished." According to NAPSA, compensated sureties should be abolished because the ability to pay a bondsman is unrelated to the risk of flight or danger to the community; a surety bond system transfers the release decision from a judge to private party making unreviewable decisions on unknown factors; and the surety system unfairly discriminates against defendants who are unable to afford non-refundable fees required by the bondsman as a condition of posting the bond.[30] The American Bar Association also recommends that "compensated sureties should be abolished."[31] The Commonwealth of Kentucky and the State of Wisconsin have prohibited the use of compensated sureties.[32] In addition, Illinois and Oregon do not allow release on surety bonds (but do permit deposit bail).[33]

The ability of a defendant to obtain pretrial release has a significant correlation to criminal justice outcomes. Numerous research projects conducted over the past half century have shown that defendants who are held in pretrial detention have less favorable outcomes than those who are not detained —regardless of charge or criminal history. In these studies, the less favorable outcomes include a greater tendency to plead guilty to secure release (a significant issue in misdemeanor cases), a greater likelihood of conviction, a greater likelihood of being sentenced to terms of incarceration, and a greater likelihood of receiving longer prison terms."[34] Data support the common sense proposition that pretrial detention has a coercive impact on a defendant's amenability to a plea bargain offer and inhibits a defendant's ability to participate in preparation for a defense. In summarizing decades of research, the federal Bureau of Justice Assistance noted that "research has demonstrated that detained defendants receive more severe sentences, are offered less attractive plea bargains and are more likely to become 'reentry' clients because of their pretrial detention – regardless of charge or criminal history."[35]

IV. Evidence-Based Risk Assessment: The Lesson of *Moneyball* and the Challenge of Adopting New Practices

Michael Lewis's book *Moneyball* documents how Oakland A's general manager Billy Beane used statistics and an evidence-based approach to baseball that yielded winning seasons despite severe budgetary constraints.[36] His approach attracted considerable antagonism in the baseball community because it deviated from long-held practices based on intuition and gut feelings, tradition, and ideology. As

persuasively set forth more recently in *Supercrunchers*, the cost of ignoring data and evidence in a broad variety of human endeavors is suboptimal decision-making.[37] This realization and the commensurate movement toward evidence-based practice, by now firmly ensconced in medicine and other disciplines, have finally emerged in the fields of sentencing, corrections, and pretrial release (but not without resistance, as in baseball).

In 1961, the New York City Court and the Vera Institute of Justice organized the Manhattan Bail Project, an effort to demonstrate that non-financial factors could be used to make cost-effective release decisions.[38] Decades later, the movement away from financial conditions and toward use of an evidence-based risk assessment in setting pretrial release conditions appears to be gathering momentum. The 2009 Survey of Pretrial Services Programs found that the majority of 112 counties responding to a survey of the 150 largest counties use a combination of objective and subjective criteria in risk assessment. Eighty-five percent of those responding counties reported having a pretrial services program to assess and screen defendants and present that information at the first court appearance.[39] The ongoing development of evidence-based decision-making in pretrial release decisions is demonstrated by the release in August 2011 of a monograph by the National Institute of Corrections recommending outcome and performance measures for evaluating pretrial release programs.[40] Looking forward to the type of assessments that would support evidence-based pretrial decisions, an accumulation of empirical research strongly suggests the following points:

- Actuarial risk assessments have higher predictive validity than clinical or professional judgment alone.[41]
- Post-conviction risk factors (relating to recidivism) should not be applied in a pretrial setting.[42]
- Several measures commonly gathered for pretrial were not significantly associated with pretrial failure: residency, injury to victim, weapon, and alcohol.[43]
- The six most common validated pretrial risk factors are prior failure to appear; prior convictions; current charge a felony; being unemployed; history of drug abuse; and having a pending case.[44]
- Defendants in counties that use quantitative and mixed risk assessments are less likely to fail to appear than defendants in counties that use qualitative risk assessments.[45]
- Not only are subjective screening devices prone to demographic disparities, but these devices produce poor results from a public safety perspective.[46]
- The statewide pretrial services program in Kentucky, begun in 1968, now uses a uniform assessment protocol that results in a failure to appear rate of only 10 percent and a re-arrest rate of only 8 percent.[47]

- Pretrial programs that use quantitative and mixed quantitative-qualitative risk assessments experience lower re-arrest rates than programs that only use qualitative risk assessments.
- The number of sanctions a pretrial program can impose in response to non-compliance with supervision conditions further lowers the likelihood of a defendant's pretrial re-arrest.[48]

The use of a validated pretrial risk assessment tool when making a judicial decision to release or not, and the attendant conditions on release based on that assessment, fits within a well-functioning case management regimen. While different instruments have been used with success in different jurisdictions, in general, research on pretrial assessment conducted over decades has identified these common factors as good predictors of court appearance and/or danger to the community:

- Current charges;
- Outstanding warrants at the time of arrest;
- Pending charges at the time of arrest;
- Active community supervision at the time of arrest;
- History of criminal convictions;
- History of failure to appear;
- History of violence;
- Residence stability over time:
- Employment stability;
- Community ties; and
- History of substance abuse.[49]

A comprehensive guide to implementing successful evidence-based pretrial services into the pretrial release determination, with step-by-step instructions on the process from formation of a Pretrial Services Committee through program implementation, is available from the Pretrial Justice Institute.[50]

Perhaps the best-known use of evidence-based risk assessment to reduce reliance on financial release conditions exists in the District of Columbia's Pretrial Services Agency (PSA).[51] Paradoxically, the DC pretrial Code requires detention if no combination of conditions will reasonably assure that a defendant does not flee or pose a risk to public safety.[52] If the prosecutor demonstrates by clear and convincing evidence that a defendant presents a serious flight risk or threat to the victim or to public safety, the defendant is detained without the option for pretrial release. However, the DC Code also provides that a judge may not impose a financial condition as a means of preventative detention.[53] PSA conducts a risk assessment (flight and danger) through an interview with the defendant within 24 hours of arrest that assesses points on a 38-factor instrument, assigning a defendant into a category as high risk, medium risk, and low risk.[54] In 1965, only 11% of defendants were released without a money bond, but by 2008, 80% of all defendants were released without a money bond, 15% were held without bail, and 5% were held with financial bail (none on surety bond), while at the same time 88% of released defendants made all court appearances and 88% completed pretrial release without any new arrests.[55]

Another example of the impact of evidence-based pretrial risk assessment is found in the Harris County (Houston), Texas, "direct filing" system.[56] As charges are being accepted and filed, the defendant is transferred to the central jail for intake. At the jail, the pretrial screening department interviews the defendant and collects data such as family composition, employment status, housing, indigency status, education level, health problems and medications, and potential mental health issues. This process culminates in a risk classification, identifying defendants who are appropriate for release on personal recognizance bond. The process continues through appearance before a magistrate (typically within 12 hours of arrest), where defendants granted personal bond and those able to post cash or surety bonds are released from jail.[57] An estimate of net savings and revenue for Fiscal Year 2010 showed that Harris County gained $4,420,976 in avoided detention costs and pretrial services fees collected after deducting for the costs of pretrial services.[58]

Kentucky abolished commercial bail bondsmen in 1976 and implemented the statewide Pretrial Services Agency that today relies on interviews and investigations of all persons arrested on bailable offenses within 12 hours of his or her arrest. Pretrial Officers conduct a thorough criminal history check and utilize a validated risk assessment that measures flight risk and anticipated conduct to make appropriate recommendations to the court for pretrial release. Furthermore, Pretrial Services provides supervision services for pretrial defendants, misdemeanor diversion participants and defendants in deferred prosecution programs.

In 2011 Pretrial Services processed 249,545 cases in which a full investigation was conducted on 88% of all incarcerated defendants.[59] Using a validated risk assessment tool, Pretrial Services identifies defendants as being either low, moderate, or high risk for pretrial misconduct, (i.e. failing to appear for court hearings or committing a new criminal offense while on pretrial release). Ideally, low risk defendants (those most likely to return to court and not commit a new offense) are recommended for release either on their recognizance or a non-financial bond. Statistically, about 70% of pretrial defendants are released in Kentucky; 90% of those make all future court appearances and 92% do not get re-arrested while on pretrial release.[60] When looking at release rates by risk level, the data shows that judges follow the recommendations of Pretrial Services. In 2011, judges ordered pretrial release of 81% of low risk defendants, 65% of moderate risk defendants, and 52% of high risk defendants.[61]

In 2011, Kentucky adopted House Bill 463, a major overhaul of the Commonwealth's criminal laws that intended to reduce the cost of housing inmates while maintaining public safety.[62] Since adoption of HB 463, Pretrial Services data shows a 10% decrease in the number of defendants arrested and a 5% increase in the overall release rate, with a substantial increase in non-financial

releases and in releases for low and moderate risk defendants. The non-financial release rate increased from 50% to 66%, the low risk release rate increased from 76% to 85%, and the moderate risk release rate increased from 59% to 67%. In addition, pretrial jail populations have decreased by 279 defendants, while appearance and public safety rates have remained consistent.[63]

There are other, similar examples of successful implementation of evidence-based pretrial assessments that deliver on the promise of pretrial release without financial conditions.[64] Evidence-based pretrial risk assessment in the context of skillful and collaborative case management and data sharing should be embraced as the best practice by judges, court administrators, and court leaders. Reliance on a validated, evidence-based pretrial risk assessment in setting non-financial release conditions balances the interests of courts in both protecting public safety and safeguarding individual liberty.

V. The Way Forward

> *"The purposes of the pretrial release decision include providing due process to those accused of crime, maintaining the integrity of the judicial process by securing defendants for trial, and protecting victims, witnesses and the community from threat, danger or interference. . . .The law favors release of defendants pending adjudication of charges. 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."*
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> ABA Criminal Justice Standards on Pretrial Release, Third Edition
> Standard 10-1.1.

By adopting this paper, COSCA is not leading a parade, but joining in some very good and credible company. As noted in 2011 by a leading official of the United States Department of Justice, "Within the last year, a number of organizations have publicly highlighted the need to reform our often antiquated and sometimes dangerous pretrial practices and replace them with empirically supported, risk-based decision-making."[65] Not surprisingly pretrial services agencies themselves support this effort,[66] but so do a wide variety of other justice-oriented interest groups: the National Association of Counties,[67] the American Jail Association,[68] the International Association of Chiefs of Police,[69] the American Council of Chief Defenders,[70] the American Bar Association,[71] the Association of Prosecuting Attorneys,[72] and the American Association of Probation and Parole.[73]

Following the 2011 National Symposium on Pretrial Justice hosted by the U.S. Department of Justice (DOJ), the DOJ's Office of Justice Programs collaborated with the Pretrial Justice Institute to convene in October 2011 the first meeting of the Pretrial Working Group. Information about the continuing work of the Pretrial Working Group subcommittees can be found at the Web site published by the Office of Justice Programs in association with the Pretrial Justice Institute. The stated goals of this effort are to exchange information on pretrial justice issues, develop a website to disseminate information on the work of the subcommittees, and inform evidence-based pretrial justice policy making.[74]

There are two major obstacles to reform. First, there is resistance to changing the status quo from those who are comfortable with or profit from the existing system. This resistance can be overcome by a well-

executed, evidence-based protocol, as has been demonstrated in the District of Columbia and in Kentucky. Second, courts tend to be deliberate in adopting change and to require persistent presentation of well-documented advantages to new approaches, such as evidence-based practices in the pretrial release setting. In this regard, familiarity with evidence-based decision making in drug courts, at sentencing, and in evaluating court programs should help gain acceptance for evidence-based practices in the pretrial setting. Part of this shift in practice might include elimination of or decreased reliance on bail schedules, which are in use in at least two-thirds of counties across the country.[75] State court leaders should closely follow and make a topic of discussion the efforts of the Department of Justice and its Pretrial Justice Working Group discussed above, as well as continuing efforts by the American Bar Association which is supporting transition toward evidence-based pretrial practices through its Pretrial Justice Task Force.[76]

State court leaders must take several steps to leverage the emerging national consensus on this issue:

- Analyze state law and work with law enforcement agencies and criminal justice partners to propose revisions that are necessary to
  - support risk-based release decisions of those arrested;
  - ensure that non-financial release alternatives are available and that financial release options are available without the requirement for a surety.
- Collaborate with experts and professionals in pretrial justice at the national and state levels.
- Take the message to additional groups and support dialogue on the issue.
- Use data to promote the use of data; determine what state and local data exist that would demonstrate the growing problem of jail expense represented by the pretrial population, and that show the risk factors presented by that population may justify broader pretrial release.
- Reduce reliance on bail schedules in favor of evidence-based assessment of pretrial risk of flight and threat to public safety.

