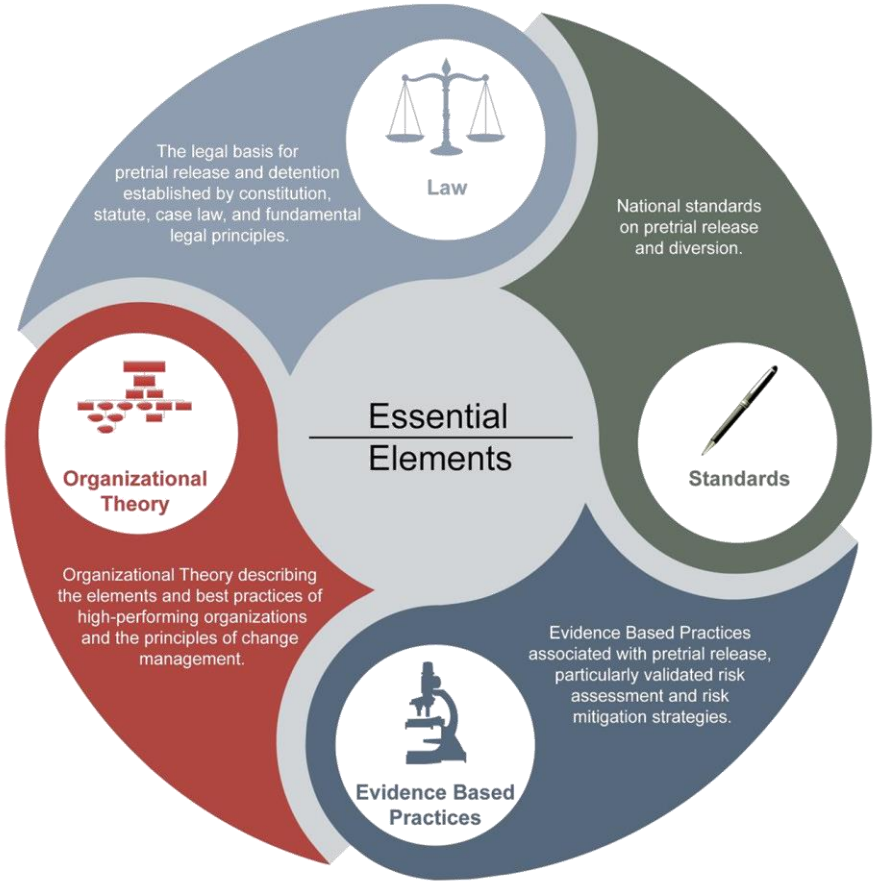
A Framework for Pretrial Justice

Essential Elements of an Effective Pretrial System and Agency



NIC
National Institute of Corrections

A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency

Lead Drafter/Facilitator:
Lisa Pilnik, Director, Child & Family Policy Associates

Editors:
Barbara Hankey, Manager, Oakland County Community Corrections.
Elizabeth Simoni, Executive Director, Maine Pretrial Services, Inc.
Spurgeon Kennedy, Vice President, National Association of Pretrial Services Agencies.
Leland J. Moore, *Esq.*, Pretrial Justice Consultant (New Haven, CT).
Jim Sawyer, Executive Director, National Association of Pretrial Services Agencies.

February 2017
NIC Accession Number: 032831

Shaina Vanek
Acting Director

Robert M. Brown, Jr.
Senior Deputy Director

Holly Busby
Chief, Community Services Division

Lori Eville
Project Manager

DISCLAIMER:

This document was funded by contract No. DJBP0700COBOPN41194, awarded by the National Institute of Corrections. The National Institute of Corrections is a component of the United States Department of Justice, Federal Bureau of Prisons. Points of view and opinions in this document are those of the author and do not necessarily represent official positions or policies of the U.S. Department of Justice.

TABLE OF CONTENTS

Director's Message iv
Foreword v
Acknowledgements viii
Introduction 1
The Framework for Pretrial Justice 3

1. Pretrial release and detention decisions based on risk and designed to maximize release, court appearance, and public safety 4
Maximizing release 4
Maximizing court appearance 5
Maximizing public safety 5
Risk-Based Decision-Making 6
Summary of EBDM pretrial decision points 8

2. Legal framework that includes: a presumption of least restrictive nonfinancial release; restrictions or prohibition on the use of secured financial conditions of release; and detention for a limited and clearly defined type of defendant 10
Presumption of least restrictive nonfinancial Release 12
Restrictions or prohibition on the use of secured financial conditions of release 13
Preventive detention 15

3. Release options following or in lieu of arrest 20
4. Defendants eligible by statute for pretrial release are considered for release, with no locally-imposed exclusions not permitted by statute 22
5. Experienced prosecutors screen criminal cases before first appearance 24
6. Defense counsel active at first appearance 26
7. Collaborative group of stakeholders that employs evidence-based decision-making to ensure a high-functioning system 29
8. Dedicated pretrial services agency 31
Independence 32
Resources 32

1. Operationalized mission 35
2. Universal screening 36
3. Validated pretrial risk assessments 38
Reliability and validity 40

4. Sequential bail review 42
5. Risk-based supervision 44
Supervision levels and conditions 44
Effective supervision practices 46

6. Performance measurement and feedback 50
Suggested measures 50

Conclusion 52
References 53
Case Law and Statutes: 53
Department of Justice Statements/Guidance: 53
Professional Standards and Recommendations: 54
Additional Resources on Legal and Evidence-Based Practice: 55
Resources on Pretrial and Race: 57
Appendix: Essential Elements Decision Points 58

DIRECTOR'S MESSAGE

This document highlights the commitment of the National Institute of Corrections (NIC) to define and support evidence-based practices that improve decision-making at the pretrial stage of our criminal justice system, enhancing the safety of America's communities and fostering the fair administration of pretrial release and detention.[1] With the release of *A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency,* NIC and its Pretrial Executive Network helps inform the discussion on bail reform and pretrial justice by presenting and defining the fundamentals of an effective pretrial system and the essential elements of a high functioning pretrial services agency. This publication presents and describes these essential elements—as well as the components of an evidence-based framework for improving pretrial outcomes nationwide.

Bail determination is one of the most important decisions in criminal justice. Courts that make evidence-based decisions set the following as goals:

(1) Protecting community safety.
(2) Ensuring a defendant's return to court.
(3) Basing release and detention decisions on an individual defendant's risk and the community's norms for liberty.
(4) Providing judicial officers with clear, legal options for appropriate pretrial release and detention decisions.

A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency should serve as a guide for jurisdictions interested in improving their current pretrial systems. By presenting a framework of evidence-based and best practices, NIC supports the equally important concepts of pretrial justice and enhanced public safety in all of America's courts.

Shaina Vanek
Acting Director
National Institute of Corrections

---

[1] This publication is one in a series of materials on evidence-based practices in pretrial justice. See also: Center for Effective Public Policy. (2010). *A Framework for Evidence-Based Decisionmaking in Local Criminal Justice Systems: An Initiative of the National Institute of Corrections,* 3rd Ed. Washington, DC: National Institute of Corrections. Schnacke, T. R. (2014). *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*. Washington, D.C.: National Institute of Corrections. Schnacke, T.R. (2014). *Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial.* Washington, D.C.: National Institute of Corrections. VanNostrand, M. (2007). *Legal and Evidence-Based Practices: Applications of Legal Principles, Laws, and Research to the Field of Pretrial Services.* Washington D.C.: National Institute of Corrections. National Institute of Corrections. (2011). *Measuring What Matters: Outcome and Performance Measures for the Pretrial Services Field*. Washington D.C.: National Institute of Corrections. National Institute of Corrections. (2016). *Pretrial Justice: How to Maximize Public Safety, Court Appearance and Release.* Live broadcast held September 8, 2016. **https://nicic.gov/library/032719**. Last accessed on 3/21/2017.

FOREWORD

Although I had been a civil litigator for my entire legal career, soon after I became a judge, I found myself presiding in a criminal trial department. I didn't know much about bail. I didn't have to. The county, like all California counties, had adopted a bail schedule, and it was easy to use. Each offense was paired with a dollar amount and multiple charges were stacked. There were lots of bail bond companies close to the courthouse and the jail. Some of the defendants whose cases were assigned to me were out on bail; most – particularly those charged with felonies – were in custody. At the end of every preliminary hearing – California proceeds by preliminary hearing not by indictment in the overwhelming majority of cases – if I determined there was sufficient cause to bind a defendant over for trial, I was trained to say, "Bail review waived, counsel?" And the answer was almost always, "yes." To be perfectly honest, I didn't think much about bail, and to the best of my recollection, neither did anyone else – not my colleagues on the bench, not the prosecutors, not the public defenders.

Remarks by Lisa Foster, Director of the Office for Access to Justice, United States Department of Justice at the American Bar Association's 11th Annual Summit.
http://www.justice.gov/opa/speech/director-lisa-foster-access-justice-initiative-delivers-remarks-aba-s-11th-annual-summit

Courts in the United States process millions of criminal cases annually. Each requires a judicial officer to determine a defendant's release or detention pending adjudication—*bail*. Bail determination is one of the most important decisions in a criminal case. Justice systems that administer bail effectively and fairly have as their overarching goals ensuring a defendant's return to court and safeguarding the public, while respecting the principle that "liberty is the norm" for defendants pending trial. To help balance the individual's right to reasonable bail with the public's expectation of safety, these systems include mechanisms to assess the likelihood of missed court appearances or criminal activity and provide supervision designed to address these risks. Moreover, these systems give judicial officers clear, legal options for appropriate pretrial release and detention decisions. Effective bail systems minimize unnecessary pretrial detention, increase public safety and court appearance, and, most important, administer the pretrial release process fairly.

Unfortunately, most justice systems in the United States lack the means to make effective and fair bail decisions. Judicial officers do not receive the information needed to make the determinations about release and detention, nor do they have a full statutory gamut of release and detention options to address the varying levels of risk within a defendant population. Even when options exist, most systems lack the structure to monitor released defendants, screen detained defendants regularly for release eligibility, and safeguard individual rights and public safety.

Just as getting bail decisions "right" has its benefits, performing this critical function poorly has consequences. Nationally, almost 63 percent of jail detainees are un-convicted defendants, mostly on pretrial status.[2] Most detainees cannot satisfy financial conditions; a type of detention that bail reform advocates argue has no relationship to an individual's risk of flight or to public safety. Since 2000, 95 percent of the growth in the need for jail resources—the most expensive asset of the criminal justice system—is from the increase in un-convicted detainees.[3] Studies have shown that individuals held in jail before trial, even for short periods of detention, have worse outcomes, such as higher risk of unemployment,[4] higher rates of sentencing disparity,[5] and a greater likelihood of reoffending.[6]

The shortcomings of the current bail system have made bail reform part of the larger national discussion on improving America's criminal justice systems. Public and private justice initiatives include enhancing bail decision-making and expanding the number of defendants released pretrial as reform outcomes. States such as New Jersey, New Mexico, Connecticut, and Kentucky have revised or are considering revisions to current bail laws aimed at fairer and more evidence-based bail decisions. However, with a few exceptions, these initiatives focus on a single aspect of improving bail decision-making (for example, risk assessment validation and reforms to bail laws) or incorporate bail reform under other initiatives (such as jail population reduction, provision of substance abuse treatment, and addressing economic and racial inequality). Few initiatives see bail reform as its own good achievement, with a comprehensive, system-wide set of elements needed for successful outcomes.

For most of America's justice systems, real bail reform will be transformative, requiring a holistic change in local culture and attitudes about pretrial release, the rights of pretrial defendants, and what truly is needed to reasonably assure future court appearance and public safety. Proper implementation of this reform must include **all** elements of an effective pretrial justice system, properly defined and functioning well.

---

[2] Minton, T.D. and Zeng, Z. (2015). *Jail Inmates at Midyear 2014*. Washington, D.C.: United States Department of Justice, Bureau of Justice Statistics. NCJ 248629.
[3] *Id.* at page 1.
[4] Schönteich, M. (2010) *The Socioeconomic Impact of Pretrial Detention*. New York, NY: Open Society Foundations.
[5] Leipold, A.D. (2005). "How the pretrial process contributes to unfair convictions." *The American Criminal Law Review*, 42(4): 1123-1165.
[6] Lowenkamp, C., VanNostrand, M., and Holsinger, A. (2013). *The Hidden Cost of Pretrial Detention*. New York, NY: Laura and John Arnold Foundation.

The National Institute of Corrections and its Pretrial Executive Network seeks to help inform the discussion on bail reform and pretrial justice by presenting and defining the fundamentals of an effective pretrial system and the essential elements of a high functioning pretrial services agency. This publication is a guide for jurisdictions interested in improving current elements of their pretrial systems or creating needed procedures and practices. It will also serve as a resource for practitioners and policy makers to compare current pretrial release and diversion practices to recognized evidence-based and best practices and national standards.

ACKNOWLEDGEMENTS

The National Institute of Corrections' Pretrial Executive Network includes directors of pretrial services agencies nationwide. Its mission is to promote pretrial services programming as an integral part of state and local criminal justice systems. Network members include:

Heather Condon
Pretrial Services Program Manager
Second Judicial District Court, NV

Barbara M. Hankey, Manager
Oakland County (MI) Community Corrections

Mary Pat Maher, Executive Director
Project Remand–Ramsey County (MN) Pretrial Services

Jessica Beach, Corrections Manager
Yamhill County (OR) Department of Community Justice

Bob Bruchsaler, Pretrial Services Supervisor, Missouri Office of State Courts Administrator

Kenneth Rose
Criminal Justice Program Coordinator
Virginia Department of Criminal Justice Service

Tanya Anderson
Pretrial Services Coordinator
Administrative Office of the Illinois Courts

Tara Boh Blair, Executive Officer
Kentucky Pretrial Services

Elizabeth Simoni, Executive Director
Maine Pretrial Services, Inc.

Dennis L. Berry, Director
Mesa County (CO) Criminal Justice Services

Peter C. Kiers, Acting Executive Director
New York City Criminal Justice Agency

Nick Sayner, Executive Director
JusticePoint, Inc. (WI)

Edwin H. Monteagudo, Director
Los Angeles County Probation Department, Pretrial Services Division

Clifford T. Keenan, Director
Pretrial Services Agency for the District of Columbia

Kelvin Banks, Director
Harris County (TX) Pretrial Services

Thomas McCaffrey
Criminal Court Administrator
5th Judicial District of PA

Tiana Glenna, MS
Eau Claire County (WI)
Criminal Justice Manager

Domingo P. Corona
Director of Pretrial Services
Arizona Superior Court in Pima County

The PEN and the National Association of Pretrial Services Agencies would like to acknowledge and thank NIC Correctional Program Specialist, Lori Eville, for her continued commitment to the pretrial services field.

INTRODUCTION

Improving America's criminal justice systems is a national priority with bipartisan support. Whether it be to reduce jail and prison populations, manage offenders returning to communities, minimize racial disparity or increase public confidence in the justice system, there is consensus across the political spectrum for reforms that promote smarter, evidence-based decisions, more efficient use of system resources, and greater fairness in practices and outcomes.

In many states and localities, pretrial justice reform is a major part of the larger justice reform narrative. Across the country, practitioners are applying innovative approaches to better assess defendant risk of pretrial misconduct, manage risk through supervision, and maximize the use of nonfinancial release options. These practices have improved the efficiency and fairness of pretrial decisions and outcomes and have expanded our knowledge of "what works" to promote the release of suitable defendants, encourage court appearance, and ensure public safety. Informing a wider audience of practitioners and policy makers about these practices will provide an impetus for other jurisdictions to undertake these efforts.

The National Institute of Corrections (NIC) has been at the forefront of many of today's justice reform efforts. Through innovative programs such as the Evidence Based Decision-making (EBDM) Initiative, the Orientation for New Pretrial Executives, direct technical assistance to criminal justice professionals, and sponsorship of the Pretrial Executives Network (PEN), NIC has helped state and local jurisdictions improve the quality of their justice system's decision-making, operation, and outcomes. Building on this knowledge base, NIC identified what it believes are "essential elements" of effective, high functioning pretrial justice systems and agencies, and has made these elements the focal point of its instruction to pretrial executives and practitioners.

