Illinois Supreme Court Commission on Pretrial Practices

Final Report

April 2020

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Last, the Commission extends its sincere appreciation to the many community members who attended the public hearings and/or submitted written comments.

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Executive Summary

In November 2017, the Illinois Supreme Court created the Commission on Pretrial Practices. The Commission's charge was to provide guidance and recommendations regarding comprehensive pretrial reform in the Illinois criminal justice system.

The Supreme Court's directive places Illinois among the leaders in a national movement to rethink and improve effective and fair bail decisions, to ensure that defendants released pretrial are monitored appropriately and that detained defendants are screened regularly for release eligibility, and to safeguard individual rights and public safety. This movement has arisen because 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, higher rates of sentence disparity, and a greater likelihood of reoffending. Although much attention has been focused on whether bail decisions place an overreliance on financial conditions to control release, transformative pretrial practices reform must address *all* elements of an effective pretrial justice system.

Illinois's courts and criminal justice system partners must be adequately funded and sustained to accomplish the Commission's overarching goals to ensure a fair and effective pretrial justice system. Financial resources are critical for the development and implementation of a statewide data collection system and the enhancement of current systems. Pretrial assessments require accurate and readily accessible data and it is essential that all justice partners collect and share data in the same way. Accurate data is necessary to review and assess the efficacy of systemwide change and outcomes.

Following two years of studying best practices in use around the country, consulting pretrial reform experts, listening to stakeholders throughout the state, and analyzing the myriad sources of academic and professional analysis of pretrial issues, the Commission has completed its work. The following recommendations to modify state laws, Supreme Court rules and policies, and the practices and procedures and systems used in circuit courts throughout Illinois are designed to 1) ensure a fair, efficient, transparent, accountable and adequately-resourced system of pretrial services; 2) use legal evidence-based practices; and 3) develop an operational structure that is guided by the National Institute of Corrections' *A Framework for Pretrial Justice: Essential Elements of a High Functioning Pretrial System and Agency*.

Arrest and Pre-Arraignment Decisions

1. Encourage all involved in the criminal justice system to divert individuals with mental and behavioral health issues and substance abuse disorders to alternative support, medical, or clinical services prior to entry into the criminal justice system.

2. Law enforcement shall issue a citation in lieu of custodial arrest, upon proper identification, for those accused of Class B and C traffic and criminal misdemeanor offenses, or of petty and business offenses, who pose no obvious threat to the community or any person, or who have no obvious medical or mental health issues that pose a risk to their own safety. Those released on citation shall be scheduled into court within 21 days. Subsequent court reminder notification shall be provided via mail, electronically, text or telephone.

3. If an arrestee is not eligible for citation in lieu of arrest, upon booking, a trained designated jail or pretrial services staff shall have delegated release authority from the court to release defendants who:

    a. are assessed as low risk (utilizing a state-wide validated risk assessment tool);
    b. are charged with non-violent Class A misdemeanor and/or non-violent Class 3 and 4 felony offenses;
    c. pose no obvious threat to the community or any person; or
    d. have no obvious medical or mental health issues that pose a risk to their own safety, with specific guidelines, defined by the court.

Pre-arraignment releases shall exclude weapons-related and sex offenses, as defined by the Illinois Code of Criminal Procedure of 1963 (725 ILCS 5/100-1 et seq.). Upon release, defendants shall be provided written notification of their scheduled court date, to occur within 21 days, and conditions of release, and shall receive subsequent court reminder notification by mail, electronically, text or telephone.

Meaningful First Appearance

4. The criminal justice system will ensure a meaningful first appearance consistent with the essential elements of an effective pretrial system, to maximize public safety, maximize court appearance and maximize release. The core elements necessary for the judiciary to have proper information needed to make informed bail decisions include:
    a. prosecutor-screened and clearly defined charges;
    b. use of an objective and validated risk assessment;
    c. trained prosecutor input; and
    d. active and engaged defense.

5. A trained prosecutor should review all available reports from law enforcement, witness statements, summaries of known facts, validated pretrial risk assessment instrument scores, and criminal histories of defendants and complainants prior to the first appearance and shall identify defendant's eligibility for diversion, specialty courts or other alternative prosecution with recommendations for release or detention.

6. A trained public defender shall be appointed prior to the defendant's first appearance, with sufficient time for meaningful attorney-client contact to gather information in order to advocate effectively for defendant's pretrial release under the least restrictive conditions to reasonably assure community safety and court appearance. Defense counsel shall have access to the same documentary information relied upon by the prosecution and presented to the court.

7. If feasible, the defendant shall appear before the court in person at the first appearance, but based on geographical or other constraints, may appear through remote access.

8. A pretrial services agency shall screen all defendants who are statutorily eligible for release before the initial court appearance and provide a written report for bail hearings. The screen shall include a defendant interview, criminal history investigation, verification of interview information, administration of a validated pretrial risk assessment instrument, and any other information as required to assist the court in making informed release or detention determinations.

9. Judicial bail decisions shall presumptively favor nonfinancial release under the least restrictive and individualized conditions designed to provide reasonable assurance of public safety and court appearance.

10. No defendant shall be detained due to his/her inability to meet a financial condition of release.

11. Sequential review procedures shall be adopted to review pretrial release and detention decisions throughout the pendency of the case.

12. Defendants shall receive verbal and written notification of all court-imposed bail conditions with clear instructions for each condition. Defendants shall also receive verbal and written notification of subsequent court dates, including date, time and courtroom.

13. All counties shall establish procedures to ensure that the rights of victims are recognized at the pretrial stage. The rights afforded victims should include, but are not limited to, notification of all pretrial hearings, all bail decisions, conditions of release related to the victim's safety, the defendant's release from custody, and instructions on seeking enforcement of release conditions.

Preventive Detention

14. Pretrial detention should be permitted only for arrestees charged with defined "violent" offenses. A clearly defined "eligibility net" set forth in statute, narrowly drawn in design and intentional in its implementation should trigger a detention decision-making procedure. The "eligibility net" should be limited to enumerated offenses identified by statute as "violent."

15. The Court may order the pretrial detention of a defendant only upon clear and convincing evidence as shown through relevant facts and circumstances that (a) the person poses an unmanageable level of risk to commit or attempt to commit a "violent" offense, as defined by the Code of Criminal Procedure of 1963, while on pretrial release against a reasonably identifiable person or groups of persons, and (b) that no condition or combination of conditions will reasonably assure public safety or manage the person's unmanageable level of risk.

16. No single offense or aggravating factor should mandate a denial of bail.

17. At the initial pretrial court appearance, the court, upon written motion by the prosecution, may order the defendant's temporary detention, pending a full pretrial detention hearing within three (3) calendar days, provided:
    a. the court finds probable cause for the crime charged;
    b. the defendant falls within the narrowly drawn detention-eligible criteria; and
    c. the court finds by the preponderance of the evidence that the defendant poses an unmanageable level of risk to commit or attempt to commit a "violent" offense, and/or intentional failure to appear for scheduled court appearances, setting forth the factual basis for temporary detention.

18. At all pretrial detention hearings, the defendant shall be represented by counsel and have the right to cross examine the prosecution's witnesses and present evidence.

19. At all pretrial detention hearings, the prosecution shall have the burden to prove by clear and convincing evidence that no conditions of release will reasonably assure the safety of the community or the defendant's appearance in court.

20. At all pretrial detention hearings, when detention is ordered, the court shall make a written finding, explaining why less restrictive conditions of release would be insufficient to protect community safety or reasonably assure the defendant's appearance at future court hearings.

21. When a defendant's liberty is substantially impaired prior to trial, the pretrial period should be limited; therefore, the defendant shall be brought to trial within 90 days, unless good cause is shown.

Pretrial Risk Assessment

22. Results of a validated pretrial risk assessment instrument, which is approved by the Illinois Supreme Court, shall be one of the factors considered during the pretrial release decision-making process. The use of a pretrial risk assessment instrument does not restrict the judge from considering all other statutory factors but adds information the judge shall use in the exercise of the judge's adjudicatory duties.

23. In the interest of providing a state-specific tool to be utilized in bail hearings, Illinois shall develop a pretrial risk assessment instrument based on research of the local defendant population utilizing a comprehensive and robust source of statewide data with the ability to differentiate as follows:

    1. Risk of failure to appear
    2. Risk of willful failure to appear
    3. Risk of new criminal offense
    4. Risk of new violent criminal offense and risk of new domestic violence criminal offense

24. The Illinois General Assembly should allocate sufficient and sustainable state funding for development of a validated statewide pretrial risk assessment instrument.

25. In the interim of developing a statewide risk assessment instrument, counties may continue to utilize their current pretrial risk assessment instrument. Counties that are not currently using a risk assessment instrument shall adopt, in consultation with AOIC, one of the following validated pretrial risk assessment instruments when determining release and detention decisions:

    1. Revised Virginia Pretrial Risk Assessment
    2. Public Safety Assessment (PSA)
    3. Ohio Pretrial Risk Assessment

26. Develop a process to evaluate and improve the quality, completeness and availability of data needed and collected to develop and validate a statewide pretrial risk assessment instrument.

27. The Administrative Office of the Illinois Courts should adopt a mission and vision statement for pretrial supervision.

28. Conditions and supervision shall be based on the least restrictive means and focus only on requirements directly related to reasonably assuring community safety and a defendant's appearance as required in court.

29. Conditions and supervision shall not mandate rehabilitative services (substance abuse, mental health, partner abuse intervention programs, etc.) unless the court finds them to be a risk factor directly related to further criminal behavior and failure to appear at court hearings. The inability to pay for such court-ordered services shall not interfere with release.

30. Conditions and supervision shall not include punitive measures (community service, restitution).

31. Once an individual is ordered to pretrial supervision, pretrial services agencies shall meet with the individual to review the court-ordered conditions, establish expectations during pretrial supervision, answer questions and review future court appointments.

32. Pretrial services agencies shall monitor and maintain records of defendants' compliance with conditions of release.

33. Pretrial services agencies shall implement a system of court date reminders (including location, date, and time of the court appearance). Reminders should be provided 1-3 days prior to each scheduled court appearance.

34. Each jurisdiction shall develop and approve a local process to promptly notify the court of facts concerning compliance or noncompliance that may warrant modification of release conditions and of any arrest of an individual released pending further court appearances. Additionally, the response to the defendant's conduct shall be timely and meaningful.

35. Electronic monitoring is available for pretrial supervision; however, its use should be limited and specific to a condition that requires close monitoring. Should electronic monitoring be ordered as a condition of release, no defendant shall remain in jail or have their supervision revoked due to their inability to pay electronic monitoring fees. Further research on electronic monitoring and its impact on pretrial success is recommended.

36. It is recognized there will be protected person(s) identified as a part of defendants' pretrial release. In these instances, conditions of no contact and/or stay away orders are appropriate. Judges should determine, based on risk, whether these conditions may require electronic monitoring as detailed in the Domestic Violence Surveillance Program (730 ILCS 5/5 8A-7).

37. Office visits shall be purposeful and used only to promote pretrial success. Office visits should not interfere with defendant protective factors, such as work and school.

38. Research shall be conducted on home and field contacts in relation to pretrial success.

39. Court ordered conditions of release shall be individualized in accordance with the defendant's identified level of risk to reasonably assure public safety and guard against non-court appearance during the pretrial phase of the case.

Performance Measurements

40. AOIC should establish and adopt performance measurements to analyze the criminal justice system's effectiveness in administering pretrial justice.

41. AOIC should adopt the following goals of performance measurements in identifying data metrics:

    1. Highlight opportunities for pretrial system improvements
    2. Obtain a view of the landscape of pretrial in our state
    3. Allow for county comparisons
    4. Highlight data collection issues and quality
    5. Identify model/high functioning county systems
    6. Allocate sufficient resources to counties for data collection

42. AOIC shall establish a Pretrial Division to assist and support statewide implementation of pretrial recommendations.

43. The Illinois General Assembly should allocate sufficient state funding to implement and sustain a robust individual-level data collection system for statewide uniform reporting.

44. The Illinois Supreme Court should request additional state resources for counties to add required data elements to their existing data collection system.

45. AOIC shall allow for agreements with external research entities (e.g. Illinois Criminal Justice Information Authority, universities) to use the data to further study pretrial practices, risk assessment instrument development and validation.

Pretrial Operational Structure

46. Illinois shall have a dedicated and independent Pretrial Services Agencies.

Legislative

47. Several Illinois statutes are in direct conflict with the legal underpinnings of pretrial justice. The Illinois Supreme Court and the Illinois General Assembly should implement rules and statutes to reflect the evolving goals of pretrial justice and resolve internal conflicts within the statute(s) that are inconsistent with the

presumption that conditions of release will be non-monetary, least restrictive, and considerate of the financial ability of the accused.

Communication and Training

48. Create and deliver a strategic plan for comprehensive education and training for all criminal justice stakeholders, providing a roadmap for the Supreme Court's pretrial goals, and including training videos and webinars regarding a meaningful first court appearance.

49. Training should include the utility of risk assessment instruments, offered not only for those who will implement the instruments, but those receiving the results, including judges, prosecutors and defense counsel.

50. Encourage collaborative training with judges, probation and pretrial service agencies through the Illinois Judicial College.

51. Partner with other stakeholder organizations to provide joint training regarding legal and evidence-based pretrial practices.

52. Each of the twenty-four (24) judicial circuits shall be required to create a criminal justice coordinating council, to interface with other criminal justice stakeholders and to be chaired by the Chief Judge of the circuit.

53. Create and maintain a central repository on the Illinois Courts website, available to all criminal justice stakeholders, the public and media, to easily access information regarding pretrial reform.

54. Create a traveling press team to visit editorial boards at the state's major media outlets and provide education, training and outcome data of pretrial decision making.

Each recommendation is discussed in more detail below at pp. 22-71. This discussion includes brief commentary explaining the rationale and purpose, as well as by implementation steps that would help ensure that the recommendation achieves its goal.

Creation and Structure of Commission

In December 2017, the Illinois Supreme Court formed a Commission comprised of individuals from all three branches of government and a broad array of stakeholders in the criminal justice system and the community. The Commission includes judges from all across the state, from rural areas and urban areas, from trial courts and appellate courts. It also includes legislators from all four caucuses, and representatives from the Executive branch. It also includes representatives from offices of prosecutors, defense attorneys, law enforcement, probation and pretrial services officers as well as representatives from state agencies responsible for research and grant funding relating to the criminal justice system. Included are representatives from circuit court clerk's offices, the Administrative Office of the Illinois Courts, and from the public (including formerly incarcerated members of the public). Additionally,

there are representatives from the Illinois Judicial College, the Illinois State Bar Association and from the Illinois Supreme Court.

The Court directed the Commission to provide guidance and recommendations regarding pretrial reform in the state criminal justice system. The Commission was instructed to evaluate current pretrial detention practices in light of information about both real and perceived inequities in current practices. The Court directed a comprehensive review that would include the fiscal impact of changes needed at county and state levels of government, and identification of any necessary changes in current rules, policies, or laws. The Court directed that the recommended reforms be designed to produce pretrial practices in all jurisdictions that are consistent, in form and substance, with the Supreme Court's April 19, 2017 Policy Statement on Pretrial Services, and that would ensure a fair, efficient, transparent, accountable and adequately-resourced system. Finally, the Court directed that the resulting system use evidence-based practices, and have an operational structure guided by the National Institute of Corrections' *Essential Elements of a High Functioning Pretrial System and Agency*.[1]

The Essential Elements of an Effective Pretrial ***System*** include:

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

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

The Essential Elements of a High functioning Pretrial Services ***Agency*** include:

1. Operationalized mission

[1] Pilnik, L., Hankey, B., Simoni, E., Kennedy, S., Moore, L.J., Sawyer, J. (2017). *Essential Elements of an Effective Pretrial System and Agency. Washington, D.C.: National Institute of Corrections.* NIC Accession Number: 032831.

2. Universal screening

3. Validated pretrial risk assessments

4. Sequential bail review

5. Risk-based supervision

6. Performance measurement and feedback

Process of Commission

The Commission heard from state and national experts on pretrial practices, systems and agencies. It examined the laws in states that have implemented pretrial reform, and reports from several other states that have studied and are presently seeking to reform their pretrial systems. It consulted with members of the groups in those states regarding the analyses they conducted. The Commission formed subcommittees in the areas of arrest decisions/pre-arraignment, risk assessment, first appearance/preventive detention, supervision/conditions of release, legislative reform, performance measurements, funding and resources for implementation, and communication/training. Each of these subcommittees included additional stakeholder members with expertise and interest in the focus area of that group. The Commission held public hearings in Springfield, Urbana, Chicago, and Freeport. It publicized its work and structure on the public website of the Administrative Office of Illinois Courts, and invited the public and interest groups to submit written comments and suggestions. The Commission and select subcommittees met regularly over the course of 2018, leading to the issuance of a preliminary report as ordered by the Supreme Court in December 2018. Throughout 2019, the Commission and its subcommittees continued to study the many facets of reforming the pretrial system. The full Commission deliberated over the proposed recommendations of each subcommittee, which deliberations led to the recommendations set forth in this final report to the Illinois Supreme Court.

Guiding Principles

The final recommendations of the Commission are designed to honor these guiding principles of an effective pretrial services system:

1. The constitutional presumption of innocence and reasonable bail shall be honored, by providing for release of persons charged with crimes on the least restrictive conditions that reasonably assure the person would a) not endanger public safety while awaiting trial and b) appear in court as directed.

2. Decisions regarding release, conditions of release, and detention prior to trial should be individualized.

3. Locally imposed exceptions to release of individuals who are statutorily eligible for pretrial release shall be precluded.

4. Limited preventive detention of individuals charged with statutory delineated exceptions shall be allowed, but only after a due process hearing at which the individual's risk to public safety or risk of flight is lawfully established by clear and convincing evidence.

5. Pretrial detention of any individual solely due to inability to meet a financial condition of release, shall be prohibited.

6. A systematic mechanism to identify any individual who remains in custody solely due to inability to meet a financial condition of release shall be established and used to cause prompt reconsideration in that case.

7. The entire pretrial services system must be fair, efficient, transparent, accountable and adequately-resourced; it must use legal and evidence-based practices and have an operational structure guided by the National Institute of Corrections' "*Essential Elements Framework."*

Definitions and Meanings

ABA: American Bar Association

Arrest: To seize someone by legal authority and take into custody.

Bail: The process of releasing a defendant from custody with conditions set to reasonably assure public safety and court appearance.

Best Practice: A procedure that has consistently shown results superior to those achieved with other means.

Bond: An agreement between the defendant and the court to reasonably assure public safety and reappearance in court.

Due Process: Fair treatment through a course of formal judicial proceedings carried out regularly and in accordance with established laws and principles.

Eighth Amendment: According to the United States Constitution, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Legal and Evidence-Based Practice (LEBP): "Interventions and practices that are consistent with the pretrial legal foundation, applicable laws, and methods research has proven to be effective in decreasing failures to appear in court and danger to the community during the pretrial stage."[2]

FTA: A defendant fails to appear in court.

LEADS: Law Enforcement Agency Data Systems.

[2] VanNostrand, M. (2007). *Legal and evidence-based practices: Applications of Legal Principles, Laws, and Research to the Field of Pretrial Services.* Washington, DC: National Institute of Corrections. At 12.

Monetary Bail Schedule: A predetermined amount of money to be used in bail setting based on the offense charged regardless of the characteristics of any individual.

NAPSA: National Association of Pretrial Services Agency

Pretrial Bond Report: The assembling of verified information and data concerning the community ties, employment, residency, criminal record, and social background of arrested persons to assist the court in determining the appropriate terms and conditions of pretrial release.

Pretrial Risk Assessment: A validated instrument used to classify defendants' risk of pretrial misbehavior if released from custody during the pretrial phase of their case proceedings.

Preventive Detention: The intentional incarceration of a defendant to prevent either danger to the community or willful failure to appear.

ROR: Release on Recognizance: a defendant is released from custody on his or her own recognizance.

Stakeholders: An organizational entity or individual that has a vested interest in the success of the criminal justice system.

Statutory Violation: A defendant violates the conditions of his release by being arrested for a new offense.

Technical Violation: A violation of a court-ordered condition excluding a new offense.

History of Pretrial Practices and the Generations of Bail Reform

Life can only be understood backwards: but it must be lived forwards

-Soren Kierkegarrd

Legal and evidence-based pretrial justice reform requires a meaningful, critical assessment of existing pretrial practices in Illinois. It is essential to recognize why we are where we are today and do so through a historical lens.

There is a long history associated with balancing the competing interests that arise in a pretrial setting.[3] As early as 1275 in England, the right to bail meant a right to be released and the denial of bail meant detention. The common practice called for a surety to take responsibility over the accused to ensure that they returned to court for prosecution. Sureties received no compensation and no promise of reimbursement upon default. The system substantially allowed release (bail) before trial for the vast majority of defendants, and detention (no bail) before trial under narrowly drawn exceptions.

[3] Unfortunately, the differing uses of various terms throughout history has produced some confusion. "Bail" is often used to refer to the amount of cash that a defendant must post as a condition of release. "Bond" is sometimes treated as a synonym of "bail." Understood properly, "bail" – which literally means, "release" – is a *process* of releasing a defendant from custody on conditions designed to assure both public safety and the person's appearance in court. A "bond" occurs whenever a defendant enters an agreement with the court. The agreement may, but need not necessarily, include a financial condition, but can also or instead include a variety of other conditions such as electronic monitoring, curfews, supervised visits or appointments, etc.

Colonial America initially adopted England's bail practices - a system of using personal sureties and promises to pay and unsecured financial conditions of release. However, over time, colonial judges also began looking at the charge, the evidence, and the character of the defendant to set the only limitation on pretrial freedom available at the time – the amount of money that a personal surety would be obligated to pay. Subsequently, the colonies liberalized criminal penalties and bail laws. For example, in 1641, the Massachusetts Body of Liberties created an unequivocal right to bail to all persons, except those charged with capital offenses. In 1682, Pennsylvania adopted an even more liberal law granting bail to all persons except when charged with a capital offense "where proof is evident or the presumption great." These types of provisions became the model for nearly every American jurisdiction thereafter.

In the mid-to-late 1800s, personal sureties began to decline. As the frontier expanded, individuals became reluctant to assume responsibility for those accused, whose risk of flight over the expanding territories increased. Small communities where the accused were known to many residents diminished, making way for sprawling urban populations, an additional impact on the personal surety system. American judges who could no longer rely on personal sureties began requiring defendants to post a monetary bond prior to release. When they were unable to pay the required monetary bond themselves, commercial sureties were adopted, implementing secured financial conditions as a form of release.

First Generation of Reform – 1920s to 1960s

The increased use of secured financial conditions necessitated the first generation of reform as criminal justice partners looked for ways to release otherwise bailable defendants.[4] Illinois enacted pretrial reform statutory changes with the codification of the Code of Criminal Procedure of 1963, allowing release on recognizance and encouraging the least restrictive nonfinancial conditions. Further, Illinois was one of the first states to abolish bail bondsmen; those practices were replaced by allowing counties to retain 10% of the monetary conditions of release imposed on a defendant.

The Federal Bail Reform Act of 1966[5] focused on alternatives to the traditional money bail system, establishing presumptions favoring release on recognizance which was based on information gathered concerning a defendant's community ties to help assure court appearance. The American Bar Association promulgated Standards on Pretrial Release in 1968[6] providing comprehensive recommendations covering release and detention.

Second Generation of Reform – 1960s to 1980s

Prior to 1970, ensuring court appearance was the only constitutionally permissible purpose for limiting a defendant's pretrial liberty. Therefore, judges were forced to set high monetary conditions of release in an effort to detain defendants who were deemed to pose a high risk to public safety. The second generation of reform focused on detention, or no bail, allowing consideration of public safety as a constitutionally valid purpose to limit pretrial liberty.

[4] For a thorough analysis of generations of reform, see generally Timothy R. Schnacke "Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform" September 2014. (hereinafter "NIC *Fundamentals")*
[5] *See* Bail Reform Act of 1966, Pub. L No. 89-465, 80 Stat (1966)
[6] *American Bar Association Standards for Criminal Justice* (1st Ed.) *Pretrial Release (*1968)

Congress enacted the Bail Reform Act of 1984[7], which included public safety as a valid purpose for limiting pretrial freedom and due process procedures designed to allow preventive detention without bail for high-risk defendants. The United States Supreme Court in *United States v. Salerno*[8], upheld the federal detention statute, and states across the nation began to make constitutional and statutory changes to restrict pretrial liberty based on public safety.