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[5] ALA. CONST. art. I, §16; ALASKA CONST. art. I, § 11; ARIZ. CONST. art. II, § 22; ARK. CONST. art. II, § 8; CAL. CONST. art. I, § 12; COLO. CONST. art. I, § 19; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 12; FLA. CONST. art. I, § 14; IDAHO CONST. art. I, § 6; ILL. CONST. art. I, § 9; IND. CONST. art. I, § 7; IOWA CONST. art. I, § 12; KAN. CONST. Bill of Rights, § 9; KY. CONST. § 16; LA. CONST. art. I, § 8; ME. CONST. art. I, § 10; MICH. CONST. art. I, § 15; MINN. CONST. art. I, § 7; MISS. CONST. art. III, § 29; MO. CONST. art. I, § 20; MONT. CONST. art. II, § 21; NEB. CONST. Art. I, § 9; NEV. CONST. art. I, § 7; N.J. CONST. art. I, § 11; N.M. CONST. art. II, § 13; N.D. CONST. art. I, § 11; OHIO CONST. art. I, § 9; OKLA. CONST. art. II, § 8; OR. CONST. art. I, § 14; PA. CONST. art. I, § 14; R.I. CONST. art. I, § 9; S.C. CONST. art. I, § 15; S.D. CONST. art. VI; Tenn. CONST. ART. I, §15; TEX. CONST. art. I, § 11; UTAH CONST. art. I, § 8; VT. CONST. ch. 2, § 40; WASH. CONST. art. I, § 20; WIS. CONST. art. I, § 8; WYO. CONST. art. I, § 14; P.R. CONST. art. II, § 11; D.C. Code. Bill of Rights, art. I, § 108.

[6] ME. CONST. art. I, § 10.

[7] Fredette v. State, 428 A.2d 395, 404-05 (Me. 1981).

[8] U.S. CONST. amend. VIII (1791).

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Risk-based Pretrial Systems Serve Victims' Needs

Better Than Current Practice

13
April
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It is impossible to know how it feels to be a victim of crime if you have never been one. In addition to the loss of property or bodily harm, the experience may also involve psychological trauma that can linger long after property is replaced or wounds heal.

This is National Crime Victims' Rights Week, and the focus this year is the importance of early intervention in serving victims' needs. This provides an occasion to reflect upon how, at the pretrial stage of the criminal justice process—the period following arrest but before a case is resolved—systems based on risk address victim needs in ways that money-based systems cannot.

Research and polling have identified crime victims' most common and pressing needs: to feel safe, to have their voices heard, and to have access to timely and relevant information.

Money-based pretrial systems—those that equate risk to dollar amounts and allow potentially dangerous defendants to purchase their pretrial release with little-to-no judicial oversight or supervision— fail to meet victims' needs. In most cases, victims have no idea if or when a defendant will be released. These policies often exacerbates feelings of disconnect from the process and personal and family fears. Risk-based pretrial systems, on the other hand, are better designed to keep victims safe and to create an environment where they remain engaged and are kept informed of pretrial decisions and their rationales.

Whereas money-based systems are predicated upon a single, notoriously unreliable variable, a defendant's access to money, evidence-based risk tools draw upon relevant information, such as the defendant's past history, to predict future behavior; and do so with remarkable reliability. The scores these tools produce can then inform judicial discretion to influence the release decision. We can't ever

know what an individual will do in a given situation, but modern risk tools get us closer to understanding the risks they pose than ever before.

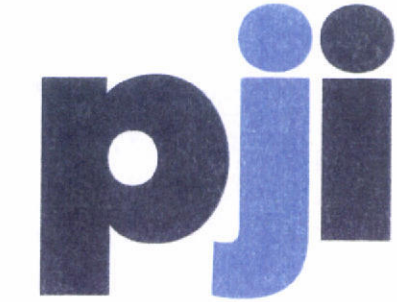
Should a defendant be found to present a high risk of committing crime, committing a crime of violence, or of flight, robust risk-based systems allow them to be preventively detained—with full due process, of course—in order to protect the public, victims, and the integrity of the legal process.

Because risk-based systems are geared toward actively managing defendants—rather than releasing them with a receipt and a handshake—they provide numerous opportunities for victims to be heard and to keep informed.

Many risk-based pretrial models also include an interview with victims as part of the risk assessment process. This allows victims to be involved in the case and for the courts to obtain valuable information about the defendant and their relationship with the victim. This can be maintained by ensuring that victims are informed of the release decisions and any conditions imposed on the defendant, the rationale behind those decisions. Also, active monitoring of defendants' behaviors and movements allows courts to keep victims up-to-date, safe, and aware.

PJI's support of pretrial reform that honors and protects all people includes victims. A central goal of our 3DaysCount campaign is to see states replace money-based pretrial systems with ones based on the scientific measurement of risk and that include, inform, and protect people who have been victimized by crime.

GLOSSARY OF TERMS AND PHRASES RELATING TO BAIL AND THE PRETRIAL RELEASE OR DETENTION DECISION



PRETRIAL JUSTICE INSTITUTE

Gaithersburg, MD

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Introduction

The complicated nature of various terms and phrases relating to bail and pretrial release or detention can sometimes lead to confusion and misuse of those terms. That, in turn, may lead to unnecessary quibbling and distraction from fundamental issues in the administration of bail and pretrial justice. Some of this confusion and misuse is quite understandable. For example, in his Dictionary of Modern Legal Usage, Bryan Garner describes the term "bail" as "a chameleon-hued legal term," with strikingly different meanings depending on its overall use as either a noun or a verb.[1] A term like "habeas corpus," as another example, has little meaning to one not fully immersed in the legal waters of the American system of justice. How does one sum up a concept like habeas corpus, when, as the online company Twitter said when explaining its own service in March of 2010, "it's a whole thing?"

Misuse of terms can be caused by simple lack of education. That "bail" is used primarily to refer to amounts of money is likely due only to a lack of education for not only the public and the press, but also for some criminal justice practitioners. Other terms are often so ingrained in usage that they seem correct even when they are misused. For example, the terms "pretrial" and "pretrial services" are sometimes used as short-hand nouns referring to pretrial services agencies or programs (e.g., "Pretrial wants to eliminate commercial bail bonding."), instead of their proper use as (1) a period of time, and (2) the actual services provided by the pretrial services agency or program.

These predominantly legal terms are difficult enough without any layer of confusion and misuse. Accordingly, this glossary of terms and phrases has been written to provide current definitions, in context, and with historical references as needed, to clarify a comprehensive set of common terms relating to bail and the pretrial release and detention decision. The authors hope that the glossary will be used to find consensus on common terms and phrases to avoid needless distractions from the important work of making the administration of bail more effective. References to Black's Law Dictionary (or "Black's") are to the Ninth Edition.[2]

Adversary System

Black's calls it "[a] procedural system, such as the Anglo American Legal System, involving active and unhindered parties contesting with each other to put forth a case before an independent decision maker." According to Michael Asimow, "[t]he central precept of the adversary system is that the sharp clash of proofs presented by opposing lawyers, both zealously representing the interests of their clients, generates the information upon which a neutral and passive decision maker can most justly resolve a dispute."[3] It is typically contrasted with the inquisitorial system of justice, in which the judge controls most of the pretrial and trial procedures, including framing the issues, supervising criminal investigations and discovery, questioning and cross-examining witnesses, and summarizing evidence. Understanding the adversary system's importance at bail is critical, for initiation of adversary proceedings triggers certain rights, such as the right to counsel. In practice, judges comfortable operating in a system in which they are to oversee two sides in the adversarial clash of proofs often find that the typical bail hearing is overwhelmingly lopsided, many times operating with no defense counsel, and instead proceeding with defendants who are unprepared to argue issues concerning their pretrial release. The adversary system presupposes somewhat equal adversarial opponents, but bail hearings often lack that equality.

Affidavit

A voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths (Black's). Among other things, affidavits are drafted to obtain search warrants and to document an officer's probable cause for making a warrantless arrest. In the administration of bail, some persons may be tempted to place a greater emphasis on this sometimes riveting recitation of "facts" and to the charge filed, to the exclusion of other relevant factors used to assess risk of flight and to public safety.

American Bar Association ("ABA") Criminal Justice Standards

The American Bar Association is the 400,000-plus member national association for the legal profession and those interested in the legal profession. In 1964, the ABA implemented its "Criminal Justice Standards Project," which has created and updated best practice standards on twenty-three areas in criminal justice. The Third Edition of the ABA's Standards on Pretrial Release (black letter standards approved in 2002, commentary approved in 2007) are based on empirically sound social science research, as well as on fundamental legal principles, and have been used by courts, legislatures, scholars, and others interested in best practices in the field of pretrial justice.

Appearance Bond

see Bail Bond

Appearance Rate

see Court Appearance Rate

Arraignment

A criminal proceeding at which the defendant is read the charge or charges and asked to enter a plea. The essence of the arraignment is the act of pleading (e.g., guilty, not guilty, no contest) to the formal charge or charges, and although an arraignment may be continued or postponed, its goal is to obtain the defendant's plea. The term is sometimes incorrectly used to mean the defendant's "first appearance" or "initial appearance," but the arraignment needn't be the first appearance. As correctly noted in Black's and other sources, the law

regarding arraignments varies from jurisdiction to jurisdiction, and is typically explained by court rules or statutes governing those jurisdictions.

Arrest Warrant

see Warrant

Bail

In criminal law, bail is the process of releasing a defendant from jail or other governmental custody with conditions set to reasonably assure public safety and court appearance. "Bail" is perhaps one of the most misused terms in the field, primarily because bail has grown from the process of delivering the defendant to someone else, who would personally stand in for the accused if he or she did not appear for court, to presently being largely equated with sums of money. It is now clear that, whatever pure system of "standing in" for a particular defendant to face the consequences of non-appearance in court may have existed in the early Middle Ages, that system was quickly replaced with paying for that non-appearance first with goods (because standardized coin money remained relatively rare in Anglo Saxon Britain until the Eighth and Ninth Centuries) and later money. The encroachment of money into the process of bail has since been unrelenting. And, unfortunately to this day, the terms "money" and "bail" have also been joined in an unholy linguistic alliance.

This coupling of money and bail is troubling for several reasons. First, while money bail may have made sense in the Anglo Saxon criminal justice system – comprised of monetary penalties for nearly all bailable offenses – the logic eroded once those monetary penalties were largely replaced with corporal punishment and imprisonment. Second, while perhaps logically related to court appearance (many people believe that money motivates human action, and in most state statutes, money amounts are forfeited for failure to appear), to date money has never been empirically related to it – that is, no studies have shown that money works as an added incentive to appear for court. Third, the purpose of bail itself has changed over the past 100 years from reasonably assuring only court appearance to also reasonably assuring public safety, and research has demonstrated that money is in no way related to keeping people safe. Indeed, this notion is reflected in most state statutes, which routinely disallow the forfeiture of money for breaches in public safety. Fourth, money bail does not reflect the criminal justice trend, since the 1960s, to make use of own recognizance or personal recognizance bonds with no secured financial conditions. And finally, in most jurisdictions monetary conditions of release have been overshadowed by the numerous nonfinancial conditions designed to further bail's overall purpose to provide a process for release while reasonably assuring court appearance and public safety.