At this critical time in criminal justice reform, NIC—in partnership with the National Association of Pretrial Services Agencies (NAPSA)—commissioned PEN members to refine these essential elements to help guide jurisdictions seeking to improve their pretrial justice systems. PEN members subsequently identified and defined 14 essential elements, building on knowledge and guidance developed within the pretrial field over many years. This publication presents these elements as a guide for jurisdictions interested in improving their current pretrial systems and a resource for practitioners and policy makers to compare their current pretrial release and diversion practices to national standards and recognized evidence-based and best practices.

Elements of an effective pretrial system

1. Pretrial release and detention decisions based on risk and designed to maximize release, court appearance, and public safety

2. Legal framework that includes: presumption of least restrictive nonfinancial release; restrictions or prohibition on the use of secured financial conditions of release; and detention for a limited and clearly defined type of defendant

3. Release options following or in lieu of arrest

4. Defendants eligible by statute for pretrial release are considered for release, with no locally-imposed exclusions not permitted by statute

5. Experienced prosecutors screen criminal cases before first appearance

6. Defense counsel active at first appearance

7. Collaborative group of stakeholders that employs evidence-based decision-making to ensure a high functioning system

8. Dedicated pretrial services agency

Elements of a high functioning pretrial services agency

1. Operationalized mission

2. Universal screening

3. Validated pretrial risk assessments

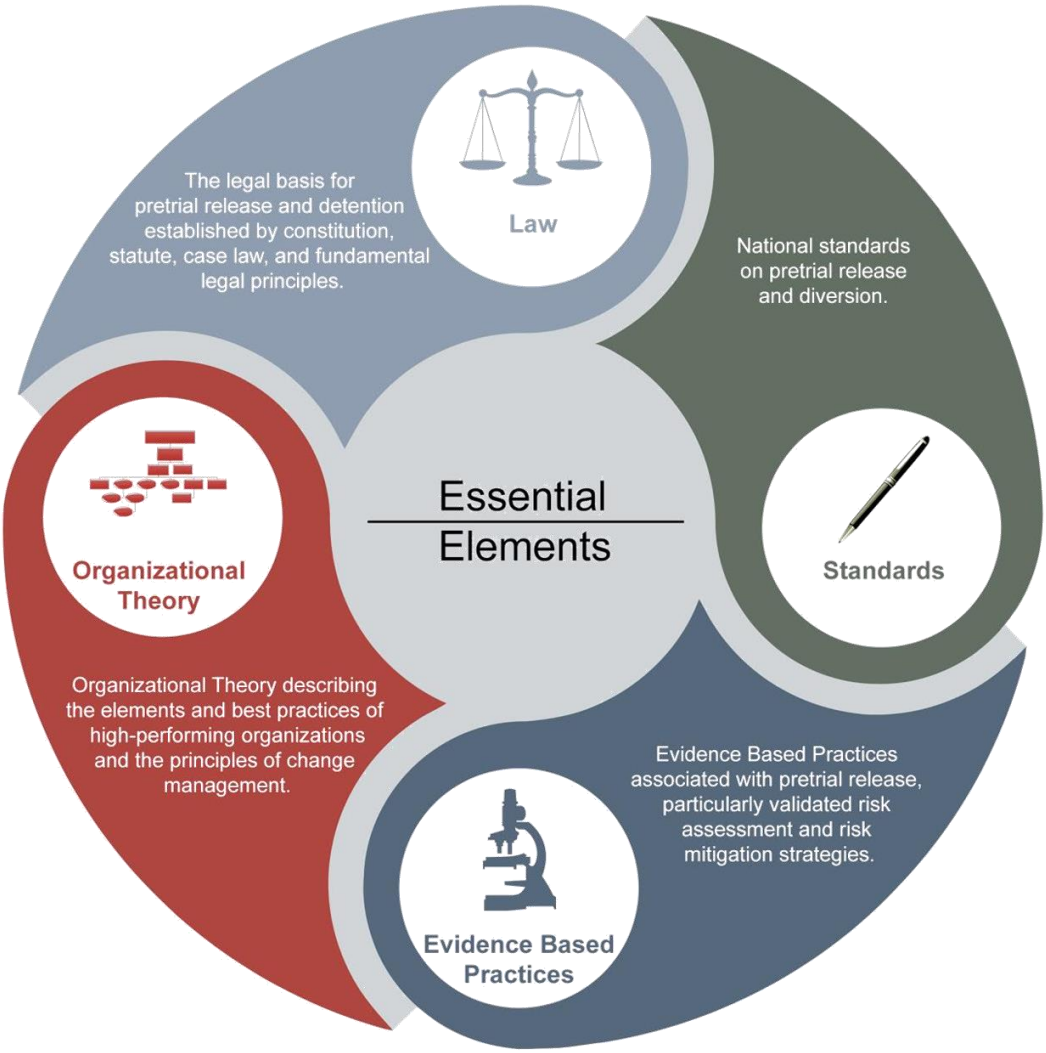
4. Sequential bail review

5. Risk-based supervision

6. Performance measurement and feedback

THE FRAMEWORK FOR PRETRIAL JUSTICE

In developing these essential elements, NIC considered sources that described consensus legal and statutory requirements in the pretrial field, outlined what has worked to promote court appearance and public safety and highlighted promising or preferred practices. Collectively, these dimensions form the framework for the essential elements and a roadmap to establishing pretrial justice in America's courts.



1. PRETRIAL RELEASE AND DETENTION DECISIONS BASED ON RISK AND DESIGNED TO MAXIMIZE RELEASE, COURT APPEARANCE, AND PUBLIC SAFETY [7]

Pretrial Justice- 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.

VanNostrand, M. and Keebler, G. (2007). "Our Journey Toward Pretrial Justice," Federal Probation, Vol .71 (2): 20-25.

The goal of bail setting is to ***maximize release*** while simultaneously ***maximizing court appearance*** and ***public safety.*** Effective pretrial justice systems utilize risk-based decision-making to release or detain defendants while maintaining public safety and high levels of court appearance. All other essential elements flow from this defining principle.

MAXIMIZING RELEASE

American law contemplates a presumption of release before trial. This notion underlies all aspects of a high functioning pretrial system. The United States criminal justice system was designed purposely to place limits on the power of government in its treatment of individuals accused of a crime. As the U.S. Supreme Court articulated in *United States* v. *Salerno*: "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[8] Although the legal framework for pretrial decision-making favors release before trial, it also allows the government to impose conditions to reasonably assure public safety and court appearance while facilitating release—and under the extremely limited circumstances where no condition will guarantee either, outright detention.[9]

[7] This publication defines "risk" as a defendant's likelihood of failing to appear at scheduled court dates or being rearrested while released pretrial.

[8] *United States* v. *Salerno*, 481 U.S. 739, 755 (1987).

[9] American justice systems incorporate the principle that US law favors release before trial. The presumption in favor of release and the right to bail are legally distinct yet interconnected concepts. It is important to note that, while the presumption in favor of release is universal, the right to bail varies by jurisdiction. Where such a right is provided for it is not necessarily absolute under all circumstances. For example, in the Federal system and 48 states, courts may deny bail to persons charged with capital crimes, usually if proof is evident or the presumption is great. Hegreness, M.J. (2013). *America's Fundamental and Vanishing Right to Bail*, 55 Ariz. L.Rev. 909, 916.

MAXIMIZING COURT APPEARANCE

For hundreds of years, courts imposed conditions of bail to motivate the accused to return to court.[10] In 1951, the U.S. Supreme Court in *Stack* v. *Boyle* wrote that—in modern times—bail "serves as additional assurance of the presence of an accused," continuing: "Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment."[11] In fact, until the 1970's, court appearance was the sole justification for limiting pretrial freedom.

MAXIMIZING PUBLIC SAFETY

Defining "Bail"

Although the term "bail" often is used as a synonym for money (or an amount of money), actually, it is a process of release which may or may not involve money. This document will use the definition from the NIC publication, Fundamentals of Bail: "a process of releasing a defendant from jail or other governmental custody with conditions set to provide reasonable assurance of court appearance or public safety."

Providing for public safety is one of the underlying goals of both the pretrial justice system and the larger criminal justice system. Although public safety was not considered a proper reason to impose conditions until the 1970's, today it is recognized as an underlying goal of effective systems. It is widely recognized that an individual's potential impact on public safety should be assessed and considered in pretrial decision-making. In fact, the federal judicial system, along with at least 36 states, considers public or individual safety explicitly as part of the release or detention decision.[12] Pretrial detention should be a "limited exception." The Supreme Court has determined this exception may be authorized in cases where defendants are found "after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel."[13] Pretrial System Element 2 provides additional guidance to jurisdictions regarding preventive detention.

---

[10] For what is generally regarded as the most in-depth examination of the early history of bail, see de Haas, E. (1966). *Antiquities of Bail: Origin and Historical Development in Criminal Cases to the Year 1275.* New York, NY: AMS Press, Inc.

[11] Ibid.

[12] National Institute of Corrections. (2011). *Measuring What Matters: Outcome and Performance Measures for the Pretrial Services Field* Washington D.C.: National Institute of Corrections.

[13] *U.S.* v. *Salerno*, 481 U.S. 739, 755 (1987).

RISK-BASED DECISION-MAKING

Risk-Based Decision-Making (RBDM) is a process that organizes information about risk to help decision makers make more informed choices. RBDM allows systems to create a common decision-making process that stakeholders will understand readily and accept. Resulting decisions are easier to defend, given the process used and the stakeholders involved.[14] RBDM is the best process to make decisions that maximize release, court appearance, and public safety. Specifically, systems should incorporate the following RBDM elements into pretrial release and detention decisions:[15]

Establish the decision structure: This involves defining the decision (release or detention appropriate to ensuring court appearance and safety); the stakeholders involved in or affected by the decision (courts, law enforcement, prosecution; defense, pretrial services); the options available (own recognizance, supervised release or detention); and the factors that will influence the decision (risk assessment results; other aggravating and mitigating factors, factors outlined in bail law).

Use risk assessment: RBDM encourages risk assessment, using factors shown by research to be predictive of outcomes, for example, court appearance, the potential for rearrest on any crime, and the potential for rearrest on specific types of charges.

Use risk-based information in decision-making: A goal in decision-making is to reduce risk as much as possible. Under RBDM, decision makers assess possible risk management options and determine how risk can be managed most effectively. This can include "rejecting" the risk (applying pretrial detention for defendants with unacceptable risk levels) or finding specific ways to reduce the risk (for example, heightened levels of pretrial supervision). This element adheres to the evidence-based practice of the "risk principle." Under this approach, jurisdictions target high-risk defendants for research supported interventions while avoiding over-supervising low risk defendants.

Monitor effectiveness through impact assessment: Impact assessment involves tracking the effectiveness of actions to manage risk. The goal is to verify that the organization is getting the expected results from its risk management decisions. If not, a new decision-making process must be considered. As noted in Pretrial Services Agency Element 6, high functioning pretrial services agencies achieve this through outcome measurement of release rates, appearance and safety rates, and continued placement of defendants on pretrial release.

---

[14] Macesker, B., Myers, J.J., Guthrie, V.H., Walker, D.A., and Schoolcraft, S.G. *Quick-reference Guide to Risk-based Decisionmaking (RBDM): A Step-by-step Example of the RBDM Process in the Field.* http://www.au.af.mil/au/awc/awcgate/uscg/risk-qrg.pdf.

[15] United States Coast Guard: Risk-Based Decisionmaking Guidelines. https://www.uscg.mil/hq/cg5/cg5211/risk.asp

Facilitate risk communication: At every step in the process, stakeholders should:

- Provide guidance on key issues to consider. Stakeholders should identify the issues of importance to them. They should present their views on how each step of the process should be performed, or at least provide comments on plans suggested by others.
- Provide relevant information needed for assessments. Some or all stakeholders may have key information needed in the decision-making process.
- Provide for the final decisions. Stakeholders should agree on the work to be done in each phase of the risk-based decision-making process. They then can support the ultimate decision making process.[16]

The Evidence Based Decision-making Model: [17] EBDM highlights several of the principles in risk-based decision-making. The goal of this initiative is to build a system wide framework (arrest through final disposition and discharge) that will result in more collaborative evidence-based decision-making and practices in state and local criminal justice systems. This effort is grounded in two decades of research on the factors that contribute to criminal reoffending and the methods the justice system can employ to interrupt the cycle of reoffense. The initiative seeks to equip criminal justice policymakers in local communities with the information, processes, and tools that will result in measurable reductions of pretrial misconduct, post-conviction reoffending, and other forms of community harm resulting from crime.

EBDM identifies several pretrial decision-making points in criminal case processing. A key feature of EBDM is the application of valid risk and/or needs assessment at each decision point: prosecutors, defense attorneys and judges will use this information to determine whether pretrial release is appropriate and to identify individualized risk reduction strategies for released defendants.

---

[16] Pretrial System Element 7 presents a fuller discussion about the importance of stakeholder buy-in.
[17] EBDM is a strategic and deliberate method of applying empirical knowledge and research-supported principles to justice system decisions made at the case, agency, and system level and seeks to equip criminal justice local and state policymakers with the information, processes, and tools that will result in measurable reductions of pretrial misconduct, post-conviction reoffending, and other forms of community harm resulting from crime.

A full description of EBDM can be found at http://info.nicic.gov/ebdm/?q=node/8 and Center for Effective Public Policy, Pretrial Justice Institute, Justice Management Institute, and the Carey Group. (2010). *A Framework for Evidence-Based Decisionmaking in Local Criminal Justice Systems: Third Edition*. Washington, D.C.: National Institute of Corrections.

SUMMARY OF EBDM PRETRIAL DECISION POINTS

Arrest Decisions	Pretrial Status Decisions	Charging Decision	Plea Decisions
•Cite •Divert •Treat •Release	•Release on Own Recognizance •Release with Supervision •Release with Financial Conditions •Detain •Violation Response Response •Supervision Condition Reassessment	•Charge •Divert •Defer •Dismiss	•Plea Terms

Racial Bias in Pretrial Decision-making

Racial bias is a significant discussion point in criminal justice, particularly in pretrial decision-making. In her article "Give Us Free," Cynthia Jones references 25 studies finding bias in bail practices alone, and explains that these findings occur across rural, suburban, and urban jurisdictions, and among all different case types. Some of the many examples she shared included studies finding that:

- *Latino and African American defendants were more likely than white defendants to be sent to jail by 91 percent and 66 percent respectively;*
- *African American and Latino individuals were twice as likely as white defendants to remain in jail because they could not pay their bonds; and*
- *African American defendants had higher bail amounts set than similarly situated white defendants.*

According to Jones and other scholars, the wide latitude judicial officers have in bail setting is a major contributor to these disparities, Jones concludes that "[w]hether the racial divide documented in these studies is the product of racial animus or subtle implicit bias by bail officials, the pattern of disadvantage suffered by minority defendants in bail determinations should be addressed with reforms to the bail determination process."

In their report entitled "Bail Fail," the Justice Policy Institute discussed racial disparities, including the fact that African Americans were jailed at rates 5 times higher than white Americans. The report concluded that "[s]ince being jailed while awaiting trial has a direct impact on case outcomes such as conviction rates and sentencing decisions, racial disparities in the pretrial process have a ripple effect throughout the justice system."

There are also concerns about possible racial bias in pretrial risk assessment instruments, discussed in detail in Element 8. The essential elements discussed in this document are designed to make the system fairer overall, and are intended to improve outcomes for everyone. As part of any pretrial reform, stakeholders need to specifically look for and address disparities based on race and should make sure that reforms eliminate those disparities.