Illinois followed suit and adopted a preventive detention statute, allowing for mandatory and discretionary charge-based detention for defendants, and implemented procedural processes.[9] However, the statute was sparingly used, as prosecutors opted to instead seek high money bonds and judges followed cultural practices utilizing secured conditions of release to achieve detention. In 1987, with the adoption of the Pretrial Services Act (725 ILCS 185.1 *et seq*)[10] Illinois provided a foundational framework for the pretrial process. Under the Act, pretrial services are two-fold: (1) providing a pivotal function in collecting and verifying information to be used by a judge in determining conditions of release, and (2) oversight of compliance with all court conditions while awaiting trial. However, in practice throughout much of the state, it has become largely aspirational rather than a model for everyday procedure.

Third Generation of Reform – 1990s to present

Our current and third generation of reform focuses on both release and detention principles. Many factors contribute to reform efforts:

1. Legal and evidence-based research regarding pretrial risk;
2. Use of empirical pretrial risk assessment instruments;
3. Media reporting;
4. Advocacy group movement; and
5. Nationwide lawsuits alleging equal protection and due process violation claims in an effort to eliminate secured money bonds and limit preventive detention measures.

Many states across the nation are making significant changes regarding policies and practices: California, Colorado, Indiana, New Jersey, New Mexico, New York and Wisconsin to name a few. Similarly, Illinois enacted the Bail Reform Act of 2017 with substantial procedural changes. Our Legislature recognized that "decision making behind pretrial release shall not focus on a person's wealth and ability to afford monetary bail but shall instead focus on a person's threat to public safety or risk of failure to appear before a court of appropriate jurisdiction."[11]

In 2014, the Illinois Supreme Court chose Cook, Kane and McLean as pilot counties and implemented the use of the Public Safety Assessment (PSA) risk assessment tool. The pilot site validation study is in process and estimated to be completed in 2020. State-wide, counties have made substantial changes to pretrial practices, establishing pretrial departments, adopting the use of empirical risk assessments instruments, changes to pretrial system operations and movement from a resource-based system of justice to one that is risk-based.

It is within this realm, the Third Generation of Reform; the Commission has endeavored to answer three foundational questions:

[7] *See* Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. (1976)
[8] *United States v. Salerno*, 481 U.S. 739 (1987)
[9] Illinois Preventive Detention Statute 725 ILCS 5/110-4(a); 725 ILCS 5/110-5(a)
[10] Pretrial Services Act (725 ILCS 185.1 *et seq)*
[11] Illinois Bail Reform Act of 2017 (Public Act 100-0001, effective 06/09/2017)

1. Who do we release?
2. Who do we detain?
3. How do we do it?

It is paramount that we review and understand the first two generational eras of reform, identify gaps, omissions and unsound practices to shape prudent and enduring effective answers to these questions. To do less would pose a risk of implementing equally misguided justice policies, requiring a Fourth Generation of Reform.

Recognition of the Movement to Eliminate Cash Bail

Within the context of discussing the generations of bail reform, the Commission would be remiss if it did not address the growing national movement focused on the elimination of cash bail as a means of securing pretrial release. Proponents of this movement rightly strive toward a fair, equitable system where individuals of limited means are not unfairly incarcerated solely based on their inability to pay. The Commission agrees that the use of cash bail as a means of preventive detention is antithetical to the constitutional guarantees of due process and the presumption of innocence. An effective pretrial system instead relies on validated, evidence-based decision-making, combined with adequately staffed and risk-based pretrial supervision strategies designed to minimize danger to the public and maximize court appearance. When these elements are in place, cash bail serves little purpose and is rarely used.

However, as the Commission has observed throughout the course of its work, far too many jurisdictions in Illinois lack an adequate framework to allow for effective evidence-based pretrial decision-making and pretrial supervision. As a result, judges are too often forced to make detention decisions based on scant information, assessing a person's danger to the community and risk of court nonappearance based on little more than the charging information and details elicited in a bail hearing, if any. This, combined with the absence of a well-defined pretrial detention statute, results in judges relying too heavily on what may sometimes be the only mechanism – monetary conditions.

Illinois is not alone. In addition to the growing national push for statutory elimination of cash bail, there has been an increase in litigation in the federal courts challenging the use of cash bail as unconstitutional, with plaintiffs experiencing varying degrees of success.[12] A common theme in these cases is that cash bail, specifically unaffordable bail, is tantamount to pretrial detention, and pretrial detention is only appropriate where a compelling need has been established, and where no less restrictive conditions are sufficient to protect community safety and assure the defendant's continued appearance at future proceedings.

As stated previously, this Commission's mandate is to develop an operational structure for pretrial services that conforms to the Supreme Court's policy statement on pretrial services and is guided by the NIC's *Essential Elements of a High Functioning Pretrial System and Agency*. Establishing a robust and effective pretrial system in Illinois is the first, and most crucial, step toward minimizing, and eventually, eliminating cash bail. However, simply eliminating cash bail at the outset, without first implementing meaningful reforms and dedicating adequate resources to allow evidence-based risk assessment and supervision, would be premature. Although the elimination of cash bail

[12] See attached compendium of recent federal cases challenging pretrial release and detention decisions using cash bail.

was discussed at length, and many points of view were considered, the Commission reached no consensus on the issue.

This has largely been the criticism of the recent bail reforms in New York. Beginning in 2020, New York implemented reforms aimed at drastically reducing or eliminating cash bail. The new law is charge-based, prohibiting judges from ordering cash bail for most misdemeanors and nonviolent felonies. New York's existing laws that prohibit judges from considering dangerousness of the accused or public safety remained in place, resulting in a system in which 90 percent of statewide arrests are subject to release without bail, and judges there have no authority to assess or even consider the potential danger to the community in doing so.

By contrast, New Jersey also overhauled its bail system in order to reduce the reliance on cash bail. The Criminal Justice Reform Act, passed in 2014 but not implemented until three years later in 2017, enacted sweeping systemic changes. Under New Jersey's new system, all defendants, other than those facing life imprisonment, are entitled to a presumption of release. Pretrial detention is only allowed where a prosecutor convinces a judge that no conditions could protect the public or ensure that the defendant will return to court. At these hearings, defendants are represented by counsel, can call and cross examine witnesses, and receive all the same information the prosecutor has. Most crucially, the New Jersey system also relies on a validated risk assessment tool that allows judges to make well-informed, risk-based decisions about detention or release. That, combined with a robust pretrial services agency utilizing evidence-based supervision strategies, has largely resulted in success. Since implementation, New Jersey has seen a dramatic reduction in pretrial jail populations, while failure to appear and re-arrest rates have largely remained the same.[13]

The overarching lesson we can learn from the contrasting outcomes in New York and New Jersey is that bail reform, specifically bail reform aimed at reducing or eliminating the use of cash bail, works best when it is preceded by foundational reforms like those outlined in the pages to follow.

Pretrial Justice System – Fundamental Principles of Release and Detention

Freedom is critically important to every person. As a result, our criminal justice system is built on the foundational concept that every person is presumed innocent of criminal charges brought against them until guilt is proven beyond a reasonable doubt. Upon conviction, most people accept the prospect of reducing or removing the freedom of those convicted as punishment for serious crimes. But, today, merely being charged with crimes also raises the prospect of losing one's freedom – if cash as a bond condition is required pending the outcome of those charges, and if one has inadequate cash to satisfy the bond. A large percentage of accused persons who enter the criminal justice system are indigent, facing economic obstacles. A system of release based solely on wealth exacerbates conditions of poverty and disadvantages poor people. A mere few days in jail may impose collateral consequences that attach to the loss of pretrial freedom and custodial detention. Charged persons may lose a job because they did not show up for work. They may lose custody of a child because they were not home to care for their child. They may suffer adverse health consequences because of lack of access to medications or treatment while held in jail that would have been available at home. Those individuals who have behavioral health diagnoses or are victims of trauma may decompensate while in custody. They may lose a home because they were not earning income and became unable to pay rent or mortgage payments. Those impoverished defendants receiving governmental subsidized benefits may

[13] New Jersey Pretrial Services Program Review Commission Annual Report, 2019

lose financial assistance based on their incarceration. Defendants with substance abuse disorders, if left untreated, may be more susceptible to overdose once released.

The inability to post bail may also affect the outcome of the case. Research has shown that individuals released pretrial have better case outcomes and are less likely to be arrested in the future.[14] These concerns, however, must be balanced with other concerns of importance. Judges and other participants in the criminal justice system, as well as the public, want persons charged with crimes to appear in court when ordered, so that charges can be addressed. Similarly, no one wants charged persons to commit new crimes during the pendency of a criminal case, including the intimidation of victims or other witnesses. How can a society balance these interests? How can it maximize public safety (in the short run and the long run), protect the rights of victims and witnesses, and maximize court attendance, while protecting the core constitutional commitment to the presumption of innocence?

There are only two constitutionally permissible purposes for limiting a defendant's pretrial liberty: to maintain public safety and reasonably assure appearance in court. American law contemplates a presumption of release. By definition, bail is a monetary condition of release, not a mechanism for detention, although prevailing pretrial practices bely this premise. The United States Supreme Court in *Stack v Boyle,*[15] held that "since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant." Judges must meaningfully consider the inherent distinct circumstances of each defendant and release on the least restrictive conditions. Illinois' bail statute,[16] mandates a presumption that any conditions of release imposed shall be non-monetary in nature and requires the court to impose the least restrictive conditions or combination of conditions necessary to maximize community safety and maximize court appearance. Simply setting monetary conditions of release based on a charge or bond schedule[17] is inconsistent with constitutional and statutory principles.

The United States Supreme Court has recognized that our Constitution enshrines a presumption of release prior to trial. As Chief Justice William Rehnquist opined, "in our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[18] That being said, we acknowledge the equally legitimate consideration of detention in our pretrial justice system. Judges must have a legally defined and transparent method to detain the small percentage of defendants that cannot be safely released. Statutory limitations on pretrial release are permissible as long as procedural safeguards are in place to ensure that: (1) those limitations are not excessive in relation to the government's legitimate purposes; (2) they do not offend substantive or procedural due process; and (3) they do not foster the impermissible, that detention becomes the norm and not the limited exception to release.[19]

Balancing the aforementioned interests is not simply a matter of abolishing monetary conditions of release or adopting and utilizing a validated risk assessment tool or putting pen to paper with legislative and rule changes. Illinois' framework for pretrial justice must be based on legal and evidence-based practices, and strategic system-wide, adequately funded and sustainable reform. To achieve comprehensive transformation requires removing

[14] Christopher T. Lowenkamp, Ph.D. Marie Van Nostrand, Ph. D. Alexander Holsinger, Ph.D. "The Hidden Costs of Pretrial Detention," Laura and John Arnold Foundation (Nov. 2013)
[15] *Stack v Boyle,* 341 U.S.1 (1951)
[16] 725 ILCS 5/110-5
[17] *See, e.g.:* Illinois Code of Criminal Procedure of 1963, Article V, Amended IL R S CT Rule 526-528.
[18] *Salerno*, 481 U.S. 739
[19] NIC *Fundamentals* p.31.

injustices from historical and cultural pretrial practices and acknowledging decades of repetitive, and arguably impermissible pretrial practices:

1. Reliance on monetary conditions of release to detain defendants who are otherwise bailable;
2. Funding criminal justice and related system operations; and
3. Providing a payment source for restitution, fines, assessments or attorney fees.

Such practices often thwart the very results we aspire to achieve: a system of justice that is risk-based, minimizes the use of monetary conditions of release in the criminal justice system, fosters public safety, reasonably assures court appearance, maximizes appropriate release and preserves the integrity of the court. Pretrial justice reform must comprise all elements of an effective pretrial justice system, from arrest through adjudication.

Illinois Current System of Pretrial Decision Making

The United States Constitution, as interpreted by the United States Supreme Court in *Gerstein v. Pugh*[20] requires that a person arrested without a warrant must be promptly taken before a judge for a determination of probable cause for the arrest. In 1991, the Supreme Court further clarified, in *County of Riverside v. McLaughlin*[21], that "promptly" means within 48 hours of arrest. The statutory framework for this process in Illinois is found in Article III of the Code of Criminal Procedure of 1963 (725 ILCS 5/109-1 et seq.).

All persons are eligible for bail before conviction in Illinois, except where the proof is evident or the presumption is great that the defendant is guilty of certain statutorily enumerated offenses (e.g., capital offenses, offenses which carry a maximum sentence of life imprisonment, or where the minimum sentence includes imprisonment without parole).

Bond, a condition of release, may be secured (cash or property) or unsecured, (signature with promise to abide by conditions of release). Section 110-2 of the Code of Criminal Procedure authorizes the use of unsecured recognizance bonds when the court is of the opinion that the defendant will appear as required, comply with all conditions of bond, and will not pose a danger to any person or the community. The Code encourages the use of unsecured bonds, furthering the purpose of relying on contempt of court proceedings or criminal sanctions, instead of financial loss, to assure the defendant's compliance. The Code directs judges to set monetary bail only when no other conditions of release will reasonably assure that the defendant will not present a danger to any person or to the community and that the defendant will appear at future court dates.

In determining the type of bond or conditions of pretrial release, judges are required by the Code to consider more than 30 statutory factors pertaining to the nature of the charge(s) against the defendant, his or her criminal history, prior instances of failure to appear, and the defendant's home and community information, such as place of residence, family ties, employment, education, character, and mental condition. In addition, several other provisions set specific bond procedures for particular types of offenses. For example, Section 110-5.1 specifies the procedure for setting bond in the case of a person charged with domestic violence.

[20] *Gerstein v. Pugh*, 420 U.S. 103 (1975)
[21] *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991)

The Code instructs judges to set a bond amount that is: i) sufficient to assure compliance with the conditions imposed; ii) is not oppressive; iii) is considerate of the financial ability of the accused; and iv) in cases involving possession or delivery of drugs, considers the full street value of the drugs seized. The Code does not require the imposition of specific bond amounts, though it does require that in the event that a defendant is charged with an offense that is punishable by fine only, the total bond amount must not exceed double the amount of the maximum penalty. Within these statutory guidelines, setting bond is largely a function of judicial discretion.

The Bail Reform Act of 2017 modified current bail procedures providing that defendants have a right to counsel at the initial bail hearing and if unable to obtain counsel, the court shall appoint a public defender. The Act provides a presumption of non-monetary release and the imposition of least restrictive conditions necessary to maximize community safety and reasonably assure appearance in court. The Act identified criminal offenses by category. Defendants being held on a category B offense, generally misdemeanor and non-violent felony offenses, who are unable to comply with a secured condition of release, are required to be brought before a judge within 7 days for further evaluation. The court may consider other conditions of release for those being held solely for their inability to post a monetary condition of release. A person subject to a monetary condition of release on a category B offense shall have $30 deducted from his or her monetary bail every day the person is incarcerated. The Act further encouraged the establishment of an evidence-based statewide risk assessment tool to assist the court in initial liberty decisions.

Recommendations

The Commission appreciates the opportunity afforded by the Illinois Supreme Court to review pretrial practices in the State of Illinois and make recommendations that ensure defendants are not denied liberty solely due to their inability to financially secure their release from custody.

The Commission has endeavored over the course of these last two years to draft recommendations that balance the defendant's presumption of innocence and due process while protecting the public, assuring court appearance and maintaining the integrity of the court. The Commission's final recommendations are designed to honor these guiding principles and fulfill the charge bestowed upon us. The Commission respectfully submits the following recommendations for consideration.

Arrest and Pre-Arraignment Decisions

Encourage all involved in the criminal justice system to divert individuals with mental and behavioral health issues and substance abuse disorders to alternative support, medical, or clinical services prior to entry into the criminal justice system.

Commentary:

Police regularly encounter individuals with mental and behavioral health issues or substance abuse disorders. Deflection models allow law enforcement officers in the field to utilize validated risk screening instruments and best practices to identify those individuals who can be diverted toward treatment and avoid the collateral consequences

of entry into the criminal justice system. This is vital given the breadth of substance abuse and mental health issues in arrestee and defendant populations. For example, one study showed 87% of males at the time of arrest tested positive for at least one illegal drug, and only a small percentage of those incarcerated received drug treatment while detained.[22] Upon release from custody, those untreated, will be released to their communities, re-use and often have further police interaction. Additionally, an individual experiencing a mental health crisis may find themselves subject to police interaction as opposed to receiving medical intervention. Nearly 15% of men and 30% of women booked into jails have a serious mental health condition. Most are arrested on non-violent offenses.[23] Once in jail, due to limited resources, many do not receive treatment or medication and may quickly decompensate. Upon release, they may no longer have access to healthcare and benefits, or a stable place to live. Deflection embodies a community response to pressing challenges.

The following are two examples of Illinois programs which have successfully implemented deflection models. "A Way Out" is a Lake County, Illinois Law Enforcement Assisted Diversion program "designed to fast-track" those who need treatment to substance abuse programs and services in accordance with The Community-Law Enforcement Partnership for Deflection and Substance Use Disorder Treatment Act.[24] Individuals with substance abuse disorders are encouraged to contact participating police agencies 24 hours a day, 7 days a week, including holidays, without fear of arrest. Upon contact, program representatives match individuals with available treatment, including those who lack insurance or financial resources. Park Ridge Police Department partnered with the Center for Public Safety and Justice and Advocate Lutheran General Hospital, in a collaborative effort with medical personnel, faith leaders, and community members implementing a proactive, person-centered approach to mental health, expanding mental health education and training for police and other agencies and out-reach activities that engaged the entire city.[25]

Law enforcement shall issue a citation in lieu of custodial arrest, upon proper identification, for those accused of Class B and C traffic and criminal misdemeanor offenses, or of petty and business offenses, who pose no obvious threat to the community or any person, or who have no obvious medical or mental health issues that pose a risk to their own safety. Those released on citation shall be scheduled into court, within 21 days. Subsequent court reminder notification shall be provided via mail, electronically, text or telephone.

Commentary:

Arrest is an essential and integral function of effective policing. However, the practice is far more intrusive to individual freedom, subjecting a person to potential pretrial detention or unnecessary conditions of pretrial release. Citation in lieu of arrest authorizes law enforcement to release a subject, in appropriate non-violent cases, with a date to appear in court, rather than being subjected to formalized arrest and booking procedures.

The American Bar Association and International Association of Chiefs of Police foster a policy favoring issuance of citations. "It should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued

[22] Jac Charlier, "Want to Reduce Drugs in Your Community? You Might Want to Deflect Instead of Arrest," The Police Chief/ September 2015
[23] "Jailing People with Mental Illness," NAMI
[24] 5 ILCS 820/1
[25] "Park Ridge's Success Story on Going Beyond Crisis Intervention Team Training" (2018).

custody to the maximum extent consistent with the effective enforcement of the law."[26] Nationwide, law enforcement departments utilize some form of citation in lieu of arrest. Approximately 87% of police agencies participate in this form of policing with 80% of these jurisdictions having ten (10) years or more experience using this arrest alternative.[27]

Cite and release practices may offer potential benefits for law enforcement as it takes significantly less time than formalized arrest procedures, transporting and booking, allowing officers time to focus on other more serious crimes.[28] Further, the citation procedure limits the necessity for pretrial services and court involvement prior to release. Conversely, legitimate questions have been raised as the use of cite and release procedures increase throughout the country. Does citation increase failure to appear rates? How can the potential for officer bias in arrest or release decisions be mitigated? What information do officers need to make informed decisions and is the necessary information readily accessible? How does citation vs. arrest affect pretrial public safety? [29] These questions require further exploration. Procedural safeguards must be incorporated with implementation efforts to manage risk, including court appearance within a short, specified period of time, systematic follow-up to remind defendants of court dates and quick action when citation recipients do not appear in court.

Further ways to presumptively release should encourage the issuance of summons over arrest warrant for misdemeanors and nonviolent felony offenses. The common practice of issuing an arrest warrant upon a finding of probable cause, with a monetary bond amount, places judges in the position of setting an arbitrary monetary condition of release with no meaningful way to assess risk. This may result in defendants, no matter how dangerous they are or however high their risk of flight, being returned immediately to the community with no individualized bond conditions to manage pretrial misconduct. Moreover, the detention of defendants who could be safely released simply because the money bail attached to the arrest warrant is unattainable. A more prudent, risk-informed practice would be the issuance of a summons for those charged with non-violent misdemeanor or enumerated non-violent felony charges, and a no-bond arrest warrant for all defendants charged with other offenses, for presentment at a meaningful first appearance.

Systematic data collection and performance measures provide an important and necessary mechanism to ensure best practices. Keeping these questions and challenges in the forefront, adoption of statewide citation release policies embraces constitutionally favored presumptive pretrial release for appropriate low-risk defendants.

If an arrestee is not eligible for citation in lieu of arrest, upon booking, a trained designated jail or pretrial services staff shall have delegated release authority from the court to release defendants who:

a. are assessed as low risk (utilizing a state-wide validated risk assessment tool);
b. are charged with non-violent Class A misdemeanor and non-violent Class 3 and 4 felony offenses;

[26] *See American Bar Association Standards for Criminal Justice* (3rd Ed.) *Pretrial Release* (2007) [hereinafter ABA Standards) Standard 10-2.1. and Citation in Lieu of Arrest; Examining Law Enforcement's Use of Citation Across the United States, A Report by the International Association of Chiefs of Police (April 2016).
[27] Citation in Lieu of Arrest; Examining Law Enforcement's Use of Citation Across the United States, A Report by the International Association of Chiefs of Police (April 2016).
[28] *Id.*
[29] *Id.*

c. **pose no obvious threat to the community or any person; and**
d. **have no obvious medical or mental health issues that pose a risk to their own safety, with specific guidelines, defined by the Court.**

Pre-arraignment releases shall exclude weapons-related and sex offenses, as defined by the Illinois Code of Criminal Procedure of 1963 (725 ILCS 5/100-1 et seq.). Upon release, defendants shall be provided written notification of their scheduled court date, to occur within 21 days, and conditions of release, and shall receive subsequent court reminder notification by mail, electronically, text or telephone.

Commentary:

Delegated authority is a further means to expedite the release of defendants who are charged with non-violent misdemeanor and felony offenses upon arrest and formal booking procedures, including a comprehensive identification process and prior record check. Trained personnel review information regarding the charge and conduct an interview to verify key items of information, including the arrestee's address, employment and ties to the community, and administer a state-wide validated risk assessment tool. Such procedures identify a group of defendants for immediate and automatic release, while the rest of those accused proceed to meaningful bail hearings where judges rightfully are responsible for pretrial release or detention judgments.

Generally, those defendants who fall within a designated low to moderate score on the risk assessment tool, as specified by the Supreme Court, shall be released on a recognizance bond and provided written notification of their next scheduled court date, scheduled within 21 days of release, with a subsequent court reminder via text, mail or electronically. Prompt review by the judiciary allows the court to ensure conditions of release placed upon the defendant are least restrictive, individualized and intended to manage court appearance and public safety. Procedural guidelines should include prompt measures to address a defendant's non-appearance, including contact initiated through a pretrial services agency.

Implementation:

In developing delegated release policies, the Supreme Court should identify detailed standards to be utilized for release eligibility, including but not limited to charge and risk. All standards and policies should be in writing pursuant to Illinois Supreme Court Rule.

Article V of the Illinois Supreme Court Rules sets forth several offense-based monetary bond schedules, in conjunction with the newly enacted Criminal and Traffic Assessment Act. Arrestees who can afford to pay an amount preset by rule are allowed to do so, while those who cannot are forced to wait for a hearing before the court. Similar bond schedules have been held unconstitutional.[30] No one - dimensional monetary standard should determine bail conditions. Although, Illinois Supreme Court Rule[31] authorizes police officers or agencies, designated by name or office by the chief judge of the circuit, under defined circumstances, to release individuals without monetary

[30] O'Donnell, et al. v Harris county, No. 17-20333 at 5 (5th Cir.Feb. 14, 2018) Pierce v City of Velda, 2015 U.S. Dist. LEXIS 176261 (E.D.) Mo. June 3, 2015
[31] Amended rule 55 (d)

conditions, practices vary throughout the state. Therefore, amendments to Illinois Supreme Court Rules are suggested.

The Supreme Court of Kentucky adopted a state-wide Non-Financial Uniform Schedule of Bail Administration Release Program, in an effort to "expedite pretrial release of low to moderate risk defendants charged with non-violent, non-sexual misdemeanors and to increase efficiency by reserving resources for higher-risk defendants ordered to pretrial supervision."[32]

The above recommendations focus on the front end of our criminal justice system, a substantial shift in current pretrial practices. Carefully scrutinized rules and standardized regulations, coupled with appropriate education and training for all criminal justice partners, should be implemented by the Supreme Court to ensure that only the lowest risk population is being released by citation, summons or delegated authority.