Garner has correctly noted the multiple definitions of bail that have evolved over time, most of which presuppose some security in the form of money.[4] For example, besides being defined as the security agreed upon, bail was also once defined as a person who acts as a surety for a debt, and was often used in sentences such as, "The bail is supposed to have custody of the defendant."[5] However, because much has been learned over the last century about money at bail (including its deleterious effect on the concept of pretrial justice), and because the very purpose of bail has also changed to include notions of public safety in addition to court appearance (preceding a new era of release on nonfinancial conditions), defining the term "bail" as an amount of money, as many state legislatures, criminal justice practitioners,

newspapers, and members of the public do, is flawed. Thus, a new definition of the term is warranted.

Bail as a process of release is the only definition that: (1) effectuates American notions of liberty from even colonial times; (2) acknowledges the rationales for state deviations from more stringent English laws in crafting their constitutions (and the federal government in crafting the Northwest Territory Ordinance of 1787); and (3) naturally follows from various statements equating bail with release from the United States Supreme Court from the late 1800s to 1951 (in Stack v. Boyle, the Supreme Court wrote that, "federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction")[6] and to 1987 (in United States v. Salerno, the Supreme Court wrote that, "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").[7]

Bail as release accords not only with history and the law, but also with scholar's definitions (in 1927, Beeley defined bail as the release of a person from custody), the federal government's usage (calling bail a process in at least one document), and use by organizations such as the American Bar Association, which has quoted Black's Law Dictionary definition of bail as a "process by which a person is released from custody."[8] States with older (and likely outdated) bail statutes often still equate bail with money, but many states with newer provisions, such as Virginia (which defines bail as "the pretrial release of a person from custody upon those terms and conditions specified by order of an appropriate judicial officer"),[9] and Colorado (which defines bail as security like a pledge or a promise, which can include release without money),[10] have enacted statutory definitions to recognize bail as something more than simply money. Moreover, some states, such as Alaska,[11a] Florida,[11b] Connecticut,[11c] and Wisconsin,[11d] have constitutions explicitly incorporating the word "release" into their right to bail provisions.

The phrase "or other governmental custody" is added in recognition of the fact that bail, as a process of releasing a defendant prior to trial, includes various mechanisms occurring at various times to effectuate that release, for example, through station house release from a local police department. The term "with conditions" is added with the understanding that by changing the status of an individual from citizen to defendant in a court proceeding, each release of any particular defendant contains at least one condition – attendance at trial – and typically more to reasonably assure court appearance as well as public safety.

Bail Bond

An agreement between the defendant and the court, or between the defendant, the surety (commercial or noncommercial surety), and the court, originally designed primarily to assure the defendant's appearance in court and later expanded in the federal system and most states to include public safety protections. Bail bonds are sometimes called "appearance bonds," as all bail bonds are minimally appearance bonds, but that term does not fully reflect the purpose of bail, which is to normally afford release while reasonably assuring court appearance and public safety.

Black's Law Dictionary defines "bond" generally as an obligation or a promise, and "bail bond" as "[a] bond given to the court by a criminal defendant's surety to guarantee that the defendant will duly appear in court in the

future and, if the defendant is jailed, to obtain the defendant's release from confinement. The effect of release on bail bond is to transfer custody of the defendant from the officers of the law to the custody of the surety on the bail bond, whose undertaking is to redeliver the defendant to legal custody at the time and place appointed in the bond." A broader definition, however, correctly takes into account the fact that many defendants are released without third party sureties, and recognizes the dual purpose of bail.

In the law there are numerous types of bonds, and specifically several different types of "bail bonds," all of which fall under one of two categories of pretrial release from custody or confinement: (1) those that require a secured financial condition of release; and (2) those that do not.[12] The United States Department of Justice, Bureau of Justice Statistics ("BJS"), provides the following categories and explanations of financial bonds that require immediate payment or secured guarantee of payment prior to a defendant's release from detention:

> *[Compensated] Surety bond* – A bail bond company signs a promissory note to the court for the full [money] bail [bond] amount and charges the defendant a fee for the service (usually 10% [or more] of the full [money] bail [bond] amount). If the defendant fails to appear, the bond company is liable to the court for the full [money] bail [bond] amount. Frequently the [money bail] bond company requires collateral from the defendant [or friend or relative of the defendant for the full amount of the bail bond] in addition to the fee.
>
> *Deposit bond* – The defendant deposits a percentage (usually 10%) of the full [money] bail [bond] amount with the court. The percentage of the [money] bail [bond] is returned after the disposition of the case, but the court often retains a small portion for administrative costs. If the defendant fails to appear in court, he or she is liable to the court for the full [money] bail [bond] amount.
>
> *Full cash bond* – The defendant posts the full [money] bail [bond] amount in cash with the court. If the defendant makes all court appearances, the cash is returned. If the defendant fails to appear in court, the bond is forfeited.
>
> *Property bond* – Involves an agreement made by a defendant as a condition of pretrial release requiring that property valued at the full [money] bail [bond] amount be posted as an assurance of his or her appearance in court. If the defendant fails to appear in court, the property is forfeited. Also known as 'collateral bond.'[13]

BJS also provides the following categories of bonds that do not require immediate payment or guarantee of payment prior to a defendant's release from detention:

> *Release on recognizance (ROR)* – The court releases some defendants on a signed agreement that they will appear in court as required ... [which] includes citation releases in which arrestees are released pending their first court appearance on a written order issued by law enforcement or jail personnel. [In many jurisdictions, a ROR (also known as "Own Recognizance," "Personal Recognizance," or "PR") bond may also be an unsecured financial bond if it has money attached].
>
> *Unsecured bond* – The defendant pays no money to the court but is liable for the full

amount of [the money] bail [bond] upon failure to appear in court.

Conditional release – Defendants are released under specified conditions. A pretrial services agency usually conducts monitoring or supervision, if ordered for a defendant. In some cases, such as those involving a third-party custodian or drug monitoring and treatment, another agency may be involved in the supervision of the defendant. Conditional release sometimes includes an unsecured bond.[14] There is growing recognition that "typing" bail bonds based on a single condition of release – money, such as when labeling a bail bond a "surety bond" or a "cash bond" – is an archaic practice, and thus the better practice (as reflected in the ABA Standards) is to refer either to "release" or "detention," with release having one or more conditions –financial or non-financial – as limitations on pretrial freedom.

Bail Bondsman

Also known as a commercial or compensated surety, a bail bondsman is one who guarantees a defendant's appearance for court by promising to pay a financial condition of bond if the defendant does not appear for court. Bail bondsmen are typically licensed by the state and have an appointment from an insurance company to act as such. For their services, bail bondsmen charge defendants a non-refundable fee, and usually require the defendant (or his or her friends or family) to collateralize the full amount of the financial condition with cash or property.

Bail Reform Act of 1966

The first major reform of the federal bail system since the Judiciary Act of 1789, which established the federal judiciary. The 1966 Act contained the following provisions: (1) a presumption in favor of releasing non-capital defendants on their own recognizance; (2) conditional pretrial release with conditions imposed to reduce the risk of failure to appear; (3) restrictions on money bail bonds, which the court could impose only if nonfinancial release options were not enough to assure a defendant's appearance; (4) a deposit money bail bond option, allowing defendants to post a 10% deposit of the money bail bond amount with the court in lieu of the full monetary amount of a surety bond; and (5) review of bail bonds for defendants detained for 24 hours or more.[15] After passage of this Act, many states passed similar laws.

Bail Reform Act of 1984

The Act that amended the 1966 Bail Reform Act to include danger to the community, or public safety, as a consideration in the pretrial release and detention decision. The 1984 Act mandates "pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court . . . unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community."[16] The Act further provides that if, after a hearing, "the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial."[17] The Act creates a rebuttable presumption toward confinement when the person has committed certain delineated offenses, such as crimes of violence or serious drug crimes.[18] The preventive detention provisions of the 1984 Act were upheld as constitutional in United States v. Salerno.[19] ***See Salerno***

Bail Schedule

see Money Bail Bond Schedule

Bench Warrant

see Warrant

Bounty Hunter

Also known as a "bail recovery agent," "fugitive recovery agent," and other similar terms, a bounty hunter is one who seeks to capture wanted persons for the reward (bounty) offered for the capture. Taylor v. Taintor, 83 U.S. 366 (1872), is commonly cited as the authority for persons to act as bounty hunters in the administration of bail. Bounty hunters were thought to be an essential ingredient to bail administered through a personal surety system, which placed enormous responsibility on sureties but did not allow them to profit from or be indemnified through the bail transaction. With the advent of the commercial bail system in about 1900, however, the need for the bounty hunter function has grown increasingly dubious. Indeed, given the widespread capability of traditional law enforcement and the tendency for bail bondsmen to collateralize the full amount of bail bonds (thus obviating the need to "track someone down" to avoid payment), there is substantial debate over the continued need for the bounty hunter profession.

Capias

From the Latin for "that you take," a capias is the general name for several types of writs, the common characteristic of which is that they require the officer to take a defendant into custody (Black's).

Carlson v. Landon

342 U.S. 524 (1952). The United States Supreme Court case clarifying the concept of a right to bail via the Excessive Bail Clause in the federal system, written just four months after Stack v. Boyle. In Carlson, the Court wrote:

> The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable.[20]

Citation

According to Black's, a citation is (1) a "court ordered writ that commands a person to appear at a certain time and place to do something demanded in the writ; (2) A police issued order to appear before a judge on a given date to defend against a stated charge, such as a traffic violation." The second definition seems to reflect more common usage. Citation release is a large but often ignored part of pretrial justice, which involves a host of decisions that occur from arrest until case disposition, including whether to release an arrestee with a citation versus taking that person to jail. Despite the fact that pretrial release has not been historically viewed as a police function, through their discretionary decision-making ability to issue citations in lieu of arrests in certain cases, "the police are often in the best position to provide for the speedy release of criminal defendants."[21] Pretrial literature now typically discusses citation release under the

topic of "delegated release authority," which includes release of defendants prior to their first appearance by field officers and jail staff, in addition to pretrial services program staff.

Following the principle of releasing defendants under the least restrictive conditions, the American Bar Association Criminal Justice Standards on Pretrial Release "favor use of citations by police . . . in lieu of arrest at stages prior to the first judicial appearance in cases involving minor offenses."[22] In Part II of the ABA Standards, "Release by Law Enforcement Officer Acting Without an Arrest Warrant," Standard 10-2.1 states that "[i]t should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law. This policy should be implemented by statutes of statewide applicability."[23] Commentary to that standard explains that "emphasis on citation release (as well as 'stationhouse' release) was a logical extension of bail reform presumptions favoring pretrial release and release under least restrictive alternatives as well as encouraging diversion from the justice system altogether."[24] ABA Standard 10-2.2 recommends mandatory issuance of citation for minor offenses, and would require law enforcement agencies to document in writing the reasons for choosing to take a suspect into custody at a secure facility on a minor offense.[25] Moreover, Standard 10-2.3 recommends that,

> [e]ach law enforcement agency should promulgate regulations designed to increase the use of citations to the greatest degree consistent with public safety. Except when arrest or continued custody is necessary, the regulations should require such inquiry as is practicable into the accused's place and length of residence, family relationships, references, present and past employment, criminal record, and any other facts relevant to appearance in response to a citation.[26]

Citations are also sometimes called "desk appearance tickets," and are most used when the risk to public safety and for failure to appear for court are perceived as low.

Collateral

Generally, collateral is property that is pledged as security against a debt (Black's). Specifically, collateral in the administration of bail is typically a deposit of money or property to protect a commercial bail bondsman from loss if a defendant fails to appear for court. It can come from the defendant, but often comes from friends and family of the defendant.