Source: Jones, C.E. (2013). "Give Us Free:" Addressing Racial Disparities in Bail Determinations. Journal of Legislation and Public Policy, 16: 919-961 (2013).

Justice Policy Institute. (2012). Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail). Washington, D.C.: Justice Policy Institute.

2. LEGAL FRAMEWORK THAT INCLUDES: A PRESUMPTION OF LEAST RESTRICTIVE NONFINANCIAL RELEASE; RESTRICTIONS OR PROHIBITION ON THE USE OF SECURED FINANCIAL CONDITIONS OF RELEASE; AND DETENTION FOR A LIMITED AND CLEARLY DEFINED TYPE OF DEFENDANT

"Bail exacerbates and perpetuates poverty because of course only people who cannot afford the bail assessed or to post a bond – people who are already poor – are held in custody pretrial. As a consequence, they often lose their jobs, may lose their housing, be forced to abandon their education, and likely are unable to make their child support payments. We also know, and we have known for 50 years – that a decision to detain or release a defendant pretrial may be a critical factor affecting the outcome of a case. Most disturbingly, there is, in the words of Professor Caleb Foote…'an extraordinary correlation between pretrial status and the severity of the sentence after conviction.'"

Remarks by Lisa Foster at the American Bar Association's 11th Annual Summit on Public Defense.

The pretrial legal framework—composed of bail statutes, state and Federal constitutional provisions, and applicable case law—establishes the rules for pretrial release and detention. Bail law defines the purposes and types of bail; the defendant populations eligible and ineligible for bail consideration; and the roles and responsibilities of courts, pretrial services agencies, and other stakeholders in bail decision-making. The proper legal framework greatly facilitates maximizing release, court appearance, and public safety. This framework should include:

1. A presumption of nonfinancial release on the least restrictive conditions necessary to ensure future court appearance and public safety.

2. Prohibition or restrictions on the use of secured financial conditions.

3. Provisions for detention without bail for a clearly defined and limited population of defendants who pose an unmanageable risk to public safety. Detention without bail must include robust due process protections for detention-eligible defendants and those detained.

All three of these components are interrelated and must exist within a legal framework to achieve maximized rates of release, appearance, and public safety. For example, courts are far less likely to utilize formal preventive detention when secured financial conditions are allowed. Presumptive nonfinancial release—along with real and practical supervision options—keeps systems from applying preventive detention to an unnecessarily large defendant population or resorting to high bond amounts for higher-risk defendants.

Washington, D.C.'s example illustrates the relationship between the system's use of preventive detention and restrictions on money bail. As noted in a case study of the Pretrial Services Agency for the District of Columbia:

> *In 1991, during the height of a crack cocaine epidemic, there were a number of highly publicized drive-by shootings that focused attention on the bail system. (PSA Director) Jay Carver worked closely with the U.S. Attorney's Office and the Public Defender's Office on a bill before the D.C. Council. The resulting legislation, passed in 1992, expanded the scope of pretrial detention and included several rebuttable presumptions for detention. Carver was also successful in getting language inserted in the bill that prohibited the court from setting a financial bail that resulted in the defendant remaining in jail.*
>
> > *"A judicial officer may not impose a financial condition under paragraph (1) (B)(xii) or (xiii) of this subsection to assure the safety of any other person or the community, but may impose such a financial condition to reasonably assure the defendant's presence at all court proceedings that does not result in the preventive detention of the person, except as provided in § 23-1322(b)."*
>
> *The impact of this bill was immediately apparent. In the year before the law took effect only 2% of defendants were held under a detention provision. In the year after it became law, 15% were detained. Many in the District's criminal justice system credit Carver's insertion of the clause forbidding the use of money bail to detain a defendant as the single most important event in ridding D.C. of bail bonding for profit and rendering any use of money bail to rare occasions… While acknowledging the importance of the 1992 act, Carver sees that the virtual demise of money bail in D.C. and the certainty of detention for the highest risk defendants was a long process of demonstrating how the pretrial release decision-making process could work without money bail. "To make the detention parts work, we had to make the release options work. By expanding those options, we got away from money. It was a natural progression."*[18]

Pretrial justice advocates also emphasize that a presumption of nonfinancial release on the least restrictive conditions and due process-based preventive detention are achievable only with restrictions on money bail. For example, Schnacke (2014) argues that the issue for states is determining the appropriate balance of bailable to unbailable defendants, given the presumption of release:

[18] Pretrial Justice Institute. "The D.C. Pretrial Services Agency: Lessons From Five Decades of Innovation and Growth." Case Studies: An E-Publication of the Pretrial Justice Institute Volume 2, Number 1. http://www.pretrial.org/download/pji-reports/Case%20Study-%20DC%20Pretrial%20Services%20-%20PJI%202009.pdf.

If a proper bail/no bail balance is not crafted through a particular state's preventive detention provisions, and if money is left as an option for conditional release, history has shown that judges will use that money option to expeditiously detain otherwise bailable defendants. On the other hand, if the proper balance is created so that high-risk defendants can be detained through a fair and transparent process, money can be virtually eliminated from the bail process without negatively affecting public safety or court appearance rates.[19]

PRESUMPTION OF LEAST RESTRICTIVE NONFINANCIAL RELEASE

Consistent with the constitutional safeguard against excessive bail, the Federal bail statute and those of most states mandate release on the least restrictive conditions needed to ensure appearance and public safety. State and/or local law should favor the use of release on a defendant's own recognizance above all other conditions, unless a judicial officer believes that it is insufficient to ensure court appearance or public safety. The law subsequently should favor a progression (from least to most restrictive) of conditions and release options consistent with a defendant's risk of nonappearance or rearrest. The Bail Reform Act of 1984 includes an example of a presumption of release on the least restrictive conditions that may be useful for jurisdictions modifying their legal framework:

(a) IN GENERAL.—*Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be—*

(1) *released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section;*

(2) *released on a condition or combination of conditions under subsection (c) of this section;*

(3) *temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or*

(4) *detained under subsection (e) of this section.*[20]

---

[19] Schnacke, T. R. (2014). *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform.* Washington, D.C.: National Institute of Corrections. p. 52.

[20] 18 U.S. Code § 3142 - Release or detention of a defendant pending trial.

RESTRICTIONS OR PROHIBITION ON THE USE OF SECURED FINANCIAL CONDITIONS OF RELEASE

Historically, bail involved mainly unsecured bonds, which do not require payment prior to release. Unsecured bonds allow defendants to be released from jail immediately, regardless of their financial ability. However, over the past century, "secured financial conditions"—money or collateral that a defendant, their family or a private bail bond provider must pay prior to release—have come into widespread use.[21] Bail reform advocates have noted several significant issues with the use of secured financial conditions. These include:

- incarceration due to an inability to pay;
- the diminishing of judicial authority in bail setting;
- the inability to guarantee the detention of truly dangerous defendants; and
- collateral consequences of unnecessary detention.

Virtually every neutrally conducted study over the past eighty years has described the money bail system as inadequate. For the most part, these studies formed the basis for recommendations by the American Bar Association (ABA), the National District Attorneys Association (NDAA), NAPSA, and the National Association of Counties (NACo) to eliminate certain hallmarks of the money bail system, including the use of commercial bail, in favor of a system that rarely relies on money as a condition of release and that incorporates professional pretrial services risk assessment and community-based supervision.[22]

Secured financial bail and jail crowding: The overuse of secured financial conditions has fueled the over incarceration of pretrial defendants. Nationally, almost 63% of jail detainees are un-convicted defendants, mostly on pretrial status.[23] Since 2000, 95% of the growth in jail resources is from the increase in un-convicted detainees.[24]

Secured financial bail and judicial release authority: Secured financial conditions diminish judicial discretion by allowing a commercial surety or the defendant to determine release or detention. Bail bonding agents make these decisions on factors that are unknown to the public or other decision-makers. Even in jurisdictions where commercial

---

[21] Schnacke, T. R. (2014). *Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial*. Washington, D.C.: National Institute of Corrections.
[22] Pretrial Justice Institute (2011). *Responses to Claims About Money Bail for Criminal Justice Decision-Makers*. Washington, D.C.: Pretrial Justice Institute.
[23] Minton and Zeng. (2015).
[24] *Id.* at page 1.

sureties are not allowed, "judges are still effectively abdicating their decision-making role by setting secured money bonds."[25] Often, judges set low money amounts, assuming these will facilitate release or detention. However, a 2013 report on New Jersey's jail population found that 12% of pretrial detainees in the state were held on bonds of $2,500 or less.[26] A Bureau of Justice Statistics data series on felony case filings in America's largest urban counties found "on any given day, five out of six defendants provided with a financial release condition are unable to make the bond amount set by the court."[27]

Money and public safety: Historically, secured financial conditions have been tied exclusively to court appearance. Unlike supervised pretrial release, under which judges can impose safety-related release requirements, financial conditions do not provide a mechanism to consider and address dangerousness. Since bonds cannot be forfeited after a new arrest, the surety pays no price for a defendant's new criminal conduct and has no incentive to provide supervision or support to reduce the likelihood of new arrests.

Collateral consequences: Research demonstrates that individuals held in jail before trial, even for short periods of time, have worse outcomes, such as higher risk of unemployment,[28] sentencing disparity,[29] and recidivism.[30] A study supported by the Laura and John Arnold Foundation looked at 153,407 defendants in Kentucky and found that longer stays in pretrial detention:

- increased the likelihood that a defendant would fail to appear in court (up to a certain point)
- increased the likelihood that a defendant would engage in new criminal activity, and
- increased the likelihood of recidivism after disposition.

Even a small amount of time in jail had a huge impact: "When held 2-3 days, low-risk defendants are almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours."[31] Generally, outcomes were worse for low-risk defendants, and the Foundation noted a hypothesis of failures occurring due to increased periods of defendants' separation from their communities.

---

[25] *Ibid*.
[26] *Ibid*.
[27] Cohen, T. H., & Reaves, B. A. (2008). *Pretrial release of felony defendants in state courts*. Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics.
[28] Schönteich. (2010).
[29] Leipold (2005). pp. 1123-1165.
[30] Lowenkamp, VanNostrand, and Holsinger. (2013).
[31] *Ibid*.

Several jurisdictions restrict the use of money bail—or eliminate certain types of financial bail altogether—as part of comprehensive bail reform. Kentucky,[32] Oregon,[33] Illinois,[34] and Wisconsin[35] ban commercial surety. Bail laws for the Federal courts and Washington, D.C. forbid financial conditions that result in a defendant's pretrial detention. Under the D.C. statute:

> *(3) A judicial officer may not impose a financial condition under paragraph (1)(B)(xii) or (xiii) of this subsection to assure the safety of any other person or the community, but may impose such a financial condition to reasonably assure the defendant's presence at all court proceedings that does not result in the preventive detention of the person, except as provided in § 23-1322(b).*
> *(http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000869&DocName=DCCODES23-1322&FindType=L&ReferencePositionType=T&ReferencePosition=SP_a83b000018c76)*
>
> *(4) A person for whom conditions of release are imposed and who, after 24 hours from the time of the release hearing, continues to be detained as a result of inability to meet the conditions of release, shall upon application be entitled to have the conditions reviewed by the judicial officer who imposed them. Unless the conditions of release are amended and the person is thereupon released, on another condition or conditions, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed.*[36]

PREVENTIVE DETENTION

For a very limited subset of the pretrial population, no condition or combination of conditions will reasonably assure the safety of any other person or the public. In these narrow circumstances, preventive detention—detention without bail—is both appropriate and necessary. An effective pretrial justice system provides limited authority for preventive detention accompanied by proper procedural safeguards.

Traditionally, jurisdictions have relied heavily on secured financial conditions as a proxy for detention without bail. Courts across the country impose financial conditions that are presumptively unaffordable to a defendant with the unexpressed intent to protect the public from future crime. Unfortunately, these *sub rosa* preventive detention practices are largely immune from appellate review, circumvent procedural protections, are not limited by risk or offense, and ultimately do not guarantee the detention of the individual perceived to be dangerous.

---

[32] Kentucky Statutes, § 431.510.
[33] Oregon Revised Statutes. §§ 135.255, .260, .265.
[34] Illinois Statutes, Chapter 725 §§ 5/110-7, 5/110-8.
[35] Wisconsin Statutes, Section 969.12(2).
[36] Code of the District Columbia, §23-1321(c) (3)-(4).

Preventive detention, when used properly and with extreme care, provides justice systems with a transparent and rational means to address high-risk individuals. However, it is important to note that preventive detention is controversial within the pretrial field. Many bail reform advocates have voiced concern that courts with preventive detention statutes may apply the law too broadly. Others believe that some state preventive detention laws lack the due process rigor required by the U.S. Supreme Court's *Salerno* decision. However, if not consensus, there is broad agreement that courts need an effective—and legal—means to detain the limited number of defendants who present an unacceptable risk to public safety. As described by Superior Court for the District of Columbia Senior Judge Truman Morrison in remarks to the New Jersey Joint Committee on Criminal Justice:

> *"[u]nless judges are given an open, rational way to deal with community safety, they will sometimes, I think understandably see danger where it actually may not exist…and much of bail setting becomes infused, not in a sinister way, but in an inchoate but real and important way, with perceptions of possible danger in many of the wrong people. This contributes in way too many people sitting in jail because they are poor.*
>
> *It is my conviction that judges here, like in the rest of America, need what I am blessed with as I grapple with pretrial decisions about bail: a fair, due process – laden, workable preventive detention scheme that everyone buys into. That scheme portends freedom for judges…once they have openly addressed the issue of community safety within their dockets, they can begin to intellectually relax and with clearer eyes focus upon what Justice Rehnquist told us to do…to figure out ways to release most everybody.*
>
> *That is why I now am a fervent advocate of a workable, fair limited preventive detention provision in every state code."*[37]

Jurisdictions that use or are contemplating preventive detention must limit its application and adopt the safeguards emphasized by the U.S. Supreme Court in *Salerno*. For example, to satisfy substantive and procedural due process, preventive detention must occur only after a full adversarial hearing where the defense may rebut the Government's assertion of dangerousness and the Government must demonstrate by clear and convincing evidence that no conditions or condition combinations "will reasonably assure" safety.[38]

A jurisdiction's ability to detain without bail is dictated primarily by its constitutional provisions and secondarily by its statutes. The use of preventive detention is not authorized in every state and furthermore, state constitutional provisions providing for a broad right to bail may present a barrier to the use of pretrial preventive detention. Most state constitutions still retain provisions guaranteeing a right to bail by sufficient sureties. A subset of these states has interpreted this provision to require a near absolute right to

---

[37] New Jersey Supreme Court, *Report of the Joint Committee on Criminal Justice* (2014). The report contributed to a new bail law enacted in New Jersey in 2014.
[38] 481 U.S. 741.

bail before trial. Although, in theory, these provisions provide that all defendants have a right to release, in practice these provisions (1) continue to allow for the *sub rosa* detention of individuals unable to meet secured financial conditions imposed upon them, and (2) prohibit the state from utilizing detention without bail.

Several states have proposed, passed, or begun to consider amending their constitutional bail provisions to allow for the use of preventive detention. For example, as part of a

Recent Federal Guidance on Financial Bail

The Bail Reform Act of 1984 prohibits federal judicial officers from imposing any "financial condition that results in the pretrial detention." (18 USC § 3142). Building upon the growing national awareness of the problems with financial conditions of release, the United States Department of Justice also confirmed that some common state practices on this issue are not just unfair, but illegal. In its December 2015 Statement of Interest in the case of *Varden* v. *City of Clanton*[*] the Department of Justice (the "Department") asserted that a system that fixed bond amounts based on charges, without considering individual circumstances, should be found unconstitutional. It added that "[n]ot only are such schemes offensive to equal protection principles, they also constitute bad public policy." (The Statement of Interest also referenced earlier Department publications on this issue, including Schnacke's *Fundamentals of Bail*.)