Meaningful First Appearance

The criminal justice system will ensure a meaningful first appearance consistent with the essential elements of an effective pretrial system, to maximize public safety, maximize court appearance and maximize release. The core elements necessary for the judiciary to have proper information needed to make informed bail decisions include:

a. **prosecutor-screened and clearly defined charges;**
b. **use of an objective and validated risk assessment;**
c. **trained prosecutor input; and**
d. **active and engaged defense.**

A trained prosecutor should review all available reports from law enforcement, witness statements, summaries of known facts, validated pretrial risk assessment instrument scores, and criminal histories of defendants and complainants prior to the first appearance and shall identify defendant's eligibility for diversion, specialty courts or other alternative prosecution with recommendations for release or detention.

A trained public defender shall be appointed prior to the defendant's first appearance, with sufficient time for meaningful attorney-client contact to gather information in order to advocate effectively for defendant's pretrial release under the least restrictive conditions to reasonably assure community safety and court appearance. Defense counsel shall have access to the same documentary information relied upon by the prosecution and presented to the court.

If feasible, the defendant shall appear before the court in person at the first appearance, but based on geographical or other constraints, may appear through remote access.

A pretrial services agency shall screen all defendants who are statutorily eligible for release before the initial court appearance and provide a written report for bail hearings. The screen shall include a defendant

[32] A copy of the Kentucky Supreme Court Order is attached as an example of a state-wide delegated authority structure.

interview, criminal history investigation, verification of interview information, administration of a validated pretrial risk assessment instrument, and any other information as required to assist the court in making informed release or detention determinations.

Judicial bail decision shall presumptively favor nonfinancial release under the least restrictive and individualized conditions designed to provide reasonable assurance of public safety and court appearance.

No defendant shall be detained due to his/her inability to meet a financial condition of release.

Sequential review procedures shall be adopted to review pretrial release and detention decisions throughout the pendency of the case.

Defendants shall receive verbal and written notification of all court-imposed bail conditions with clear instructions for each condition. Defendants shall also receive verbal and written notification of subsequent court dates, including date, time and courtroom.

All counties shall establish procedures to ensure that the rights of victims are recognized at the pretrial stage. The rights afforded victims should include, but are not limited to, notification of all pretrial hearings, all bail decisions, conditions of release related to the victim's safety, the defendant's release from custody, and instructions on seeking enforcement of release conditions.

Commentary:

The judicial decision to release or detain a defendant pretrial is defined as a crucial decision by the American Bar Association, *Standards Relating to Pretrial Release.*[33] At this initial stage, determinations are made about the defendant's release or detention that have enormous implications both for the community and the defendant. Review of this critical liberty decision may not occur in a timely fashion, or at all. Nevertheless, historical practices reflect a perfunctory proceeding with emphasis placed on the classification of the offense charged, equating seriousness of potential penalty with risk of community safety and nonappearance, void of sufficient information regarding the varying levels of pretrial risk a defendant may pose and the least restrictive conditions of release necessary to mitigate pretrial failure. Too often, there is minimal input from prosecution or defense other than differing opinions as to the dollar amount of cash bail. Bail-setting in this traditional manner often results in skewed outcomes: incarceration of poor, but harmless individuals, and release of dangerous but affluent individuals. A meaningful first appearance encompassing an informed judiciary, trained and engaged prosecution and defense, application of a validated and objective risk assessment instrument and vigorous pretrial screening procedures aligns with the constitutional rights of the accused and a framework for an effective pretrial system.

Trained and experienced prosecutors should screen all cases and make charging decisions based on the most complete and accurate data. Bail decisions and pretrial risk assessment scores are influenced and weighted by the current charge. Therefore, early and accurate screening of the case ensures that charging decisions reflect the true nature of the alleged offense. Screening should minimally include review of all available reports from law

[33] ABA Standards, Introduction p. 29.

enforcement including a summary of known facts, review of complaining witness statements, and review of criminal histories of defendants and/or complaining witnesses through criminal history databases. Further, prosecutor review should encompass pretrial services agency information, including validated pretrial risk assessment tool scores. Prosecutors assigned to bond proceedings should have full authorization to make referrals for alternative prosecutions, i.e., diversion, problem solving courts, appropriate release recommendations assessing defendant's ability to perform conditions of bail, and initiation of statutory procedures for pretrial detention.

The Bail Reform Act of 2017 requires that all defendants have the right to counsel at the initial appearance. All counties must ensure that defendants are represented by trained, experienced counsel at the initial pretrial court appearance and all subsequent release or detention court proceedings. Defendants who have lawyers present at bail hearings are 2.5 times more likely to be released on a recognizance bond, 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 spend an average of 2 days in jail, compared to 9 days for those without).[34]

It is statutorily required that defendants be afforded representation at the first appearance stage. But the right to counsel envisions meaningful representation, not merely the presence of counsel. Therefore, defense counsel must have adequate opportunity to confer with the defendant prior to the bond hearing, ensuring effective advocacy on the client's behalf for release under the least restrictive conditions. Inclusive in defendant's advocacy should be knowledge of defendant's ability to make monetary bond conditions if imposed by the court. Moreover, the public defender should be appointed prior to the first appearance hearing, allowing sufficient time for meaningful attorney-client contact. Preceding the initial hearing, defense counsel should have access to the same documentary information relied upon by the prosecution and presented to the court. Such documents should minimally include criminal histories, driving abstracts if applicable, validated pretrial risk assessment instrument scores and written reports prepared by the pretrial services agency.

In recognizing the serious implications of the initial appearance, American Bar Association Standards emphasize that the "proceedings should be held in physical facilities that are appropriate for the administration of justice and conducted with the dignity and decorum to be expected of a court proceeding."[35] The Commission adopts this standard, endorsing, when feasible, the defendant's physical appearance in court. However, due to geographical or other constraints, the defendant may appear via remote access as long as a structure is in place to allow private conversations with counsel. Also of importance is the assurance that interested parties, victims, family members, and media have access to bail decision proceedings whether the defendant is physically present in the courtroom or by video.

The Commission recommends that a pretrial services agency interview and screen all defendants before the initial court appearance, as recommended by ABA Standards for Criminal Justice, Standard, 10-4.2, which provides "that 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."[36] Information derived from a pretrial interview, such as community ties, residency, employment, history of alcohol or drug abuse, and physical and mental behavioral health

[34] 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).
[35] ABA Standard 10-4.3
[36] ABA Standard 10-4.2

conditions, provide additional information that assists the court in making informed bail decisions. Risk assessment instruments help pretrial services agencies match monitoring and supervision strategies to assessed levels and factors to promote pretrial success. However, the risk assessment instrument score alone does not fully capture a defendant's individualized circumstances.

Cases involving charges of domestic violence pose particular challenges for courts. Pretrial services agency interviews can help inform judicial decisions in intimate partner cases by obtaining and providing the following information: the defendant's relationship with the alleged victim, including living situation and whether they have children in common; the existence of any court orders (past or present) restraining the defendant from contacting the victim; the defendant's possible substance abuse issues; verified living arrangements separate from the alleged victim that may be available for the defendant if released, and mechanisms that can be used to prevent contact between the defendant and the alleged victim during the pretrial period and to monitor the defendant's conditions of release.[37]

The National Association of Pretrial Services Agency (NAPSA) recommends that the pretrial services agency review the status of detained defendants routinely to determine if there are any changes in eligibility for release options or other circumstances that might enable the conditional release of the defendants."[38] Consistent with NAPSA Standards, sequential review of the initial bail decision should be a component of Illinois' effective pretrial services system. Further court review may be requested by the judge, pretrial services agency, prosecutor or defense attorney. When money bail results in a defendant's continued detention, it is imperative that subsequent bail review proceedings occur expeditiously. That being said, "sequential review should not be relied on to remedy bad initial decisions…the first decision should be the best and most resourced decision. Similarly, effective continuous review practices are not an excuse to defer the release decision for a later date."[39]

Continual oversight is important to readdress factors relied upon by the court's initial release or detention decisions, which may change over time. Changed circumstances might include the reduction or dismissal of charges, rearrests, verification of appropriate residence with family support to ensure compliance with court appearance, current residence which conflicts with conditions of release, (such as electronic home monitoring protocols or stay-away orders or restriction on movement) or compliance or non-compliance with current conditions of release. "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 those who are still detained."[40]

Defendants released pretrial should receive written release orders addressing all court-imposed conditions of bail. The court release order should contain information summarizing the consequences for failing to appear for scheduled court appearances, ramifications for rearrests and non-compliance of release conditions, future court dates, with times and court locations and notification information about who to contact regarding questions about the conditions of release order or in an emergency. Modifications of release conditions at a sequential bond review should likewise be in writing and provided to defendant.

A victim's ability to provide input into pretrial decisions is critical to victim safety, as well as to promote trust and confidence in the criminal justice system.[41] Ensuring victim safety is a key goal of effective pretrial practices. The

[37] National Institute of Justice; Pretrial Services Programs: Responsibilities and Potential, page 21, March 2001.

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

[39] NIC *Essentials,* page 42

[40] NIC *Essentials, supra*

[41] Pretrial Justice Center for Courts; Addressing Victims' Rights in Pretrial Justice Reform

Rights of Crime Victims and Witnesses Act,[42] includes the right to have the safety of a victim and the victim's family considered in denying or fixing the amounts of bail, determining whether to release the defendant, and setting conditions of release after arrest. Care must be taken to assure that all victims are offered an opportunity to be heard. Cases involving intimate partner violence or family abuse, and sex offenses present unique elements for consideration. Custodial issues, financial support and visitation often influence a victim's stance regarding release or detention and the victim's input should be factored into the court's decision. Consistent with victims and witnesses' rights, the Commission recommends that all counties establish procedures to ensure that the rights of victims are recognized at the pretrial stage. Prompt first appearance is a component of defendant's due process rights and effective pretrial practices. However, victim's rights may not be enforced when detention or release decisions are made expeditiously. The rights afforded victims should include, but are not limited to, notification of all pretrial hearings, all bail decisions, conditions of release related to the victim's safety, the defendant's release from custody, and instructions on seeking enforcement of release conditions.

Implicit in the Commission's Final Report are time-honored constitutional guiding principles underlying an effective pretrial services system. Decisions regarding release, conditions of release and detention prior to trial should be individualized and no single factor or standard should be used exclusively to make a bail determination. Federal, Illinois law and Supreme Court precedent uphold a presumption of release on the least restrictive conditions necessary to reasonably assure public safety and court appearance. Courts should first and foremost consider nonfinancial bail alternatives and release on recognizance. To the extent that it is used, money bail should be a method of release, not a *de facto* method of detention, and must be attainable. No defendant should be detained solely because they are financially unable to post a money bond. Further, empirical research suggests that if monetary bail is required as a condition of release, it should not be used for the purpose of assuring the safety of any other person or the community.[43] Therefore, a secured bond should not be set by reference to a predetermined schedule of monetary amounts, nor should a court set a secured bond that a defendant cannot afford. In jurisdictions which allow financial conditions of release, the court setting monetary bail should be required to issue written findings explaining why non-monetary conditions of release will not reasonably assure the defendant's appearance in court, how the defendant is presently able to pay the bond amount to secure his or her release, and why the bond amount is the lowest amount necessary to reasonably ensure the defendant's appearance in court. Policies should be implemented to ensure that defendants unable to secure release within an expedited timeframe, (24 hours), receive a detention or conditional release hearing.[44]

Implementation:

Trained judges, prosecutors, defense counsel and pretrial services agency staff at the first appearance and subsequent bail hearing stage are of utmost importance for the implementation of a meaningful first appearance and subsequent bail hearings.. Pretrial education and training should be implemented for each county to ensure that all participants at the first appearance are adequately trained on legal and evidence-based pretrial criminal justice standards. The statewide training curriculum shall include the NIC Essential Elements Framework.

The Commission recognizes early screening by experienced and trained prosecutors requires collaboration with law enforcement. In many jurisdictions, police reports, witness statements and other data supporting the charging

[42] The Rights of Crime Victims and Witnesses Act 725 ILCS 120/4(a)(4)(7.5)
[43] Harvard, ABA Standards
[44] Harvard Article

decision have not been completed or are not readily accessible prior to the first appearance. The National District Attorneys Association Standards recognize this reality. "While it is advisable to gather all information possible prior to charging, that is simply an unrealistic expectation."[45] However, the Standards still recommend prosecutors "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."[46]

Prosecutors screening cases for first appearance and appearing in other courts where issues of bond are addressed should be trained in the practice of case screening and conditions of release. A training manual should be developed by the Illinois State's Attorney Association and the Illinois State's Attorneys Appellate Prosecutor and a copy of that manual shall be provided to every State's Attorney's Office in the state.

The most effective means to ensure that every defendant is effectively represented by competent counsel at the first appearance or subsequent bail hearings would be the blanket appointment of the public defender unless and until private counsel files an appearance. This is the current practice in a number of Illinois counties. This presupposes that every county has an attorney serving as Public Defender who is available to both interview each defendant and appear at every first appearance. At present, approximately one-half of Illinois counties provide for indigent criminal defense by entering into a contract with a private attorney. The majority of those attorneys are solo practitioners, and when unavailable, no alternative representation is available. Recognizing the scarcity of resources, NIC suggests that some jurisdictions may find the most efficient way to ensure defense counsel at the initial appearance may be to hire attorneys to focus only on pretrial advocacy.[47] Additionally, jurisdictions where there are not enough cases to employ a full-time attorney, part-time attorneys may be used, or neighboring jurisdictions may choose to pool resources to ensure the availability of counsel who represent pretrial clients in multiple counties or jurisdictions. [48] As Illinois is a county-based system of public defenders, it is the obligation of the county to provide adequate counsel to every defendant. However, the lack of county financial resources continues to present barriers for many jurisdictions. System analysis may be necessary to determine the need and number of attorneys necessary to ensure effective pretrial practices in all Illinois counties. In addition, Illinois has received a grant from the Bureau of Justice Institute, for the 6th Amendment Center to research and provide recommendations regarding indigency representation throughout the state and the results will be an additional resource.

In 2019, the Pretrial Commission conducted a survey of pretrial services in all Illinois counties. The results revealed 87% of the time defense counsel is present at in-person bond hearings. Additionally, the survey revealed the need for approximately seventy-five (75) additional public defenders in Illinois in order for every defendant to be represented by competent counsel at the first and all subsequent hearings.

The recommendation that the public defender or court-appointed counsel have access to the same documentary information relied upon by the prosecution and presented to the court at the first appearance is in direct conflict with Supreme Court Rule 411.[49] Therefore, the Rule should be amended. At minimum, the defendant shall be provided, prior to the first appearance, copies of defendant's criminal history, if any, if available, and any written or recorded

[45] National District Attorneys Association 2009. *National Prosecution Standards,* Third Edition (Standard 4-2.1), Arlington, VA: National District Attorneys Association
[46] NDAA (2019) Standard 4-5.2
[47] NIC *Essentials,* page 27
[48] *Id.*
[49] IL R S CT Rule 411

statements and the substance of any oral statements made by a person, if relied upon by the State. *Cf.* 725 ILCS 5/110-6.3(c)(1)(A).

Public Defenders appearing at first appearance and in other courts where issues of bond are addressed shall be trained to effectively represent defendants in those courts. A training manual should be developed by the Illinois Public Defender Association and the Illinois Office of the State Appellate Defender and a copy of that manual shall be provided to every public defender in the state.

Physical accommodations should be made to facilitate the confidential attorney/client private consultation. As an alternative, a dedicated electronic connection, both audio and video, could be employed as a mechanism for client contact.

To ensure that victims' rights are protected, State Attorneys are encouraged to partner with local advocacy groups to promote prompt notification and services for victims and witnesses throughout the pendency of the case.

Preventive Detention

Pretrial detention should be permitted only for arrestees charged with defined "violent" offenses. A clearly defined "eligibility net" set forth in statute, narrowly drawn in design, and intentional in its implementation should trigger a detention decision-making procedure. The "eligibility net" should be limited to enumerated offenses identified by statute as "violent."

The Court may order the pretrial detention of a defendant only upon clear and convincing evidence as shown through relevant facts and circumstances that (a) the person poses an unmanageable level of risk to commit or attempt to commit a "violent" offense, as defined by the Code of Criminal Procedure of 1963, while on pretrial release against a reasonably identifiable person or groups of persons and (b) no condition or combination of conditions will reasonably assure public safety or manage the person's level of risk.

No single offense or aggravating factor should mandate a denial of bail.

At the initial pretrial court appearance, the court, upon written motion by the prosecution, may order the defendant's temporary detention, pending a full pretrial detention hearing within three (3) calendar days, provided:

a. the court finds probable cause for the crime charged;
b. the defendant falls within the narrowly drawn detention-eligible criteria; and
c. the court finds by a preponderance of the evidence that the defendant poses an unmanageable level of risk to commit or attempt to commit a "violent" offense, and/or intentional failure to appear for scheduled court appearances, setting forth the factual basis for temporary detention.

At all pretrial detention hearings, the defendant shall be represented by counsel and have the right to cross examine the prosecution's witnesses and present evidence.

At all pretrial detention hearings, the prosecution shall have the burden to prove by clear and convincing evidence that no conditions of release will reasonably assure the safety of the community or the defendant's appearance in court.

At all pretrial detention hearings, when detention is ordered, the court shall make a written finding, explaining why less restrictive conditions of release would be insufficient to protect community safety or reasonably assure the defendant's appearance at future court hearings.

When a defendant's liberty is substantially impaired prior to trial, the pretrial period should be limited, therefore, the defendant shall be brought to trial within 90 days, unless good cause is shown.

Commentary:

For the small percentage of defendants for whom no condition or combinations of conditions will reasonably assure the safety of the community or the defendant's court appearance, (Washington D.C. detention rates are 6% and New Jersey detention rates are 6.5%)[50] pretrial preventive detention serves legitimate state interests. In *United States v. Salerno,*[51] the United States Supreme Court upheld the 1984 Bail Reform Act's use of "dangerousness" as an appropriate factor when considering pretrial release, holding that the government's interest in protecting society from violent criminals outweighed an individual's right to release under limited circumstances and detailed procedural safeguards:

"The Bail Reform Act carefully limits the circumstances under which detention, and the maximum length of pretrial detention is limited by the Speedy Trial Act. … The Bail Reform Act…narrowly focuses on a particularly acute problem in which the Government in the Act operates only on individuals who have been arrested for specific category of extremely serious offenses. Congress specifically found that these individuals are far more likely to be responsible for dangerous act in the community after arrest. Nor is the Act by any means a scattershot attempt to incapacitate those who are merely suspected of these serious crimes. The Government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, but that is not enough. In a full-blown adversary hearing, the Government must convince a neutral decision maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person."

The Commission recommends the adoption of a robust procedural framework whereby judges are afforded a legal, transparent, and effective means to intentionally detain the small percentage of high risk individuals who pose an unmanageable risk to commit a dangerous violent offense or willfully fail to appear for court proceedings, together with safeguards emphasized by the *Salerno* Court. Illinois' preventive detention authority must draw purposeful lines between release and detention by using legally justified and limited detention "eligibility nets" and further guaranteeing due process in accordance with principles articulated by the *Salerno* Court's underscored comments: "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[52]

How can this be accomplished? Limited entry points, and carefully circumscribed threshold circumstances triggering preventive detention determination, should be adopted by policymakers implementing preventive detention

[50] Pretrial Services Agency for the District of Columbia (2020). *FY 2019 Release Rates for Pretrial Defendants within Washington, DC.* Washington, DC: PSADC.
[51] *Salerno*, 481 U.S. 739
[52] *Id.*

schemes.[53] Pretrial detention should be limited to some "specific category of extremely serious offenses," which includes persons found "far more likely to be responsible for dangerous acts in the community after arrest."[54]

Jurisdictions have grappled with defining limited entry points, under which any defendant might face a preventive detention determination. Illinois' current preventive detention statutes are predicated on statutorily enumerated offenses (e.g., capital offenses, offenses which carry a maximum sentence of life imprisonment, or where the minimum sentence includes imprisonment without parole).[55] In certain cases where a mandatory or discretionary life sentence is possible, a defendant shall be held without bond upon a finding by the court that the proof is evident or the presumption great that the defendant is guilty of the offense. The court must conduct a hearing in which either the State or the defense may proceed by proffer. No petition is necessary, and the burden is on the State.

The federal system has automatically triggered preventive detention based on the offense charged. Specifically, particular types of offenses create a rebuttable presumption that no condition or combination of conditions will reasonably assure appearance or public safety.[56] Kentucky, a leader in the pretrial field since 1976, only allows for preventive detention in capital cases.[57]

In 2014, New Jersey voters approved amending the state's constitution replacing the right to bail with the right to be considered for pretrial release and allowing a court to order a defendant charged with certain crimes to be detained prior to trial.[58] The current law went into effect in 2017, adopting a risk-based system that presumes release with the least restrictive conditions for all defendants except (1) those charged with or having been convicted of specified serious crimes, including defendants charged with any indictable (felony) offense or charged with any disorderly persons offense (most misdemeanors); or (2) when the prosecutor believes there is a serious risk the defendant will not appear in court or poses a danger to any person or the community.[59] In an attempt to redraw the line between release and detention based on "risk" and not charge, New Jersey's detention eligibility net is extremely broad, but detention numbers are very small.

New Mexico voters approved a state constitutional amendment to allow courts to deny pretrial release to defendants charged with a felony (exemplifying a wide "eligibility net") where the prosecutor files a motion for pretrial detention that states the specific facts supporting the motion. Most recently, New York implemented bail reform legislation that eliminated money bail and pretrial detention for nearly all misdemeanors (excluding sex offense misdemeanors and criminal contempt charges for an order of protection violation). Both money bail and pretrial detention are eliminated in all nonviolent felonies, with the following exceptions: witness intimidation or tampering, conspiracy to commit murder, felony criminal contempt charges involving domestic violence, and a limited number of offenses against children, sex offenses, and terrorism-related charges.[60] In addition, money bail and detention are still permitted in the majority of all violent felonies, except for specific sub-sections of burglary and robbery. Bail and detention are permissible in cases classified as Class A felonies, most of which involve violence. Money bail and detention are eliminated for all Class A drug felonies, with the sole exception of operating as a major trafficker. It is

[53] Criminal Justice Policy Program at Harvard Law School, *Moving Beyond Money: A Primer on Bail Reform,* (2016)
[54] *Salerno*, 481 U.S. at 750
[55] 725 ILCS 5/110-4(a)
[56] D.C. CODE ANN. § 23-1322(b)(1): 18 U.S.C. § 3142(e)
[57] Criminal Justice Policy Program, Harvard Law School, *Bail Reform; A Guide for State and Local Policymakers,* (2019)
[58] New Jersey Preventive Detention Amendment Public Question No.1 (2014)
[59] N.J.P.L 2014 c.31(C.2A:162-15 et seq.)
[60]Criminal Justice Policy Program, Harvard Law School, *Bail Reform; A Guide for State and Local Policymakers,* (2019)

estimated that of the almost 205,000 criminal cases arraigned in New York City in 2018 only 10 percent would have been eligible for money bail under the new law.[61]

Moreover, national standards addressing pretrial release and detention create a detention eligibility net for "defendants most likely to present a danger or fail to appear."[62] The ABA Standards reserve detention for those defendants who fall within four subsets: (1) defendants charged with a crime of violence or a dangerous crime: (2) defendants charged with a "serious" offense who are already on release in a different case that is also a serious offense unless the defendant was on release pending sentencing or on appeal (if the defendant was on probation or parole, the underlying conviction must be for a serious and violent or dangerous offense); (3) defendants charged with serious offenses who pose "a substantial risk. . . [to] fail to appear for court or flee the jurisdiction[63] or (4) defendants charged in any case "who pose a substantial risk of obstructing justice or threatening, injuring, or intimidating prospective witnesses or jurors."[64] The Standards deferred to jurisdictions to define "crime of violence" and "serious" offenses, but commented that serious crimes would "clearly encompass some offenses that are not violent or physically dangerous."[65]

In a detailed guide and case study review of national pretrial practices (including Cook County), authors Doyle, Baines, and Hopkins, of the Criminal Justice Policy Program at Harvard Law School, addressed short falls regarding pretrial detention policies.[66] Automatic preventive detention hearings based only on the offense charged, rather than risk of reoffending, fails to take into account the individual situation of each defendant and ties the detention hearings to the choices of the prosecutors, who have wide discretion in charging, and raises the risk of undue incarceration based on inappropriate charging decisions.[67] Moreover, Kentucky's limited preventive detention statute results in judges imposing money bail beyond what they think a defendant can afford to ensure detention.[68]

Critics argue that preventive detention policies based on charge, instead of individualized risk, may be interpreted too broadly, increasing the likelihood of detention for defendants whose risk could be safely managed if released into the community. Reviewers of the federal system note that the expansive nature of the eligibility net and the misuse of various rebuttable presumptions has resulted in over-detention.