Commercial Surety or Compensated Surety

see Bail Bondsman

Condition

A future and uncertain event on which the existence or extent of an obligation or liability depends; an uncertain act or event that triggers or negates a duty to render a promised performance (Black's). In the administration of bail, conditions are requirements that must be met to avoid certain consequences. Pretrial release often hinges on defendants promising to follow certain conditions of release, which are set to further the constitutionally valid purposes for limiting pretrial freedom (i.e., to reasonably assure court appearance and public safety). Among many other delineations in the law, these conditions may be precedent and subsequent. Most bail bond conditions are conditions subsequent – that is, release is obtained, but if the condition occurs (or fails to occur, depending on its wording), it will trigger

some consequence, and sometimes bring pretrial freedom to an end. Money at bail is the quintessential, and typically the only condition precedent. Unlike other conditions, some or all of a financial condition often must be paid first in order to initially obtain release.

Consent of Surety

Primarily used with commercial bail bondsmen, consent of surety refers to a written document from the bondsman agreeing to remain as surety despite good cause for a bail bond to be revoked.

Contempt

Black's defines criminal contempt as "[a]n act that obstructs justice or attacks the integrity of the court." Generally speaking, a court can declare a defendant to be in contempt for any number of disruptive acts that interfere with the administration of justice, including violating a formal court order. Contempt of court may occur directly (committed in the immediate vicinity of the court) or indirectly (committed outside of court).

Co-signor

A person, separate from and in addition to the defendant, who guarantees compliance with a bail bond. Despite having a parallel function to that of a commercial surety, the term co-signor has grown in use primarily to refer to an uncompensated surety who guarantees only the financial condition of release. ***See Surety***

Court Appearance Rate

A more representative way of expressing the court appearance outcome by focusing on the more frequent number of court appearances, instead of the typically much lower number of failures to appear ("FTA") for court. This rate may be calculated at the person level, by determining how many persons in a group appeared for all court events, or at the court event level, by determining what percentage of court events were attended by any person or group of persons. See Pretrial Release Outcomes

Criminal History

Also known as a criminal record, it is a compilation of criminal offenses associated with a particular individual. Criminal histories can be powerful documents in the administration of bail, so great caution is urged in compiling and interpreting them.

Defendant

The accused in a criminal proceeding.

Delegated Release Authority

The entrusting – to law enforcement, or in some places, a pretrial services agency or program – of judicial authority to release an arrested person before his or her first court appearance.

Diversion

According to the National Association of Pretrial Services Agencies' Performance Standards and Goals for Pretrial Diversion/Intervention, pretrial diversion/intervention is "a voluntary option which provides alternative criminal case processing for a defendant charged with a crime that ideally, upon successful completion of an individualized program plan, results in a dismissal of the charge(s)." The purpose of such a program is to "enhance justice and public safety through addressing the root cause of the arrest provoking behaviors of the defendant, reducing the stigma which accompanies a record of conviction, restoring victims and assisting with the conservation of court and criminal justice resources."[27] The Pretrial

Justice Institute's website contains links to a variety of publications related to this topic.[28]

Double Supervision or "Doubling Up"

The practice of setting a commercial surety bond along with professional pretrial agency or program supervision. The National Association of Pretrial Services Agencies Standards on Pretrial Release recommend not using this practice of "doubling-up" supervision:

> [p]ending abolition of compensated sureties, jurisdictions should ensure that responsibility for supervision of defendants released on bond posted by a compensated surety lies with the surety. A judicial officer should not direct a pretrial services agency to provide supervision or other services for a defendant released on surety bond. No defendant released under conditions providing for supervision by the pretrial services agency should be required to have bail posted by a compensated surety.[29]

Commentary to that Standard provides the following reasoning:

> [o]ther provisions of the Standards emphasize that financial bail should be used only if other conditions are insufficient to minimize the risk of nonappearance, and that, if [secured] financial conditions are imposed, the bail amount should be posted with the court under procedures that allow for the return of the amount of the bond if the defendant makes required court appearances. There is no reason to require defendants to support bail bondsmen in order to obtain release (and to pay the bondsman a fee that is not refundable even if they are ultimately cleared of the charges), and the practice of [simultaneously] providing for supervision by the pretrial services agency simply encourages perpetuation of the undesirable practices associated with commercial bail bonding. It also drains supervisory resources from often understaffed and overworked pretrial services agencies, making it more difficult to supervise the defendants for whom they properly have responsibility.[30]

The American Bar Association at one time had a position on "double supervision" in its Standards for Pretrial Release, but it has since has removed it "so as to leave no doubt as to the imperative nature of the recommendation that [commercial sureties] be abolished."[31]

Due Process

Refers generally to protecting individuals from arbitrary or unfair federal or state action pursuant to the rights afforded by the Fifth and Fourteenth Amendments of the United States Constitution (and similar state provisions). As noted by the Supreme Court inUnited States v. Salerno, due process is further broken down into two subcategories:

> So called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.' When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as 'procedural' due process.[32]

In the administration of bail, due process considerations include fundamental fairness arguments that high money bail bonds lead to defendants being unfairly punished prior to trial, as well as concerns that high money bonds and the resulting detention affects the fairness of a defendant's trial and the ultimate

disposition of the case. When financial conditions of release result in a defendant's pretrial detention without the type of hearing envisioned by the U.S. Supreme Court in Salerno, a procedural due process claim might also prove successful.

Eighth Amendment

Typically refers to the Eighth Amendment to the United States Constitution, which states that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." ***See Excessive Bail***

Emergency Release

As it relates to the field of bail and pretrial release, it is the release of any prisoner due to an emergency situation, such as (and typically) jail crowding. As a jail's percentage of pretrial inmates rises, that jail's overall population can rise above its operational capacity. Because many jurisdictions are uneasy with making policy changes affecting the pretrial population, one sometimes sees jails releasing convicted inmates early, often pursuant to elaborate emergency release schemes designed to comfort the public. At the extreme, emergency releases are a response to a court order to reduce a jail's population, but some programs are voluntary to remain within agreed-upon caps based on budgetary or other reasons. Emergency releases are relatively rare, but represent a significant and often well-publicized failure to manage a jail's population.

Equal Protection

Refers generally to protecting individuals from laws that treat people unequally pursuant to the right guaranteed by the Fourteenth Amendment of the United States Constitution (and similar state provisions). In addition to considerations of due process (which include fundamental fairness arguments that high money bail bonds lead to defendants being unfairly punished before trial, as well as concerns that high money bonds and detention affects the fairness of a defendant's trial and the ultimate disposition of the case), many scholars have argued that equal protection considerations should serve as an equally compelling basis for fair treatment in the administration of bail, especially when considering the disparate impact of money bail bonds on defendants due only to their level of income.[33]

Over the years, this argument has been bolstered by language from Supreme Court opinions in cases like Griffin v. Illinois, which dealt with a defendant's ability to purchase a transcript required for appellate review. In that case, Justice Black stated that, "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[34] Moreover, sitting as circuit justice to decide a prisoner's release in two cases, Justice Douglas uttered the following dicta frequently cited as support for equal protection analysis: (1) "Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?";[35] and (2) "[N]o man should be denied release because of indigence. Instead, under our constitutional system, a man is entitled to be released on 'personal recognizance' where other relevant factors make it reasonable to believe that he will comply with the orders of the Court."[36] Overall, despite scholarly arguments to invoke Equal Protection Clause analysis to the issue of bail, the federal courts have not been inclined to do so.

Excessive Bail

A legal term of art used to describe bail that is unconstitutional pursuant to the Eighth Amendment to the United States Constitution (or similar state provisions). The Eighth

Amendment states that, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Excessive Bail Clause derives from reforms made by the English Parliament in the 1600s to curb the abuse of judges setting impossibly high money bail to thwart the purpose of bail to afford a process of pretrial release. The English Bill of Rights of 1689 first used the phrase, "Excessive bail ought not be required," which was incorporated into the 1776 Virginia Declaration of rights, and ultimately found its way into the United States and many other state constitutions.

Excessiveness must be determined by looking both at federal and state law, but a rule of thumb is that term relates overall to reasonableness. In United States v. Salerno, the Court stated as follows:

> The only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil. Of course, to determine whether the Government's response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response. Thus, when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. Stack v. Boyle, supra. We believe that when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail.[37]

Thus, to determine excessiveness, one must "look to the valid state interests bail is intended to serve for a particular individual and judge whether bail conditions are excessive for the purpose of achieving those interests. The state may not set bail to achieve invalid interests [flight and public safety are valid; at least one federal court has held that the state's interest in setting bail at a level designed to prevent the arrestee from posting it is invalid, see Wagenmann v. Adams, 829 F.2d 196, 211-14 (1st Cir. 1987), and bail as punishment would also undoubtedly be an invalid state interest], nor in an amount that is excessive in relation to the valid interests it seeks to achieve."[38]

The law of Stack v. Boyle is still strong: when the state's interest is assuring the presence of the accused, "[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment."[39] Nevertheless, as the language in Salerno indicates, financial conditions (i.e., amounts of money) are not the only conditions vulnerable to an excessive bail claim. Any unreasonable condition of release (e.g., a nonfinancial condition having no relationship to reducing or ameliorating an identified risk, or that exceeds what is needed to assure the constitutionally valid state interest) might be deemed constitutionally excessive.[40]

Exoneration

Exoneration generally is the removal of a responsibility. In the administration of bail and the pretrial process, it is a term of art referring to one being released from liability on a bail bond upon the successful satisfaction of all conditions of the bond, upon payment of a forfeiture of the bond, or upon the occurrence of any other statutorily enumerated justification, such as the death of the defendant, the surrender of the defendant into custody before the forfeiture process is complete, or deficiencies in the process affecting a surety's liability.

Failure to Appear (FTA)

The phrase typically used when a defendant or witness under subpoena does not show up for a scheduled court appearance. It is understood to carry with it some penalty for the failure, such as the issuance of a bench warrant. It has sometimes been defined as a "willful" absence from a court appointment, but research and experience has shown that FTAs needn't be willful to nonetheless occur.

Failure to Appear Rate

see Court Appearance Rate

Felony

A serious crime usually punishable by imprisonment for more than one year or by death (Black's). Also called "major" or "serious" crimes. What is and is not considered a felony (and whether it is even called a felony) differs among jurisdictions, and the lines of demarcation between less-serious felonies and more-serious misdemeanors are often blurred, so reference to each state's sometimes complex criminal code is necessary to determine the precise definition. When reporting crime statistics, many entities (including the Federal Bureau of Investigation) categorize offenses using other classifications, such as "violent" and "property" offenses.

First Appearance

The court proceeding in which a criminal defendant is first brought before a judge, either physically or through some electronic transmission. The laws concerning first appearances vary among the states, and can have different names. For example, in Rothgery v. Gillespie County, the case dealing with the Sixth Amendment right to counsel at the initial appearance, that appearance was called an "article 15.17 hearing," in which the Texas courts combined a probable cause determination with charge recitation and bail setting.[41] The relevant statute typically requires such a hearing "without unreasonable delay," causing some practical variation, and usually includes an advisement of defendant rights, a recitation of charges, and bail bond setting. Also called an "initial appearance." ***See also Presentment***

Forfeiture

To forfeit something generally in the law means to lose the right to money or property based on the breach of a legal obligation. In the administration of bail and the pretrial process, forfeiture refers to the procedure in which a court orders that the money paid up-front be retained by the court or that a surety pay the security pledged to the court when a defendant fails to fulfill the requirements of a bail bond. It is often used in relation to the bond agreement between a court, the defendant, and a commercial surety (bail bondsman), with numerous complicated statutory provisions governing the forfeiture procedure.[42]

Habeas Corpus

From the Latin, "that you have the body," the term is short for habeas corpus ad subjiciendum, which means "that you have the body to submit to," and long for "habeas," as in "the defendant filed his habeas petition today." The term "habeas corpus" actually precedes any number of writs designed to bring a person from one place to another, typically court. The most frequently used and referred to (ad subjiciendum) is directed to someone detaining another person and commanding that the detained person be brought to court, typically to ensure that the person's imprisonment is not illegal. It is one means available for defendants to obtain judicial review of the right to bail, or the amount of a financial condition of a bail bond. To Garner, the term

habeas corpus "is the quintessential Latinism that has taken on a peculiar meaning so that no homegrown English term could now supply."[43]

It is often referred to as the "Great Writ," in recognition of its importance among all other writs, and has been described by the United States Supreme Court as "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action."[44] As Justice Stevens once wrote, "[t]he great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom. Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments."[45]

Habeas corpus derives from the famous 1676 English case of an individual known only as Jenkes, who was held for two months on a charge that, pursuant to statute, required admittance to bail. Jenkes' case, and cases like it, ultimately led to Parliament's passage of the Habeas Corpus Act of 1679, which established procedures to prevent long delays before a bail hearing was held. The United States explicitly incorporated the right of habeas corpus into the Constitution in Article 1, Section 9, which reads, "[t]he privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." The first Judiciary Act provided habeas corpus for federal prisoners, and in 1867 Congress expanded the process to allow federal courts to grant writs of habeas corpus in all cases, including state cases, where any person may be restrained in violation of the Constitution or U.S. law or treaty. Each state typically also has its own habeas right and procedure, which is often incorporated into an overall postconviction remedy provision.