In March 2016, the Department followed this statement with a letter to state and local courts "intended to address some of the most common practices that run afoul of the United States Constitution." Included among those was any bail practice that led to a defendant remaining incarcerated because he or she was unable to afford release. In the letter, the Department stated that incarceration solely due to poverty violates the Constitution and that using secured money bonds in the bail process leads to defendants who pose no public safety risk being incarcerated unnecessarily. Instead of such systems, the Department urged courts to switch to "one grounded in objective risk assessments by pretrial experts."

[*]*Varden* v. *City of Clanton* is one of several cases challenging money bail in jurisdictions across America initiated by the nonprofit group Equal Justice Under Law. More information is available at http://equaljusticeunderlaw.org/wp/current-cases/ending-the-american-money-bail-system/.

Sources: Statement of Interest of the United States, *Varden* v. *City of Clanton*, No. 2:15-cv-34-MHT-WC (M.D. Ala., Feb. 13, 2015); U.S. Department of Justice Dear Colleague Letter Regarding Law Enforcement Fines and Fees, March 16, 2016

bipartisan reform effort, New Jersey and New Mexico amended their constitutions, eliminating its broad right to bail provision to allow for the use of preventive detention.

Legal Presumption of Nonfinancial Release and the Pretrial Services Agency's Role

"The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of release…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." --18 USC § 3142.

Federal law and several state statutes call for a presumption of release on the least restrictive nonfinancial conditions. The National Association of Pretrial Services Agencies believes that pretrial services agencies should recommend release under ***non-restrictive or the least restrictive conditions possible*** *(based on public safety/court appearance considerations) and that those agencies should* ***never recommend money bail.*** *This position is discussed in greater detail in the forthcoming 4th edition of NAPSA's Standards on Pretrial Release.*

Pretrial services agencies have an obligation to be knowledgeable about and work within their state laws and local court rules. However, they also should have a role in improving these laws. By serving on relevant committees and workgroups, issuing reports, and advising the courts and policymakers, ***pretrial agencies can advocate for rules and laws that help them achieve the goals of pretrial practice, consistent with*** *legal and evidence-based pretrial practices.*

3. RELEASE OPTIONS FOLLOWING OR IN LIEU OF ARREST

"Almost all of these individuals could be released and supervised in their communities—and allowed to pursue or maintain employment and participate in educational opportunities and their normal family lives—without risk of endangering their fellow citizens or fleeing from justice. Studies have clearly shown that almost all of them could reap greater benefits from appropriate pretrial treatment or rehabilitation programs than from time in jail—and might, as a result, be less likely to end up serving long prison sentences."

Remarks by former Attorney General Eric Holder, National Symposium on Pretrial Justice

Effective pretrial justice systems include opportunities to effectuate an arrestee's release before the initial appearance. These options involve law enforcement and pretrial services agencies as decision makers and are permitted by state or local statutes[39] or through the local court's authority to delegate release powers to other justice system agencies. Early release of lower-risk arrestees redirects law enforcement and corrections resources at arrest and booking to individuals whose risk level requires a judicial officer's determination of release or detention. Release in lieu of arrest has the added benefit of keeping an arrest from a person's criminal record, and less chance of the collateral consequences that incur.

Citation in Lieu of Arrest: A citation is a written order issued by law enforcement that requires a person to appear in court at a designated date and time. Law enforcement has long used citations instead of physical arrest for minor offenses and misdemeanors not involving a victim. A 2016 study by the International Association of Chiefs of Police found that nearly 87% of law enforcement agencies used citation release. In appropriate cases, citation in lieu of arrest can serve as a de-escalation tool to help maintain officer and public safety. Citations can also improve officers' efficiency—it takes considerably less time to issue a citation than to process a custodial arrest.[40]

Alternatives to arrest: In many justice systems, law enforcement has decision options besides arrest for individuals with severe mental health, substance abuse or other issues. These alternatives often provide a more effective response to an individual than would arrest.

- Under the *crisis intervention team* (CIT) model, law enforcement officers trained to recognize and respond to individuals with severe mental health issues can provide

[39] Nineteen states have legislation allowing law enforcement to issue citations after arrest. Louisiana and Oregon permit citations for some felonies. Laws in 10 states create a presumption that citations be issued for certain crimes and under certain circumstances. For example, Maryland requires police officers to issue a citation for any misdemeanor that does not carry a penalty of imprisonment, most misdemeanors punishable by a maximum of 90 days imprisonment and for misdemeanor possession of marijuana. National Conference of State Legislatures, "Citation in lieu of arrest." http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx.

[40] International Association of Chiefs of Police. *Partnerships in Pretrial Justice*. Alexandria, VA: IACP. http://www.theiacp.org/Portals/0/documents/pdfs/IACP_ParnersinPretrialJustice_Final.pdf.

referrals to community-based mental health and social services in lieu of arrest. CIT brings police and the public together for the common goals of safety, services, and understanding to persons with mental health issues who are in emotional crisis situations and their families.

- Law Enforcement Assisted Diversion (LEAD) is a pre-booking diversion program developed to address low-level drug and prostitution crimes in Seattle, Washington's Belltown neighborhood and the Skyway area of unincorporated King County. LEAD allows law enforcement officers to redirect low-risk individuals engaged in drug or prostitution activity from arrest and prosecution to community-based services.

- The Gloucester, Massachusetts Police Department developed the Angel Program in 2015 to help address the city's illicit drug use problem. Under the program, a drug-involved individual can report to a police precinct for assistance. Angel participants receive a professional substance abuse assessment and intake for appropriate treatment placement. Community-based "Angel volunteers" provide participant support.

Delegated release authority: In many jurisdictions, corrections or pretrial services staff have delegated release authority through their courts to screen and release arrestees before or after a formal booking into a detention center. Pre- and post-booking applies to a group of arrestees defined by stakeholders (usually those charged with misdemeanors or non-violent felonies). Jail or pretrial services staff determine release based on criteria developed with other stakeholders or with the use of a validated risk assessment.

Multnomah County (Portland, Oregon) releases close to 40% of defendants to "pre-initial appearance ROR" or direct referrals to pretrial supervision from booking. Release screening excludes defendants charged with murder, treason, person crimes if the defendant has a prior person-crime event, a third DUI offense, weapons offenses, methamphetamine manufacture or delivery and defendants on sex offender registries. Eligible defendants must score a 0-9 on the pretrial services agency's "Recognizance Risk Assessment" or be charged with a traffic or misdemeanors not involving a victim. Law enforcement and the pretrial agency's Recognizance Unit's staff may override a decision to release, if they believe the decision should be reviewed by a judicial officer.

Jurisdictions may find that some of these options fit their needs better than others. However, these release options must operate under the same guiding principles as formal bail setting: maximizing rates of release, court appearance, and public safety. As with other elements of pretrial practice, there are tools that jurisdictions can use to "triage" arrestees to ensure that only the lowest risk population is being released.

4. DEFENDANTS ELIGIBLE BY STATUTE FOR PRETRIAL RELEASE ARE CONSIDERED FOR RELEASE, WITH NO LOCALLY-IMPOSED EXCLUSIONS NOT PERMITTED BY STATUTE

"A fair, safe and impartial justice system will assess all defendants. A principle called 'Universal Screening' was implemented as part of Mesa County's [Grand Junction, CO] new Bond Guidelines in 2013. This means that everyone booked into the jail with new charges has to be assessed, and then a Judge can make an informed release or hold or decision."

Comments by Joel Bishop, Manager, Mesa County Criminal Justice Services, October 2016

Pretrial systems should screen all defendants eligible by statute for pretrial release consideration.[41] Local justice systems should not impose limitations on pretrial screening and assessment eligibility beyond those established in the controlling bail law. Both the National Association of Pretrial Services Agency (NAPSA) and the American Bar Association's (ABA) Standards support the idea of universal assessment. NAPSA Standard 3.3 reads, "In all cases in which a defendant is in custody and charged with a criminal offense, an investigation about the defendant's background and current circumstances should be conducted by the pretrial services agency or program." ABA Standard 10-4.2 (a) states, "In all cases in which the defendant is in custody and charged with a criminal offense, an investigation to provide information relating to pretrial release should be conducted by pretrial services or the judicial officer prior to or contemporaneous with a defendant's first appearance."

Often jurisdictions use charge as a limiting factor for pretrial assessment. However, research has found that the "seriousness of criminal charges was not a predictor of (was not systematically related to) flight or crime by defendants who gained pretrial release." [42] In *State* v. *Brown*,[43] the New Mexico State Supreme Court rebuked the lower court for using charge as the sole basis for the bail decision writing:

> *"Neither the Constitution nor our rules of criminal procedure permit a judge to base a pretrial release decision solely on the severity of the charged offense. Bail is not pretrial punishment and is not to be set solely on the basis of an accusation of a serious crime. As the United States Supreme Court has emphasized, "[t]o infer from the fact of*

[41] "Assess" and "assessment" are used by their general meaning (e.g., evaluating, estimating or judging someone or something), rather than the clinical meaning of an assessment or assessment tool.
[42] Goldkamp, J.S., et al. (1995). "Personal Liberty and Community Safety: Pretrial Release in Criminal Court." *Plenum Series in Crime and Justice*, 180, pp. 307-08.
[43] 338 P.3d 1276, 2014 New Mexico Supreme Court 38.

indictment alone a need for bail in an unusually high amount is an arbitrary act." Stack v. Boyle, 342 U.S. at 6. (Rule 5-401) requires the judge to make an informed, individualized decision about each defendant and does not permit the judge to put a price tag on a person's pretrial liberty based solely on the charged offense."[44]

This element is particularly applicable on both the municipal and county level. Occasionally, local or county-level governments will impose additional limitations on the accused's eligibility for screening, assessment, and release beyond that which is required by state law. These exclusions or limitations exist in the form of a local ordinance, resolution, policy decision, bond schedule, or governmental practice. In some instances, these exclusions may violate state or federal law.

[44] *Id*. At 1293.

5. EXPERIENCED PROSECUTORS SCREEN CRIMINAL CASES BEFORE FIRST APPEARANCE

"Early involvement with cases is essential to effective advocacy. Prosecutors, in particular, must have access to factual information typically not reflected in initial charging documents. Early review of detailed police reports and accurate criminal history information allows for fidelity in charging decisions and ultimate case evaluation. An informed prosecutor's appearance at arraignment or other 'first calling' ensures against unnecessary pretrial detention and misallocation of scarce resources."

Michael N. Herring, Commonwealth's Attorney for the City of Richmond (Virginia)

Experienced, well-trained prosecutors should screen arrest filings before initial appearance to determine the most appropriate charge or action. Screening outcomes can range from dismissing a case, offering defendants a referral to a diversion program or problem-solving court or preparing appropriate bail recommendations at the initial court appearance. Early screening can help:

- reduce needless pretrial detention based on bail decisions made using arrest charges;
- aid prosecution in determining the most appropriate recommendations for pretrial release or detention;
- dispose of weaker cases sooner and target resources to higher level cases; and
- identify defendants eligible for diversion and other alternatives to adjudication.

Early prosecutorial screening is supported in standards. The National District Attorneys Association (NDAA) calls for prosecutors to "work very closely with law enforcement and the courts to establish standard procedures to assure the filing of accurate charges without unnecessary delay, but with sufficient time for prosecutor input."[45] The American Bar Association (ABA) recommends that prosecutors "act with diligence and promptness to investigate, litigate, and dispose of criminal charges, consistent with the interests of justice…" and call for prosecutors' offices to be staffed in ways that allows for this (Standards 3.1-9). A key recommendation from the 2011 National Symposium on Pretrial Justice was for prosecutors to screen cases "before the initial appearance to make sure that the charge before the court at that first appearance is the charge on which that the prosecutor is moving forward." Having inaccurate charges during the pretrial process contributes to needless delays and possible infringement of due process rights. This is yet

[45] National District Attorneys Association (2009). *National Prosecution Standards*, Third Edition. (Standard 4-5.2). Arlington, VA.: National District Attorneys Association.

another example of why "the first decision needs to be the best and most resourced decision."[46]

The Office of the State Attorney's (Baltimore, Maryland) Charging Division

Best practices in prosecutorial case intake and screening include assigning screening to attorneys with trial experience, clear standards for declining cases, rules to secure complete and timely investigation files from law enforcement, written record of screening decisions, and notification to law enforcement and victims of screening decisions. (Jacoby, J.E., Gilchrist, P.S., and Ratledge, E.C. (1999). Prosecutor's Guide to Intake and Screening. Silver Spring, MD: The Jefferson Institute for Justice Studies).

A real-world example of these principles is the Office of the State's Attorney for Baltimore, Maryland (OSA) Charging Division. Established in 1999, the Charging Division operates around-the-clock within the City Booking and Intake Center. Its screener teams—comprised of some of OSA's most veteran prosecutors—review filings documents on all arrests, make decisions to release or charge arrestees based on principles of law, and recommend pretrial release or detention to court commissioners for cases involving violent felonies, firearm charges, and other cases as appropriate. Staff also screen all arrestees for eligibility for diversion options, such as Early Resolution (ER) Court and Quality Case Review (QCR) dockets, and for designation of Repeat Violent Offender status. The Division follows up with notifications of arrests to the Division of Parole and Probation, the Department of Juvenile Services, OSA trial units, and other law enforcement partners. The Division also staffs daily District Court bail review and the QCR Docket, under which eligible defendants charged with quality of life crimes appear in court within days of their arrest and may have their case(s) resolved.

Division Chief Patrick Motsay describes the division's goal as improving justice for the public and the accused by ensuring the best screening decisions made with the most complete and accurate data. Working with law enforcement, the Division makes sure that arrest filing information conforms to established standards and reflects the true nature of the alleged offense. The Division works with bail commissioners to ensure that filing decisions are made and reported in time for use in bail setting (which in Maryland must occur within 24 hours of arrest). The results of the quality-centered collaborative approach are impressive. The quality of law enforcement's filing documents has improved. "Release with no charge" rates (or a decision not to prosecute an arrest charge) dropped from close to one-third of filings in 2005 to less than two percent in 2015. Bail commissioners have prosecutor-screened charges on which to determine bail, rather than arrest reports. Defendants eligible for the QCR docket and other diversion options received them quickly, saving the OSA, court, and defense valuable resource time.

The Charging Division plans several new innovations in the coming year, including a post-arrest risk assessment for bail recommendations. The Division will continue to push to improve front-end justice for the public and the accused. For more information about the OSA's Charging Division, please contact Patrick Motsay, OSA Assistant State's Attorney, Chief, Charging Division at PMotsay@stattorney.org *or 443-984-2566.*

[46] Statement by Lori Eville, National Institute of Corrections, during February 2016 NIC/NAPSA meeting discussing the Essential Elements of Highly Effective Pretrial Services Agencies.

6. DEFENSE COUNSEL ACTIVE AT FIRST APPEARANCE

A lawyer for every defendant at initial appearance: Maine's model

*For the past five years, under the Maine Commission on Indigent Legal Services, **every** defendant, regardless of charge, civil or criminal, has the opportunity to speak with a lawyer at their initial appearance. Robert Ruffner, Executive Director of the Maine Indigent Defense Center, says "There needs to be rigorous training and standards to make sure that this interaction is meaningful and not in name only."*

The role of defense counsel is of critical importance during the adjudicatory phase of a criminal case—especially when liberty is subject to restriction. The Sixth and Fourteenth Amendments to the United States Constitution guarantee the assistance of competent and effective counsel in "all criminal prosecutions." In *Rothgery* v. *Gillespie County*, *Texas,* the U.S. Supreme Court established that legal representation is required at initial appearance, given the defendant's liberty interest is at stake. The Court ruled that "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."[47] Without counsel present, defendants may incriminate themselves, due process protections may not be observed, and other constitutional rights may be violated. Effective assistance by competent counsel protects the accused from self-incrimination, assures that Due Process protections are observed and ultimately protects the "…accused from conviction resulting from his own ignorance of his legal and constitutional rights."[48]

National Association of Pretrial Services Agencies (NAPSA) and American Bar Association (ABA) Standards highlight the importance of a defendant having effective counsel at the first appearance before a judicial officer to help ensure fair and appropriate bail decisions. NAPSA Standard 2.2 advises that "At 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." Per ABA Standard 4-2.3: "A defense counsel should be made available in person to a criminally-accused person for consultation at or before any appearance before a judicial officer, including the first appearance."