Most bail laws were premised on assumptions about risk in correlation with charge – the more serious the charge, the higher the risk – without supportive empirical evidence. Current research on pretrial success and failure does not support this premise. Persons charged with less serious offenses are often high risk for pretrial misbehavior as opposed to defendants facing more serious charges.[69] Further, offense-based triggers may be problematic because they are not tied to individual circumstances of a defendant and reflect the relatively low threshold for issuing a charge.[70] Our Illinois statute arguably does not sufficiently tailor the offenses for which an accused person may be detained prior to trial. The law allows for pretrial detention, after a hearing, of people charged with stalking and non-

[61] Center for Court Innovation, *New York's Bail Reform Law,* Summary of Major Components.
[62] ABA Standards, *supra* note 100, Std. 105.9 p.130
[63] std 10.59 at 129
[64] ABA Standards (commentary, at 132)
[65] ABA Standards, 10.59 at 130
[66] Criminal Justice Policy Program, Harvard Law School, *Bail Reform; A Guide for State and Local Policymakers,* February, 2019
[67] Criminal Justice Policy Program, Harvard Law School, *Bail Reform; A Guide for State and Local Policymakers,* February, 2019
[68] *supra 39*
[69] Timothy R. Schnacke, Changing Bail Laws, *Moving from Charge to "Risk:" Guidance for Jurisdictions Seeking to Change Pretrial Release and Detention Laws,* September 23, 2018
[70] Criminal Justice Policy Program, Harvard Law School, *Moving Beyond Money: A Primer on Bail Reform* (2016)

probational offenses where the defendant is a real and present threat to the physical safety of another person, although on their face there may be no correlation to an elevated risk of flight or danger. Illinois policymakers in crafting or amending preventive detention policies based on offenses charged as a triggering mechanism must be certain that the enumerated offenses remain narrow and that, even when they trigger hearings, they do not dictate outcomes or prevent an individualized determination based on the defendant's circumstances.[71]

An effective pretrial justice system incorporates a validated risk assessment instrument into the bail decision-making procedures. Should actuarial assessment instruments be incorporated in the creation of an "eligibility net"? This is not recommended for various reasons. Learning from the history of bail, the law surrounding release and detention and the pretrial research "points to discerning a different kind of risk to detain than that is currently provided by actuarial pretrial risk assessment instruments today . . . the eligibility net should more appropriately be based on justifiable and limited categories of criminal charge."[72] An actuarial pretrial assessment instrument for determining detention or detention eligibility would require the use of a risk assessment instrument geared specifically to the risk of re-arrest for violent or serious crime, as opposed to instruments that lump together re-arrest for serious and non-serious crime or do not distinguish between re-arrest and non-appearance.[73] Further, current actuarial pretrial assessment instruments do not differentiate between a substantial and unmanageable risk of willful flight versus simply failure to appear for court, or the risk of committing a serious or violent crime against knowable persons versus the risk of committing any crimes against potentially all persons.[74]

Jurisdictions are cautioned (1) not to use an actuarial pretrial risk assessment instrument solely to determine release or detention in the first instance based on risk; (2) not to use them in creating detention eligibility nets; and (3) not use them to automatically determine defendant's detention within a wide charge-based net.[75] Decisions about whether to detain or release a defendant will require more rigorous due process protections as opposed to decisions for release conditions intended to mitigate pretrial misconduct.[76] Policymakers should tread carefully in incorporating the use of an actuarial assessment instrument as the sole or substantial basis for the creation of the "eligibility net." It is likely only appropriate to use them as one factor in the detention decision after some other triggering event.[77]

As Illinois policymakers consider where and how to draw the line between pretrial release and detention, they should be mindful of how other states have drawn those distinctions. Notably, two cases have addressed the limits of preventive detention. In Arizona, Proposition 100 prohibited state courts from setting bail for serious felony offenses for those who entered or have remained in the United States illegally, if the proof of the charged offense was great. In *Lopez-Valenzuela v. Arpaio,* the Ninth Circuit Court of Appeals held that if bail is denied for certain serious felony offenses based on the illegal immigration status of the accused, and there is a great presumption of guilt for the charge in question, the substantive component of due process granted under the Fourteenth Amendment is violated and is considered to be unlawful pretrial punishment.[78] The Ninth Circuit applied a heightened substantive due

[71] *Id*. at 27.
[72] Timothy R. Schnacke, *"Model" Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention,* (2017) [hereinafter, Schnacke, *"Model" Bail Laws*
[73] Criminal Justice Policy Program, Harvard Law School, *Moving Beyond Money: A Primer on Bail Reform* (2016)
[74] Schnacke, *"Model" Bail Laws,* at 125.
[75] *supra*
[76] Criminal Justice Policy Program, Harvard Law School, *Moving Beyond Money: A Primer on Bail Reform* (2016)
[77] Schnacke, *"Model" Bail Laws* at 124.
[78] *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014) (9th Cir. 2014

process analysis, under *United States v. Salerno,* and found that Proposition 100 did not address an established particularly acute problem, was not limited to specific categories of extremely serious offenses, and did not afford the essential individualized determination of flight risk or dangerousness.

Similarly, in *Simpson v. Miller,*[79] the Arizona Supreme Court held that Arizona's Constitution and laws that forbade bail in cases involving sexual conduct with a minor under age fifteen when the proof is evident or the presumption great that the defendant committed the crime violated the Fourteenth Amendment's due process guarantee since the prohibition was not narrowly focused to protect public safety. The court held that the Arizona statute met the first prong of the *Salerno* analysis in that the government's interest in preventing crime by arrestees is both legitimate and compelling, and operated only on individuals who have been arrested for a specific category of extremely serious offenses. However, it further held that the statute violated *Salerno,* by denying bail categorically for crimes that inherently demonstrate future dangerousness. While sexual conduct with a minor is always a serious crime it is not inherently predictive of future dangerousness, and detention requires a case-specific inquiry.[80]

In defining an "eligibility net", the question remains: which charges or crimes should be included in that net? The Commission engaged in robust discourse with varying and well-supported stake-holder opinions. Reemphasizing the Commission's earlier observations, judges and other participants in the criminal justice system, as well as the public, want persons charged with crimes to appear in court when ordered, so that charges can be addressed. Likewise, no one wants additional crimes to be committed by a charged person during the pendency of a criminal case, including the intimidation of victims or other witnesses. As we have no fool-proof way to predict or determine future behavior, pretrial failure is inherent in our criminal justice system and must be accepted. Therefore, a further debatable question arises: how much failure are we willing to accept? As a society, do we care about all crime committed during pretrial release, therefore, potentially detaining all defendants, even those who may commit a traffic or non-violent misdemeanor offense? Or are we more concerned about serious, violent offenses being perpetuated? Likewise, do we detain all individuals who may fail to appear for court, due to lack of transportation, work obligations, child care, or should our focus be on willful failures to appear to avoid prosecution for those charged with serious, violent offenses? United States Supreme Court Justice Robert Jackson in addressing this very dilemma stated that "[a]dmission to bail always involves a risk…a calculated risk which the law takes as the price of our system of justice."[81]

The Commission supports limiting detention eligibility to a narrowly defined class of defendants personally charged with "violent" offenses, and the ability to detain for both willful flight and danger considerations. The Commission notes that several statutes define "violent" differently. Examples include the following:

- 730 ILCS 5/5-6-3.4(a)(1) (Second Chance Probation)
- 740 ILCS 45/2(c) (Crime Victims Compensation Act)
- 725 ILCS 120/3(c) (Crime Victim's Rights Act)
- 705 ILCS 405/5-820 (Violent Juvenile Offender)
- 730 ILCS 154/5(b)(1) (Violent Offender Against Youth)
- 720 ILCS5/11-1.30 (A) (Aggravated Criminal Sexual Assault)
- 750 ILCS 60/103 (Domestic Violence)

[79] *Simpson v. Miller*, 241 Ariz. 341 (2017).
[80] *Simpson*, 241 Ariz. 341.
[81] *Stack v. Boyle*, 342 U.S. 1, 8 (1951) (Jackson, J., concurring).

- 730 ILCS 166/20(B)(4).

However, the Commission recommends that "violent" offenses must be narrowly drawn and specifically identified by charge. The definition of "violent" offense established by the legislature for detention purposes should be exclusive of other statutory definitions of "violent offense" or "violence."

The Commission recommends that no offense or aggravating factor shall trigger a defendant's mandatory detention. A charge-based mandatory pretrial detention system is antithetical to an effective legally and evidence-based system designed to maximize community safety, maximize court appearance and maximize release, while upholding the constitutional protections afforded those accused of committing a criminal offense.

Salerno requires further limiting processes: "[t]he government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, but that is not enough. In a full-blown adversary hearing, the Government must convince a neutral decision maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person."[82]

What entails a full-blown adversary hearing? *Salerno* requires that the defendant has the right to be represented by counsel. If the defendant is financially unable to obtain representation, the defendant has the right to have counsel appointed. Further statutory factors cited by the Court include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community. New Jersey's Bail Reform Law provides a list of broad categories of information that a court may consider in determining whether to order pretrial detention:[83]

1. the nature and circumstances of the offense charged;
2. the weight of the evidence against the eligible defendant;
3. the history and characteristics of the eligible defendant;
4. the nature and seriousness of the danger to any other person or the community that would be posed by the eligible defendant's release; if applicable;
5. the nature and seriousness of the risk of obstructing or attempting to obstruct the criminal justice process would be posed by the eligible defendant's release, if applicable; and
6. the release recommendation of the pretrial services agency obtained using a risk assessment instrument.

Further instructive guidelines appear in the Criminal Justice Policy Program, Harvard Law School's Guide for State and Local Policymakers, as well as ABA Standards: the defendant shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. At the hearing, the rules governing admissibility of evidence in criminal trials should not apply and all proceedings should be recorded. Testimony of the defendant given during the hearing shall not be admissible on the

[82] Criminal Justice Policy Program, Harvard Law School, *Bail Reform; A Guide for State and Local Policymakers,* (2019) ABA Standards

[83] N.J. Stat. Ann. § 2A:162-20(a) to (f) (West)

issue of guilt in any other judicial proceeding, but shall be admissible in any future hearing to determine whether the defendant subsequently violated a condition of release or committed a crime while on release.

The Commission recognizes that it is not the entity to draft or propose statutory language. Rather, the legislative branch of government is appropriately tasked with this responsibility. However, the Court directed the Commission to undertake a comprehensive review of the State's pretrial detention system, and make recommendations for amendments to state laws, Supreme Court rules or Supreme Court policies, as necessary, to ensure pretrial practices throughout Illinois that are consistent with the Court's policy statement for pretrial services. It is within this context that the Commission encourages state policymakers to implement procedures designed to ensure that pretrial detention is restricted to the limited number of defendants who present an unmanageable risk to commit a dangerous or violent offense while on pretrial release or to willfully fail to appear at scheduled court appearances, respecting constitutionally required principles and procedures, and adopting practices supported by ABA and NAPSA and legal empirical evidence and research. It is noted that many of the suggested polices are contained within Illinois current bail statutes. The Commission respectfully encourages the following pretrial detention policies be adopted:

(1) Legislation should define and justify the criteria for legal pretrial detention.

(2) Legislation should define and justify the "violent offense" eligibility net, setting forth enumerated offenses, by name and statute, that are detention eligible.

(3) A court may confine a person who is statutorily eligible for pretrial detention only upon a written finding by clear and convincing evidence, as shown through relevant facts and circumstances, that a detention eligible defendant (a) poses a high risk to commit or attempt to commit a violent crime while on pretrial release against a reasonably identifiable person or persons or (b) that a detention eligible defendant poses a high risk of intentional failure to appear to avoid prosecution.

(4) At the initial pretrial court appearance, the court, upon written motion by the prosecution, may order the temporary detention of the defendant, pending a prompt pretrial detention hearing, conducted within three calendar days, provided that (a) the court finds probable cause for the crime charged (b) the defendant falls within the narrowly drawn detention eligible criteria and (c) the court finds by the preponderance of the evidence that the defendant poses a high risk of intentional failure to appear for scheduled court appearances or a high risk to commit or attempt to commit a violent offense, setting forth the factual basis for temporary detention.

(5) At the initial pretrial court proceeding, the court may consider the charging document, information obtained from the pretrial services agency, both oral and written, and arguments presented by prosecution and defense counsel.

(6) The defendant has the right to be represented by an attorney, and if financially unable to obtain representation, the court shall appoint the public defender.

(7) The prosecution shall provide defense counsel all evidence and documentation that the State relied upon in seeking temporary preventive detention.

(8) At the pretrial detention hearing, to overcome the statutory presumption against pretrial detention, the State has the burden of proving by clear and convincing evidence that the detention eligible accused person, as shown through relevant facts and circumstances, poses a high risk of intentional failure to appear to avoid prosecution

or poses a high risk to commit or attempt to commit a violent crime while on pretrial release against a reasonably identifiable person or persons and that no condition or combination of conditions of release will reasonably assure the safety of the community or an identifiable person and the defendant's appearance in court.

(9) At the pretrial detention hearing, the State must provide defense counsel with all evidence and documentation relied upon for detention determination as well as exculpatory evidence reasonably within its custody or control prior to and at the pretrial detention hearing.

(10) At the pretrial hearing, the rules governing admissibility of evidence in criminal trials should not apply and proceedings should be recorded; testimony of the defendant given during the hearing shall not be admissible on the issue of guilt in any other judicial proceedings.

(11) At the pretrial hearing, the court may consider information concerning:

a. The nature and circumstances of the offense charged;
b. The weight of the evidence against the eligible defendant, except that the court may consider the admissibility of any evidence sought to be excluded;
c. The history and characteristics of the eligible defendant, including;

    i. The eligible defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

    ii. whether, at the time of the current offense or arrest, the eligible defendant was on probation, parole, or other release pending trial, sentencing, appeal, or completion of sentence for an offense under federal law, or the law of this or any other state;

    iii. The nature and seriousness of the danger to any other person or the community that would be posed by the eligible defendant's release, if applicable;

d. The nature and seriousness of the risk of obstructing or attempting to obstruct the criminal justice process that would be posed by the eligible defendant's release, if applicable; and the release recommendation of the pretrial services agency, obtained using a risk assessment instrument. Although the court may consider the risk assessed through an actuarial pretrial risk assessment instrument, the court may not detain based solely on the results of that instrument.

(12) The Court shall, upon a detention determination, state in writing the factual basis for its finding that, by clear and convincing evidence, the defendant poses an unmanageable risk to commit a violent offense or to willfully fail to appear for scheduled court appearances and explaining why less restrictive conditions of release would be insufficient to protect the public or ensure that the defendant returns to court. This written finding shall be entered in every instance where detention is ordered or where the conditions imposed by the court do not result in the defendant's immediate release.

Thus far, the Commission's remarks have primarily focused on individuals arrested in the first instance on "violent" charges and first presentment proceedings. Of equal concern, are those defendants released pretrial who demonstrate

non-compliance of court-ordered conditions by further arrest or missed court appearances. How do we address risk after pretrial failure, - is it the same or different? After all, at this point in time, there is some evidence of individualized risk, based on non-compliance.

Current Illinois' law provides that when a defendant released on bail or recognizance on a felony fails to appear as required, the court shall issue a "no bail" warrant. The defendant who is arrested on such a warrant within 30 days of the warrant's issuance shall not be bailable unless the defendant shows by a preponderance of the evidence that his failure to appear was unintentional. Additionally, if a defendant fails to appear within 30 days after a bond forfeiture, he may be charged with a violation of bail bond and any sentence imposed shall be served consecutive to the sentence for which bail has been granted. Arguably, the statute focuses solely on failure as opposed to future risk.[84]

Research suggests that jurisdictions should consider creating a secondary detention "eligibility" net along with a limiting due process procedure for instances when the accused has failed on pretrial release by willfully failing to appear for court or committing a new crime.

Researcher Tim Schnacke suggests that jurisdictions consider creating a secondary detention eligibility net incorporating due process protections, considerate of the new circumstances, as opposed to automatic revocation or detention.[85] As we have discussed, the only two constitutionally valid purposes for limiting pretrial freedom are to reasonably assure public safety and court appearance. Therefore, technical violations of pretrial conditions (missed check-ins, failed or missed drug-drops, etc.,) should not trigger eligibility for detention, unless the violations rise to criminal charges.

In defining the "eligibility net" for alleged pretrial release violations, the secondary net may be broader than the "violent" offense eligibility net, as an articulable risk of pretrial failure is present. Therefore, any new crime and willful failure to appear in court could trigger the detention process. In comparison, ABA Standards allow detention for defendants charged with a "serious" offense who are already on release on a different case that is also a serious offense, unless the defendant was on release pending sentencing or on appeal (if the defendant was on probation or parole, the underlying conviction must be for a serious and violent or dangerous offense).

Accordingly, the Commission supports pretrial detention as an appropriate court response to noncompliance with bail conditions, willful failure to appear and rearrests. For all persons eligible for pretrial detention under this provision, the following procedures and policies are recommended:

1. The Court must find probable cause that a person already on pretrial release for any jailable offense has committed a new jailable offense or failed to appear for court to avoid prosecution.
2. The Court must find by clear and convincing evidence as shown through relevant facts and circumstances that the person poses either a high risk to commit or attempt to commit any new jailable offense against a person or persons or their property or to willfully fail to appear for court to avoid prosecution.
3. The Court must find by clear and convincing evidence that no condition or combination of conditions will suffice to manage the person's high level of risk.
4. The State must file a written petition for detention and provide notice to defendant and defense counsel. The petition shall identify the eligible charged offense(s) and list all relevant facts and

[84] 720 ILCS 5/32-10(d)
[85] Schnacke, *"Model" Bail Laws,* at 179.

circumstances upon which the prosecution intends to rely in seeking detention.

5. In considering the facts and circumstances to detain persons under this provision, the court may rely substantially on the assessed risk from an actuarial pretrial risk assessment instrument.
6. The court may not impose a condition of release that results in the pretrial detention of the defendant. However, a person's willful refusal to agree to lawful conditions of release may result in the detention of that person.
7. The Court shall issue a written order detailing the detention or restrictive conditions of release and the factors upon which the court relied to order the detention or restrictive conditions of release. If detention is ordered, the court must further detail the reasons why less restrictive conditions of release would be insufficient to protect the public or ensure that the defendant returns to court.

Pretrial Risk Assessment

Results of a validated pretrial risk assessment instrument, which is approved by the Supreme Court, shall be one of the factors considered during the pretrial release decision-making process. The use of a pretrial risk assessment instrument does not restrict the judge from considering all other statutory factors, but adds information the judge shall use in the exercise of the judge's adjudicatory duties.

In the interest of providing a state specific tool to be utilized in bail hearings, Illinois shall develop a pretrial risk assessment instrument based on research of the local defendant population utilizing a comprehensive and robust source of statewide data with the ability to differentiate as follows:

1. **Risk of failure to appear**
2. **Risk of willful failure to appear**
3. **Risk of new criminal offense**
4. **Risk of new violent criminal offense and risk of new domestic violence criminal offense**

The Illinois General Assembly should allocate sufficient and sustainable state funding for development of a validated statewide pretrial risk assessment instrument.

In the interim of developing a statewide risk assessment instrument, counties may continue to utilize their current pretrial risk assessment instrument. Counties that are not currently using a risk assessment instrument shall adopt, in consultation with AOIC, one of the following validated pretrial risk assessment instruments when determining release and detention decisions:

1. **Revised Virginia Pretrial Risk Assessment**
2. **Public Safety Assessment (PSA)**
3. **Ohio Pretrial Risk Assessment**

Develop a process to evaluate and improve the quality, completeness and availability of data needed and collected to develop and validate a statewide pretrial risk assessment instrument.

Commentary:

Risk assessments have been used in the criminal justice field since the 1920s,[86] mirroring actuarial assessment in other fields such as medicine, economics, and business. Early criminal justice assessments relied on the professional judgment of practitioners. However, by the 1960s and early 1970s, studies of these "clinical assessments" questioned the criteria many used as well as their accuracy and fairness.[87] Since the 1980s, risk assessment instruments have evolved and complemented a wider movement toward evidence-based practices in judicial decision making and processes. A "second generation" of risk prediction saw the inclusion of actuarial-style items to assessment instruments, usually numeric values associated with the presence or absence of a perceived risk factor. However, risk assessment instruments of this period usually lacked a true research basis and often consisted of static items.[88] The "third generation" of risk assessment instruments introduced empirical study to the factors associated with misconduct. These included dynamic factors[89] (or criminogenic needs) along with static factors to produce a more accurate picture of risk. Currently, most criminal justice risk assessments are "fourth generation" instruments that predict risk and suggest intervention strategies to minimize or alleviate this risk.[90] Risk assessment instruments are meant to inform judicial decision-making, not supplant judicial discretion. "No risk assessment tool is perfect-yet, as a judge directed to use one of them, you can use them in ways to maximize fairness and justice. Doing so requires a careful understanding of what the tool is measuring and how that might differ across race, class, and age."[91]

Risk assessment instruments are meant to inform judicial decision-making, not supplant judicial discretion.

Risk Assessment in the Pretrial Services Field

Risk assessments in the pretrial service field followed a similar evolution. The earliest pretrial services agencies used locally created clinical assessments[92] or adopted the most popular of the field's instruments, the "Vera Point Scale."[93] The mid 1980s to late 1990s saw a range of research in the pretrial field that helped develop third generation assessment instruments in jurisdictions such as Harris County (Houston), Texas, Hennepin County (Minneapolis),

[86] Kehl, D., Guo, P. and Kessler, S. (2017). *Algorithms in the Criminal Justice System: Assessing the Use of Risk Assessments in Sentencing.* Responsive Communities Initiative, Berkman Klein Center for Internet & Society, Harvard Law School. at 3.
[87] Id at 4-5.
[88] Static factors are those that do not change, including age at first arrest and current charge.
[89] Dynamic factors are those that change over time, such as the rate of drug use, residence, and employment.
[90] Andrews, A. and Bonta, J. (2010). *Rehabilitating Criminal Justice Policy and Practice*. Psychology, Public Policy, and Law 2010, Vol. 16, No. 1, 39–55. American Psychological Association.
[91] Judge Journal "Bail Reform", Page 10.
[92] An example of these assessments was the District of Columbia Pretrial Services Agency's "problems/solutions" grid adopted in the 1971. That instrument identified risk factors agency leadership believed were associated with failure to appear and rearrest and presented a list of conditions designed to address each.
[93] Developed as part of the Manhattan Bail Project in 1961, the Vera Point Scale tested the idea that pretrial risk could be categorized at varying levels, which pretrial staff could use to recommend bail to the court. The scale used factors such as family and community ties, length of residence in the community, and prior criminal history to identify defendants whom the agency believed could be released safely pending trial. Early evaluations of the point scale validated the idea that objective criteria were effective in predicting the risk of failure to appear. However, subsequent research of the point scale's use in other jurisdictions yielded mixed results. (See Eskridge,C. (1981). "Predicting and Protecting Against Failure to Appear in Pretrial Release: The State of the Art. *"Pretrial Services Journal"*

Minnesota, New York City, and Maricopa County (Phoenix), Arizona.[94] These studies incorporated risk factors found through research to be predictive of failure to appear and rearrest. While keeping the Vera Point Scale's basic design, these next generation assessments assigned weights to risk factors based on an empirically observed correlation to pretrial misconduct.