Like "bail," habeas corpus is a process, implicating a unique legal procedure and body of legal precedent.

Immigration and Customs Enforcement ("ICE")

The principal investigative arm of the United States Department of Homeland Security, created in 2003 by merging parts of the United States Customs Service and the Immigration and Naturalization Service. In some jurisdictions, ICE places immigration holds on defendants that can affect their perceived risk and thus their pretrial status.

Incarceration

According to Black's, it is the act or process of confining someone. By most estimates, the United States has the highest number of inmates and the highest incarceration rate in the world, with China (number of inmates) and Russia (incarceration rate) coming in second.

Incarcerated Population

Also known at the local level as the jail population, the incarcerated population is the number persons held in one or more detention facilities. Jail population dynamics are important to understand when dealing with policies and procedures that affect that population, such as those surrounding bail and pretrial release. A typical jail is akin to a water barrel, which has an overall amount of liquid based on how much water is put into it, and how long that water stays inside the barrel until it is let out. Like the water barrel, the average daily jail population is determined by bookings (inflow) and length of stay (outflow). Thus, in addition to variations in bookings, various jail subpopulations can drive the average daily population based on their lengths of stay, and these lengths of stay, in turn, are affected by local

policies and procedures. As it pertains to bail and pretrial release, the Bureau of Justice Statistics reports that jail populations peaked in 2008, but have been declining since then. Nevertheless, approximately two thirds of the inmates housed in our nation's jails are pretrial detainees, and the use of secured money at bail has increased the lengths of stay of pretrial inmates.

Individualized Bail Determination

The notion underlying a risk-based administration of bail that each defendant poses his or her own risk, which can be assessed using professional standards and research. It presupposes that the fixing of bail in a blanket fashion not taking into consideration those individual risk characteristics is flawed and possibly illegal. The notion was first articulated by the United States Supreme Court in Stack v. Boyle, 342 U.S. 1, 5-6 (1951), when the Court wrote that "[t]o infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act," and "[s]ince the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. The traditional standards as expressed in the Federal Rules of Criminal Procedure are to be applied in each case to each defendant." The particular standards referred to in Stack included the nature and circumstances of the offense, the weight of the evidence, the financial ability of the defendant, and his or her character. Most states have similar standards in their bail statutes, thus statutorily mandating an individualized bail setting.

Initial Appearance

see First Appearance

Integrity of the Judicial Process

A term of art in the field of bail and pretrial release that often sums up a number of variables typically related to risk to court appearance and public safety. The phrase has sometimes been used as a label for a third constitutionally valid purpose for limiting pretrial freedom beyond court appearance and public safety, but often the phrase is either used without definition or has been further defined as relating to either court appearance or public safety. For example, the American Bar Association states that the purpose of the pretrial release decision includes "maintaining the integrity of the judicial process by securing defendants for trial."[46] Other jurisdictions use the phrase when describing the threat of intimidating or harassing witnesses, arguably clear risks to public safety.

The phrase "ensure the integrity of the judicial process" was used in United States v. Salerno,[47] but only in a passing reference to the argument on appeal. Reviewing the court of appeals ruling, however, sheds some light on that argument. The principle contention at the court of appeals level was that the Bail Reform Act of 1984 violated due process because it permitted pretrial detention of defendants when their release would pose a danger to the community or any person.[48] As the appeals court noted, this contention was different from what it considered to be the clearly established law that detention was proper to prevent flight or threats to the safety of those solely within the judicial process, such as witnesses or jurors. The appeals court found the idea of potential risk to the broader community "repugnant" to due process and, had the Supreme Court not reversed, the distinction between those in the judicial process and those outside of it might have remained. However, by upholding the Bail Reform Act's preventive detention provi-

sions, the Supreme Court forever expanded the notion of public safety to encompass consideration of all potential victims, whether in or out of the judicial process. Today, use of the phrase typically begs further definition so as to clarify whether judicial integrity means specifically court appearance or public safety, more general compliance with all court-ordered conditions of one's bail bond, or some other relevant factor.

Jail

A jail is a building designated and used to temporarily confine persons who are sentenced to minor crimes or who do not obtain release during the pretrial period, typically operated by local jurisdictions. As Black's notes, it is a place of confinement that is somewhat more than a police station, and less than a prison. Jail is pronounced the same as "gaol," the British variant, which is traced to the Latin term for "cage." Because jails are seen as somewhat temporary, they often do not have the sort of long-term rehabilitation programs afforded in many prisons.

Judge

A public official appointed or elected to hear and decide legal matters in court (Black's). The term is often used interchangeably with "court," as in "I hope that the court will decide this matter soon." There are numerous types of judges, from county and district to military and "senior visiting," so one should attempt always to further clarify the title. The term is frequently misused to describe those on supreme courts, who are typically instead called "justices." In some jurisdictions the title is important when determining the authority to grant or fix bail.

Judicial Officer

Broader than the term "judge," judicial officers include judges and magistrates, as well as other officers of the court as defined locally or in state or federal bail statutes. In some jurisdictions the title is important when determining the authority to grant or fix bail.

Least Restrictive Conditions

Least restrictive conditions is a concept related to excessive bail, as evidenced by the United States Supreme Court's opinion in Salerno, which explained that conditions of bail must be set at a level designed to assure a constitutionally valid purpose for limiting pretrial freedom "and no more." The phrase "least restrictive conditions" is a term of art expressly contained in the federal and District of Columbia statutes, the American Bar Association best-practice standards on pretrial release, and other state statutes based on those Standards (or a reading of Salerno). Moreover, the phrase is implicit through similar language from various state high court cases articulating, for example, that bail may only be met by means that are "the least onerous" or that impose the "least possible hardship" on the accused.

Commentary to the ABA Standard recommending release under the least restrictive conditions states as follows:

> This Standard's presumption that defendants should be released under the least restrictive conditions necessary to provide reasonable assurance they will not flee or present a danger is tied closely to the presumption favoring release generally. It has been codified in the Federal Bail Reform Act and the District of Columbia release and pretrial detention statute,

> as well as in the laws and court rules of a number of states. The presumption constitutes a policy judgment that restrictions on a defendant's freedom before trial should be limited to situations where restrictions are clearly needed, and should be tailored to the circumstances of the individual case. Additionally, the presumption reflects a practical recognition that unnecessary detention imposes financial burdens on the community as well as on the defendant.

The least restrictive principle is foundational, and is expressly reiterated throughout the ABA Standards when, for example, those Standards recommend citation release or summonses versus arrest. Moreover, the Standard's overall scheme creating a presumption of release on recognizance, followed by release on nonfinancial conditions, and finally release on financial conditions is directly tied to this foundational premise. Indeed, the principle of least restrictive conditions transcends the Standards and flows from even more basic understandings of criminal justice, which begins with presumptions of innocence and freedom, and which correctly imposes increasing burdens on the government to incrementally restrict one's liberty.

More specifically, however, the ABA Standard's commentary on financial conditions makes it clear that the Standards consider secured money bonds to be a more restrictive alternative to both unsecured bonds and nonfinancial conditions: "When financial conditions are warranted, the least restrictive conditions principle requires that unsecured bond be considered first." Moreover, the Standards state, "Under Standard 10-5.3(a), financial conditions may be employed, but only when no less restrictive non-financial release condition will suffice to ensure the defendant's appearance in court. An exception is an unsecured bond because such a bond requires no 'up front' costs to the defendant and no costs if the defendant meets appearance requirements."

Legal and Evidence-Based Practices

According to Marie VanNostrand, Ph.D., who first coined the term, they are "interventions and practices that are consistent with the pretrial legal foundation, applicable laws, and methods research has proven to be effective in decreasing failures to appear in court and danger to the community during the pretrial stage. The term is intended to reinforce the uniqueness of the field of pretrial services and ensure that criminal justice professionals remain mindful that program practices are often driven by law and when driven by research, they must be consistent with the pretrial legal foundation and the underlying legal principles."[49]

Magistrate

A judicial officer, often with limited jurisdictional power, who possesses whatever authority that is given to him or her through appointment or law. In some jurisdictions the title is important when determining the authority to grant or fix bail.

Manhattan Bail Project (or Vera Study)

One of the best known social science studies of bail, and the first to explore alternatives to release on secured financial conditions (money bail bonds). It was conducted by the Vera Foundation (now the Vera Institute of Justice) and the New York University Law School beginning in October of 1961. It was designed "to provide information to the court about a defendant's ties to the community and thereby hope that the court would release the defendant without requiring a bail bond [i.e., release on the

defendant's own recognizance]."[50] The project was a focal point of discussion at the National Conference on Bail and Criminal Justice in 1964, and generally in the bail reform movement of the 1960s.

Misdemeanor

A crime that is less serious than a felony and is usually punishable by a fine or relatively brief confinement in a place other than a prison (Black's). ***See also Felony***

Monetary Bail Bond Schedule (or Bail Schedule)

A written listing of amounts of money to be used in bail setting based on the offense charged, regardless of the characteristics of any individual defendant. While they are often created with good intentions, many argue that bail schedules are the antithesis of individualized bail determinations, and thus clearly violate principles articulated by the Supreme Court in Stack v. Boyle.[51] To many, they also improperly displace judicial discretion, and they have been "flatly reject[ed]" by the American Bar Association's Criminal Justice Standards on Pretrial Release because they are "arbitrary and inflexible," and because they exclude individualized factors that are more relevant to risk. At least three state supreme courts have examined procedures to implement non-discretionary bail amounts and found them legally deficient.[52]

Money Bail

A shorthand term used primarily for describing bail or a bail bond using secured financial conditions. The two central issues concerning money bail are: (1) unnecessary incarceration of defendants who cannot afford to pay; and (2) the use of secured financial conditions to protect public safety, a notion with no empirical support and no legal basis in the more enlightened states' statutes.

Money Bail System

The "traditional" money or financial bail system, which includes any system of the administration of bail that is over-reliant on money. Some of its hallmarks include monetary bail bond schedules, overuse of secured bonds, a reliance on commercial sureties (for-profit bail bondsmen), financial conditions set to protect the public from future criminal conduct, and financial conditions set without consideration of the defendant's ability to pay, or without consideration of non-financial conditions that would likely reduce risk.

National Association of Pretrial Services Agencies ("NAPSA") Standards on Pretrial Release

NAPSA is the national professional association for the pretrial release and pretrial diversion fields. Like the ABA's Standards, the NAPSA's Standards on Pretrial Release serve as best practice standards in the field.[53] In many areas, the NAPSA Standards compliment (and sometimes mirror) the ABA Standards, but they also provide important detailed guidance on best practices for operating pretrial services agencies or programs.