The presence of a defense counsel is essential to ensuring due process and the effective administration of law. In adopting this practice, however, jurisdictions should weigh the following considerations:

[47] *Rothgery* v. *Gillespie County*, *Texas*, 554 U.S. 191, 213 (2008)
[48] *Johnson* v. *Zerbst*, 304 U.S. 458, 465 (1938).

Historical interests: In many jurisdictions, defense counsel have not traditionally been part of the pretrial process. As a result, pretrial is often considered the domain of prosecution, and may not have been considered a high priority for public defenders. As with other parts of pretrial practice, improving the system may require dedicated advocacy and a significant shift in philosophy and practice.

Resource scarcity: All jurisdictions struggle with having enough resources and how to best allocate those resources. Some may feel that they do not have enough defenders to provide meaningful representation at the first appearance. Systems must ensure that the "first decision is the best decision" and this includes providing for defense counsel at initial appearance. Some jurisdictions may find the most efficient way to do this is by hiring attorneys to focus only on pretrial advocacy. In areas where there are not enough cases to employ a full-time attorney, part-time practitioners may be used, or neighboring jurisdictions may choose to pool their resources to ensure the availability of counsel who represent clients in a consortium of counties.

The Difference Defense Counsel Can Make

Few would argue that having an attorney present is not helpful during the pretrial--or any other period--of a case. But how much impact does it have? A study of defendants accused of non-violent crimes in a large urban area found large differences in outcomes based on representation. Defendants who had lawyers present at bail review hearings were:

- 2.5 times more likely to be released on recognizance;
- More than 4 times as likely to have their bail reduced; and
- Almost 2 times as likely to be released within one day of arrest (defendants with attorneys spent an average of 2 days in jail, compared to 9 days for those without).

Source: "Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail," Cardozo Law Review, Vol. 23:5 at 1721 (2001-2002).

Attorney-client relationship: Depending on the structure and practice of public defense in a jurisdiction, attorneys may not have yet been appointed to defendants at the first appearance. This can be solved with local policy change (and a reallocation of resources) that appoints the attorney earlier, or it may be most effective to hire defense counsel to represent individuals solely for the first appearance, or the pretrial period. This type of short-term or "attorney for a day" appointment can meet the goals of pretrial defense if the attorneys meet their ethical obligation to zealously represent each client, even if they are only with their client for the hour. Attorneys must ensure they are also meeting their ethical duty to provide meaningful representation. This may mean different things in the context of a first appearance, but at a minimum, the defender must meet and interview their client; as well as review and act upon any information available to them (e.g., risk assessments, complaints, conditions of release).

Pretrial Defense in Kentucky

Apart from its three major cities, Kentucky is a largely rural state. Thus, formal court dockets may take place only once a week, depending on the charge and location. However, to comply with constitutional mandates, judges will hold arraignment hearings several times per week. Although defense counsel is not required to attend, Kentucky's public defenders prioritize doing so.

B. Scott West, Kentucky Department of Public Advocacy General Counsel, explains that extra time spent is minuscule compared to the tremendous value it adds. Bail set at the initial appearance is difficult to change later, he explains, and in many instances a prosecutor may be willing to accept "time served" for a minor offense, meaning that a defendant can go home in 2 days instead of 6 if counsel is available to negotiate at that first appearance. Those few days' difference can mean someone gets to keep a job or be with family that much sooner, says West. If an inappropriate bail is set, defense counsel can appeal immediately, and if a defendant needs legal advice about a potential plea offer, she can get it and decide more quickly. Many judges find that these early appearances—with defense counsel present—help them dispose of cases sooner and therefore help keep their dockets less crowded, says West.

He adds that his office did not need to hire any additional attorneys when they decided to prioritize attending these hearings; they take only 15-20 minutes, and often result in a later court dates being unnecessary (e.g., when a "time served" plea is arranged). Rather than adding to an attorney's caseload, he says, the early appearance gives attorneys the case they were already going to have a few days earlier and lets them resolve it a few days sooner. This promotes efficiency, but also promotes justice, says West, who adds: "nothing bad happens to a client because they got legal representation sooner rather than later, but bad things can happen if they get representation later rather than sooner."

7. COLLABORATIVE GROUP OF STAKEHOLDERS THAT EMPLOYS EVIDENCE-BASED DECISION-MAKING TO ENSURE A HIGH-FUNCTIONING SYSTEM

CJCCs [Criminal Justice Coordinating Committees] differ from other criminal justice committees in that they are designed to be permanent, ongoing, advisory boards that not only solve some specific problems as they arise, but, more importantly, monitor the system's functioning and manage its collective workload.

Michael R. Jones. (2013). "Keeping Your Criminal Justice Coordinating Committee Going Strong." National Jail Exchange: 2013*. Washington, D.C.: National Institute of Corrections*

Many different professionals are involved at the pretrial phase. Providing these stakeholders with an avenue for coordination and collaboration is essential to ensure that all the elements discussed in this document are integrated into the system. While many jurisdictions use formal entities called Criminal Justice Coordinating Committees (CJCCs)[49] to carry out this function, any mechanism that fulfills this purpose will help create and sustain a high functioning pretrial justice system. The National Institute of Corrections' (NIC) guide to developing a CJCC explains that inter-agency coordination can help allocate scarce resources most efficiently, reduce jail overcrowding, and can ultimately "increase public confidence in and support for criminal justice processes, enhancing system performance and, ultimately, the integrity of the law."[50] CJCCs have also been credited with large reductions in pretrial lengths of stay, crime, and criminal justice costs.[51]

Generally, CJCCs or other coordinating bodies should include representation from all three branches of government, and other relevant stakeholders, and should address "both specific and systemic issues."[52] Within the pretrial context, CJCC's can provide a useful analysis of current performance (e.g., of detain/release decisions), and suggest opportunities for improvement.

---

[49] NIC uses the term "criminal justice coordinating committee" to refer to "informal and formal committees that provide a forum where many key justice system agency officials and other officials of general government may discuss justice system issues." Cushman, R.C. (2002). *Guidelines for Developing a Criminal Justice Coordinating Committee*. Washington, D.C.: National Institute of Corrections.
[50] *Ibid*.
[51] National Association of Counties, Justice Management Institute, and Bureau of Justice Assistance. (2014). "From Silo to System: The Importance of Criminal Justice Coordinating Councils (CJCCs)" (Webinar). Available at http://www.naco.org/sites/default/files/event_attachments/NACo%20From%20Silo%20to%20System%20-%20Sept%2024.pdf.
[52] *Ibid*.

Criminal Justice Stakeholder Collaboration in Yamhill County, Oregon

"We are very fortunate in Yamhill County to have a long history of local criminal justice stakeholder collaboration. This history allowed us to easily form our local Policy Team when we first began this work in 2010. Members were carefully considered resulting in representatives from the Judicial Department, Board of Commissioners, District Attorney's Office, Defense Consortium, Community Justice, Health and Human Services, Sheriff's Office, Victim Services, and the community.

It was important to us to have a representative from each branch of government to achieve a balanced approach and consider different viewpoints when facing sometimes difficult criminal justice and pretrial topics. For over six years now our dedicated Policy Team continues to meet monthly with the purpose of analyzing and responding to performance and outcome measurement data to make evidence informed policy revisions as needed. This approach allows us to continually monitor our pretrial justice system's performance. I sincerely believe that the Yamhill County Pretrial Justice Program would not be as successful without the existence of this coordinating committee."

Jessica Beach, Yamhill County Department of Community Justice Corrections Manager

8. DEDICATED PRETRIAL SERVICES AGENCY

"To reduce barriers to the pretrial release of persons in custody whose release on bond with appropriate conditions reasonably assures court appearance and public safety, all counties and cities and counties are encouraged to develop a pretrial services program in consultation with the chief judge of the judicial district in an effort to establish a pretrial services program that may be utilized by the district court of such county or city and county."

Colorado Revised Statutes, §16-4-106

A jurisdiction's *operational pretrial functions*—risk assessment, release/detention recommendation, supervision, compliance monitoring, and performance measurement and feedback—should be consolidated under a single organizational structure: a pretrial services agency. Preferably, the pretrial services agency should be a separate, independent entity. However, jurisdictions may incorporate pretrial services agencies within a larger "parent" organization, if that component has:

- a clearly-defined, pretrial service related function as its purpose;
- staff assigned only to pretrial-related work with pretrial defendants; and
- management that can make independent decisions on budget, staffing, and policy.

Support for a dedicated pretrial services agency is grounded in organizational theory, standards, and the law. Operational pretrial functions have an interdependent and reciprocal relationship—the results of one function effect or become the input of another. For example, risk assessment results inform recommendations on release or detention, which inform supervision strategies. The input from these activities become the outcomes and performance metrics needed to improve procedures. Interdependent and reciprocal relationships are the most complex and difficult to manage and require the highest level of communication and coordination among those performing the tasks. These functions are best managed under a single entity and management mission and philosophy.[53]

A dedicated pretrial services agency or component ensures that these other essential elements are operationalized and realistic. For example, Courts can make bail decisions based on empirically validated factors and have real supervision options related to risk level and which have been shown to help mitigate pretrial misconduct. These services and support are best done under a single organizational structure.

American Bar Association (ABA, Standard 10-1.10) and National Association of Pretrial Services Agencies (NAPSA, Standard 1.3) Standards endorse the establishment of pretrial

[53] Thomas, J.D. (1967). *Organizations in Action*. New Brunswick, NJ: McGraw-Hill Publishing. Aiken, M. and Hage, J. (1968). "Organizational Interdependence and Intra-organizational Structure." *American Sociological Review*, 1968 Dec; 33(6): 912-930.

services agencies to perform operational pretrial functions. Recognizing the importance of an independent pretrial services function, several jurisdictions have legislation authorizing or encouraging pretrial services agencies. These include the Federal courts[54] Virginia,[55] Illinois,[56] and Washington, D.C..[57] Since 2012, five states—Colorado, Hawaii, Nevada, Vermont, and West Virginia—have authorized or created guidelines for the administration of pretrial services state-wide.[58]

INDEPENDENCE

Pretrial services agencies should be independent, stand-alone entities, like other criminal justice agencies. This ensures the independence of operation needed to manage such essential elements as universal screening and recommendations for pretrial release or detention. It also helps emphasize the budget and other resources needed to effectively assess and manage a pretrial defendant population.

Jurisdictions where an independent agency may be a resource challenge may opt to establish a dedicated pretrial program within a parent organization. Regardless of where this function is housed, the NAPSA Standards state that it "should function as an independent entity in providing information to the court and in monitoring and supervising defendants released on nonfinancial conditions." When pretrial functions are housed within other agencies, it is even more critical to ensure that they have dedicated staff and can make independent decisions and recommendations based on risk rather than expedience for any stakeholder. This can be achieved by employing autonomous staff who understand and subscribe to the pretrial agency's mission.

RESOURCES

Like other criminal justice agencies, pretrial services agencies should be resourced appropriately to accomplish its mission and complete its operational functions. Depending on the jurisdiction's population and the size of its justice system, an effective pretrial services function could be accomplished using either full-time or part-time staffing or with resources and services shared across multiple jurisdictions.

---

[54] U.S.C. Title 18, § 3153, Organization and administration of pretrial services.
[55] Code of Virginia § 19.2-152.2. Purpose; establishment of pretrial services and services agencies.
[56] Illinois Criminal Procedure, 725 ILCS 185/0.01, Pretrial Services Act.
[57] District of Columbia Official Code, Title 23. Criminal Procedure, Chapter 13. Bail Agency [Pretrial Services Agency] and Pretrial Detention.
[58] National Council of State Legislatures. (2014). Pretrial Release Laws: Recent State Enactments. http://www.ncsl.org/documents/cj/PretrialHandoutNCSL.pdf.

Pretrial Functions within a Probation Authority

Nearly 40% of pretrial services agencies are under probation authorities. (*Pretrial Justice Institute. (2009). Survey of Pretrial Services Programs*.) Pretrial and probation authorities share many evidence-based strategies and practices. However, there are important differences between the two that probation authorities with pretrial functions should realize. Most significant are the differences in legal status between defendants and probationers and the purposes of pretrial and probation intervention.

As non-adjudicated individuals, defendants enjoy a greater level of rights and protections than probationers. Thus, defendants cannot be forced to discuss the circumstances of a pending case nor be ordered to punitive conditions such as community service or victim restitution. Legal status conveys distinctly different purposes for pretrial and probation interventions. The limited purposes of pretrial release tie functions here to reasonably assuring court appearance and public safety. A pretrial supervision authority may not expose defendants to requirements geared towards rehabilitation or reduction in long-term recidivism. By contrast, criminal sanctioning, offender rehabilitation, and recidivism reduction are hallmarks of probation supervision and oversight.

These differences are enough to recommend that probation authorities with pretrial programming implement operational and mission-oriented separation of pretrial functions. The Pretrial Justice Institute and the American Probation and Parole Association identify several such strategies, including distinct and separate mission and vision statements for the pretrial component; pretrial-specific job titles and functions for pretrial staff; distinct policies and procedures for pretrial services functions; pretrial-specific performance measures; and pretrial-specific training. (*Pretrial Justice Institute and American Probation and Parole Association (2010). Promising Practices in Providing Pretrial Services Functions Within Probation Agencies: A User's Guide*.)

Essential Elements of a High Functioning Pretrial Services Agency

The essential elements described in the following pages are critical to a high functioning pretrial services agency. While these are presented separately, it is important to note the interrelationship between the pretrial justice system and the pretrial services agency. System and agency elements must be present to support good pretrial decision making and practice.

1. OPERATIONALIZED MISSION

Mission statements answer the question, "Why do we exist?" It gives the organization purpose and meaning and speaks to why people want to work for your company… Every organization needs to define its fundamental purpose, philosophy and values, as well as develop a strong foundation for its strategic planning framework... This is not about the products and services you provide; rather, it is about why you provide them.

Regan, S. (2012). Strategic Planning Framework: The Importance of Mission http://www.beckershospitalreview.com/strategic-planning/strategic-planning-framework-the-importance-of-mission.html

Mission statements are a staple of high-performing organizations. The mission statement communicates an organization's purpose and how it serves its key stakeholders. Mission statements guide an organization's strategic decision-making, allowing leadership to develop short and long-term objectives and strategies to accomplish these objectives.

For pretrial services agencies, an operationalized mission makes clear to agency staff and stakeholders the agency's goals, responsibilities, and principles. It also provides the basis for the agency's oversight and management of operational pretrial functions. To comport with the Framework underlying these essential elements, a pretrial services agency mission statement must be consistent with maximizing release rates, court appearance, and public safety.

Tying Mission to Outcome

As a Federal agency, the Pretrial Services Agency for the District of Columbia (PSA) must draft a strategic plan every four years. The plan includes a mission statement covering the agency's major functions and operations, outcome-oriented goals and objectives for major agency functions and operations, and a description of how the goals and objectives are to be achieved.

To meet this requirement, PSA leadership refined its mission in 2015, to make it more compatible with the agency's outcomes of ensuring court appearance, enhancing community safety, and maximizing compliance among released defendants. Consistent with its new mission ("to promote pretrial justice and enhance community safety"), PSA adopted supporting strategic goals (judicial concurrence with agency recommendations; continued pretrial release; minimize rearrest; maximize court appearance) and strategic and management objectives (risk assessment; risk-based supervision; appropriate treatment; and effective agency administration). The new goals and objectives serve as the blueprint for PSA's operational and administrative structure. ***All*** *agency functions are included under a strategic or management goal that ties back to strategic goals and, ultimately, the agency's mission.*

2. UNIVERSAL SCREENING

Pretrial service programs should conduct universal screening using a standardized interview format and objective approach (e.g., point scale) to determine eligibility for release. Information collected through the interview should be verified, and together with the program's recommendation or eligibility determination, should be provided to the court of jurisdiction in an expeditious manner.