The Virginia Pretrial Risk Assessment Instrument (VPRAI) was the first fourth generation pretrial risk assessment. Developed originally in 2007 as a directive of the Virginia Pretrial Services Act,[95] the VPRAI was the first pretrial risk assessment based on data from multiple jurisdictions (the original VPRAI validation included over 4,000 cases from 10 Virginia localities) and the use of higher-level logistic regression to correlate risk factors to pretrial misconduct.[96] It also was the first to consider openly state and federal requirements for reasonable bail and legal detention. The VPRAI included a companion "PRAXIS" matrix that helped users translate risk assessment results into recommended levels of supervision and conditions.[97]

The VPRAI soon was followed by the Federal Pretrial Risk Assessment Instrument (FPRAI). The FPRAI was produced from data on over 500,000 federal pretrial defendants from 2001 to 2007. As with the VPRAI, the goal was to identify statistically significant and policy relevant predictors of pretrial risk of federal criminal defendants, develop a classification scheme to scale the risk persons arrested for federal criminal offenses pose if released pending trial, and assess the efficacy of bail conditions and supervision levels to alleviate this risk. The evaluation produced a risk assessment instrument based on nine statistically predictive factors and including five distinct risk levels (gauging danger to the community and risk of failure to appear), with one being lowest risk and five being highest risk. Research found that as defendant risk increased, the likelihood of pretrial detention increased, and when defendants were released, the likelihood of pretrial failure increased as the level of pretrial risk increased. The data also showed that of defendants ordered to pretrial supervision, moderate to high risk defendants (Levels 3 through 5) were less likely to experience pretrial failure when compared to defendants released without supervision. By contrast, lower risk defendants (Levels 1 and 2) released on supervision were more likely to experience failure compared to unsupervised defendants.[98] This "over-supervision" effect would be found in later fourth generation pretrial risk assessment studies.

As of this report, there are over two dozen fourth generation pretrial risk assessment instruments, many in the public domain.[99] A key feature of nearly all these assessments is the use of static factors over dynamic factors in risk prediction.[100] Consistent with "fourth generation" risk assessment instruments, these assessments also help pretrial

[94] See Pretrial Justice Institute. *Overview of Research Findings on Pretrial Risk Assessment and Pretrial Supervision*. Washington, D.C.: Pretrial Justice Institute.

[95] Code of Virginia Title 19.2. Criminal Procedure » Chapter 9. Bail and Recognizances » Article 5. Pretrial Services Act » § 19.2-152.3. "The Department of Criminal Justice Services shall develop risk assessment and other instruments to be used by pretrial services agencies in assisting judicial officers in discharging their duties pursuant to Article 1 (§ 19.2-119 et seq.) of Chapter 9 of this title." § 19.2-152.3.

[96] VanNostrand, M. (2003). *Assessing Risk Among Pretrial Defendants in Virginia: The Virginia Pretrial Risk Assessment Instrument*. Richmond, VA: Virginia Department of Criminal Justice Services.

[97] Rose, K. "Virginia Pretrial Risk Assessment Instrument (VPRAI) & Praxis Overview." (Power Point Presentation, June 11, 2018). Richmond, VA: Virginia Department of Criminal Justice Services.

[98] VanNostrand, M., and G. Keebler (2009) Pretrial Risk Assessment in Federal Court. Federal Probation. Vol. 73 (2).

[99] Grommon, E., Ray, B., Sapp, D., and Thelin, R. (2018). *Process Evaluation of the IRAS-PAT Pilot Program Implementation Report to the Indiana Office of Court Services*. Bloomington, IN: The Indiana University School of Public and Environmental Affairs, Center for Criminal Justice Research, and School of Public and Environmental Affairs. p. 3.

[100] Mamalian, C.A. (2011). *State of the Science of Pretrial Risk Assessment*. Washington, D.C.: Pretrial Justice Institute. Citing Austin, J. and T. Murray (2009) *Re-Validation of the Actuarial Risk Assessment Instrument for Harris County Pretrial Services*. Washington. D.C.: The JFA Institute. Clark, J. and D. Levin (2007) The *Transformation of Pretrial Services in Allegheny County, Pennsylvania: Development of Best Practices and Validation of Risk Assessment*. Washington, D.C.: Pretrial Justice Institute. Lowenkamp, C., Lemke, R., and Latessa,

services agencies match monitoring and supervision strategies to assessed risk levels and factors to promote pretrial success. This report reviews several of the most popular and publicly available pretrial risk assessment instruments in a later section.

Actuarial Risk Assessment in Bail Decision-making

The Commission found a consensus in the available literature that the use of actuarial risk assessment instruments in justice, business, social science, and medical settings predicted outcomes better than professional judgment alone.[101] As described by one author:

> *Meta-analytic evidence of this trend is not limited to the criminal justice field. Grove et al. (2000) and Ægisdóttier et al. (2006) examined the predictive accuracy of professional judgment when compared to actuarial methods across several policy fields. Grove et al. (2000) reviewed 136 studies from the fields of psychology and medicine that included a wide range of prediction types, such as diagnosis of a specific disease, college academic performance, criminal recidivism, and probation success. Ægisdóttier et al. (2006) used 67 studies from the counseling psychology field to examine the prediction of a wide range of outcomes that included criminal offense or violence, academic performance, and suicide attempts. In both meta-analyses researchers found that statistical prediction methods were generally more accurate than relying solely on professional judgment and both found an overall 13% increase in predictive accuracy when using*

E. (2008). "The Development and Validation of a Pretrial Screening Tool." *Federal Probation*. Vol. 72 (3). Podkopacz, M. (2006). *Fourth Judicial District of Minnesota Pretrial Evaluation: Scale Validation Study*. Power Point Presentation. Siddiqi, Q. (2006). *Predicting the likelihood of pretrial re-arrest for violent felony offenses and examining the risk of pretrial failure among New York City defendants: An analysis of the 2001 dataset*. New York, NY: New York City Criminal Justice Agency, Inc. VanNostrand, M. (2003). *Assessing risk among pretrial defendants in Virginia: The Virginia pretrial risk assessment*. Richmond, VA: Virginia Department of Criminal Justice Services. VanNostrand, M., and G. Keebler (2009). Laura and John Arnold Foundation (2013). Developing a National Model for Pretrial Risk Assessment. Houston, TX: LJAF Foundation. Austin, J.F. and Allen, R. (2016). *Development of the Nevada Pretrial Risk Assessment System Final Report*. Washington, D.C.: JFA Institute. JFA Institute and Pretrial Justice Institute (2012). *The Colorado Pretrial Assessment Tool (CPAT)*. Washington, D.C.: PJI. Hedlund, J., Cox, S.M., and Wichrowski, S. (2003). *Validation of Connecticut's Risk Assessment for Pretrial Decision Making*. Central Connecticut State University, Department of Criminology & Criminal Justice.

[101] See Andrews & Bonta, 1998; Andrews, Bonta, & Wormith. (2006); Andrews et al., *Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis*, Criminology, Aug. 1990; Bonta, 2007; Gendreau, Little, & Goggin, 1996; Grove, W. & Meehl, P.E. *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical Statistical Controversy*, Psychology. Public Policy, and Law, 1996; Gendreau, P., Little, T. and Goggin, C. *A META-ANALYSIS OF THE PREDICTORS OF ADULT OFFENDER RECIDIVISM: WHAT WORKS!* Nov. 1996; Grove, W.M. et al., *Clinical Versus Mechanical Prediction: A Meta-Analysis*, Psychological Assessment 2000; Harris, 2006; Smith, Gendreau, & Swartz, 2009. 15 Andrews, 2007; Andrews and Bonta, 2007; Andrews & Dowden, 2007; Bonta, Wallace-Capretta, & Rooney, 2000; Lowenkamp and Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, *Topics in Community Corrections, 2004,* at 3, 6; Andrews, Bonta, and Wormith, *The Recent Past and Near Future of Risk and/or Need Assessment*, Crime & Delinquency, Jan. 1, 2006; Lowenkamp, Latessa, & Holsinger, *The Risk Principle in Action: What Have We Learned From I3,676 Offenders and 97 Correctional Programs?*, Crime and Delinquency, Jan. 2006, at 77, 89*;* Andrews and Bonta, *The Risk-Need-Responsivity Model of Assessment and Human Service in Prevention and Corrections: Crime-Prevention Jurisprudence*, The Canadian Journal of Criminology and Criminal Justice, 2007; Andrews and Bonta, *The Risk-Need-Responsivity Model of Assessment and Human Service in Prevention and Corrections: Crime-Prevention Jurisprudence*, The Canadian Journal of Criminology and Criminal Justice, 2007; Andrews and Dowden, *The Risk-Need-Responsivity model of assessment and human service in prevention and corrections: Crime-prevention* jurisprudence, Canadian Journal of Criminology and Criminal Justice, 2007; Smith, P., Gendreau, P., and Swartz, K. *Validating the Principles of Effective Intervention: A Systematic Review of the Contributions of Meta-Analysis in the Field of Corrections*, Victims & Offenders, Feb. 2009; Finch, L. and *Harris, K. in 2006*, C-SPAN (Oct, 18, 2016), https://www.c-span.org/video/?c4625856/kamala-harris-2006.

statistical methods. This means that the likelihood of a successful prediction can go up 13% when using a statistical rather than a professional judgment only approach to prediction.[102]

Actuarial prediction involves an empirical selection of factors related to the observed outcome. These risk factors are weighted consistently in each assessment, according to their observed correlation to pretrial failure. This differs from decisions based on professional judgment, where factors and their influence may differ by decision maker or case. Lacking standardized metrics, risk categorization may result in inconsistent, disparate, and potentially arbitrary recommendations.[103] Assessment instruments also increase decision making standardization and transparency, enhancing the public's confidence in how decisions are made and their outcomes. The legitimacy of a criminal justice system is enhanced when stakeholders make consistent, reliable and accurate decisions, using unbiased and proven factors.

As two authors noted:

"Every day many thousands of predictions are made by parole boards, college admission committees, psychiatric teams, and juries…. To use the less efficient of two prediction procedures in dealing with such matters is not only unscientific and irrational, it is unethical."[104]

The research also suggests that no risk assessment instrument is significantly more accurate or valid than any other. For example, a 2016 meta-analysis of 52 studies of 19 different risk assessment instruments found that no one tool stood out as being more accurate.[105] (We note that this analysis included a single pretrial risk assessment, the Ohio Risk Assessment System-Pretrial Assessment Tool. The data suggested a positive association between ORAS-PAT scores and pretrial misconduct, with higher scores correlating with an increased likelihood of pretrial misconduct and lower scores associated with infrequent pretrial misconduct).

Given that empirically designed actuarial risk instruments are relatively new to the pretrial field, the research around these instrument's predictiveness and validity is not as established as in other criminal justice areas. What is available is mixed. For example, a 2016 meta-analysis of 16 studies testing the predictiveness of pretrial risk assessments found that these instruments predicted failures to appear and a combined measure of failures to appear and rearrests, but that the predictive strength of most instruments tested was modest.[106] However, an internal report by Allegheny County (Pittsburgh), PA Pretrial Services found significant differences in total compliance rates among identified risk levels. Ninety-seven percent of low-risk defendants made all scheduled court appearances, remained arrest-free pretrial, and complied with conditions of pretrial supervision. This compared to 94 percent of "low-medium" defendants, 88 percent of "high-medium" defendants, and 76 percent of "high risk" defendants.[107] Similar differences in rates of arrest-free behavior pretrial were found in Mecklenburg County (Charlotte), NC, with 94 percent of low-risk, 91 percent of moderate risk, and 88 percent of high risk defendants remaining arrest-free

[102] Thompson, C. (2017). *Using Risk and Need Assessments to Enhance Outcomes and Reduce Disparities in the Criminal Justice System*. Washington, D.C.: National Institute of Corrections.
[103] Cooprider, K. *Pretrial Risk Assessment and Case Classification: A Case Study*, Federal Probation, June 2009. Lowenkamp and Whetzel. (2009).
[104] Grove & Meehl (1996)
[105] Desmarais, S. L., Johnson, K. L., and Singh, J. P. (2016). Performance of recidivism risk assessment instruments in U.S. correctional settings. *Psychological Services*, 13(3), 206-222.
[106] Bechtel, K., Holsinger, A. M., Lowenkamp, C. T., & Warren, M J. (2016). "A meta-analytic review of pretrial research: Risk assessment, bond type, and interventions." *American Journal of Criminal Justice*. DOI: 10.1007/x12103-016-9367-1.
[107] Collins, K. (2018). *Allegheny County Pretrial Services Outcome Reports: 2018*. Pittsburgh, PA: Allegheny County Pretrial Services.

pretrial.[108] El Paso County, TX's pretrial risk validation study found a total compliance rate of 85.2 percent for low risk defendants, 63.8 percent for "below average" defendants, 55.7 percent for "average" defendants, 55.4 percent for "above average" defendants, and 40 percent for high risk defendants.[109] A validation study of the VPRAI in Riverside, CA found that a version of that risk assessment with three risk levels (0-2, 3-4, and 5+) yielded differences in total failure rates of 88.4 percent, 70.8 percent, and 62 percent, respectively.[110]

While the literature is still developing,[111] what is available suggests that these instruments can greatly benefit bail decision making and help assure the least restrictive means needed to public safety and court appearance. However, while superior to decisions based on clinical judgment, actuarial instruments "cannot anticipate every possible case or scenario."[112] The relative strength of pretrial risk assessments noted in the research suggest further that these instruments are best used in conjunction with other mitigating and aggravating factors known about the defendant at bail setting.

The Commission's review of pretrial risk assessment instruments identified more similarities among these instruments than differences. For example, while there is wide variation among risk assessments in the number of risk factors used,[113] generally pretrial risk assessments consist of between eight to ten risk factors. The most common factors are:

- current offense charge
- prior convictions
- prior incarcerations
- pending offense charge(s)
- employment.[114]
- history of failure to appear
- residence
- age
- substance abuse

The following chart from Grommon, et. al. (2018)[115] shows the distribution of risk factors among an array of risk assessments:

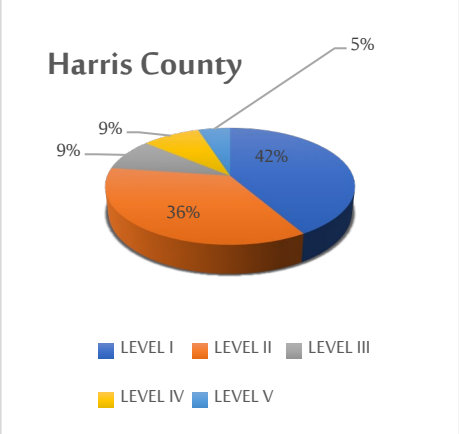
[108] Data from e-mail correspondence with Mecklenburg County Pretrial Services Director, November 2, 2017.
[109] Debora, J.L. and Meils, J. (2019). *The County of El Paso, Texas Assessing Risk Among Pretrial Defendants in El Paso County: Validation of the El Paso Pretrial Risk Assessment Instrument and Revision Recommendations*. El Paso, TX: County of El Paso, TX.
[110] Lovins, B. and Lovins, L. (2016). *Riverside Pretrial Assistance to California Counties (PACC) Project Validation of a Pretrial Risk Assessment Tool Report*. Boston, MA: Crime and Justice Institute.
[111] Fuller discussions about the state of pretrial risk assessment science can be found at Stevenson, M. Assessing Risk Assessment 4 (George Mason Univ. Law & Econ. Research Paper, Working Paper No. 17-36, 2017) (on file with Harvard Law School Library). Van Nostrand, M. (2007). Levin, D. (2007). *Examining the Efficacy of Pretrial Release Conditions, Sanctions and Screening with the State Court Processing Statistics Data series*. Washington, DC: Pretrial Justice Institute. VanNostrand, M., and Rose, K. (2009).
[112] Latessa, E., et al. (2009). Creation and Validation of the Ohio Risk Assessment System: Final Report. Columbus, OH: Ohio Department of Rehabilitation and Correction.
[113] Factors ranged from six (Iowa's Fifth Judicial District; Prell, L. (2008). *Validation of the Fifth Judicial District Pretrial Release Point Schedule on Polk County defendants*. Des Moines, IA: Iowa Department of Corrections.) to over 50 (District of Columbia; Lotze, E., Clark, J., Henry, D. A., & Juszkiewicz, J. (1999). *The pretrial services reference book: History, challenges, programming*. Washington, DC: Pretrial Services Resource Center.)
[114] Mamalian, C.A. (2011).
[115] Grommon, E., Ray, B., Sapp, D., and Thelin, R. (2018). *Process Evaluation of the IRAS-PAT Pilot Program Implementation Report to the Indiana Office of Court Services*

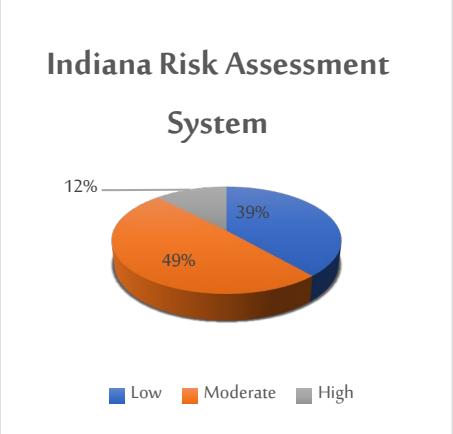
Exhibit 3. Comparison of Risk Assessment Instruments

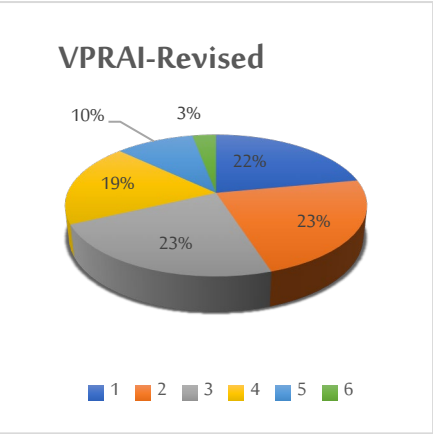
	IRAS	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24
Defendant Characteristics																									
Age	•	•				•	•	•				•	•	•		•		•		•	•	•		•	
Mental health history									•			•		•	•										•
Substance abuse	•				•		•	•	•	•	•	•	•	•	•	•	•						•	•	•
Criminal History																									
Criminal history	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•
Past release failures	•	•		•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•
Pending cases		•		•	•		•	•		•	•			•	•	•	•	•	•				•	•	•
Current offense		•			•	•	•	•			•	•			•	•	•	•			•		•		
Financial Indicators																									
Employment history	•		•	•	•	•	•		•	•		•	•	•	•	•	•	•		•	•	•	•	•	•
Education									•						•	•									•
Financial assets			•	•					•		•			•	•	•									•
Home owner				•			•							•		•									
Phone Access				•								•		•		•				•					
Social Ties																									
Residential stability	•		•		•	•		•	•	•	•	•	•			•	•	•			•	•	•	•	
Residential arrangement			•			•		•							•	•				•					•
Marital status			•									•			•					•					•
Available guarantors			•	•					•		•				•										•
Number of Items	7	9	7	6	9	9	9	22	6	9	12	11	7	12	11	30	8	13	7	8	16	7	9	12	14

1. Public Safety Assessment (PSA) Tool (aka Arnold Instrument)
2. Philadelphia (PA) Bail Experiment (aka Vera Instrument)
3. New York City (NY) Pretrial Risk Assessment Instrument.
4. Lake County (IL) Pretrial Risk Assessment Instrument.
5. Minnesota 4th Judicial District Pretrial Evaluation Scale.
6. Allegheny Pretrial Services Risk Assessment.
7. District of Columbia Pretrial Risk Assessment.
8. Iowa 5th Judicial District Pretrial Release Point Schedule.
9. Virginia Pretrial Risk Assessment Instrument.
10. Kentucky Pretrial Risk Assessment Instrument.
11. Florida Pretrial Risk Assessment Instrument.
12. Ohio Risk Assessment System (Same as IRAS-PAT).
13. Colorado Pretrial Risk Assessment Tool.
14. Connecticut Pretrial Risk Assessment Instrument.
15. Coconino County (AZ) Pretrial Services Risk Assessment.
16. Mecklenberg County (NC) Pretrial Risk Assessment Praxis.
17. Lee County (FL) Risk Assessment Tool.
18. Maryland Pretrial Risk Assessment Tool.
19. Harris County (TX) Pretrial Services Point Scale.
20. Ramsey County (MN) Pretrial Evaluation Point Scale.
21. Monroe County (NY) Pretrial services Point Scale.
22. Summit County (OH) Pretrial Risk Assessment.
23. County of Orange (CA) Pretrial Risk Assessment.
24. Connecticut Pretrial Risk Assessment.

Pretrial risk instruments tend to assign similar proportions of defendants to similar risk levels. According to data from NIC and NAPSA, assessments such as the PSA (Harris County, TX), Indiana Risk Assessment Instrument (IRAS, in 13 jurisdictions in Indiana), and the VPRAI (commonwealth of Virginia) tend to assign defendants into low-to-moderate risk levels.[116]







All pretrial risk assessments produce a single "product" namely, a categorical description of defendant risk. This is true even for the PSA, which measures risk along three dimensions but reports it as a singular "Level" with suggested conditions.

[116] See Kennedy, S. (2019). *A Framework for Pretrial Justice* Power Point.

Given reliance on criminal history, all risk assessment instruments will require a commitment in resources and training. A need for accuracy will mean improvements to information management and use.

Specific Risk Assessment Instruments Review

The Commission identified three "public-domain" risk assessment instruments in use nationwide and by Illinois courts that met the criteria of being developed specifically for pretrial defendants through research on defendant populations. These were:

1. The Arnold Ventures, L.L.C. Public Safety Assessment (PSA).
2. Virginia Pretrial Risk Assessment Instrument-Revised (VPRAI-Revised).
3. Ohio Risk Assessment System-Pretrial Assessment Tool. (ORAS-PAT).[117]

We compared each risk assessment tool against generally acknowledged standards for risk instruments:

- *Accuracy*, or how well the assessment truly measures the likelihood of pretrial misconduct.
- *Validity*, whether the assessment measures what it purports to measure.[118]
- *Transparency*, or whether the instrument's risk factors, and weighting criteria are known publicly.
- *Reliability*, or how well a single rater and rater groups agree in their assessment of similar defendants.[119]

The Commission also considered whether each risk assessment instrument had been revalidated, how often, in how many jurisdictions and whether initial assessment development or later revalidations considered and attempted to alleviate the likelihood of racial, gender, or ethnic bias. Finally, the Commission reviewed available post-validation data showing assessment outcomes by risk levels.

The Commission did not find a particular pretrial risk assessment instrument it considered a "best fit" for all Illinois court systems. Further, other states reviewing the feasibility of a single pretrial risk assessment took varying strategies. For example, Indiana implemented a revised version of another state's risk assessment system, the ORAS. New Jersey implemented the PSA statewide, while Virginia, Alaska, Colorado, and Nevada developed their own empirical instruments. Until an Illinois specific instrument is developed, departments should either maintain status quo by continuing to use the risk assessment instrument they are using, or, if no instrument is being utilized, they shall utilize one of the following validated instruments: PSA, VPRAI- Revised or the ORAS-PAT. Below is a review of the three pretrial risk assessment instruments being utilized in Illinois.

[117] Indiana developed a risk assessment matching the ORAS-PAT (the Indiana Risk Assessment System, or IRAS). The state is piloting that instrument and pretrial services agencies in 13 counties. Where appropriate, the Committee included data regarding that risk assessment in our discussion of the ORAS-PAT.

[118] This includes internal validity (are the results valid for the study subjects), external validity (are the results valid for the universe of defendants), and face validity (do observers view the assessment as accurate).

[119] This includes 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).

The Public Safety Assessment (PSA)

Arnold Ventures, LLC (formerly the Laura and John Arnold Foundation) created the PSA as a model national pretrial risk assessment. The PSA consists of nine static factors: age at current arrest, current violence offense, pending charge at time of arrest, prior misdemeanor conviction, prior felony conviction, prior violent conviction, prior failures to appear pretrial in the past two years, prior failures to appear pretrial older than two years, and prior sentence to incarceration. The instrument measures three risk dimensions: failure to appear, new criminal activity, and new violent criminal activity. As of this report, the PSA is used in approximately 218 jurisdictions and statewide in Arizona, Kentucky, New Jersey, and Utah.

Arnold Ventures created the PSA based on 750,000 cases from jurisdictions nationwide, then piloted and researched the draft assessment in Kentucky.[120] Evaluators found a correlation between PSA risk scores and pretrial misconduct, with the proportion of negative outcomes increased with each additional risk score.[121] For example, six percent of low-risk assessed defendants and 20 percent of high-risk defendants failed to appear for court. In assessing the rates of predicted true positives (i.e., low-risk defendants having no pretrial misconduct) and false positives (high-risk defendants with no pretrial misconducts), evaluators found the PSA moderately predictive, but not meeting "the commonly accepted target for risk assessment research."[122] Another study of classifications by race and gender found similar rates of pretrial misconduct by risk levels among these demographics.[123]

The PSA meets all recognized standards for criminal justice risk assessments. It also is the only pretrial instrument in the public domain that yields separate assessments of the likelihood of a missed court appearance, new arrest pretrial, and new arrest on a violent charge.[124] The PSA was validated in Kentucky and Volusia County, FL.[125] Arnold Ventures also plans validation studies in jurisdictions nationwide.[126] Illinois three pilot sites that are using the PSA (Cook, Kane, McLean) are in process of a validation through Arnold Ventures. Consistent with "fourth generation" risk assessments, the PSA includes companion "release condition matrices" to suggest appropriate supervision levels and conditions for each risk level. Finally, the PSA is the best supported of the public domain assessment instruments, with training, implementation, research and technical assistance available through Arnold Ventures (see psapretrial.org) and its partner agency, the Center for Effective Public Policy (see cepp.com).