National Conference on Bail and Criminal Justice

The 1964 conference, convened by United States Attorney General Bobby Kennedy, which brought together over 400 judges, prosecutors, defense lawyers, police, bondsmen, and prison officials to present "for analysis and discussion specific and workable alternatives to [money] bail based on the experience of the Manhattan

Bail Project and some others which followed in its wake."[54] Attorney General Kennedy closed the conference with the following memorable statement:

> For 175 years, the right to bail has not been a right to release, it has been a right merely to put up money for release, and 1964 can hardly be described as the year in which the defects in the bail system were discovered.
>
> * * *
>
> What has been made clear today, in the last two days, is that our present attitudes toward bail are not only cruel, but really completely illogical. What has been demonstrated here is that usually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is, simply, money. How much money does the defendant have?[55]

Plea

In criminal law, it is an accused person's formal response to a criminal charge (e.g., "guilty," "not guilty," "no contest") (Black's).

Parole

Release from jail, prison, or other confinement after actually serving part of a sentence (Black's).

Plea Bargain

A negotiated agreement between a prosecutor and a criminal defendant whereby the defendant typically pleads guilty to a lesser offense, or to one of multiple charges, in exchange for some concession by the prosecutor, such as an agreement to a more lenient sentence or a dismissal of other charges. It is also called a "plea agreement." There is a significant, but extremely sensitive issue in the administration of bail concerning whether a defendant's pretrial status has the effect of "coercing" a plea, typically by providing the defendant with a Hobson's choice (a take it or leave it option) of pleading guilty in order to be released from confinement. Given the large percentage of cases ending with guilty pleas, research is needed to shed further light on this issue.

Point Scale

A system by which number or "point" values are assigned to various characteristics and circumstances associated with individual defendants. Threshold scores are established that identify defendants as eligible for release or not. Many pretrial programs have used a version of the original VERA point scale at one time, but many others have developed local or statewide validated pretrial risk assessments as called for by national standards. See Pretrial Risk Assessment

Preliminary Hearing

A criminal hearing to determine whether there is sufficient evidence to prosecute an accused person. If sufficient evidence exists, the case proceeds to the next phase. Also called a preliminary examination, a probable cause hearing, or a bindover hearing (Black's).

Presentment

A little-used term to describe the act of bringing a defendant before a judge for the defendant's first appearance as soon as reasonably possible. The United States Supreme Court recently commented on the federal presentment requirement, writing that it is not just some "administrative nicety," but in

fact still has practical importance: "As we said, it stretches back to the common law, when it was one of the most important protections against unlawful arrest. Today presentment is the point at which the judge is required to take several key steps to foreclose Government overreaching: informing the defendant of the charges against him, his right to remain silent, his right to counsel, the availability of bail, and any right to a preliminary hearing; giving the defendant a chance to consult with counsel; and deciding between detention or release."[56] See First Appearance

Presumption

A legal inference of assumption that a fact exists, based on the known or proven existence of some other fact or group of facts. Most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence. A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption (Black's). Concerning bail and pretrial release, the term is often used in "presumption of innocence" (see below), a "presumption of release" (tied philosophically to the presumption of innocence, and included in both the ABA's Criminal Justice Standards on Pretrial Release and NAPSA's Standards on Pretrial Release), a more specific "presumption of release on recognizance" (a principle flowing from the Standards' recommendations to use least restrictive conditions of release), and sometimes a "presumption toward confinement" found in some preventive detention statutes.

Presumption of Innocence

The fundamental principle that a person may not be convicted of a crime unless the government proves guilt beyond a reasonable doubt, without any burden placed on the accused to prove innocence (Black's). Although it is not mentioned in the United States Constitution, its tie to the criminal burden of proof implicates the Due Process Clause.[57] The United States Supreme Court first discussed the principle as the "true origin" of the doctrine of reasonable doubt, writing in Coffin v. United States that "a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[58] The Coffin Court itself traced the presumption's origins to various statements under Roman law, which included not only notions of proof, but also language re-articulated and published by Blackstone, who wrote that "it is better that ten guilty persons escape than that one innocent suffer."

Some confusion surrounding the phrase derives from a line in Bell v. Wolfish, in which the Court stated that the presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."[59] The temptation to use this quote to erode the role of the presumption in the administration of bail is dampened considerably by the scope of concerns addressed in the Bell opinion. As the Court expressly stated: "We are not concerned with the initial decision to detain an accused and the curtailment of liberty that such a decision necessarily entails. . . . Instead, what is at issue when an aspect of pretrial detention that is not alleged to violate any express guarantee of the Constitution is challenged, is the detainee's right to be free from punishment, and his understandable desire to be as comfortable as possible during his confinement, both of which may conceivably coalesce at some point."[60] Bell was essentially a conditions-of-confinement case, and the "no application" language, above, was uttered in discussing a prisoner's right to

be free from the correctional facility's practice of "double bunking" inmates.
Thus, the presumption of innocence everything to do with bail and the decision to release or confine a particular inmate, and theBell language should in no way diminish the strong statements concerning the right to bail found in Stack v. Boyle, in which the Court wrote,

> From the passage of the Judiciary Act of 1789, to the present Federal Rules of Criminal Procedure, federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.[61]

That the broader notion of a right to bail necessarily triggers serious consideration of the presumption of innocence is also clearly seen in United States v. Salerno, through Justice Marshall's dissent in which he wrote, albeit unconvincingly, that "the very pith and purpose of [the Bail Reform Act of 1984] is an abhorrent limitation of the presumption of innocence."[62]

Pretrial

A period of time referring to the phase of a criminal defendant's case beginning at arrest and ending at final disposition. The term is often misused to refer to a pretrial services agency or program, or to pretrial services supervision.

Pretrial Conditional Release

Pretrial conditional release refers to any form of release in which the defendant is required to comply with specific conditions set by the court, which can be financial, nonfinancial, or both.

Pretrial Detention

Holding a defendant in secure detention before trial on criminal charges either because release was denied or because the established bail bond could not be posted (Black's). As the definition implies, pretrial detention can be intended or unintended, and thus judges should be purposeful when setting bail bonds so that they realize their intention that the defendant either be released or remain detained.

Pretrial Justice

According to Tim Murray, Director Emeritus of the Pretrial Justice Institute, pretrial justice involves the proper administration of laws through fair and effective pretrial policies and practices for "the host of decisions that occur, from the arrest up to the point at which the case is concluded or disposed of."[63] This definition extends the concept beyond merely the bail, or release/detention decision, to all decisions made during the pretrial phase of a criminal case. A similarly broad definition, drafted with inspiration from the United States Probation and Pretrial Services Charter for Excellence, is as follows: "The honoring of the presumption of innocence, the right to bail that is not excessive, and all other legal and constitutional rights afforded to accused persons awaiting trial while balancing these individual rights with the need to protect the community, maintain the integrity of the judicial process, and assure court appearance."[64]

Pretrial Release Decision

A court's determination of whether a criminal defendant will remain at liberty or be held in secure detention until the disposition of his or her case. According to the American Bar Association's Criminal Justice Standards on Pretrial Release, "[t]he purposes of the pretrial release decision include providing due process to those accused of crime, maintaining the integrity of the judicial process by securing defendants for trial, and protecting victims, witnesses, and the community from threats, danger, or interference."[65] The pretrial release decision, as contemplated by the Standards, is specifically distinguished from the traditional financial bail decision. ***See Money Bail System, Bail***

Pretrial Release Outcomes

Although the term "outcomes" can reflect whatever is measured (e.g., pretrial detention/release outcomes, adjudication and sentencing outcomes), it is typically used to refer to results tied to the two constitutionally valid purposes for limiting pretrial freedom – court appearance and public safety. A third outcome, compliance with all other bail bond conditions, may also be measured.

Pretrial Risk Assessment

The method by which a pretrial services program/agency or individual identifies and categorizes risks of pretrial misconduct presented by a particular defendant based upon the information gathered before the bail hearing. The risk assessment can be either subjective or objective. Subjective assessments are based on an evaluation of the defendant by the interviewer, who draws on his or her prior experience to assess release appropriateness. Objective assessments are based on procedures and conclusions supported by research and national organizations, such as the National Association of Pretrial Services Agencies and the American Bar Association, through their published standards.

Pretrial Services Agency or Program

While widely varying, a pretrial services agency or program is generally known as any organization created ideally to perform the three primary pretrial agency or program functions of: (1) collecting and analyzing defendant information for use by the court in assessing risk; (2) making recommendations to the court concerning bail bond conditions of release to address risk; and (3) monitoring and supervising defendants who are released from secure custody during the pretrial phase of their cases in order to manage their risk. For a number of reasons, having a single entity provide these functions is likely the ideal, and is superior to separating the functions and having them performed by other, existing criminal justice entities.

Pretrial Supervision

The act of managing, directing, or overseeing a defendant who has been released from secure custody during the pretrial phase of a criminal case, ideally to reasonably assure both court appearance and public safety. It is often re-phrased as "pretrial services supervision," and used to refer to supervision by a pretrial services program or agency, engaged to provide oversight for compliance with all conditions of a bail bond to further the dual purpose of bail. Because commercial bail bondsmen are only concerned with court appearance, their oversight in any particular case could arguably be considered a more limited form of "pretrial supervision," but likely never "pretrial services supervision."

Preventive Detention

Pretrial detention designed to prevent either flight or danger to the community. The laws of many states and the federal system allow the court to detain defendants in certain carefully defined categories of cases either based on the defendant's most serious charge or when no condition or combination of conditions of pretrial release can reasonably assure court appearance or public safety. When drafted properly, these laws include substantial due process elements, such as those reviewed and approved by the United States Supreme Court in United States v. Salerno.[66] It is correctly argued that such detention should be used sparingly, for while the Supreme Court in Salerno upheld the federal preventive detention provisions of the Bail Reform Act of 1984, it also uttered the memorable statement, "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[67] In that opinion, the Court specifically emphasized that the "extensive safeguards" embedded in the Bail Reform Act and the "careful delineation of the circumstances under which detention will be permitted" were crucial to repelling the constitutional challenges. Nevertheless, some federal districts have reported pretrial detention rates as high as 70-80%, indicating potential overuse of the statutory provisions, and a trend contrary to the Court's warning to ensure that detention remain an exception.[68] Moreover, in many cases across this country bail bonds are often set in unaffordable, if not excessive amounts, leading to preventive detention without any of the procedural safeguards envisioned by the Court in Salerno.

Prison

According to Webster's Dictionary, a prison is generally a place of confinement, and specifically an institution (as one under state jurisdiction) for confinement of persons convicted of serious crimes. One should not expect to find any pretrial inmates housed in a state prison; however, defendants facing federal charges are sometimes held in federal prisons, and some states actually call their jails "prisons." Private prisons exist in the United States, which are run by private corporations whose services and beds are contracted out by state governments or the Federal Bureau of Prisons.

Probable Cause

A reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime (Black's). Probable cause generally refers to having more evidence for than against. It is a term of art in criminal procedure referring to the requirement that arrests be based on probable cause. Probable cause to arrest is present when "at that moment the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [person] had committed or was committing an offense."[69] In County of Riverside v. McLaughlin, 500 U.S. 44 (1991), the Supreme Court ruled that suspects who are arrested without a warrant must be given a probable cause hearing within 48 hours.

Probation

A court imposed criminal sentence that, subject to stated conditions, releases a convicted person into the community instead of sending him or her to jail or prison (Black's). Though similarities exist between probation and pretrial release (indeed, sometimes pretrial services are delivered by a jurisdiction's probation office), the crucial difference is that probation is a sentence of punishment imposed upon conviction, and thus has entirely

different legal purposes than those underlying the bail process. There exists an unfortunate irony that many criminal defendants will spend the entire pretrial phase of their case in secured confinement, only to be released back into the community after conviction by being sentenced to probation.