State of New York Division of Probation and Correctional Alternatives. (2007). New York State Pretrial Releases Services Standards.

Pretrial services agencies should screen all defendants eligible by statute for release consideration to make informed, individualized, risk-based recommendations to the court regarding release, supervision, and detention decisions. Screening should occur before the defendant's initial court appearance so that the judicial officer can factor screening results into his or her release decision. Screening results also can help determine the defendant's eligibility for pretrial diversion options or the need for referrals to behavioral health or social services programming to augment pretrial supervision.

Typical elements of a pretrial screening include:

- defendant interview;
- criminal history investigation;
- independent investigation and verification of interview information, specifically information that may affect the agency's supervision intervention; and
- application of a validated pretrial risk assessments.

American Bar Association (ABA) and National Association of Pretrial Services Agency (NAPSA) Standards call for pretrial services agencies to conduct a *voluntary* interview and advise defendants about their right to refuse the interview and other possible uses of the information shared. The interview provides context to information found in an arrest record or provided by a screening tool or risk assessment instrument. The interview also provides an opportunity to gather essential facts such as contact information. Information obtained during an interview may also help identify opportunities for diversion/problem-solving courts, and an interview may also be required by statute or as part of a specific risk assessment tool. ABA Standards urge pretrial agencies to "carefully exclude questions relating to the events or the details of the current charge," a sentiment also supported by NAPSA Standards.

ABA Standards (3.3 and 3.4) state that the pretrial investigation should "focus on assembling reliable and objective information relevant to determining pretrial release and should be organized per an explicit, objective and consistent policy for evaluating risk and identifying appropriate release options." Investigations may examine and verify information shared in the interview, such as criminal history, current address, and

employment status. NAPSA Standards further explain that investigating release options includes conditional release, supervision, and similar options. NAPSA's Standards for Pretrial Diversion/Intervention (3.1) call for those programs to set broad eligibility requirements to "include as many appropriate defendants as can benefit from the intervention without sacrificing public safety."

In a report describing its pretrial services agency, Allegheny County, Pennsylvania describes improvements to its pretrial investigation practices:

> *"[u]sing a standardized risk assessment tool has added objectivity to the process, but bail investigators must still make important judgments about aggravating, mitigating or changing circumstances"*[59] *[not present in the actuarial risk assessment].*

The case study provides examples in which investigators discover that reported information (such as residence) is false, or learn of contextual information about the defendant's family life and work situation. In either of these instances the bail investigator must decide if the information is an aggravating or mitigating circumstance which may contribute to the defendant's overall pretrial success or failure.

Release is maximized by considering all bail-eligible defendants. Perhaps most importantly, equal access to justice is afforded through a universal screening process and release consideration for all defendants. Clearly, high functioning pretrial systems and agencies should invest in practices that support universal screening of all eligible defendants prior to initial appearance.

[59] Barron, B. (2014). *Pretrial Decisionmaking: How a Model Pretrial Services Program Changed Allegheny County's Criminal Justice System.* Pittsburgh, Pa: The Allegheny County Department of Human Services.

3. VALIDATED PRETRIAL RISK ASSESSMENTS

Research reviews repeatedly showed that actuarial instruments performed better than clinical or professional judgement when making predictions of human behavior.

Bonta, J. and Andrews, D.A. (2007).
Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation 2007-06.

The expected outcomes of bail decision-making are maximized rates of court appearance and public safety. Research in criminal justice and other disciplines has demonstrated that decisions about individual behavior are best made using *actuarial risk assessment*. Actuarial assessments calculate potential risk by using factors shown empirically to be related to the assessed risk. Predictions made using these assessments tools are far more accurate than those based on clinical (i.e.; professional) judgment. In its *Framework for Evidence Based Practice,* the National Institute of Corrections (NIC) emphasized that structured risk assessment tools "predict pretrial misconduct and risk of re-offense more effectively than professional judgment alone."[60] In an issue brief, the Pretrial Justice Institute (PJI) summarized the research on pretrial risk assessments and concluded that—in contrast to clinical judgement—decisions based on factors validated to the local defendant population can be good predictors of which defendants will be re-arrested or fail to appear in court.[61]

There has been a wealth of research on pretrial risk assessment validation over the past decade. There are now several empirically-derived public domain risk assessment tools, and a consensus within the pretrial field about the factors most associated with failure to appear and rearrest.[62] Jurisdictions should develop their own pretrial risk assessments based on research of the local defendant population. However, pretrial services agencies can use a validated publicly available risk instrument, with later validation to their defendant population. In choosing an available assessment, jurisdictions should be mindful of the following:

Are the assessment instrument's risk factors consistent to the jurisdiction's defendant population? Defendant populations differ, and these differences can be significant when considering an assessment validated to another jurisdiction's defendant population. For

[60] Center for Effective Public Policy, Pretrial Justice Institute, Justice Management Institute, and the Carey Group. (2010). p. 13.
[61] Pretrial Justice Institute. (2015). *Issue Brief: Pretrial Risk Assessment: Science Provides Guidance on Assessing Defendants.* Washington, D.C.: Pretrial Justice Institute.
[62] *Ibid* at p. 3. Common risk factors among validated pretrial risk assessments include: previous failure to appear, previous convictions, current charges, housing information, employment or educational status, age, and drug and alcohol history and current use.

example, before adopting the Virginia Risk Assessment Instrument (VPRAI), the Multnomah County (Portland), Oregon pretrial services agency compared the VPRAI's validation population to a sample of local defendants. It found significant differences in age, ethnicity, residence of less than one year, employment during the past two years, and current charge level. The Multnomah pretrial agency implemented the VPRAI, but validated the assessment's factors against the local population, and made appropriate changes to match the county's defendant population and charging practices.

Was the risk assessment designed specifically to assess pretrial misconduct? Most publicly available pretrial risk assessments are validated to pretrial risk and defendant populations. However, some risk assessments "borrowed" from other disciplines have been touted as applicable to pretrial purposes. Most often, these assessments measure recidivism, defined as a sentenced offender's risk of new criminal activity following supervision. Using risk assessments for purposes and in environments in which they are not validated can greatly diminish an agency's assessment of appearance and safety risk and assignment of defendants to correct pretrial supervision levels. Before choosing a public domain assessment, practitioners should ensure that the assessment is normed to pretrial risk and populations.

Is the assessment instrument compatible to your current pretrial data collection and screening practices? Pretrial agencies should verify that their current data collection protocols allow for consistent quality collection of risk assessment data. For example, pretrial agencies that do not include defendant interviews or verification in their initial screening procedures cannot use risk assessments with demographic or substance use-related factors. All pretrial risk assessments require data on a defendant's criminal history and status with the criminal justice system. However, pretrial agencies that limit criminal history to just local events may reduce an assessment's validity on these factors.

Could the risk instrument create or exacerbate existing racial disparity in pretrial release and detention outcomes? Although risk assessments are designed to be race- and gender-neutral, there is continuing discussion in the field about how racial bias may impact the factors considered in the assessment. For example, when past criminal history is given more weight in a risk assessment, and mitigating factors such as those gained through interviews are not included, racial differences in risk assessment scoring could become more pronounced.[63] Research and best practice suggests that jurisdictions must make sure

---

[63] See Skeem, J.L. and Lowenkamp, C.T. (2016). *Risk, Race, & Recidivism: Predictive Bias and Disparate Impact* available at http://ssrn.com/abstract=2687339 and Angwin, J., et al. (2016). *"Machine Bias: There's software used across the country to predict future criminals. And it's biased against blacks."* ProPublica, available at https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing. Also, see Candace McCoy, *Caleb Was Right: Pretrial Decisions Determine Mostly Everything*, 12 Berkeley J. Crim. L. 135 (2007), discussing a New Jersey commission's finding that "one of the main factors accounting for the imprisonment rate disparities was that minority offenders had much longer prior criminal records than white offenders and linking it to aggressive enforcement of drug laws in urban centers. Also, see Breaux, J. and Ho, H. *Could risk assessment contribute to racial disparity in the justice system?* (in Urban Institute's August 11, 2014 Urban Wire blog), making similar arguments in the context of sentencing and probation revocation.

to create and validate tools (or re-validate existing tools) with a focus on avoiding potential racial bias and must use those tools as intended.[64]

RELIABILITY AND VALIDITY

Two important risk assessment concepts are *reliability* and *validity*. Reliability measures how well an assessment produces stable and consistent results. Validity refers to how often the instrument measures what it purports to measure. Both concepts are quality controls of a risk assessment's accuracy and consistency before implementation. However, pretrial services agencies must address reliability and validity issues even after implementation.

"Internal reliability" measures how well a single rater or group of raters agree in their assessment of similar defendants. It is the guarantee that staff apply the risk assessment accurately and consistently across risk categories and risk factors. As a quality assurance, pretrial agencies should institute procedures to track intra-rater reliability (the consistency of individual raters in applying the assessment) and inter-rater reliability (the consistency of the assessment's application among a rating group).

"Construct validity" is how well the risk assessment measures what it intends to measure, for example, the potential for missed court dates or arrests during the pretrial period. Validation is an important step in risk assessment development. However, pretrial services agencies should continue to measure and report the assessment's validity through overall rates of appearance and public safety (see Agency Element 6) and by differences in appearance and safety rates by risk assessment category.

"Face validity" is the extent that observers view the assessment as accurate. Put simply, a risk assessment has face validity if it "looks like" it measures what it is supposed to measure. Although not as scientific as other concepts, face validity is important to enlisting support for the risk assessment among stakeholders. Stakeholders must believe that an instrument assesses pretrial failure accurately and catalogues defendants correctly by risk level. Pretrial services agencies can increase the likelihood of face validity by sharing the risk assessment and its supporting research with stakeholders before implementation and addressing any concerns stakeholders may have. This may include addressing why the risk assessment may not contain certain "favorite" risk factors or why certain factors are grading lower or higher than expected. Agencies also should share with stakeholders the results of regularly tracked construct validity appearance and public safety metric results.

---

[64] Skeem and Lowenkamp (2016). Council of State Governments Justice Center (2016). "Risk and Needs Assessment and Race in the Criminal Justice System," available at https://csgjusticecenter.org/reentry/posts/risk-and-needs-assessment-and-race-in-the-criminal-justice-system/.

Overrides

Actuarial risk assessments treat individuals in the aggregate—the instruments gauge an individual's likely behavior based on the observed behavior of a group that shares the individual's risk factors. While superior to assessments based on clinical judgment, actuarial tools "cannot anticipate every possible case or scenario." (Latessa, E., et al. (2009). Creation and Validation of the Ohio Risk Assessment System: Final Report. Columbus, OH: Ohio Department of Rehabilitation and Correction).

To address the rare instances when the assessment may incorrectly classify a defendant, some criminal justice agencies use an "adjusted actuarial" approach, under which staff may override assessment results under limited and clearly-defined circumstances. Most often, these systems involve the use of an approved list of considerations that can raise or lower the assessed level of risk. (Hanson, R.K. (1998). Predicting sex offender re-offense: Clinical application of the latest research. Presentation sponsored by Sinclair Seminars and given in Richmond, VA.). To guard against overuse of these factors, agencies should set as a performance measure an annual cap on the number of overrides as a percentage of risk assessments performed. James F. Austin of the JFA Institute recommends an override range of 5-15 percent, with overrides for lower and higher supervision levels being about equal.

The adjusted actuarial approach also may help staff accept a new actuarial assessment. Generally, these tools remove professional discretion from decision making, which may make staff and other stakeholders resistant initially to their use. Allowing staff to apply their experience and judgement to decision making (even in controlled circumstances) may help garner support for and confidence in these instruments.

4. SEQUENTIAL BAIL REVIEW

***Responsibility for ongoing review of the status of detained defendants**: The pretrial services agency or program should review the status of detained defendants on an ongoing basis to determine if there are any changes in eligibility for release options or other circumstances that might enable the conditional release of the defendants. The program or agency should take such actions as may be necessary to provide the court with needed information and to facilitate the release of defendants under appropriate conditions.*

National Association of Pretrial Services Agencies. (2004). Standards on Pretrial Release, 3rd ed. (Standard 3.6).

Circumstances that supported an initial pretrial release or detention decision may change during case processing.[65] To ensure that a defendant's release or detention status continues to match their risk level, high functioning pretrial services agencies continuously review the defendant population and report to the court when material changes warrant a reconsideration of release or detention. Agencies prioritize these sequential reviews to pretrial detainees whose assessed risk level may not warrant detention and released defendants who are noncompliant with release conditions, have missed a scheduled court appearance or have been rearrested pretrial.

The agency should target scheduled court appearances as decision points for sequential review.[66] Information provided to the court should support the agency's recommendation for a change in release or detention status, and can include new or updated information found in the investigation and updated risk assessment result.

Sequential review should not be relied on to remedy bad initial decisions. As previously discussed, the first decision should be the best decision. Similarly, effective continuous review practices are not an excuse to defer the release decision for a later date.

Continuous review is essential to address material changes in circumstance, increased or decreased risk, and should be implemented for pretrial defendants already at liberty, as well as for those who are still detained. Release or detention decisions must be appropriately matched to the defendant's assessed risk throughout the process.

[65] NAPSA Pretrial Release Standard 3.6 provides several examples of possible changes in circumstances, including: "additional positive information about the defendant's background may be obtained, or the agency may learn of the availability of a drug treatment program slot for which the defendant would be eligible...the dropping of some charges against the defendant or the willingness of a reliable relative of the defendant—not reachable prior to the initial release/detention proceeding—to take responsibility for assuring the defendant's return to court and law-abiding behavior during the pretrial period."

[66] For example, Federal bail law allows judicial officers to reconsider or amend release decisions "at any time" (18 USC § 3141), and many state laws explicitly allow for bail decisions to be reconsidered at various points in the case.

National Association of Pretrial Services Agency (NAPSA) Standard 4.1[67] calls for the re-examination of the release or detention decision and for the submission of status reports regarding pretrial detainees. This standard underscores the need for continuous review, and articulates the attendant requirements for notification, including that of changed circumstances or for when detention periods exceed the period allowed by statute. Court notification is an integral aspect of the continuous review practice, as this notification prompts the court to re-examine the release or detention decision.

[67] Standard 4.1 Re-examination of the release or detention decision; status reports regarding pretrial detainees Standard 4.1 Re-examination of the release or detention decision; status reports regarding pretrial detainees.

(a) Upon motion by the defense or prosecution or by request of the pretrial services agency supervising released defendants alleging changed or additional circumstances, the court should promptly reexamine its release decision including any conditions placed upon release or its decision authorizing pretrial detention under Standards 2.8 through 2.10. The judicial officer may, after notice and hearing when appropriate, at any time add or remove restrictive conditions of release, short of ordering pretrial detention, to ensure court attendance and prevent criminal law violations by the defendant.

(b) The pretrial services agency, prosecutor, jail staff or other appropriate justice agency should be required to report to the court as to each defendant, other than one detained under Standards 2.8, 2.9 and 2.10, who has failed to obtain release within [24 hours] after entry of a release order made pursuant to Standards 2.4 - 2.6 and to advise the court of the status of the case and of the reasons why a defendant has not been released.

(c) For pretrial detainees subject to pretrial detention orders, the prosecutor, pretrial services agency, defense attorney, jail staff, or other appropriate agency should file a report with the court regarding the status of the defendant's case and detention regarding the confinement of defendants who have been held more than [60 days] without a court order in violation of Standards 2.10(g)(iii) and 4.4.

5. RISK-BASED SUPERVISION

The monitoring and supervision of released defendants is a crucially important part of any pretrial release system. If arrested defendants are to be released before trial, judicial officers—and the community, particularly including victims of crime—must have confidence that the release order includes any conditions reasonably needed to guard against risks of nonappearance and dangerousness.