While the PSA assesses FTA and rearrests risk separately, it combines these assessments into a single "level." This could diminish the value of the separate assessments. For example, the Arnold Venture's suggested release condition matrix assigns the same level of supervision and conditions to defendants who are low risk for FTA (FTA Level 2)

[120] Laura and John Arnold Foundation. (2013). *Developing a national model for pretrial risk assessment*. Kentucky was purposely selected as a research site because of its use of a statewide interview-based pretrial risk assessment tool as well as for the state's recognition of being a leader in pretrial service operations.
[121] VanNostrand, M. and Lowenkamp, C. T. (2013). Assessing pretrial risk without a defendant interview.
[122] *Id at p.17*.
[123] Laura and John Arnold Foundation. (2014). *Results from the first six months of the public safety assessment – court in Kentucky*. Houston, TX: Laura and John Arnold Foundation. With a sample of 56,866 defendants, 45 percent of females and 41 percent of males assessed as high risk for pretrial misconduct and were rearrested pretrial, failed to appear or both. 42 percent of Whites and 41 percent of Blacks assessed as high risk and had at least one pretrial misconduct.
[124] Of all risk instruments observed, only the PSA and the Alaska and Washington, D.C. proprietary risk assessments have these features.
[125] Brittain, B. (2018). EXAMINING THE PSA IN VOLUSIA COUNTY, FL
[126] See https://www.psapretrial.org/advancingpretrial.

and high risk for rearrest ("NCA" Level 5) as for defendants that are high risk of FTA (FTA Level 5) and low risk for rearrest (NCA Level 2).[127] This assumes that similar levels of supervision and conditions can alleviate very differing types and levels of pretrial misconduct. The use of frameworks and matrices for bail recommendations also foster "blanket conditioning"—assigning supervision levels and conditions that are not individualized to a defendant.

The PSA does not support the adjusted actuarial approach to risk assessment and bail recommendation. One of the "strengths" to the PSA often noted is the absence for a defendant interview. However, both Illinois law and the national standards for the ABA and NAPSA require and recommend a defendant interview be completed.[128]

Jurisdictions adopting the PSA must decide how best to interpret the assessment's Violence Indicator. For example, data from Cook County show that between October 1, 2017 and June 30, 2019, less than one percent of released felony defendants were charged with a new violent offense pretrial. Defendants with a violence flag designation were more likely statistically than other defendants to be charged with a new violent offense (1.2% compared to 0.6%).[129] However, for some jurisdictions, such a difference in violent rearrest rates may not warrant automatic recommendations to higher (and more expensive) levels of pretrial supervision.

Similar to other assessments here, the PSA is resource intensive in its implementation and application. The assessment requires automation for quality assurance, quality control, and tracking of bail recommendations and decisions. The PSA also requires a jurisdiction to access local, state, and national criminal history databases to apply the instrument correctly. As mentioned above, Arnold Ventures offers extensive technical support for the PSA through its psapretrial.org website and the Center for Effective Public Policy (CEPP).

Below are some identified advantages and disadvantages of utilizing the risk assessment instrument:

Advantages

- Meets all ratings criteria
- Validated in multiple sites
- Includes release conditions matrix
- Measures Failure to Appear and New Criminal Activity separately

Disadvantages

- Matrix may encourage blanket conditions
- Cost associated with implementation

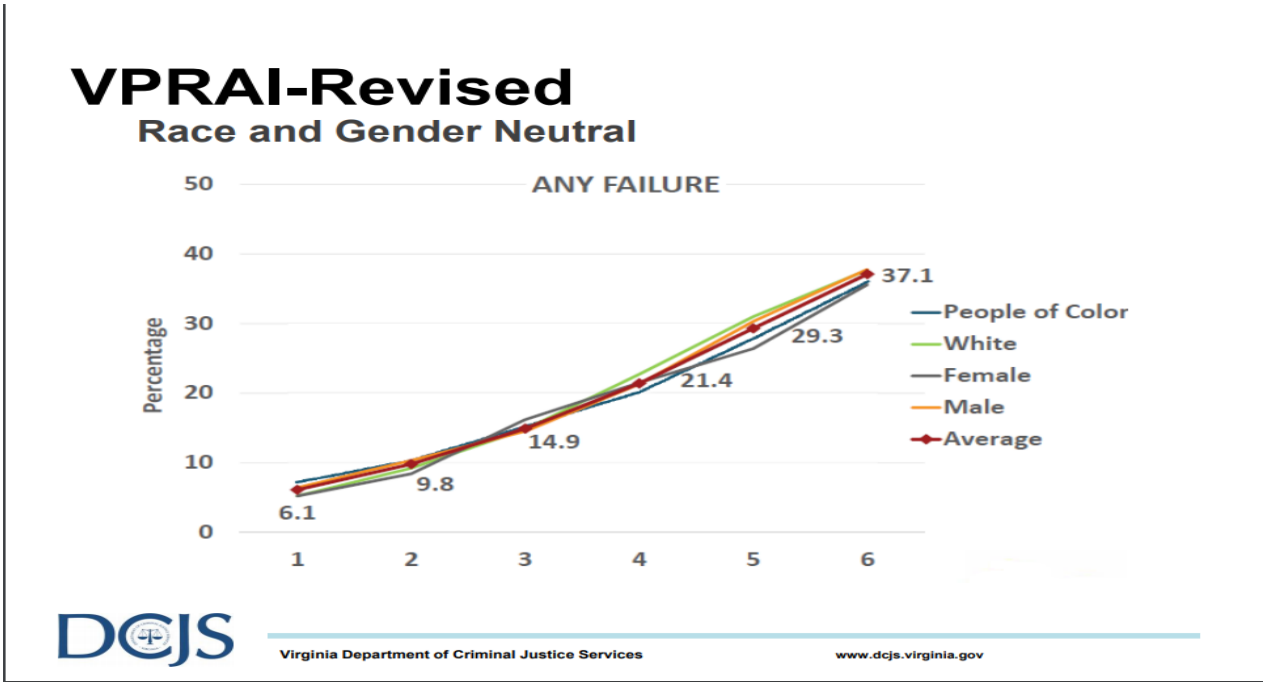
Virginia Pretrial Risk Assessment Instrument-Revised (VPRAI)

The current revised version of the VPRAI includes eight risk factors (Current Charge is a felony drug, theft, or fraud, Currently Under Active Community Supervision, Pending charge, Criminal history, Two or more failure to appear,

[127] See https://www.psapretrial.org/implementation/guides/managing-risk/guide-to-the-release-conditions-matrix.
[128] 725 ILCS 185/7
[129] http://www.cookcountycourt.org/Portals/0/Chief%20Judge/Model%20Bond%20Court/Q2%202019/2019%20Q2%20MBC%20Public%20Facing%20Dashboard%2008.13.19.pdf

Two or more violent convictions, Unemployed at time of arrest, and History of drug abuse) yielding six distinct risk levels. Validations of the instrument show a consistent correlation between risk scores and pretrial misconduct. For example, a 2016 re-validation study found that defendants categorized as "Low" had a failure rate of 4.6 percent, "Below Average" defendants' 8.5 percent, "Average" defendants' 13.6 percent, "Above Average" defendants' 18.2 percent, and "High" defendants' 24.5 percent. [130] Evaluators rated the VPRAI-revised predictive ability as "good."[131]

An analysis of risk levels by race categories found no statistically significant differences in predictive ability between White and Black defendants. Taken as a whole, the analysis supports the neutrality of the VPRAI in classifying persons of color and whites by risk of pretrial failure.[132]



[133]

The VPRAI is distinctive for having been validated more often than any other pretrial risk assessment instrument. One of the important steps in developing a pretrial tool is to examine the effectiveness of such a tool to predict for subpopulations of the larger group.[134] In this case, of most interest is the instrument's ability to predict failure by gender and race to ensure that women and people of color are not over-classified in higher risk categories than for the other populations.

Below are some identified advantages and disadvantages of utilizing the risk assessment instrument:

<u>Advantages</u>

[130] Danner, M.J.E., VanNostrand, M., and Spruance, L.M. (2016). *Race and Gender Neutral Pretrial Risk Assessment, Release Recommendations, and Supervision: VPRAI and Praxis Revised*. St. Petersburg, FL: Luminosity, Inc. p. 5.
[131] *Id*. at p. 6.
[132] *Id*. at p. 8.
[133] Chart used with permission from Kenneth Rose, Virginia Department of Criminal Justice Services
[134] Riverside Pretrial Assistance to California Counties (PACC) Project; Pg.14

- Meets all ratings criteria
- Validation in sites besides original (although with alterations to risk scores)
- Includes supervision matrix
- Ease of implementation
- Relatively low cost for implementation

Disadvantages

- Does not measure misconduct separately
- Matrix may encourage blanket conditions
- Minimal support of actuarial approach
- Need for expert training

Ohio Risk Assessment System-PAT (ORAS-PAT)/IRAS

The Ohio Risk Assessment System consists of five separate instruments—including the Pretrial Assessment Tool (PAT)—used at different decision points across the justice system. The ORAS-PAT has seven risk factors (Age at first arrest; FTA's within the past 24 months; 3 or more incarcerations; employment status at time of arrest; current residence in the past 6 months; illegal drug use in the past 6 months; and severe drug-related problems in the past 6 months) across criminal history, employment, residential stability, and substance abuse dimensions.[135] Researchers constructed the ORAS-PAT through structured interviews and self-report questionnaires with adult defendants in seven Ohio counties, selected for their geographic location across the state. The final sample consisted of 452 defendants. Researchers used two data samples (a 10-month period from 2006-2007 and a six-month period in 2008-2009). Researchers examined the predictive validity of the tool by determining the percent of defendants within each of the three risk classifications who had at least one pretrial misconduct within the one-year follow-up period. Visual "stair-step" patterns emerged as the likelihood for pretrial misconduct increased with movement from low to high risk classifications. Sampled defendants trended to lower scores, with a modal risk score of four within a range from zero to nine). Almost half the sample (47%) scored between zero and three. Risk scores were positively, but weakly (r=.22) correlated with failure to appear and new arrest one year after defendants were surveyed.[136]

Due to limitations in assessment development and testing, the researchers encouraged replication and revalidation studies. Their recommendations included the construction of more representative samples, oversampling of underrepresented groups, extended follow-up periods, and careful attention to measurement error.[137]

Researchers found the ORAS-PAT had a moderate predictive accuracy to pretrial misconduct. The assessment also suffered from a relatively small sample of pretrial defendants. However, an identical risk assessment instrument, the IRAS-PAT, is being evaluated in 13 jurisdictions in Indiana. Preliminary results show overall risk categorization is consistent with national trends with most arrestees assessing as moderate and low risk.[138]

[135] Latessa, et. al. (2009).
[136] The correlation coefficient (r) measures the strength and direction of a linear relationship between two variables. r values fall between +1 and –1, with +1 showing a perfect positive linear relationship. Generally, r scores below +0.30 are considered weak.
[137] Latessa, et. al. (2009)
[138] Grommon, et. al. (2018).

A unique feature of the ORAS-PAT is its internal support of an adjusted actuarial risk assessment approach. After scoring a defendant on the assessment, raters may apply a "professional override" for specific aggravating or mitigating factors. For Ohio counties,[139] these include:

- Low Intelligence
- Physical Handicap
- Reading and Writing Limitations
- Mental Health Issues
- No Desire to Change/Participate in Programs
- Transportation
- Child Care
- Language
- Ethnicity
- Cultural Barriers
- History of Abuse/Neglect
- Interpersonal Anxiety
- Other ___

However, the ORAS-PAT developers do not explain how or why these factors were chosen, give a definition for any (for example, "low" intelligence), which should be considered aggravating or mitigating, nor the procedures to apply them. Further, many of these factors appear better suited to community corrections populations than pretrial defendants.

Ventura County (California) is currently assessing the use of ORAS in a validation study. Results have not yet been published.

Below are some identified advantages and disadvantages of utilizing the risk assessment instrument:

<u>Advantages</u>

- Meets accuracy, validity, transparency, and reliability criteria
- Supports the use of mitigating or aggravating factors in bail recommendations
- Relatively low cost for implementation

<u>Disadvantages</u>

- Does not meet bias consideration and post-validation (though the latter is occurring in Indiana)

[139] Each locality adopting the ORAS-PAT may choose its own override factors.

RISK ASSESSMENTS BY COMPARISON CRITERIA

CRITERION	PSA	VPRAI	ORAS-PAT
ACCURACY	☑	☑	☑
VALIDITY	☑	☑	☑
TRANSPARENCY	☑	☑	☑
RELIABILITY	☑	☑	☑
BIAS CONSIDERED	☑	☑	☒
POST-VALIDATION	☑	☑	☒

A Consideration of Racial and Ethnic Bias

While the Commission recommends the use of validated actuarial pretrial risk assessment instruments, it recognizes limitations of and potential issues with this approach. These instruments' have potential for inherent racial and ethnic bias.[140] Most pretrial risk assessment instruments use previous failures to appear, criminal convictions, and prior incarcerations as their main risk factors and each of these factors has a historic and pervasive association with racial and ethnic bias.[141] Further, mitigating or aggravating factors known at bail setting (such as residence and employment) also may have some degree of bias. However, the literature seems to indicate that racial bias may not be as problematic as some critics of these instruments assert. For example, an evaluation of the FPRAI—using data from 35,000 federal prisoners—found that the risk assessment instrument predicted post-release arrests similarly across African-American and white offender populations.[142] A 2010 meta-review of forensic risk assessment

[140] See Skeem, J.L. and Lowenkamp, C.T. *Risk, race, and recidivism: Predictive bias and disparate impact*, Criminology: An Interdisciplinary Journal, 2016, http://ssrn.com/abstract=2687339; Angwin, J. et al., *Machine Bias: There's software used across the country to predict future criminals. And it's biased against blacks,* (2016) ProPublica, https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing. *See also* McCoy, C. 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.). *See also* Breaux, J. and Ho, H. *Could risk assessment contribute to racial disparity in the justice system?* Urban Institute: Urban Wire:: Crime and Justice (Aug. 11, 2014), https://www.urban.org/urban-wire/could-risk-assessment-contribute-racial-disparity-justice-system (making similar arguments in the context of sentencing and probation revocation).

[141] See Laura & John Arnold Foundation, The Public Safety Assessment–Court Analysis of Race and Gender. New York, NY: LJAF. Mona J.E., Danner, VanNostrand, M. and Spruance, L.M. (2016). Race and Gender Neutral Pretrial Risk Assessment, Release Recommendations, and Supervision: VPRAI and Praxis Revised. XX, XX: Luminosity, Inc.

[142] Community Corrections Collaborative Network (2017). Using Risk and Need Assessments to Enhance Outcomes and Reduce Disparities in the Criminal Justice System. Washington, D.C.: National Institute of Corrections at p. 6, (referencing Skeem, J. L. & Lowenkamp, C. T. Risk, race, and recidivism: Predictive bias and disparate impact, Criminology: An Interdisciplinary Journal, 2016).

instruments found eight evaluations that examined race, ethnicity and the predictive accuracy of risk and need assessments. Five meta-analyses found that predictive accuracy did not vary by the race or ethnicity of the sample. Three remaining meta-analyses found predictive accuracy increased as the number of white individuals increased. However, the authors cautioned that these studies did not conduct pairwise comparisons between ethnic groups and that post hoc analyses would be necessary to clarify these findings.[143] As stated earlier in this report, the Revised-VPRAI was found not to be racially biased.

A similar body of research is developing in the pretrial field, most of which suggests that assessment instruments can be neutral on race and ethnicity.[144] To help ensure that neutrality, the Commission recommends that jurisdictions adopting them must validate them on the defendant population on which they are used. Validation should gauge the local correlation of race and ethnicity to pretrial failure and risk levels. The effective use of properly validated risk and needs assessment can potentially help to limit racial bias in decision making in the criminal justice system by providing an evidence-based assessment of criminogenic risk factors and needs.

Stakeholders also should ensure that risk assessment instruments are used for their intended purposes. Recidivism-based assessments should not be used to predict failure to appear. Needs assessments for substance abuse and mental health needs should not be used as global assessments of new criminal arrests or condition compliance. Proper assessment use also requires training of staff who administer it and stakeholders that use the results for decision making. Actuarial assessments do not fully eliminate racial and socio-economic bias. However, they can lessen that bias better and more consistently than clinical judgment.[145]

Illinois law requires courts to set bail that is 1) individualized to specific defendant risk and 2) the least restrictive means needed to reasonably assure arrest-free behavior and court appearance. To meet these requirements, the Commission recommends that Illinois courts employ validated pretrial risk assessment instruments to inform bail decision-making. We base this recommendation on the literature showing that, when used properly, risk assessment instruments predict the likelihood of pretrial failure more accurately than unstructured professional judgment. "Fourth Generation" risk assessment instruments can also aid courts in identifying levels and conditions of pretrial monitoring and supervision that are most appropriate to the assessed risk level. As part of an "adjusted actuarial approach," (where courts consider risk assessment results with other relevant defendant and charge information in bail decision-making), risk assessment instruments can help ensure fair and effective bail decisions.

Several pretrial risk assessment instruments are in the public domain and in use by Illinois court systems and nationwide. The Commission identified those assessments (Revised-VPRAI, ORAS-PAT, PSA) that classify

[143] *Id at p.6* referencing Edens, J.F., Campbell, J.S., and Weir, J.M. "Youth Psychopathy and Criminal Recidivism: A Meta-Analysis of the Psychopathy Checklist Measures." Law and Human Behavior February 2007, Volume 31, Issue 1 pp. 53-57. Skeem, J.L, Edens, J.F., Camp, J., and Colwell, L.H. "Are There Ethnic Differences in Levels of Psychopathy? A Meta-Analysis Law and Human Behavior." Law and Human Behavior, October 2004, Vol. 28, Issue No. 5, pp. 505-527.

[144] See Flores. A.W., Bechtel, K. and Lowenkamp, C.T. *False Positives, False Negatives, and False Analyses: A Rejoinder to "Machine Bias: There's Software Used Across the Country to Predict Future Criminals. And It's Biased Against Blacks,"* Federal Probation, Sept. 2016; DeMichele, M., Baumgartner, P., Wenger, M., Barrick, K., Comfort, M., and Misra, S. *The Public Safety Assessment: A Re-Validation and Assessment of Predictive Utility and Differential Prediction by Race and Gender in Kentucky.* Available at SSRN: https://ssrn.com/abstract=3168452 or http://dx.doi.org/10.2139/ssrn.3168452. Danner, VanNostrand, and Spruance, L.M. (2016). Laura and John Arnold Foundation (2014).

[145] Mayson, S.G. (2018). Bias In Bias Out 128 Yale Law Journal (2019 Forthcoming); University of Georgia School of Law Legal Studies Research Paper No. 2018-35. Available at SSRN: https://ssrn.com/abstract=3257004. Goel, S., Shroff, R., Skeem, J.L. and Slobogin, C. (2018). *The Accuracy, Equity, and Jurisprudence of Criminal Risk Assessment.* Available at SSRN: https://ssrn.com/abstract=3306723 or http://dx.doi.org/10.2139/ssrn.3306723

defendant likelihood of court appearance and arrest-free behavior based on factors shown empirically to best predict these outcomes. Each assessment presented specific advantages and issues associated with its implementation and use. However, all:

1. Feature a common set of risk factors usually weighted comparably
2. Produce a single "product," a categorical description of defendant risk
3. Yield similar rates of validity and accuracy
4. Require similar resources and training

Acknowledging that there are no pretrial policies or practices that can be implemented to ***ensure*** a defendant released from custody will not commit a new offense and return to court during the pretrial phase of their case, we must be cognizant that "Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice."[146]

Implementation:

Given its review of risk assessment instruments and the experiences of other states in this area, the Commission offers a short-term and long-term recommendation for implementation of these instruments state-wide. Short term, we recommend that localities have the freedom to choose the pretrial risk assessment instrument (PSA, Revised-VPRAI, ORAS/IRAS-PAT) they believe best suits their court system, defendant population, and resources. Long term, the Commission recommends the development of a statewide pretrial risk assessment instrument for reasons previously stated in the report. Illinois should adopt specific and enforceable accreditation requirements with the development of its own pretrial risk assessment instrument to include, but not limited to:

- Validation by local or national research that ensures the instrument's validity and accuracy
- Assurance that the instrument is supported by available local data
- That the instrument is transparent regarding the risk factors uses, weighting, and assessment results
- Locally produced pretrial outcomes
- Regular revalidation based on the locality's defendant population

The Commission did not reach a consensus regarding this majority recommendation. The minority vote recommended that the PSA should be implemented statewide during the interim period of development for a statewide tool. The majority of Commission members believed that due to the significant implementation cost associated with the Public Safety Assessment, those financial resources would be better allocated to our long- term goal.

With the reliance of all pretrial risk assessments on criminal history, any risk instrument or strategy will require a commitment of state-wide resources and training. Most important will be the necessity of a uniform statewide data collection system. Without accurate criminal history data collected consistently across the state, there is no way to validate any pretrial risk assessment instrument.

[146] *Stack*, 342 U.S. at 8 (Jackson, J., concurring).

Pretrial Supervision and Conditions

The Administrative Office of the Illinois Courts should adopt a mission and vision statement for pretrial supervision.

Conditions and supervision shall be based on the least restrictive means and focus only on requirements directly related to reasonably assuring community safety and a defendant's appearance as required in court.

Conditions and supervision shall not mandate rehabilitative services (substance abuse, mental health, etc.) unless the court finds them to be a risk factor directly related to further criminal behavior and failure to appear at court hearings. The inability to pay for such court-ordered services shall not interfere with release.

Conditions and supervision shall not include punitive measures (community service, restitution).

Once an individual is ordered to pretrial supervision, pretrial services agencies shall meet with the individual to review the court ordered conditions, establish expectations during pretrial supervision, answer questions and review future court appointments.

Pretrial services agencies shall monitor and maintain a record of the defendant's compliance with conditions of release.

Pretrial services agencies shall implement a system of court date reminders (including location, date, and time of the court appearance). Reminders should be provided 1-3 days prior to each scheduled court appearance.

Each jurisdiction shall develop and approve a local process to promptly notify the court of facts concerning compliance or noncompliance that may warrant modification of release conditions and of any arrest of an individual released pending further court appearances. Additionally, the response to the defendant's conduct shall be timely and meaningful.

Electronic monitoring is available for pretrial supervision; however, its use should be limited and specific to a condition that requires close monitoring. Should electronic monitoring be ordered as a condition of release, no defendant shall remain in jail or have their supervision revoked due to their inability to pay electronic monitoring fees. Further research on electronic monitoring and its impact on pretrial success is recommended.

It is recognized there will be protected person(s) identified as a part of defendants' pretrial release. In these instances, conditions of no contact and/or stay away orders are appropriate. Judges should determine, based on risk, whether these conditions may require electronic monitoring as detailed in the Domestic Violence Surveillance Program (730 ILCS 5/5 8A-7).

Office visits shall be purposeful and used only to promote pretrial success. Office visits should not interfere with defendant protective factors, such as work and school.

Research shall be conducted on home and field contacts in relation to pretrial success.

Court ordered conditions of release shall be individualized in accordance with the defendant's identified level of risk to reasonably assure public safety and guard against non-court appearance during the pretrial phase of the case.

Supervision

Commentary:

Pretrial supervision policies and practices often mirror those used post-conviction, especially when pretrial services agencies function within probation departments. This administrative placement is common in Illinois, where pretrial agencies and probation departments are funded by each respective county.