Pro se

For oneself, or on one's own behalf, without the assistance of a lawyer. Sometimes called in propria persona, or "pro per" for short (Black's). There are empirical data to support the notion that pro se defendants are at some significant disadvantage during their bail setting. ***See Public Defender, Right to Counsel***

Prosecutor

A legal officer who represents the government in criminal proceedings (although there is such a thing as a private prosecutor, it is rare). They are known by different names, including district attorney, county attorney, commonwealth attorney, municipal attorney, state's attorney, prosecuting attorney, etc. Prosecutors in the federal system are known as United States Attorneys and Assistant United States Attorneys, or "AUSA's" for short.

Protection Order/Restraining Order

Often used interchangeably, but in some states defined differently, both terms refer to court orders prohibiting or restricting a person from engaging in delineated conduct. They can be mandated statutorily for all cases, or discretionary for particular cases, such as domestic violence.

Public Defender

A lawyer or staff of lawyers, usually publicly appointed and paid, whose duty is to represent indigent criminal defendants (Black's). Any term relating to defense counsel raises the important but somewhat misunderstood issue of lawyer representation during the first appearance. The relevant National Association of Pretrial Services Agencies standard, Standard 2.2(d) states that "[a]t the defendant's first appearance, he or she should be represented by counsel. If the defendant does not have his or her own counsel at this stage, the judicial officer should appoint counsel for purposes of the first appearance proceedings, and should ensure that counsel has adequate opportunity to consult with the defendant prior to the first appearance."[70] Comments to that Standard explain that organization's position:

> The committee that drafted the Standards recognizes that, as of the time of their adoption in 2004, many jurisdictions do not routinely provide for the appointment of counsel to represent defendants at first appearance. However, if the first appearance is to be fair and meaningful, it is vitally important to ensure that defendants are represented effectively at this proceeding. Attorneys who understand the importance of the decisions made at first appearance, are familiar with the contents of pretrial services reports and with available release options, and are able to advocate effectively for their clients – on the basis of consultation with the defendant and even very brief contact with family members or friends of the defendant – can make the difference between liberty and confinement for defendants during the pretrial period.[71]

The relevant ABA Standard concerning defendant representation recommends only that "[i]f the defendant is not released at the first appearance and is not represented, counsel should be appointed immediately. The next judicial proceeding should occur promptly, but

not until the defendant and defense counsel have had an adequate opportunity to confer, unless the defendant has intelligently waived the right to be represented by counsel."[72] Commentary to the Standard, however, better reflects the ABA's position on the issue:

> [i]n some jurisdictions, defendants are represented by counsel, at least provisionally, at their first appearance, but this is not a universal practice. ABA policy, however, clearly recommends that provision of counsel at first appearance should be standard in every court. Thus, the Providing Defense Services Standards call for counsel to be provided to the accused 'as soon as feasible, and, in any event, after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs first.'
>
> Provision of counsel at the first appearance is especially important if consideration is going to be given to detention or to release on conditions that involve a significant restraint on the defendant's liberty.[73]

Fairly recent data support the recommendations contained in the ABA and NAPSA Standards. Noting that previous attempts to provide legal counsel in the bail process have been neglected, in 1998 the Baltimore, Maryland, Lawyers at Bail Project was created to demonstrate empirically whether or not lawyers mattered during bail bond setting hearings. Using a controlled experiment (with some defendants receiving representation at the bail hearing and others not receiving representation) the Project found that defendants with lawyers: (1) were over two and one-half times more likely to be released on their own recognizance; (2) were over four times more likely to have their initially-set bail bond amounts reduced at the hearing; (3) had their money bail bond reduced by a greater amount; (4) were more likely to have the money bond reduced to a more affordable level ($500 or under); (5) spent less time in jail (an average of two days versus nine days for unrepresented defendants); and (6) had longer bail bond review hearings than defendants without lawyers at first appearance.[74] In a paper reporting the results of this study, the authors concluded:

> [L]awyers do make a difference. The randomized controlled experiment conducted by the Lawyers at Bail Project in Baltimore supports the conclusion that having a lawyer present at a bail hearing to provide more accurate and complete information has far-reaching consequences. The accused is considerably more likely to be released, to respect the system and comply with orders, to keep his job and his home, and to help prepare a meaningful defense. The public at large benefits, too, from the unclogging of congested court systems and overcrowded jails and the resulting savings in taxpayer dollars.[75]

At the time of their publication, Colbert et al. noted that sixteen states refused to provide lawyers at this initial proceeding altogether, and twenty-six states declined to provide defendant representation at bail bond settings in all but a few counties. According to the authors, only eight states and the District of Columbia provided a right to counsel at first appearance. ***See Pro Se, Right to Counsel***

Public Safety

The second constitutionally valid purpose for limiting pretrial freedom, along with assuring court appearance, typically measured by new arrests or new charges, but sometimes, and

more appropriately, expressed in the negative from these measurements (e.g., the "no new arrest or charge rate"). The term is also somewhat overused by some public officials as an undefined and unmeasured, and thus unassailable rationale for defending certain policies and practices.

Recognizance

Generally, an obligation by which a person promises to perform some act or observe some condition, such as to appear when called, to pay a debt, or to keep the peace. According to Black's, a recognizance most commonly takes the form of a bail bond that guarantees an un-jailed criminal defendant's return for a court date.

Recommendations

Verbal or written suggestions to the court regarding the conditions of release or detention appropriate for the case at hand.

Right to Bail

When granted by federal or state law, it is the right to release from jail or other government custody through the bail process. Technically, it is typically the "right to non-excessive bail," which goes to the reasonableness of the conditions placed on any particular defendant's release. The United States Constitution does not have an explicit right to bail clause, but that right is contained in the federal statute. Many states have right to bail clauses, even if that right has been limited for certain cases.

Some argue, incorrectly, that the right to bail means only the right to have bail set. This argument ignores clear statements by the United States Supreme Court indicating that the right to bail normally means a right to pretrial freedom, such as the following two statements from Stack v. Boyle: (1) "federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction."[76]; (2) "The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty."[77]). The argument also conflicts with the following seminal statement from United States v. Salerno: "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[78]

The legal structure of the right to bail differs among the states. Nine states, like the federal system, have no right to bail articulated in their constitutions. Approximately twenty one states have "traditional" and fairly broad right to bail provisions, which were modeled after Pennsylvania's law of 1682. The remaining states have amended their constitutions to allow for preventive detention in various ways.

Right to Counsel

The Sixth Amendment right of the accused to assistance of counsel for his or her defense. There is also a Fifth Amendment right, which deals with the right to counsel during all custodial interrogations, but the Sixth Amendment right more directly affects the administration of bail as it applies to all "critical stages" of a criminal prosecution. According to the Supreme Court, the Sixth Amendment right "does not attach until a prosecution is commenced."[79] Commencement, in turn, is "the initiation of adversary judicial criminal proceedings – whether by way of formal charge,

preliminary hearing, indictment, information, or arraignment."[80] InRothgery v. Gillespie County, the United States Supreme Court "reaffirm[ed]" what it has held and what "an overwhelming majority of American jurisdictions" have understood in practice: "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."[81]

Salerno

Short for United States v. Salerno, 481 U.S. 739 (1987), the United States Supreme Court case that upheld the 1984 Bail Reform Act's preventive detention language against facial Due Process and Eighth Amendment challenges. Regarding the Eighth Amendment claim, the Court concluded:

> Nothing in the text of the Bail Clause limits permissible Government considerations solely to questions of flight. The only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil. Of course, to determine whether the Government's response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response. Thus, when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. We believe that, when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail.[82]

It was in the Salerno opinion that Chief Justice Rehnquist uttered the famous statement (and rallying cry for all those now seeking bail reform), "[i]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[83] ***See Preventive Detention***

Secured Bond

see Bail Bond

Security

Collateral given or pledged to guarantee fulfillment of an obligation (Black's). Implied is the forfeiture of this collateral if the obligation is not met.

Stack v. Boyle

342 U.S. 1 (1951). The first major Supreme Court case to address issues in the administration of bail, albeit written at a time when the sole purpose of bail was to reasonably assure court appearance. Its holding included the following language:

> the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment. Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.[84]

The case is also often cited for the following language concerning the presumption of innocence:

> [f]rom the passage of the Judiciary Act of 1789, to the present Federal Rules of Criminal Procedure, Rule 46 (a)(1),[85] federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.[86]

Finally, the case is known for language both in the majority opinion as well as Justice Jackson's memorable concurring opinion, emphasizing the importance of individualized bail determinations that are tailored to each defendant.

Standards (also "National Standards")

Generally, standards are models accepted as correct by custom, consent, or authority, or a criterion for measuring acceptability, quality, or accuracy. In the field of pretrial release, "standards" refer to specific recommendations based on empirically sound social science research and fundamental legal principles designed to provide guidance and insight to policymakers and practitioners working to further pretrial justice. The standards published by the National Association of Pretrial Services Agencies (NAPSA) are directed specifically toward pretrial programs. The American Bar Association's Criminal Justice Standards on Pretrial Release stand out due to their breadth of stakeholder input, their comprehensive process for adoption, and their use by the courts and others as important sources of authority.[87]

Sufficient Sureties

In the administration of bail, the phrase is used to mean adequate assurance as a limit to an unfettered right to bail, sufficient to accomplish the purpose of bail – that is, court appearance and public safety. The language is derived from the 1682 Pennsylvania constitutional provision, providing that "'all prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where proof is evident or the presumption great.'"[88] The Pennsylvania law was quickly copied, and as the country grew "the Pennsylvania provision became the model for almost every state constitution adopted after 1776."[89] The more litigated issue at bail is what the term "sureties" in "sufficient sureties" means, and specifically whether it limits the government to accepting commercial sureties versus, for example, cash-only financial conditions of release. In one state court case, the Colorado Court of Appeals reviewed other published state court decisions surrounding the issue and wrote the following:

> the vast majority [of jurisdictions], either expressly or implicitly, understand the word 'sureties' in the phrase 'sufficient sureties,' to encompass a variety of bond forms, including cash. See State v. Briggs, supra, 666 N.W.2d at 583 ("the framers did not intend to favor one particular method of surety-commercial bonding-by inclusion of the sufficient sureties clause"); State v. Brooks, supra, 604 N.W.2d at 353 (the word "sureties" "encompasses a broad array of methods to provide adequate assurance that an accused will appear as the court requires"); see also Ex parte Singleton, supra, 902 So.2d at 135 (quoting State v. Briggs, supra, 666 N.W.2d at 581-83: "[w]e are also confident that the framers did not

intend to favor one particular method of surety"); People ex rel. Gendron v. Ingram, 34 Ill.2d 623, 217 N.E.2d 803, 806 (1966) ("the alternative methods of bail provided in [the statutes] do not violate the constitutional provision that all persons shall be bailable by 'sufficient sureties'"); Burton v. Tomlinson, 19 Or.App. 247, 527 P.2d 123, 126 (1974) ("Nowhere does it say that lawful release of a defendant may be accomplished only through the medium of sureties."); cf. Rendel v. Mummert, supra, 474 P.2d at 828; State ex rel. Jones v. Hendon, 66 Ohio St.3d 115, 609 N.E.2d 541, 543 (1993); but see State v. Golden, supra, 546 So.2d at 503 (limiting the "sufficient sureties" clause to commercial sureties).

Because the history of the phrase in each of the respective constitutions is similar, we are persuaded by the near uniformity of these opinions on this question. We also find particularly informative the exhaustive historical analysis done by the Iowa Supreme Court in Briggs. Specifically, that court noted that the several state constitutions that included "sufficient sureties" upon which the Iowa provision was patterned were drafted before commercial sureties even emerged as a popular bond form. Similarly, the court pointed to historical data indicating that personal, monetary, and property sureties were all more well-known ways to secure a bond when the Iowa Constitution was enacted. State v. Briggs, supra, 666 N.W.2d at 583; cf. People v. Mellor, 2 Colo. 705, (1875) (cash bond imposed by trial court).