NAPSA Standards on Pretrial Release. (2004).
Commentary to Standard 3.5.

Statutes governing pretrial release and detention as well as National Association of Pretrial Services Agencies (NAPSA) and American Bar Association (ABA) Standards define the purpose of pretrial supervision as ensuring a defendant's court appearance and minimizing the threat the defendant may pose to an individual or to the public. To be legitimate, pretrial supervision levels and conditions **must** be tied to achieving one or both objectives.

Pretrial supervision also must conform to the "risk principle," the community corrections evidence-based practice that supervision levels match an individual's assessed risk level. Research shows that matching supervision levels to risk greatly improves supervision compliance and outcomes. The risk principle warns against low risk defendants being ordered to comply with conditions more appropriate for high risk defendants (a waste of resources and potential cause of technical violations) and conversely, inadequate supervision of high risk defendants, which can lead to missed court appearances or new arrests pretrial.

Finally, appropriate pretrial supervision adheres to the requirement found in Federal and most state bail laws, and supported by pretrial release standards, that pretrial conditions are the least restrictive needed to ensure court appearance and public safety.

SUPERVISION LEVELS AND CONDITIONS

The literature suggests that pretrial supervision increases the likelihood of court appearance and public safety for medium to-higher risk defendants. For example, drawing on data from two states, the Laura and John Arnold Foundation examined the likelihood of new criminal arrest and failure to appear for defendants released pretrial with supervision and those released without supervision. The study found that supervised moderate- and high-risk defendants were likelier to appear in court and that defendants supervised pretrial for 180 days were likelier than other defendants to remain arrest-free. Multivariate models controlling for gender, race, time at risk in the community and defendant risk level revealed that supervision significantly reduced the likelihood of failure to appear. Finally, the study found that the effects of pretrial supervision on appearance rates were consistent over the differing time-to-disposition periods (time at risk in the community).

1. When the time to disposition was more than 180 days, two of the three multivariate models identified statistically significant differences in the likelihood of failure between those who received pretrial supervision and those who did not.

2. Defendants supervised pretrial for more than 180 days were 12% to 36% less likely to commit new crimes before case disposition. Some of these reductions were statistically significant while some merely approached statistical significance.[68]

Unfortunately, the literature is not as clear about which supervision conditions best assure successful pretrial outcomes. Either there is too little research at the pretrial stage about individual conditions—for example, on regular reporting and electronic surveillance—or studies that are quite dated—for example, regarding drug testing. In a paper for the Bureau of Justice Assistance and the Pretrial Justice Institute, Marie VanNostrand, PhD., analyzed the existing research on common conditions of release to determine their effectiveness:[69]

Drug Testing*:* After reviewing research tied to a pretrial drug testing program initiated in the District of Columbia and replicated in other jurisdictions, VanNostrand concluded that none "found empirical evidence that could be used to demonstrate that when drug testing is applied to defendants as a condition of pretrial release, it is effective at deterring or reducing pretrial failure, even when a system of sanctions is imposed."

Electronic Monitoring*:* The research reviewed on the use of electronic monitoring devices found that although their use could increase release rates, they did not necessarily improve supervision outcomes (e.g., re-arrests and failure to appear rates). Several of the relevant studies noted, however, that electronic monitoring was used for more high-risk defendants, leading to the (yet unproven) hypothesis that if such monitoring kept the failure rates of defendants who would have otherwise been detained to the same level as typical released defendants, its use "has the potential to reduce unnecessary detention for higher-risk defendants while maintaining court appearance and community safety."[70]

Other Supervision Options: Residential options, treatment and other interventions such as shelters, substance use disorder treatment, mental health services and location or computer monitoring may be required for defendants as conditions of supervised release. VanNostrand reviewed a study of defendants in the federal system, which has pretrial services agencies for each District Court and provides funding for supervision and alternatives to detention. Consistent with similar research on other populations, the study

---

[68] VanNostrand, M. and Lowenkamp, C. (2013). *Exploring the Impact of Supervision and Pretrial Outcomes*. New York: Laura and John Arnold Foundation.
[69] VanNostrand, M., Rose, K.J., and Weibrecht, K. (2011). *State of the Science of Pretrial Release Recommendations and Supervision*. Washington, D.C.: Pretrial Justice Institute.
[70] At least one member of NIC's Pretrial Executives Network also suggested that even in circumstances where electronic monitoring does not lower risk, it may be a low-cost alternative to detention for high risk, non-violent defendants.

found that for lower risk defendants, alternatives to detention decreased success rates, and for moderate and higher risk defendants it increased or had no impact on success rates.[71]

Prohibition on blanket supervision levels and conditions: Pretrial supervision must be individualized and based on each defendant's risk level and circumstances. Using "blanket conditions"—mandatory requirements imposed on all defendants, defendants assessed at certain risk levels or charged with certain crimes—or "one-size-fits-all" approaches are shortcuts that violate constitutional rights and undercut the goal of pretrial justice. In *Salerno*, the U.S. Supreme Court ruled that the Excessive Bail Clause guaranteed that release conditions "not be excessive in light of the perceived evil" the government sought to address.[72] Courts also have questioned release conditions tied to specific charges. For example, several Federal courts reviewing the "Adam Walsh Act"[73] have ruled as unconstitutional the law's requirement of mandatory electronic surveillance and reporting conditions for defendants charged with child pornography.[74] As one court noted:

> *As applied to this defendant at this time, the Adam Walsh Act's mandatory condition of electronic monitoring is excessive. The government interest in protecting society is valid. Its response in this particular case is not... The defendant poses no risk to society in general, or to children specifically. He has abided fully by requirements for mental health counseling, even giving lectures on sexual abuse. He has followed the strict rigors of home detention. Under these circumstances, this court finds that electronic monitoring is excessive, as applied to this defendant, "in light of the perceived evil."*[75]

EFFECTIVE SUPERVISION PRACTICES

The literature is clearer about supervision practices that help support the goals of court-ordered conditions. The following are protocols that pretrial services agencies should adopt to enhance supervision:

---

[71] The exception here was mental health services, which were recommended for defendants at all risk levels who needed them.
[72] *Salerno*, 481 U.S. at 754.
[73] The Adam Walsh Child Protection and Safety Act (PL 109-248) established a national registry of persons convicted of sex offenses. The law also amended the Bail Reform Act to require all Federal defendant charged with receipt or possession of child pornography and released pretrial comply with mandatory conditions of electronic monitoring, curfew, restrictions on personal associations and travel, stay away orders from victims, and regular reporting to a designated law enforcement or pretrial services agency. 18 U.S.C. § 3142(c)(1)(B)) (2006).
[74] Handler, M.R. "A Law of Passion, Not of Principle, Nor Even Purpose: A Call to Repeal or Revise the Adam Walsh Act Amendments to the Bail Reform Act of 1984" *101 Journal of Criminal Law and Criminology 279* (2013).
[75] *United States* v. *Polouizzi*, 697 F. Supp. 2d 381, 395 (E.D.N.Y. 2010).

***Court Notification**:* Notification of upcoming court appearances (including phone calls, recorded phone messages, mail notification, text messaging, and e-mail) is highly effective at reducing the risk of failure to appear.[76]

***Response to defendant conduct**:* Timely and meaningful responses to defendant conduct is a recognized evidence-based practice in community corrections.[77] NAPSA Standards also advise pretrial agencies that in many cases, condition infractions "can be handled administratively" by the agency [with permission of the court], rather than requiring formal court proceedings. Research shows that the most effective "incentives and sanctions" policies include the following elements:

- certainty—the defendant knows the supervision program's response scheme beforehand;
- swiftness—responses are prompt and timely to the defendant's behavior;
- proportionality—responses are appropriate to the defendant's behavior);
- fairness—defendants perceive the response as fair and just compared to the behavior; and
- individualization—responses must consider the defendant's risk of future noncompliance or pretrial failure.

Prompt Notification of Violations: Pretrial services agencies should notify the court whenever a defendant's noncompliance to conditions of supervision cannot be addressed administratively. The agency should include in its report recommendations for court action it believes are appropriate to the violation. NAPSA Standard 4.3 suggests that

---

[76] Eckert, M. and Rouse, M. (1991). *The 1991 Court-Date Notification Study: A Preliminary Report on CJA Notification Procedures and Their Impact on Criminal Court Failure-to-Appear Rates, February 4, 1991 Through March 27, 1991*. New York, NY: New York City Criminal Justice Agency. Rouse, M. and Eckert, M. (1992). *Arraignment-Date Notification and Arraignment Appearance of Defendants Released on Desk Appearance Tickets: A Summary of Preliminary Findings.* New York, NY: New York City Criminal Justice Agency. Murray, C., Polissar, N., and Bell, M. (1998). *The Misdemeanant Study: Misdemeanors and Misdemeanor Defendants in King County, Washington, Seattle, WA.* Crozier, T.L. (2000). The Court Hearing Reminder Project: "If You Call Them, They Will Come," King County, WA: Institute for Court Management Court Executive Development Program. Nice, M. (2006). *Court Appearance Notification System: Process and Outcome Evaluation, A Report for the Local Public Safety Coordinating Council and the CANS Oversight Committee*. White, W. F. (2006). *Court Hearing Call Notification Project, Coconino County, AZ: Criminal Coordinating Council and Flagstaff Justice Court.* Jefferson County Criminal Justice Planning Unit (2006). *Jefferson County Court Notification Program Six Month Program Summary, Jefferson County, CO.* Herian, M.N. and Bornstein, B.H. (2010). "Reducing Failure to Appear in Nebraska: A Field Study," The Nebraska Lawyer, 13, no. 8. Kainu, M. (2014). *Automated Court Notifications.* Washington, D.C.: District of Columbia Pretrial Services Agency.

[77] Carter, M. (2001). *Responding to Parole and Probation Violations: A Handbook to Guide Local Policy Development*. Washington, DC: National Institute of Corrections. Hawken, A. and Kleiman, M. (2009). *Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE. A report to the National Institute of Justice*. Washington, D.C.: National Institute of Justice. Marlowe, D.B. "Evidence-Based Policies and Practices for Drug-Involved Offenders." *The Prison Journal* 91, no. 3 (2011): 27S-47S. Rudes, D.S., et al. "Adding Positive Reinforcement in Justice Settings: Acceptability and Feasibility." Journal of Substance Abuse Treatment 42, no. 3 (2012): 260-270.

pretrial agencies, "take account of the seriousness of the violation, whether it appears to have been willful, and the extent to which the defendant's actions resulted in impairing the effective administration of court operations or cause an increased risk to public safety" in determining their recommendations. Since these sanctions can range from modified or additional release conditions to detention or prosecution on criminal charges, courts and pretrial systems must ensure that due process protections, like those previously discussed, are afforded (e.g., representation by counsel).

Professional Standards on Pretrial Supervision

The monitoring and supervision of defendants who have been released before trial is one of the most important responsibilities of pretrial services agencies, and is discussed in Standard 1-1.0 of the ABA Standards on Pretrial Release and Standard 3.5 of the NAPSA Standards on Pretrial Release. This obligation includes:

- Developing and adhering to policies regarding the agency's own oversight of defendants and any contracted entities, including residential facilities, treatment services, etc.;
- Monitoring defendants and promptly notifying the court, as necessary, of potential violations of conditions of release, as well as providing recommendations about the consequences of violations;
- Providing reminders and other necessary assistance to ensure defendants appear for court dates; and
- Helping defendants obtain employment as well as any services (e.g., mental health or substance use disorder treatment, legal services), that may increase their ability to comply successfully with conditions of release.

The Standards referenced above and related commentary provide more detail on the specifics of these responsibilities and, in some cases, excellent guidance on how best to achieve them.

Service Provision During Pretrial Supervision

Providing or referring defendants to interventions such as substance use disorder or mental health treatment, vocational services, or housing assistance is often part of a supervision strategy. Pretrial services, agencies should offer these services when they help achieve pretrial outcomes and supervision compliance. For example, assisting homeless defendants secure housing stability can make court date notification easier and bolster the likelihood of future court appearance. Helping defendants with substance disorder issues enroll in treatment pretrial can help prevent re-arrests related to drug or alcohol use. Such services, however, should be tied to risk factors specific to the individual defendant and be offered voluntarily rather than required as a condition of release.

In determining the appropriate type and level of services to be offered, agencies should employ evidence-informed and validated needs assessment tools, usually after the defendant's release to supervision. Agencies also consider how long a defendant likely will be supervised pretrial and what needs outcomes can be expected during that period. Agencies should work with community corrections authorities to ensure that needs-based programming—especially substance use disorder and mental health services—are incorporated into post-sentence supervision.

6. PERFORMANCE MEASUREMENT AND FEEDBACK

A performance measurement system such as the Balanced Scorecard allows an agency to align its strategic activities to the strategic plan. It permits—often for the first time—real deployment and implementation of the strategy on a continuous basis. With it, an agency can get feedback needed to guide the planning efforts. Without it, an agency is 'flying blind'.

Balanced Scorecard Institute (1998).
Top Ten Reasons for a Performance Measurement System

Performance measurement is an evidence-based practice in community corrections and a habit of high performing organizations.[78] These agencies define and measure success with the right metrics, identifying practices that work, need improvement or are nonproductive.

In 2010, the National Institute of Corrections' (NIC) Pretrial Executives Network (PEN) identified the need for consistent and meaningful data to track individual pretrial services agency performance. National data specific to pretrial agency outcomes and performance would help individual agencies measure their effectiveness in achieving goals and objectives and in meeting the expectations of their justice systems. Consistent with public- and private-sector best practices, pretrial services agency performance measures would tie into the individual agency's mission, local justice system needs, state and local bail laws, and national pretrial release standards.

Responding to this need, in 2011, NIC published *Measuring What Matters: Outcome and Performance Measures for the Pretrial Field*, a compilation of the PEN's suggested performance metrics. NIC believes these measures enable pretrial service agencies to gauge more accurately their programs' effectiveness in meeting agency and justice system goals. The measures also are compatible for any pretrial services agency whose mission statement is linked to maximizing release, court appearance, and public safety.

SUGGESTED MEASURES

1. **Appearance Rate:** The percentage of supervised defendants who make all scheduled court appearances.

2. **Safety Rate:** The percentage of supervised defendants who are not charged with a new offense during the pretrial stage.

[78] National Performance Review. (1997). *Serving the American Public: Best Practices in Performance Measurement.* Washington, D.C.: Executive Office of the President. National State Auditors Association. (2004). *Best Practices in Performance Measurement: Developing Performance Measures.* Lexington, KY: National State Auditors Association. Center for Performance Management. (2007). *Performance Measurement in Practice* Washington, D.C.: International City/County Management Association. National Center for Public Performance. (2001). *A Brief Guide for Performance Measurement in Local Government*. Newark, NJ: Rutgers University.

3. **Concurrence Rate:** The ratio of defendants whose supervision level or detention status corresponds with their assessed risk of pretrial misconduct.

4. **Success Rate:** The percentage of released defendants who (1) are not revoked for technical violations of the conditions of their release, (2) appear for all scheduled court appearances, and (3) are not charged with a new offense during pretrial supervision.

5. **Pretrial Detainee Length of Stay:** The average length of stay in jail for pretrial detainees who are eligible by statute for pretrial release.

Agency Performance Measures Codified into Colorado Law

Colorado requires pretrial services agencies established under its statute to provide annual reports to their judicial departments reporting on several measures including the:

1) *number of pretrial assessments conducted;*
2) *number of cases involving release and supervision;*
3) *number of cases where a released defendant attended all scheduled court appearances;*
4) *number of cases where a released defendant was not charged with a new offense meeting certain specifications; and*
5) *number of cases where a released defendant did not have bond revoked due to violating release conditions.*

Source: Colorado Revised Statutes Section 16-4-106 (effective May 11, 2013) available at: http://tornado.state.co.us/gov_dir/leg_dir/olls/sl2013a/sl_202.htm

CONCLUSION

In recent years, we have seen encouraging developments in policy and practice that hold the potential to create a shift both in the political environment in which public safety is addressed and in day-to-day outcomes. At the same time, we also recognize the still relatively modest scope of these changes, given the scale of the problem to be addressed. It is our hope that by contributing to public discussion about ways to build on these changes, we can help to broaden the conversation about crime and justice, and thereby envision a significantly transformed justice system 25 years from now.