The Illinois Pretrial Services Act provides a broad framework for monitoring defendants on pretrial supervision.[147] The statutory requirements are as follows: 1) supervise compliance with pretrial release conditions and promptly report violations of those conditions to the court and prosecutor to assure effective enforcement; 2) supervise compliance with the terms and conditions imposed by the courts for appeal bonds. [148] While the laws require supervision, there is no statutory requirement for individualized supervision."[149]

Research on effective pretrial supervision is not robust. Evidence from high functioning pretrial systems and agencies shows that lower levels of supervision for low to moderate risk defendants promote pretrial success while more stringent supervision requirements for this group contributes to pretrial failure.[150] Thus, utilizing least restrictive supervision strategies can reasonably assure safety to the community and reappearance in court. One researcher summarized the connection between risk principle and the law by stating *"the law tells us that a person has the right to release on the least restrictive terms and conditions, and the research tells us that [such release is] going to produce the best outcomes."*[151] Unlike post-conviction, in which supervision is primarily focused on recidivism and restorative justice, promoting pretrial success involves reasonably assuring that pretrial released defendants are not rearrested and reappear in court while awaiting disposition of their criminal case.

According to research, the only proven effective supervision strategy is court reminder notifications. In 2012, a report on the Jefferson County, NE Failure to Appear project and Resulting Court Date Notification Program, found that when defendants were reminded of their court dates, the court appearance rate was increased from 79% to 88%.[152] However, willful versus non-willful is generally not considered when warrants are issued for defendants who fail to appear in court.

The monitoring and supervision of defendants released pretrial is a critical and supportive function of pretrial service agencies to the court. While equally important functions, there is clear distinction between monitoring and supervision. Monitoring is utilized for the lowest risk defendants that according to the risk principle only need to be reminded of their court date. Supervision involves more intensive resources to monitor a defendant's compliance with a court-ordered condition or combination of conditions to reasonably assure safety to the community and

[147] NAPSA and ABA Standards also provide a blueprint for implementing legal and evidence-based pretrial supervision.
[148] *Illinois Pretrial Services Act* 725 ILCS 185/7c and 8a
[149] *Pretrial Services Reference Book (December 1999),* p.24
[150] Christopher T. Lowenkamp, Marie VanNostrand, Ph.D. "Exploring the Impact of Supervision on Pretrial Outcomes," Laura and John Arnold Foundation (Nov. 2013)
[151] *National Symposium on Pretrial Release: Summary Report of Proceedings (Bureaus of Justice Assistance, 2012), pg. 21.*
[152] *Increasing Court Appearance Rates and Other benefits of Live- Caller Telephone Court Date Reminders (2012). Court Review: The Journal of the American Judges Association. Pg. 89*

reappearance in court. For those defendants placed on pretrial supervision, the Illinois Pretrial Services Act[153] states the pretrial agency is responsible for the following: *"Supervise compliance with pretrial release conditions, and promptly report violations of those conditions to the court and prosecutor to assure effective enforcement"*

To conform to Illinois legal standards, the conditions of pretrial release must be the least restrictive needed to reasonably assure public safety and court appearance. Equally important is the process for responding to violations of pretrial supervision. There should be a varying degree of practice for responding to technical violations as opposed to statutory violations. Initial technical infractions should be handled administratively by the pretrial service agency, with notice to the court of any technical violations and the administered sanctions. Once a defendant meets a pre-defined threshold for non-compliance, the pretrial service agency should request court intervention. All notifications to the court regarding defendant behavior should include supporting documentation for the court to consider possible bail modification.

Implementation

Implementing pretrial supervision will require commitment to sufficient staffing and other resources, as well as, local county board support. The Supreme Court's budget for fiscal year 2020 included $4 million for pretrial positions. A total of 125 pretrial positions were requested by counties throughout the state, which costs $3.2 million. However, funding positions with county funds may be difficult because the counties must cover the fringe benefit which costs approximately 40% of the employee's salary and requires approval from county boards. This approval process may be contentious given the uncertainty of counties reimbursement from the Administrative Office of the Illinois Courts (AOIC), which is contingent upon the Court's budget. Prior to fiscal year 2020, the Supreme Court budget remained flat for the previous five years and AOIC was only able to reimburse 66% of probation and pretrial employee salaries to counties. Irrespective of positions allocated and approved, there must be a coordinated approach between the Court and Pretrial Services Agency in order to draft policies and practices that maximize public safety and court appearance.

Conditions

Commentary:

According to a study completed by Arnold Ventures, comparing defendants released pretrial with supervision and those released without supervision, pretrial supervision of any length of time was effective in reducing failure to appear, and pretrial supervision for more than 180 days had an impact on the reduction of new criminal activity among moderate and higher risk defendants. Conversely, higher levels of supervision for low to moderate risk defendants actually increased the likelihood of pretrial misconduct.[154] While the data suggest supervision "works" for medium to higher risk defendants, there is little solid evidence regarding the more common types of conditions of pretrial supervision used in Illinois: drug testing, electronic monitoring, regular reporting in person and telephone contact with a supervision agency, and curfew.

When the Commission examined what limited research tells us about pretrial conditions of release, it found:

[153] *Illinois Pretrial Services Act 725 ILCS 7(c)*
[154]Christopher T. Lowenkamp, Marie VanNostrand, Ph.D. *"Exploring the Impact of Supervision on Pretrial Outcomes,"* Laura and John Arnold Foundation (Nov. 2013)

Drug Testing (failure to appear and public safety):

The research results are mixed and dated. Most often, drug use is viewed more as a behavior than a risk factor.

Electronic Monitoring (public safety):

There is no research that indicates this condition promotes public safety or court appearance, though one study showed limited benefit of increasing contact with supervision agencies.[155] However, there are very limited studies that suggest it has an effect on court appearance. This condition can encourage a higher release rate, but also more technical violations and can be extremely costly to implement. An appeal court recently ruled in Arizona (*Hiskett v. Hon. Lambert/State*, No. 1 CA-SA 19-0119) that defendants cannot be forced to pay for their own GPS monitoring.

Regular Reporting (failure to appear):

There is no evidence-based research that indicates this condition has an effect on failure to appear. It is best used to verify court dates and support other conditions.

Treatment (failure to appear and public safety):

This condition should only be used for defendants that have an assessed need; itprovides a greater benefit to defendants with mental health issues, rather than substance abuse issues.

Promoting pretrial success requires that conditions of release be directly related to an individual's risk of committing new criminal activity during the pretrial phase of their case and failure to appear in court. Rehabilitative conditions shall not be a standard order of condition for defendants as this function is not the goal of pretrial supervision. According to the American Bar Association standards on pretrial release 10-1.2 regarding the presumption of release, *"the presumption constitutes a policy judgment that restrictions on a defendant's freedom before trial should be limited to situations where restrictions are clearly needed, and should be tailored to the circumstances of the individual case".* Therefore, blanket conditions are prohibited. Moreover, properly managing pretrial risk requires accurate measurement of that risk. In Illinois, this is not a common practice and therefore, subjective conditioning is what results in over conditioning and blanket conditions, which in turn increases the risk of harm to defendants released pretrial. This heightens the need for comprehensive risk assessment reform.

Performance Measurements

AOIC should establish and adopt performance measurements to analyze the state's criminal justice system's effectiveness in administering pretrial justice.

AOIC should adopt the following goals of performance measurements in identifying data metrics:

1. **Highlight opportunities for pretrial system improvements**
2. **Obtain a view of the landscape of pretrial in our state**
3. **Allow for county comparisons**
4. **Highlight data collection issues and quality**

[155] Grommon, E., Rydberg, J., and Carter, J.G. (2017). Does GPS Supervision of Intimate Partner Violence Defendants Reduce Pretrial Misconduct? Evidence from a Quasi-Experimental Study.

5. **Identify model/high functioning county systems**
6. **Allocate sufficient resources to counties for data collection**

AOIC shall establish a Pretrial Division to assist and support statewide implementation of pretrial recommendations.

The Illinois General Assembly should allocate sufficient state funding to implement and sustain a robust individual-level data collection system for statewide uniform reporting.

Absent a statewide data collection system, the Illinois Supreme Court should request additional state resources for counties to add required data elements to their existing data collection system.

AOIC should allow for agreements with external research entities (i.e. Illinois Criminal Justice Information Authority, universities) to use the data to further study pretrial practices, risk assessment instrument development and validation.

Commentary:

The current Illinois system of pretrial services data collection is antiquated and inefficient for the utilization of evaluation performance measures. Currently county pretrial agencies submit certain data elements to AOIC on a home-grown Microsoft Excel platform that utilizes stop gap formulas to identify errors in reporting. Thus, data is often missing or spotty and inconsistent. Data elements are not clearly defined, and pretrial services agencies often report their outcomes based on what is available in existing data systems that vary throughout the state.

National standards recommend mission critical data metrics for pretrial agencies.[156] However, Illinois lacks the ability to comply due to the following reasons:

- No statewide court database
- Lack of statewide agreement on data metrics
- Inability to share data (unique person and case identifiers) within, and among, counties and statewide or to link to other datasets
- Lack of data dictionary offering standard definitions, formats, sources, and relationships of all data elements

Accurate data from all stakeholders is necessary to measure our process and effectiveness of the recommended changes. A uniformed statewide data system will allow the state to evaluate and ensure that its pretrial process is fair, effective, and fiscally efficient.

Implementation:

Significant funding will need to be allocated for the procurement of a high functioning data collection system.

[156] NIC: *"Measuring What Matters: Outcomes and Performance Measures for the Pretrial Services Field"*. (2011)

Pretrial Services Operational Structure

Illinois shall have a dedicated and independent Pretrial Services Agency.

Commentary:

An independent dedicated pretrial services agency is a hallmark of an effective pretrial system. Independence ensures the operations, training, budget, resources and mindset are unique and fully dedicated to pretrial functions. As noted by NIC, "*Preferably, the pretrial services agency should be a separate, independent entity. However, jurisdictions may incorporate pretrial services agencies within a larger "parent" organization if the following requirements are observed:*

- *The pretrial services component has a clearly defined, pretrial service-related function as its purpose;*
- *Pretrial staff are assigned only to pretrial-related work with pretrial defendants; and*
- *Pretrial component management can make independent decisions on budget, staffing, and policy."*[157]

American Bar Association (ABA, Standard 10-1.10) and National Association of Pretrial Agencies (NAPSA, Standard 1.3) Standards endorse the establishment of pretrial services agencies to perform pretrial functions.

There are multiple options for Illinois. Each option requires state-wide support from the Administrative Office of the Illinois Courts (AOIC) along with resources to local jurisdictions. Each option will detail the level of support from AOIC and the amount of resources dedicated to the local jurisdiction. Each option will contain a description of the organizational structure, benefits and challenges of the respective option.

Pretrial Services can be viewed in two main categories: (1) risk assessment and bond reports prior to the first court appearance and (2) pretrial supervision ordered by the court for individuals waiting for the resolution of the respective case. The options provided will address each of these main responsibilities.

Option 1: Judicial Circuit

This model of pretrial services has administrative staff at AOIC solely dedicated to pretrial services, and pretrial officers assigned to the local level who are fully dedicated to pretrial services. The pretrial officers are employees of the respective Chief Judge. This model closely follows the current organizational structure for probation services in Illinois, the Federal system, Kentucky and New Jersey models.

For the administrative responsibilities, AOIC would rename the Assistant Director of Probation Services to Assistant Director of Pretrial and Probation Services. The Assistant Director would have a Pretrial Manager as a direct report. The Pretrial Manager will be responsible for providing expertise on pretrial services. He/she will develop and maintain standards for pretrial services for the local jurisdictions. They will provide and organize training opportunities and technical assistance for the local jurisdictions.

Additionally, there will be 6 Pretrial Coordinators: 3 assigned to work with the northern judicial circuits and 3 assigned to the southern judicial circuits. Pretrial Coordinators will be supervised by the Pretrial Manager. The Pretrial Coordinators will work closely with the pretrial officers at the local level. They will provide on-site training

[157] *A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency, Page 31, (2017)*

and technical assistance. Additionally, they will observe and provide feedback for the local jurisdictions in accordance with the policy, best practices and pretrial standards.

The size of the local jurisdictions in Illinois create a challenge to provide pretrial services in the smaller, less populous counties. Specifically, many jurisdictions do not have enough cases to justify a dedicated pretrial officer (as indicated as best practice). As a result, pretrial officers will be approved and reimbursed (salary and fringe) by AOIC based on the overall needs of the judicial circuit. Additionally, each judicial circuit will have a chief pretrial officer who reports directly to the chief judge. The chief judge and chief pretrial officer will determine the proper assignment of pretrial officers within the judicial circuit.

Under the authority of the chief judge, the chief pretrial officers will be responsible for developing the local policies to meet the standards approved by the Illinois Supreme Court and promulgated by AOIC. The chief pretrial officers will also supervise the respective pretrial officers. The chief pretrial officers will develop and maintain a schedule for the pretrial officers to meet the need of the local courts in the respective judicial circuit. This includes completing a pretrial risk assessment, completing bond reports, attending bond hearings and providing pretrial supervision. The pretrial officers will complete risk assessments, bond reports, attend bond hearings and provide supervision for individuals ordered to pretrial supervision after the bond hearing. In smaller jurisdictions, the chief pretrial officer may also perform the responsibilities and roles of pretrial officers.

Benefits

This model addresses the goals as established in the NIC Essential Elements Framework. It establishes an independent structure for pretrial services within AOIC and at the local level. The model allows the larger jurisdictions to continue to operate without disruption while addressing the challenges presented by the smaller jurisdictions. As stated previously, many jurisdictions cannot support a dedicated pretrial officer; however, research indicates dedicated pretrial services render the best results. This model allows dedicated pretrial officers for the judicial circuit under the authority of the respective chief judge. As a result, the chief judge can meet the local needs effectively and efficiently with staff dedicated to the judicial circuit.

While being independent, this model maintains the same structure as probation services in Illinois, creating equal and separate functions. The chief judge is the local employer, AOIC maintains an administrative role and there is discretion at the local level to address local needs. This model maintains clear roles and responsibilities for AOIC and local jurisdictions. Reimbursing the salary and fringe of the local pretrial officers reduces the burden to the local jurisdiction. The financial burden has prevented expansion of pretrial services in the past.

Challenges

This model establishes independent pretrial departments in all 24 judicial circuits under the authority of the respective chief judge. This is a significant reduction from probation services where each jurisdiction has an established department; however, this model creates a need to provide training and technical assistance from the AOIC to ensure consistent and uniform application of pretrial services across Illinois. This model increases AOIC's financial obligation to reimburse additional staff salaries and provide the fringe benefits portion of the position. Historically, AOIC has reimbursed the salary portion and the local jurisdiction has been responsible for the fringe component. However, the local jurisdiction's inability to fund the fringe portion has prevented the expansion of pretrial services in the past.

Funding

The expense involved in this model is primarily related to the requisite staff in the AOIC and at the local level. The needed administrative staff at AOIC are the Pretrial Manager and the six Pretrial Coordinators. Each of the positions have estimated salaries of $85,000 and $65,000 (x 6 = $390,000), totaling $475,000 plus fringes. Fringes are estimated at 40% of the salary ($475,000 * 40%) = $190,000. The total annual salary and fringe expenses for the AOIC staff is $665,000.

This model requires the salary and fringe reimbursement of the twenty-four (24) Chief Pretrial Officers in each of the Judicial Circuits. These positions will be employees at the local level under the authority of the respective Chief Judge. The estimated salary of these positions is $75,000 annually for a total of (24 * $75,000) $1,800,000. Fringes are estimated at 40% of the salary ($1,800,000 * 40%) = $720,000. The total annual salary and fringe expenses for the Chief Pretrial Officers is $2,520,000.

This model also requires reimbursement of the salary and fringes of Pretrial Officers at the local level. The Pretrial Officers are under the authority of the respective Chief Judge. An estimated 500 Pretrial Officers are needed to meet the needs in Illinois. The estimated salary for Pretrial Officers is $55,000 annually for a total of (500 * $55,000) $27,500,000. Fringes are estimated at 40% of the salary ($27,500,000 * 40%) = $11,000,000. The total annual salary and fringe expenses for the Pretrial Officers are $38,500,000.

The total estimated expenses for this option are $41,685,000.

Option 2: Centralized Assessments Centers

This model has an increased state-wide presence. The AOIC would create a new division: Pretrial Services Division. An Assistant Director – Pretrial Services Division would oversee the division and would report to the Director of AOIC. The AOIC would still have an administrative staff to support pretrial services for Illinois. A Pretrial Manager will oversee Pretrial Coordinators. Each of those positions will be assigned to the northern and southern jurisdictions accordingly. The responsibilities of these positions would be consistent with the previous option, with the addition of supporting centralized assessment centers (CAC).

This model is based on utilizing CAC throughout Illinois. Each appellate district would have its own CAC. The CAC would be centralized locations with staff ready to provide risk assessments and bond reports for all individuals in the geographic location to the local court. In addition to CACs, local pretrial officers are required to supervise the individuals ordered to supervision after the bond hearing and until there is resolution of the case. AOIC would employ the staff of each CAC and the local pretrial officers would be employed (salary and fringe reimbursed by AOIC) by the local chief judge.

The role and responsibility of the CACs is to provide consistent and uniform pretrial risk assessments and reports to the courts prior to each participant's first court appearance. Each CAC would have a supervising manager and appropriate number of staff to handle the referrals from the assigned geographic areas. CAC staff would be available to receive referrals, complete the pretrial risk assessment, complete the bond report and send the completed documents to the referring jurisdiction.

Benefits

This model establishes an independent structure at all levels. The most significant benefit of this model is ensuring consistent and uniform risk assessment and bond reports in Illinois. The training and technical assistance can be targeted to five CACs instead of 24 judicial circuits. This model also alleviates a burden on the local jurisdiction to schedule employees in the early morning, weekends and holidays to ensure risk assessments and bond reports are completed prior to every individual's first court appearance. This model also limits the number of staff at the local level which reduces the financial burden to the local level. Historically, the financial burden to the local jurisdiction has prevented the expansion of pretrial services in Illinois.

Challenges

The first challenge is this is a new model for Illinois. There is an increased role and responsibility for the AOIC. AOIC would be responsible for several new hires (100+). Another consideration is many of the current pretrial positions in local jurisdictions (approved and reimbursed by AOIC) would need to be converted to positions employed by AOIC. This will create challenges at the local level regarding union-represented employees and positions. This model will also require the AOIC to establish facilities to operate the CAC.

This model also assumes there is a risk-assessment that does not require an interview. Pretrial risk assessment interviews would not be possible in this model because the CAC staff are not local to all the jurisdictions they are assigned. Communication could be an issue since the CAC staff would be located at centralized offices and pretrial staff would be in the local jurisdiction. It is anticipated there will be requests/expectations from the local judge to inquire about the contents of the bond report or risk assessment and the staff person responsible for its completion will not be in court.

Funding

The expense involved in this model is a combination of the salary/fringe expenses and the cost of establishing the CACs. The needed administrative staff at AOIC are the Pretrial Manager, the six Pretrial Coordinators and the CAC staff. The Pretrial Manager and Pretrial Coordinators have estimated salaries of $85,000 and $65,000 respectively (x 6 = $390,000) totaling $475,000 plus fringes. Fringes are estimated at 40% of the salary ($475,000 * 40%) = $190,000. Additionally, each of the CACs will require CAC staff (management and assessors). The estimated salary of the CAC Managers is $85,000 for a total of (5 * $85,000) $425,000. Fringes are estimated at 40% of the salary ($425,000 * 40%) = $170,000. The salary of the CAC Assessors is $55,000 for a total of (250 * $55,000) $13,750,000. Fringes are estimated at 40% of the salary ($13,750,000 * 40%) $5,500,000. The total annual salary and fringe expenses for the AOIC staff is $20,510,000.

This model also requires the salary and fringe reimbursement of the twenty-four (24) Chief Pretrial Officers in each of the Judicial Circuits. These positions will be employees at the local level under the authority of the respective Chief Judge. The estimated salary of these positions is $75,000 annually for a total of (24 * $75,000) $1,800,000. Fringes are estimated at 40% of the salary ($1,800,000 * 40%) = $720,000. The total annual salary and fringe expenses for the Chief Pretrial Officers is $2,520,000.

This model also requires reimbursement of the salary and fringes of Pretrial Officers at the local level. The Pretrial Officers are under the authority of the respective Chief Judge. An estimated 250 Pretrial Officers are needed to meet the needs in Illinois. The estimated salary for Pretrial Officers is $50,000 annually for a total of (250 * $55,000)

$13,750,000. Fringes are estimated at 40% of the salary ($13,750,000 * 40%) = $5,500,000. The total annual salary and fringe expenses for the Pretrial Officers are $19,250,000.

The total estimated personnel expenses for this option are $42,280,000.Workspace to operate the five CACs is an additional expense. Further analysis is needed to estimate the costs of the CAC workspace.

Option 3: Statewide Pretrial

This option moves all pretrial services in Illinois under the AOIC. The AOIC would hire an Assistant Director – Pretrial Services to oversee the Division. AOIC would be responsible for the administrative roles and responsibilities as stated in previous options as well as the local service roles and responsibilities. AOIC would establish centralized locations for pretrial services staff to provide risk assessment, bond reports and pretrial supervision.

Benefits

AOIC is responsible for the administrative and direct service responsibilities. As , it is better able to implement and maintain pretrial services in Illinois in a consistent and uniform manner. Similarly, the training and technical assistance is more easily applied which will result in better effectiveness and efficiency. This model also reduces the financial impact to the local jurisdiction.

The size and geographic challenges in Illinois could be mitigated as AOIC would be able to address the challenges by assigning staff across counties, judicial circuits or appellate districts. Additionally, AOIC would be more readily able and quicker to address changing demands in Illinois than if staff are assigned to the local level.

Challenges

The first challenge in this model is integrating the local courts to a state-wide agency. Since all pretrial officers will be state employees, localized control will be lost. It is realistic to expect communication between the state and local entities will not be as personal or immediate as if the employees were employed locally.

AOIC has by its title always been administrative in its function. This model will require AOIC to be responsible for direct services for the local courts. There are currently 200+ positions currently approved for reimbursement at the local level. In this model, those positions will all become state positions. This will have significant impact on the current employees as many of them are union-represented and have accrued local benefits. Converting the positions to the AOIC will require a substantial hiring process, which will not guarantee a person in the current role a position at AOIC or the same conditions of employment.

This model presents a challenge for AOIC to find space for pretrial services staff to work throughout the state. It also increases the financial obligation of AOIC as it is the employer of all pretrial staff in Illinois.

Funding

The expense involved in this model is a combination of the salary/fringe expenses and the cost of establishing the CACs. In this model, all expenses are withinin AOIC. The needed administrative staff at AOIC are an AOIC - Assistant Director – Pretrial Services, a Pretrial Manager, six Pretrial Coordinators, CAC staff and Pretrial Officers. The AOIC Assistant Director, Pretrial Manager and Pretrial Coordinators have estimated salaries of $125,000, $85,000 and $65,000 respectively (x 6 = $390,000) totaling $600,000 plus fringes. Fringes are estimated at 40% of the salary ($600,000 * 40%) = $240,000. Additionally, each of the CACs will require CAC staff (management and

assessors). The estimated salary of the CAC Managers is $85,000 for a total of (5 * $85,000) $425,000. Fringes are estimated at 40% of the salary ($425,000 * 40%) = $170,000. The salary of the CAC Assessors is $55,000 for a total of (250 * $55,000) $13,750,000. Fringes are estimated at 40% of the salary ($13,750,000 * 40%) $5,500,000. The total annual salary and fringe expenses for the AOIC staff is $20,685,000.

This model also requires twenty-four (24) Chief Pretrial Officers in each of the Judicial Circuits. The estimated salary of these positions is $75,000 annually for a total of (24 * $75,000) $1,800,000. Fringes are estimated at 40% of the salary ($1,800,000 * 40%) = $720,000. The total annual salary and fringe expenses for the Chief Pretrial Officers is $2,520,000.

An estimated 250 Pretrial Officers are needed to meet the needs in Illinois. The estimated salary for Pretrial Officers is $50,000 annually for a total of (250 * $55,000) $13,750,000. Fringes are estimated at 40% of the salary ($13,750,000 * 40%) = $5,500,000. The total annual salary and fringe expenses for the Pretrial Officers are $19,250,000.

The total estimated personnel expenses for this option are $42,455,000.

Acquiring and maintaining workspace to operate the five CACs is an additional expense. Additionally, establishing AOIC offices throughout Illinois to serve the local jurisdictions will also require additional expenses. This will require further analysis to estimate the costs of CAC and Pretrial Officers' workspace.

Funding

Cost associated with implementing effective pretrial justice reforms vary depending on need for system improvements. Similar to other jurisdictions that have grappled with trying to determine financial impact, the lack of statewide data in Illinois makes it difficult to estimate an approximate cost.