Furthermore, in Colorado, as in most jurisdictions, the primary purpose of bail is to assure the presence of the accused at trial. See People v. Sanders, 185 Colo. 153, 156, 522 P.2d 735, 736 (1974) (such a purpose "should be met by means which impose the least possible hardship upon the accused"); see also Reynolds v. United States, 80 S.Ct. 30, 32, 4 L.Ed.2d 46 (1959). Interpreting the word 'sureties' broadly to encompass multiple bond forms satisfies this purpose. When bail may be secured by a court in a variety of ways, the court's ability to assure the presence of the accused at trial is strengthened. See Rendel v. Mummert, supra, 474 P.2d at 828 ("'sufficient sureties' mean, at a minimum, that there is reasonable assurance to the court that if the accused is admitted to bail, he will return as ordered until the charge is fully determined").

Accordingly, we agree with the majority of jurisdictions considering the issue that, in reference to bail, the term "sureties" refers to a broad range of guarantees used for the purpose of securing the appearance of the defendant. Such guarantees include, but are not limited to, bonds secured by cash.[90]

Historically, sureties were always people, and government officials attained sufficiency by "stacking' sureties – that is, by using multiple persons to take collective responsibility for the defendant pretrial.

Summons

A notice requiring a person to appear in court as a juror or witness; a writ directing a sheriff or other proper officer to notify a defendant to appear in court on a day named (Black's). In the administration of bail, there is a significant issue concerning what criteria should govern a judge's decision to issue summonses in lieu of arrest warrants.

Surety or Sureties

Generally, a surety is a person who is primarily liable for paying another's debt or performing another's obligation (Black's). In the administration of bail, a "surety" is one of a broad range of guarantees (not necessarily a person) as a limit to an unfettered right to bail, sufficient to accomplish the purpose of bail – i.e., court appearance and public safety. The "sufficient surety" language found in many state constitutions was drafted long before the inception of pretrial services programs and agencies, before release on recognizance programs, and before the use of commercial sureties, so a somewhat broader definition is warranted to cover all current methods used to provide reasonable assurance of court appearance and public safety.

Third Party Custody

A condition of release that requires that another person or program be responsible for assuring the defendant's appearance and compliance with all other bond conditions. Typically, the defendant signs a bail bond and agrees to remain in the custody of a third party. The third party, in turn, agrees to supervise the defendant and report any violation of the conditions of release to the court. Other conditions may also be imposed.

Unsecured Bond

see Bail Bond

Vera Study

see Manhattan Bail Project

Warrant

A writ directing or authorizing someone to do an act, especially directing a law enforcement officer to make an arrest, a search, or a seizure (Black's). An arrest warrant typically refers to the warrant issued upon probable cause to arrest and bring a person to court. The term "bench warrant" is often used for any warrant issued from the bench, but more specifically for those warrants issued for the arrest of a person who has been held in contempt, who has failed to appear, or has disobeyed a subpoena.

Writ

A court's written order, in the name of a state or other competent legal authority, commanding the addressee to do or refrain from doing a specified act. There are numerous types of writs, including, technically, a capias or arrest warrant, and the Great Writ ofhabeas corpus.

References

1. Bryan A. Garner, A Dictionary of Modern Legal Usage (Oxford Univ. Press, 3rd ed. 1995), at 96 [hereinafter Garner].

2. Black's Law Dictionary (West Pub. Co., 9th ed. 2009).

3. Asimow, Popular Culture and the Adversary System, 40 Loy. L. A. L. Rev. 653 (2007).

4. Garner, supra note 1, at 96. According to Garner, as a noun, people use the term bail to mean (1) a person who acts as a surety for a debt, (2) thesecurity or guarantee agreed upon, and (3) the release on surety of a person in custody.

5. Bouvier's Law Dictionary, 8th ed., Vol. 1, at 153 (1858).

6. 342 U.S. at 4 (internal citation omitted) (emphasis added).

7. 481 U.S. 739, 755 (1987).

8. Frequently Asked Questions About Pretrial Release Decision Making (ABA 2012).

9. Va. Code. § 19.2-119 (2013).

10. Colo. Rev. Stat. § 16-1-104 (2013).

11a. Alaska Const. art. I, § 11.

11b. Florida Const. art. I, § 14.

11c. Conn. Const. art. 1, § 8.

11d. Wis. Const. art. 1, § 8.

12. Of course, there are other ways that defendants can be released from pretrial confinement, such as through an emergency release procedure in response to a court order placing limits on a jail's population.

13. Cohen & Reaves, Felony Defendants in Large Urban Counties, 2006, U.S. Dept. of Justice, Bur. of Justice Stats. (May 2010), at 17, found at http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf.

14. Id.

15. See Evie Lotze, John Clark, D. Alan Henry, & Jolanta Juszkiewicz, The Pretrial Services Reference Book, Pretrial Servs. Res. Ctr. (Dec. 1999), at 5. The Act was codified at 18 U.S.C. §§ 3141-3151.

16. 18 U.S.C. § 3142 (b).

17. Id. § 3142 (e).

18. See Id.

19. 481 U.S. 739 (1987).

20. 342 U.S. 545-46.

21. Wayne H. Thomas, Jr., Bail Reform in America (Univ. CA Press 1976) [hereinafter Thomas] at 200.

22. American Bar Association Standards for Criminal Justice (3rd ed.) Pretrial Release (2007) [hereinafter ABA Standards] Std. 10-1.3, at 41. The term "minor offenses" is used rather than "misdemeanors" because the latter term is often defined differently among jurisdictions across the United States. Generally, according to the commentary to Standard 10-1.3, "'minor offenses' are the equivalent to lower-level misdemeanors. However, when the alleged offense involves danger or weapons – as, for example, is often the case in domestic violence misdemeanors – the Standard allows jurisdictions to determine that the offense is not 'minor,' regardless of its statutory designation." Id.

23. Id. Std. 10-2.1, at 63.

24. Id. at 63-64.

25. Id. Std. 10-2.2, at 65.

26. Id. Std. 10-2.3, at 69.

27. See Performance Standards and Goals for Pretrial Diversion/Intervention (2008) athttp://www.napsa.org/publications/diversion_intervention_standards_2008.pdf.

28. See at http://www.pretrial.org/Diversion-Programs/Pages/default.aspx.

29. Standards on Pretrial Release (3rd ed.), Nat'l Assoc. of Pretrial Servs. Agencies (Oct. 2004), Std. 1.4 (g) (commentary) at 16 [hereinafter NAPSA Standards].

30. Id. (commentary) at 19.

31. ABA Standards, supra note 22, Std. 10-1.4 (f) (commentary), at 45.

32. 481 U.S. 739, 746 (1987).

33. See, e.g. Soland, Constitutional Law – Equal Protection – Imposing Money Bail, 46 Tenn. L. Rev. 203 (1978).

34. 351 U.S. 12, 19 (1956).

35. Bandy v. United States, 81 S. Ct. 197, 198 (1960).

36. Bandy v. United States, 82 S. Ct. 11, 13 (1961).

37. 481 U.S. 739, 754 (1987).

38. Galen v. County of Los Angeles, 477 F.3d 652, 660 (9th Cir. 2007) (internal citations omitted).

39. 342 U.S. 1, 5 (1951).

40. See, e.g., United States v. Polouizzi, 697 F. Supp. 2d 381, 388 (E.D.N.Y 2010) ("The excess can be reflected in monetary terms or in other limitations on defendant's freedom such as curfews, house arrests, limits on employment, or electronic monitoring.").

41. 554 U.S. 191, 195 (2008).

42. Compare, e.g., Colo. Rev. Stat. § 16-4-112 (forfeiture procedure for compensated sureties) with Colo. Rev. Stat. § 16-4-109 (forfeiture procedure for all other bonds).

43. Garner, A Dictionary of Modern Legal Usage (Oxford Univ. Press 1987) at 263.

44. Harris v. Nelson, 394 U.S. 286 290-91 (1969).

45. Rose v. Lundy, 455 U.S. 509, 546 n. 16 (1982) (J. Stevens, dissenting) (internal quotations omitted).

46. ABA Standards, supra note 22, Std. 10-1.1.

47. 481 U.S. 739, 753 (1987).

48. See United States v. Salerno, 794 F.2d 64 (2d Cir. 1986) rev'd, 481 U.S. 739, 753 (1987).

49. Marie VanNostrand, PhD., Legal and Evidence Based-Practices: Applications of Legal Principles, Laws and Research to the Field of Pretrial Services (Nat'l Inst. Corr. and the Crime and Justice Inst., April 2007) at 12.

50. Thomas, supra note 21, at 4.

51. 342 U.S. 1 (1951).

52. See Clark v. Hall, 53 P.3d 416 (2002); Pelekai v. White, 861 P.2d 1205 (1993); Demmith v. Wisc. Jud. Conf., 480 N.W. 2d. 502 (Wisc. 1992).

53. NAPSA Standards, supra note 29.

54. National Conference on Bail and Criminal Justice, Proceedings and Interim Report (Washington, D.C. Apr. 1965), at XIV.

55. Id. at 296.

56. Corley v. United States, 129 S. Ct. 1558, 1570 (2009) (internal citations and quotations omitted).

57. See In Re Winship, 397 U.S. 358, 362-64 (1970) ("The [reasonable doubt] standard provides concrete substance for the presumption of innocence – that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law.").

58. 156 U.S. 432, 460, 453 (1895).

59. 441 U.S. 520, 533 (1979).

60. Id. at 533-34.

61. 342 U.S. 1, 4 (1951).

62. 481 U.S. 739, 762-63 (1987).

63. See Transcript: Justice Matters – Interview with Tim Murray Regarding Pre-Trial Justice and the Crucial Role Reentry Programs Play in the Justice System, at http://www.pretrial.

org/Docs/Documents/Transcripts_Justice_Matters_508.pdf.

64. Marie VanNostrand, Pretrial Justice – Afforded to Few, Denied to Many, at http://www.luminosity-solutions.com/publications/PretrialJusticeAffordedtoFewDeniedtoMany.pdf.

65. ABA Standards, supra note 22, Std. 10-1.1, at 36.

66. 481 U.S. 739 (1987).

67. Id. at 755.

68. See e.g., Marie VanNostrand, Alternatives to Pretrial Detention: Southern District of Iowa – A Case Study (June 2010) (in which that district undertook system improvements to use "alternatives to detention when appropriate to increase pretrial release rates while assuring court appearance and public safety").

69. Beck v. Ohio, 379 U.S. 89, 91 (1964).

70. NAPSA Standards, supra note 29, Std. 2.2 (d), at 27.

71. Id. Std. 2.2 (d) (commentary), at 30 (footnote omitted).

72. ABA Standards, supra note 22, Std. 10-4.3 (c), at 92.

73. Id. (commentary), at 96 (footnotes omitted).

74. See Douglas L. Colbert, Ray Paternoster, and Shawn Bushway, Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail, 32 Cardozo L. Rev. 1719 (2002). It is noted that, at the time of the study, the court used the services of a neutral pretrial services representative, who made a recommendation regarding a bail bond.

75. Id. at 1783.

76. 342 U.S. 1, 4 (internal citation omitted) (emphasis added).

77. Id. at 7-8 (concurring opinion).

78. 481 U.S. 739, 755 (1987).

79. Rothgery v. Gillespie County, 554 U.S. 191, 198 (2008) (internal quotation omitted).

80. Id.

81. Id. at 213.

82. 481 U.S. at 754-55.

83. Id. at 755.

84. 342 U.S. at 5 (internal citation omitted).

85. In addition to granting a right to bail, at the time of the decision Rule 46 also required the bail bond to be set to "insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant." 342 U.S. at 6 n. 3.

86. 342 U.S. at 4 (internal citations omitted).

87. See Marcus, The Making of the ABA Criminal Justice Standards, 23 Crim. Just. No. 4 (Winter 2009).

88. June Carbone, Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail, 34 Syracuse L. Rev. 517 (1983) at 531 (quoting 5 American Charters 3061, F. Thorpe ed. 1909) (footnotes omitted).

89. Id. at 532.

90. Fullerton v. County Court, 124 P.3d 866, 870 (Colo. App. 2005).