Mauer, M. and Epstein, K. (2012). Building a Better Criminal Justice System: 25 Experts Envision the Next 25 Years of Reform. Washington, DC: The Sentencing Project.

Comprehensive justice reforms advance strategies that promote public safety while letting go of practices that do not address (or that contribute to) increased recidivism. Whether the focus is on disparities by race or income, the potential overuse of incarceration or the abuses inherent in fines, fees and other financial sanctions, the message is the same: there are less costly, evidence-based, and legally defensible ways to ensure public safety, court appearance, and fundamental system fairness.

All justice reform efforts have recognized the importance of the bail decision. Smart, risk-based decisions ensure that the right defendants are released or detained, resulting in increased public safety and fairer administration of justice. However, uninformed decisions based mostly on arrest charge or arbitrary bond schedules—the norm in too many of America's courts—contribute to poor use of jail resources, release and detention decisions removed from evidence-based practice, inequities in sentencing, loss of community resources and the increased likelihood of future recidivism.

The essential elements presented in this publication offer jurisdictions a framework to improve front-end decisions by providing a central theme for decision-making as components of a well-functioning justice system. Together, as a collaborative system of pretrial justice reforms, these elements can help America's communities realize fairer and more effective pretrial justice systems.

REFERENCES

CASE LAW AND STATUTES:

Bail Reform Act of 1984, 18 USC § 3142: Statute covering bail in the federal criminal justice system.

Rothgery v. *Gillespie County, Texas,* 554 U.S. 191 (2008): Established that legal representation is required at the initial bail hearing because the defendant's liberty is at stake.

Stack v. *Boyle*, 342 U.S. 1 (1951): Established the right to pretrial bail as an essential part of the presumption of innocence.

State v. *Brown*, 338 P.3d 1276, 2014 New Mexico Supreme Court 38 (2014): Discussed the need for individualized bail decisions (rather than those set solely according to charge).

United States v. *Salerno*, 481 U.S. 739 (1987): Stated that providing reasonable pretrial bail is an essential part of ensuring defendants' constitutional rights, but that a defendant's liberty interest could be limited by the need to ensure he or she appears in court and does not endanger others in his or her community.

DEPARTMENT OF JUSTICE STATEMENTS/GUIDANCE:

Statement of Interest of the United States, *Varden* v. *City of Clanton*, No. 2:15-cv-34-MHT-WC (M.D. Ala., Feb. 13, 2015), available at http://www.justice.gov/sites/default/files/opa/pressreleases/attachments/2015/02/13/varden statement_of_interest.pdf. Assertion by Department of Justice that a system that fixed bond amounts based on charges, without considering individual circumstances, should be found unconstitutional.

U.S. Department of Justice Dear Colleague Letter Regarding Law Enforcement Fines and Fees, March 16, 2016, available at https://www.justice.gov/crt/file/832461/download?utm_content=buffer4f188&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer. Statement by Department of Justice that incarceration solely due to poverty violates the Constitution, and that using secured money bonds in the bail process leads to defendants who pose no public safety risk being incarcerated unnecessarily.

PROFESSIONAL STANDARDS AND RECOMMENDATIONS:

American Bar Association. (2002). *Criminal Justice Standards on Pretrial Release, Third Edition.* Washington, D.C.: American Bar Association: Guidance for attorneys and other stakeholders on all aspects of pretrial release, including purposes and considerations for the release decision, use of citations and summons, judicial role, and release/detention options and processes.

American Bar Association. (2015). *Criminal Justice Standards on Prosecution and Defense Function*, *Fourth Edition:* Chicago, IL: American Bar Association: American Bar Association standards for prosecution and defense practice, including assigned counsel and contract defense, defense at various stages of a case, qualification for receiving court-appointed representation, and quality of representation.

American Bar Association. (1992). *Criminal Justice Standards on Providing Defense Services*, *Third Edition.* Chicago, IL.: American Bar Association: American Bar Association standards for every element of defense practice, including assigned counsel and contract defense, defense at various stages of a case, qualification for receiving court-appointed representation, and quality of representation.

American Bar Association. (2002). *Ten Principles of a Public Defense Delivery System* Chicago, IL: American Bar Association: Outlines the key elements of public defense, including independence of the defense function, resource and workload considerations, training and education, and timely screening of clients and assignment of counsel.

National Association of Pretrial Services Agencies. (2008). *Performance Standards and Goals for Pretrial Diversion/Intervention.* Washington, D.C.: National Association of Pretrial Services Agencies: Provides guidelines for the use of pretrial diversion/intervention, including defining and discussing the purposes of pretrial diversion/intervention, the timing, mechanics, and key considerations (e.g., consent, benefits), eligibility, enrollment, services, outcomes, privacy, and structural/organizational considerations.

National Association of Pretrial Services Agencies. (2004). *Standards on Pretrial Release, Third Edition.* Washington, D.C.: National Association of Pretrial Services Agencies: Detailed guidance on pretrial decision-making, supervision, and programming for the pretrial release field.

National District Attorneys Association. (2012). *National Prosecution Standards, Third Edition.* Arlington, VA: National District Attorneys Association: Professional standards for prosecuting attorneys; Part IV addresses pretrial considerations.

ADDITIONAL RESOURCES ON LEGAL AND EVIDENCE-BASED PRACTICE:

Barron, B. (2014). Pretrial Decisionmaking: *How a Model Pretrial Services Program Changed Allegheny County's Criminal Justice System*. Pittsburgh, PA: The Allegheny County Department of Human Services: Overview of Allegheny County, Pennsylvania's success reforming its pretrial practices in accordance with national and evidence-based best practices and using an effective pretrial services agency.

Council for Court Excellence. (2013). *Clarifying the Post-Arrest Process in the District of Columbia.* Washington, D.C.: Council for Court Excellence: Overview of pretrial (post-arrest) process in the District of Columbia with a focus on diversion opportunities.

Cushman, R.C. (2002). "Guidelines for Developing a Criminal Justice Coordinating Committee," (January 2002), available at https://s3.amazonaws.com/static.nicic.gov/Library/017232.pdf. National Institute of Corrections.

Danner, M.J.E., Ph.D., VanNostrand, M. Ph.D., Spruance, L.M. (2015). *Risk-Based Pretrial Release Recommendations and Supervision Guidelines. Exploring the Effect on Officer Recommendations, Judicial Decisionmaking and Pretrial Outcome*. St. Petersburg, FL: Luminosity: Analysis and discussion of research on Virginia's use of the Praxis and the Strategies for Effective Pretrial Supervision (STEPS) program, finding that both decreased failure to appear rates and that Praxis training and use decreased new arrests.

Jones, C.E. (2013). *"Give Us Free": Addressing Racial Disparities in Bail Determinations.* Journal of Legislation and Public Policy, 16: 919-961: Review of many studies finding bias in bail practices; discussion of possible causes and solutions.

Jones, M.R. (2013). "Keeping Your Criminal Justice Coordinating Committee Going Strong," in *National Jail Exchange* available at http://community.nicic.gov/blogs/national_jail_exchange/archive/2013/02/12/keeping-your-criminal-justice-coordinating-committee-going-strong.aspx. National Institute of Corrections.

Justice Policy Institute. (2012). *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail*. Available at http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf.

Lowenkamp, C., VanNostrand, M., and Holsinger, A. (2013). *The Hidden Cost of Pretrial Detention*. Laura and John Arnold Foundation.

Lyons, D. "Predicting Pretrial Success: Criminal Justice Policy is Using Science to Predict Risk, Helping Courts make Decisions about the Conditions of Pretrial Release." *State*

Legislatures, February 2014: Discussed different state legislation addressing pretrial risk assessment, and conditions of release.

McGarry, P., & Ney, B. (2006). "Getting It Right: Collaborative Problem Solving for Criminal Justice." Washington, D.C.: National Institute of Corrections.: Guidance on inter-agency coordination and collaboration.

National Institute of Corrections, Center for Effective Public Policy. (2010). *A Framework for Evidence-Based Decisionmaking in Local Criminal Justice Systems: An Initiative of the National Institute of Corrections,* 3rd Ed. Washington, DC: National Institute of Corrections.

National Institute of Corrections. (2011). *Measuring What Matters: Outcome and Performance Measures for the Pretrial Services Field*. Washington D.C.: National Institute of Corrections.: Suggested performance measures and related strategies for pretrial services agencies, developed by the National Institute of Corrections' Pretrial Executive Network.

National Association of Pretrial Services Agencies. (2008). *Promising Practices for Pretrial Diversion.* Washington, D.C.: NAPSA.: Guide to different types of pretrial diversion, identifying nine strong pretrial diversion practices jurisdictions could undertake.

New Jersey Supreme Court. (2014). *Report of the Joint Committee on Criminal Justice* (2014). https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf: Report to the New Jersey legislature recommending a move from a "resource-based" pretrial system to a risk-based one, which also discussed several other jurisdictions laws, practices and history related to pretrial justice.

Pretrial Justice Institute and the Bureau of Justice Assistance. (2011). *National Symposium on Pretrial Justice: Summary Report of Proceeding.* Washington, D.C.: Bureau of Justice Assistance.: Summary of information presented at, and recommendations developed at the *2011 National Symposium on Pretrial Justice.*

Pretrial Justice Institute. (2015). *Issue Brief: Pretrial Risk Assessment: Science Provides Guidance on Assessing Defendants.* Washington, D.C.: Pretrial Justice Institute.: Overview of research on, and history of, pretrial risk assessment.

Pretrial Justice Institute. *Race & Bail Bibliography* (no date), available at http://www.pretrial.org/download/research/Race%20and%20Bail%20Bibliography.pdf.

RESOURCES ON PRETRIAL AND RACE:

Schnacke, T. R. (2014). *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* (Washington, D.C.: National Institute of Corrections, 2014): Attempted to bring those working on bail reform onto the same page by providing information on "each of the fundamentals – the history, the law, the research, the national standards, and its terms and phrases."

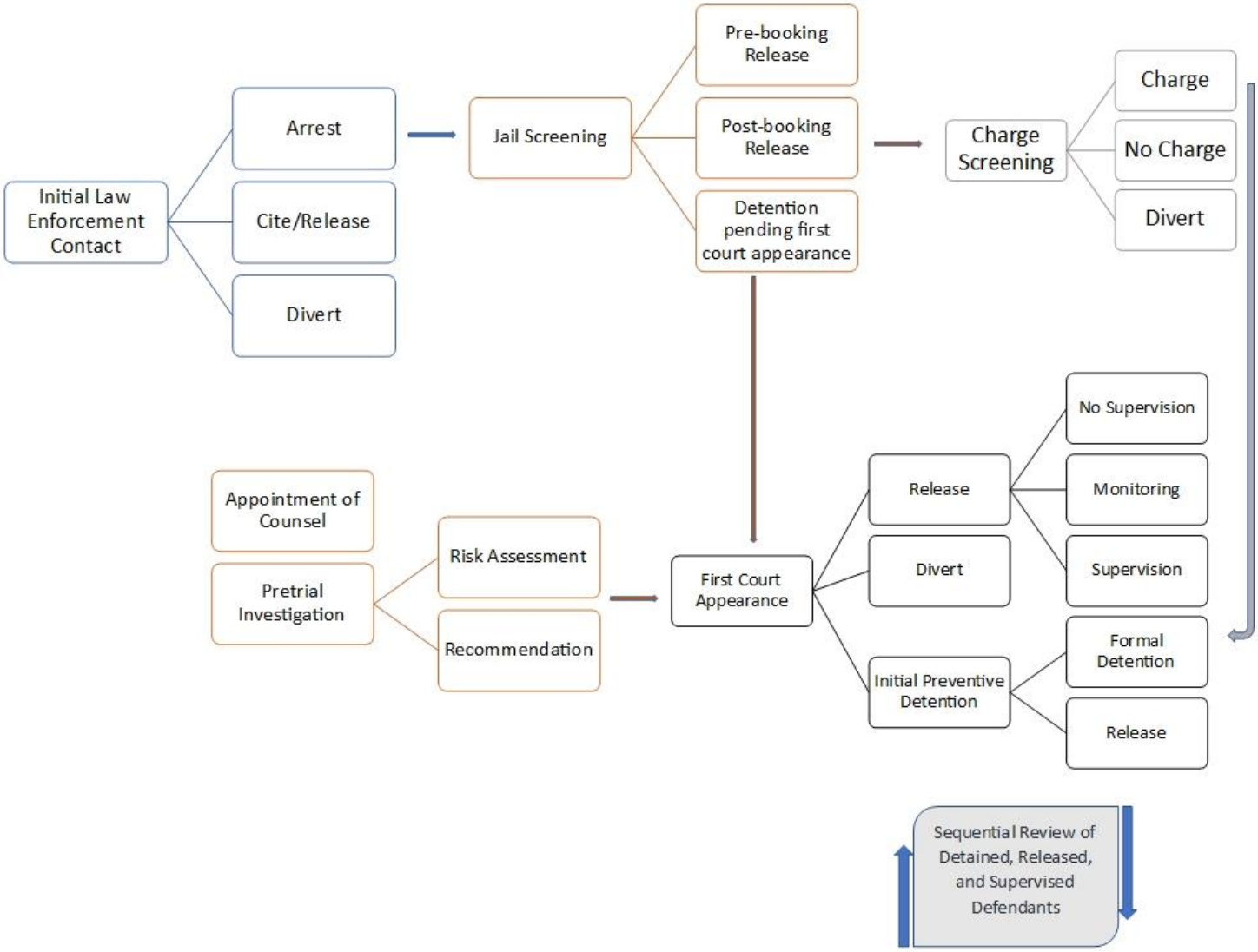
Schnacke, T.R. (2014). *Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial.* Washington, D.C.: National Institute of Corrections.: Discussed the legal history and foundations of bail, as well as relevant professional standards, risk assessment and other evidence based practices, state-based research, and other topics.

Skeem, J.L. and Lowenkamp, C.T. (2016). *Risk, Race, & Recidivism: Predictive Bias and Disparate Impact*. Available http://ssrn.com/abstract=2687339.

VanNostrand, M. and Lowenkamp, C.T. Ph.D. (2013). *Assessing Pretrial Risk without a Defendant Interview.* Laura and John Arnold Foundation.: Discusses research on pretrial detention, including the link between longer stays in pretrial detention and increased likelihood of failure to appear, pretrial criminal activity, and post-disposition recidivism.

VanNostrand, M. (2007). *Legal and Evidence-Based Practices: Applications of Legal Principles, Laws, and Research to the Field of Pretrial Services.* Washington D.C.: National Institute of Corrections.: Discussed the legal rights implicated by pretrial practice, including the presumption of innocence, the right against self-incrimination, and rights to due process, equal protection, counsel, and bail that is not excessive.

VanNostrand, M., & Keebler, G. (2009). *Pretrial risk assessment in the Federal Court for the purpose of expanding the use of alternatives to detention.* Washington, DC: U.S. Department of Justice, Office of the Federal Detention Trustee.: Discussed research intended to identify predictors of successful pretrial release and recommended detention alternatives; precursor to federal pretrial risk assessment instrument.

VanNostrand, M., Rose, K.J., and Weibrecht, K. (2011). *State of the Science of Pretrial Release Recommendations and Supervision.* Washington, D.C.: Bureau of Justice Assistance.: Reviewed and analyzed the existing research on common conditions of release to determine their effectiveness.

APPENDIX: ESSENTIAL ELEMENTS DECISION POINTS