New Jersey spent approximately $40-50 million dollars to implement their pretrial reform and California spent $68 million dollars. Nationally, annual budgets range from "less than $200,000 to as much as $10 million"[158]. One of the biggest expenditures for Illinois will be implementation of a statewide data system. New Jersey spent $7 million dollars on their pretrial software update. Unfortunately, Illinois will need to purchase a unified data system. According to a survey completed by the Commission in 2019, there are currently 20 different case management systems being utilized throughout the state's 102 counties.

Statewide implementation will require adequate funding for stakeholder staffing, pretrial services agency development, data system, training and research. Based on the above figures from New Jersey and California, one can expect the cost of implementation to be between $40-$70 million. However, we must implement a pretrial justice system that is sustainable to meet our intended goal of maximizing public safety, maximizing court appearance and maximizing release.

As stated in the previous section, Pretrial Services Operational Structure, the cost of operating pretrial services agencies throughout Illinois is approximately $41-$48 million. The 2020 Illinois budget contains funding for the reimbursement of the salaries of approximately 250 positions for a total of approximately $13.5 million.

[158] *Estimating the Costs of Implementing Pretrial Assessment and Monitoring Services*, Pretrial Justice and State Courts Initiative.

As Illinois moves from a resource-based system of justice to a risk-based system, there will be less reliance on monetary conditions of release. Because counties have sustained system operation by allowing counties to retain 10% of the monetary conditions of release imposed on a defendant, stakeholder acceptance of pretrial reform will continue to be a challenge in many areas. This issue was addressed in *In re Humphrey*, 19 Cal. App. 5th 1006 (Cal. Ct. App. 2018): *"The timelines within which bail determinations must be made are short, and judicial officers and pretrial service agencies are already burdened by limited resources…Nevertheless, the highest judicial responsibility is and must remain the enforcement of constitutional rights, a responsibility that cannot be avoided on the ground its discharge requires greater judicial resources than the other two branches of government may see fit to provide. Judges may, in the end, be compelled to reduce the services courts provide, but in our constitutional democracy the reductions cannot be at the expense of presumptively innocent persons threatened with divestment of their fundamental constitutional right to pretrial liberty."*[159]

Legislative

Illinois statutes are in direct conflict with the legal underpinnings of pretrial justice. The Illinois Supreme Court and the Illinois General Assembly should implement rules and statutes to reflect the evolving goals of pretrial justice and resolve internal conflicts within the statute(s) that are inconsistent with the presumption that conditions of release will be non-monetary, least restrictive, and considerate of the financial ability of the accused.

Commentary:

While recent amendments have been added to the bail statute, the statute is still at odds with the overarching goal of moving away from a resource-based to a risk-based system of pretrial justice with less reliance on money as a condition of release. Indeed, the bail statute seems to be at odds with itself as it states that there is a presumption that conditions should be non-monetary in nature, requires that the court impose the least restrictive conditions, and consider the defendant's socio-economic circumstance, but at the same time requires that the court consider an exhaustive list of factors that are almost exclusively aggravating.

For example, 725 ILCS 5/110(b) states that the amount of bail must be sufficient to assure compliance with the conditions, not oppressive, and considerate of the financial ability of the accused; but the very same section requires the court to consider the full street value of the drugs seized in non-violent drug related offenses.

The bail statute identifies over 30 factors that the judge shall consider when determining conditions of release. It is recommended that the following factors be *eliminated* from 725 ILCS 5/110 (a) (b):

1. The requirement that the court consider the street value of any drugs seized in Section (b)

2. Whether the offense involved corruption of public officials or employees

[159][159] *In re Humphrey*, 19 Cal. App. 5th 1006.

3. The consent of the defendant to periodic drug testing in accordance with Section 110-6.5 [725 ILCS 5/110-6.5]

4. Whether a foreign national defendant is lawfully admitted in the United States of America

5. Whether the government of the foreign national maintains an extradition treaty with the United States by which the foreign government will extradite to the United States its national for a trial for a crime allegedly committed in the United States

6. Whether the defendant is currently subject to deportation or exclusion under the immigration laws of the United States

7. Whether the defendant, although a United States citizen, is considered under the law of any foreign state a national of that state for the purposes of extradition or non-extradition to the United States

8. The amount of unrecovered proceeds lost as a result of the alleged offense

9. The source of bail funds tendered or sought to be tendered for bail

10. Whether from the totality of the court's consideration, the loss of funds posted or sought to be posted for bail will not deter the defendant from flight

11. Whether the evidence shows that the defendant is engaged in significant possession, manufacture, or delivery of a controlled substance or cannabis, either individually or in consort with others

12. Whether the defendant refused to identify himself or herself

13. Whether there was a refusal by the defendant to be fingerprinted as required by law

14. Delete "curfews" from 725 ILCS 5/110-5 a-5

15. Modify 725 ILCS 5/110 by removing the reference to Section 110-6-5 and then deleting Section 110-6-5 completely

It is also recommended that the following statutes be ***modified***:

1. Modify 725 Ill. Comp. Stat. Ann. 5/110-5 a-5 as this section references electronic home monitoring, drug counseling, etc. as acceptable conditions. The Commission recommends adding language to clarify when these are appropriate to order. For example, "these conditions are appropriate when used in accordance with national best practices as detailed in the Pretrial Supervision Standards of the Supreme Court." This allows the statute to remain current without having to make legislative changes as research continues to develop.

2. 725 ILCS 5/110-10b - the language of this section of statute is dated. The Commission recommends updating it to include the same reference as above.

3. Modify 730 ILCS 5/5-8A-7 by updating the list of qualifying offenses to be consistent with 725 Ill. Comp. Stat. Ann. 5/110-5 (f). The current language requires "best available technology" and defines it as "must have real time and interactive capabilities." The Commission recommends amending the language to

acknowledge that global positioning technology is not reliable or available throughout the state; therefore, many jurisdictions will not be able to meet this statutory requirement.

4. Modify 730 ILCS 5/5-8A-2 by removing all references to Pretrial. It is recommended to include this provision for electronic home monitoring in the Pretrial Services Act.

There have been a multitude of federal lawsuits filed around the country for bail practices that detain people due to their inability to financially secure their release from custody and for the utilization of a bail schedule. Illinois also has a bail schedule in Supreme Court Rule 526, which assigns monetary bail to certain offenses. Therefore, if the defendant has the financial means, he/she can secure their release from custody regardless of potential risk to public safety and reappearance in court. However, defendants that cannot afford to pay their monetary conditions of release, are forced to remain in custody and appear before a bond court judge with the hopes of being released on a personal recognizance.

According to a research study on the *Hidden Cost of Pretrial Detention,*[160] low risk defendants held 2-3 days are almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours." Therefore, detaining low risk defendants is not only disruptive for the defendant, but also compromises public safety.

Implementation:

A statutory effective date should be set that provides the court and justice system partners with sufficient time to fully implement an effective pretrial system. The Commission recommends a minimum of two years.

Communication and Training

Create and deliver a strategic plan for comprehensive education and training for all criminal justice stakeholders, providing a roadmap for the Supreme Court's pretrial goals and including training videos and webinars regarding a meaningful first court appearance.

Training should include the utility of risk assessment instruments, offered not only for those who will implement the instruments, but also those receiving the results, including judges, prosecutors and defense counsel.

Encourage collaborative training with judges, probation and Pretrial Service Agencies through the Illinois Judicial College.

Partner with other stakeholder organizations to provide joint training regarding legal and evidence-based pretrial practices.

Each of the twenty-four (24) judicial circuits shall be required to create a criminal justice coordinating council, to interface with other criminal justice stakeholders and to be chaired by the Chief Judge of the circuit.

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

Create and maintain a central repository on the Illinois Courts website, available to all criminal justice stakeholders, public and media, to easily access information regarding pretrial reform.

Create a traveling press team to visit editorial boards at the state's major media outlets and provide education and training.

Commentary:

Successful implementation of a robust and effective pretrial system requires comprehensive and ongoing education. All system players must fully understand risk, mitigation of risk through lawful and effective conditions of release, and the inappropriateness of using financial conditions of release to purposely detain the accused. The judiciary, stakeholders, justice system partners, media and the community must be educated on the fundamental principles of an effective pretrial system to achieve the overarching goals of a fair and just release and detention criminal justice system that upholds the constitutional precepts of due process, the presumption of innocence, community safety and court appearance. Without appropriate training and education, individuals operating within the system will remain unwilling to embrace a risk-based or risk-informed system of release and detention and alternative non-financial conditions of release. Collaboration, commitment, financial resources and time comprise the structural foundation for needed and sustainable reform.

The media, bolstered by social media outlets, plays an integral part in shaping community opinion. An informed and educated media and editorial boards will further expand Illinois' efforts for outreach and transparency. Because the public and the media tend to use the amount of monetary bail "as a sort of barometer of the justice system's sense of the severity of the crime,"[161] it is important that they are trained in the fundamental principles behind pretrial release and supervision practices. As a state, we must be engaged with the media and citizens to educate and explain the transition from a money-based pretrial system to a legal and evidence-based release and detention system.

Conclusion

There may be many who review the Commission's report and the significant recommendations which support a seismic shift in the way we "do business" and say, while aspirational, it is certainly not attainable. At first blush that might appear to be true. But sweeping state reform can be achieved; as demonstrated by New Jersey, a jurisdiction that underwent sweeping reform to overhaul its criminal pretrial justice system.

Comprehensive reform can only be successful if all three branches of government are united. Strong and deliberate legislation, clear and directive court rules, and adequate and sustainable funding is essential to the reform envisioned in the Commission's recommendations. We must continue our collaboration and most importantly, trust the process.

[161] Schnacke, *supra* at 115.

Appendix I

Kentucky Supreme Court Order on Delegated Release Authority

Supreme Court of Kentucky

2017-19

IN RE: Authorization for the Non-Financial Uniform Schedule of Bail Administrative Release Program

AMENDED ORDER

I. Introduction

This order hereby authorizes the Non-Financial Uniform Schedule of Bail Administrative Release Program, ("Administrative Release Program") for use throughout the Commonwealth of Kentucky. This order replaces in its entirety Supreme Court Order 2017-01.

No local rules, practices, procedures, orders, or other policies of any district or circuit may conflict with or controvert this order; further, to the extent that any such local rules, practices, procedures, orders, or other policies are inconsistent or otherwise conflict with this order, this order shall prevail.

II. Purpose

The purpose of the Administrative Release Program is to expedite pretrial release of low to moderate risk defendants charged with non-violent, non-sexual misdemeanors and to increase efficiency by reserving resources for higher-risk defendants ordered to pretrial supervision.

III. Implementation

The Administrative Release Program became mandatory on January 1, 2017.

IV. Governance

The Administrative Release Program will be governed by the attached Uniform Local Protocol for the Non-Financial Uniform Schedule of Bail Administrative Release Program and all applicable statutes and rules not inconsistent with this Order.

This Order shall be effective upon entry, and until further Order of this Court.

Entered this 5th day of December 2017.

CHIEF JUSTICE

UNIFORM LOCAL PROTOCOL FOR THE NON-FINANCIAL UNIFORM SCHEDULE OF BAIL ADMINISTRATIVE RELEASE PROGRAM

PART I: DEFINITIONS

As used in these sections, unless the context otherwise requires:

A. "Interview" means an investigation of a defendant for the purposes of pretrial release or pretrial supervision.

B. "Investigation" means a Pretrial Services investigation containing CourtNet and NCIC records, charge information, personal information and demographics, probation status, address, and application of the PSA Risk Assessment (See Appendix A).

C. "Non-Financial Uniform Schedule of Bail" means the authority granted by the court to a pretrial officer to apply a pre-determined release decision to detained defendants based on a uniform schedule of bail without the need for a judicial review.

D. "Public Safety Assessment (PSA) Risk Assessment" means the validated risk assessment tool used in Kentucky, containing questions relating to risk of flight or failure to appear and risk of anticipated criminal conduct or new criminal activity.

E. "Risk Assessment" means an objective, research based, validated assessment tool that measures a defendant's risk of flight or failure to appear and risk of anticipated criminal conduct or new criminal activity while on pretrial release pending adjudication.

F. "Risk scores" means the numeric values ranging from a low of '0' to a high of '7' that relates proportionally to the defendant's likelihood of failure to appear (FTA) and from a low of '0' to a high of '13' that relates proportionally to the defendant's likelihood of new criminal activity (NCA) pending adjudication.

G. "Risk level" means a scale from low to high of the risk a defendant poses of pretrial failure (e.g., failure to appear or presenting a danger to the community).

H. "Sexual Offenses" means any offense defined as sexual under Kentucky Revised Statutes and those listed by Pretrial Services as sexual for purposes of Pretrial release (See Appendix C).

I. "Verification" means matching a defendant's identity with an official record.

J. "Verified and eligible defendant" means a defendant who is charged with a bailable offense and whose identity Pretrial Services is able to confirm through investigation.

K. "Violent Offenses" means any offense defined as violent under Kentucky Revised Statutes and those listed by Pretrial Services as violent for purposes of Pretrial release (See Appendix B).

PART II: ADMINISTRATIVE RELEASE PROGRAM FOR THE PRETRIAL RISK ASSESSEMENT AND NON-FINANCIAL UNIFORM SCHEDULE OF BAIL

Section 1. Obligations of Pretrial Services and Pretrial Officers

Except where explicitly noted, no provision set forth in this order shall absolve the Administrative Office of the Courts' pretrial services agency and pretrial officers employed by the agency from following the Kentucky Rules of Criminal Procedure, including but not limited to: RCr 4.02, RCr 4.06, RCr 4.08, and RCr 4.38; and the Kentucky Revised Statutes, including but not limited to: KRS 431.066, KRS 431.515, KRS 431.518 and Administrative Procedures of the Court of Justice Part XIV, Pretrial Services.

Section 2. Risk Assessment and Risk Level

A. All verified and eligible defendants will have their risk level assessed by use of the PSA Risk Assessment.

B. The PSA Risk Assessment tool, once applied to a defendant, will result in the defendant's risk scores being a value between '0' and '7' for failure to appear (FTA) and between '0' and '13', for new criminal activity (NCA) with corresponding risk levels of Low (Risk), Moderate (Risk), or High (Risk) for both the FTA Scale and the NCA Scale.

C. The Risk Assessment tool will be applied to the defendant prior to or at the approximate time of the pretrial interview. Nothing in this order shall prohibit the tool from being re-applied to the defendant at any time after the initial application.

Section 3. Eligibility and Release Options

A. Defendants charged with non-violent/non-sexual misdemeanor(s) whose risk scores have been assessed as Low Risk or Moderate Risk on the FTA scale and Low Risk or Moderate Risk on the NCA scale will be eligible under the Schedule and shall be released on recognizance.

B. Defendants who are eligible for release under subsection A. of this Section but are charged with a misdemeanor offense of KRS 222.202 (Offenses of Alcohol Intoxication or Drinking Alcoholic Beverages in a Public Place), KRS 525.100

(Public Intoxication), or KRS 189A.010 (Operating Motor Vehicle While Under the Influence, "DUI") shall be released on recognizance as follows:

i. To an adult who is willing to accept responsibility for the defendant through a signature verification on a form prescribed by the Administrative Office of the Courts; or
ii. At such time as the defendant is able to safely care for himself or herself but in no event shall the defendant be detained for more than eight (8) hours following his or her arrest; or
iii. Unless such person's release is precluded by other provisions of law.

If the defendant is in need of emergency medical attention, the arresting officer shall obtain medical attention for the defendant prior to delivery to the jail. KRS 71.040.

C. Defendants charged with an offense that is punishable by a fine only (violations and traffic infractions) shall be released on recognizance regardless of risk scores except defendants charged with offenses of Alcohol Intoxication or Drinking Alcoholic Beverages in a Public Place shall be released in accordance with subsection B. of this Section.

D. Defendants charged with contempt of court and/or with violation(s) of misdemeanor or felony probation or conditional discharge are not eligible under the Schedule.

E. Defendants who have allegedly violated a condition of release, including being charged with a new offense while out on bond, are not eligible under the Schedule.

F. Defendants charged with violation of a protective order are not eligible under the Schedule.

G. Defendants charged with a DUI 1st offense with injuries or accident or any aggravated circumstances (other than refusals) and DUI 2nd or greater are not eligible under the Schedule. All statutory times shall be followed for all DUI offenses.

H. Defendants charged with driving on a DUI suspended license are not eligible under the Schedule.

I. Defendants who have previously failed to appear on the charge or are charged with Bail Jumping are not eligible under the Schedule.

J. Defendants who decline the pretrial services interview are not eligible under the Schedule.

K. All defendants not eligible for release under the Schedule shall only be released upon judicial review and conditions of release ordered by the court.

L. The pretrial officer shall base his or her review on the UOR code assigned by law enforcement, unless the offense charged is a DUI, in which case the pretrial officer shall base his or her review on the CourtNet or Department of Transportation (DOT) record.

M. No defendant shall be held in custody for failure to pay the $25.00 bond filing fee required under KRS 64.005.

Section 4. Local Deviation

By local rule, judges may order only the following deviation from the Schedule:

Local jurisdictions may order the Schedule's expansion to include certain, non-violent/non-sexual, Class D felony charges, with the exception of the charge of Fugitive from Justice.

Appendix II

Compendium of Federal Case Law Challenging Bail Practices

Fifth Circuit

ODonnell v. Harris Cty., 892 F.3d 147 (5th Cir. 2018)

Arrestees brought § 1983 action, on behalf of themselves and others similarly situated, against county, county sheriff, county judges, and other county officials, alleging that county's system for setting bail for indigent misdemeanor arrestees, which resulted in detention of indigent arrestees solely due to their inability to pay bail, violated Equal Protection and Due Process Clauses. The District Court granted plaintiffs' motion for preliminary injunction and denied county's motion for summary judgment. The county appealed.

The Fifth Circuit held that the preliminary injunction was overbroad but indicated that if it was crafted as follows it would be narrowly tailored and be within the guidance of the court. The court held that the revised bail practices should include: 1) individual consideration of ability to pay a proscribed bail amount, 2) verification by Pretrial Services Officer of indigency of the arrestee, 3) completion by arrestee of affidavit of indigency within 24 hours, 4) if the arrestee is not able to be released, the arrestee should be entitled to a bail hearing within 48 hours in which an impartial decisionmaker conducts an individual assessment of whether another amount of bail or other condition provides sufficient sureties.

Caliste v. Cantrell, 329 F. Supp. 3d 296 (E.D. La. 2018), *aff'd*, 937 F.3d 525 (5th Cir. 2019)

Arrestees brought class action against state magistrate judge under § 1983, alleging violations of their rights under the Fourteenth Amendment Due Process Clause and Equal Protection Clause based on judge's purported actions in routinely setting minimum secured money bond without first considering facts, requiring use of bail bond from commercial sureties, and disallowing arrestees to post cash bail. Plaintiffs asserted that the judge had a financial conflict of interest and sought a declaratory judgment. Both parties moved for summary judgment. The District Court ruled that the defendant must use bail practices that inquire into the arrestee's ability to pay, consider alternative conditions of release using a clear and convincing standard and that arrestees should be represented by counsel.

Snow v. Lambert, No. CV 15-567-SDD-RLB, 2015 WL 5071981 (M.D. La. Aug. 27, 2015)

The plaintiff filed a class action lawsuit on behalf of herself and other similarly situated persons alleging that her Due Process and Equal Protection rights guaranteed by the Fourteenth Amendment were violated by the defendants' post-arrest detention policies and practices. On September 3, 2015, the District Court issued an order supporting a settlement agreement between the parties. The settlement agreement called for all misdemeanor arrestees to be released on their own recognizance after booking except for people arrested under specified charges. In those cases, the sheriff would call the judge to make a case-by-case determination about release. Those detained would appear in front of a judge by the next business day for a bail hearing. The bail hearing would meet the requirements of due process under the Fourteenth Amendment and no one would be held due to an inability to pay the bond.

Thompson v. Moss Point, No. 1:15CV182LG-RHW, 2015 WL 10322003 (S.D. Miss. Nov. 6, 2015)

On November 6, 2015, the court entered a declaratory judgment ruling "no person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond. If the government generally offers prompt release from custody after arrest upon posting a bond pursuant to a schedule, it cannot deny prompt release from custody to a person because the person is financially incapable of posting such a bond."

Daves v. Dallas Cty., Texas, 341 F. Supp. 3d 688 (N.D. Tex. 2018)

Arrestees brought action under § 1983 against Dallas County and various individuals involved in the county's pretrial detention system, alleging that defendants employed unconstitutional system of wealth-based detention by imposing and enforcing secured money bail without an inquiry into and findings concerning arrestees' ability to pay. Arrestees moved for preliminary injunction against county's pretrial detention procedures.

On September 20, 2018, the District Court issued a preliminary injunction enjoining defendant from continuing the current bail practices, and instead requiring that county pretrial staff determine each individual's ability to pay a financial bond through an affidavit process. The verification and affidavit must be completed within 24 hours. Within 48 hours the arrestee is entitled to a hearing at which the magistrate must make an individual determination about bail and the conditions needed in each particular case. If the magistrate does not lower the bail amount, he/she must make written factual findings about the decision. There are various additional procedural and process requirements in the preliminary injunction. In its memorandum and order, the court held that this case should follow the binding precedent laid out in ODonnell and its model injunction. Defendants have appealed the ruling.

Booth v. Galveston Cty., No. 3:18-CV-00104, 2019 WL 4305457 (S.D. Tex. Sept. 11, 2019)

Indigent arrestee brought putative class action against county, district court judges, county magistrates, and district attorney, alleging that arrestees were routinely detained before trial solely due to their inability to pay bail in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

On September 11, 2019, the District Court issued an order adopting the magistrate judge's Memorandum and Recommendations and preliminary injunction. The Memorandum and Recommendations denies the plaintiff's motion for preliminary injunction regarding bail practices but grants the plaintiff's motion for preliminary injunction for appointment of counsel, finding that indigent defendants are entitled to appointed counsel at the initial hearing. Defendants have appealed the ruling.

Little v. Frederick, No. CV 6:17-0724, 2020 WL 605028 (W.D. La. Feb. 7, 2020)

Plaintiffs sought injunctive and declaratory relief and an order enjoining the defendant from continuing its bail practices where money bail was set without inquiry as to the ability to pay. The plaintiffs contended that the defendants violated the Fourteenth Amendment's Due Process and Equal Protection clauses by applying policies that resulted in jailing persons because of their inability to make a monetary payment. The plaintiffs further contended that the defendants violated the plaintiffs' fundamental rights to pretrial liberty by placing and keeping them in jail without inquiry into and findings concerning their ability to pay or non-financial alternative conditions.

The court concluded that the plaintiffs' prior claims based on the automatic imposition of bail under the prior bail schedule were moot. Plaintiffs' remaining claims did not raise substantive, but procedural due process concerns. The court further found that defendants had provided adequate procedural protection to these arrestees to ensure their liberty interests were being protected, and that they were not being held solely because of their indigency. Therefore, no declaratory or injunctive relief was warranted on the procedural due process claims. The court lastly found that the defendant's orders, policies, and practices were

"narrowly tailored" to address the compelling interest in assuring the "future appearance and lawful behavior" of the more serious misdemeanor and felony arrestees.

Sixth Circuit

Ross v. Blount, Case No. 2:2019cv11076 (E.D. Mich.)

On April 14, 2019, the plaintiffs filed this complaint against the Chief Judge of Michigan's 36th District Court because of the court's bail practices which disproportionately impact indigent individuals. On August 23, 2019, the court entered a stipulated order staying the case while the parties negotiate a settlement.

Eighth Circuit

Pierce v. City of Velda City, No. 4:15-CV-570-HEA, 2015 WL 10013006 (E.D. Mo. June 3, 2015)

The plaintiff filed a class action suit against the City of Velda City alleging defendant violated plaintiff's (and class members') rights by jailing them and keeping them in jail when they could not pay a generically set amount of money to secure release after an arrest, prior to a first court appearance. The plaintiff also sought an injunction against the defendant prohibiting Velda City from enforcing the unconstitutional post-arrest money-based detention policies.

On June 3, 2019, the court entered its order supporting the settlement agreement between the plaintiffs and defendants. The order and settlement agreement defined future bail practices requiring that the defendant would no longer use secured money bail. All arrestees are expected to be released except where the case involves "intentionally assaultive or threatening conduct." In those cases, Velda City may impose conditions for release or make a determination that "release must be denied to prevent danger to a victim, the community or any other person under applicable constitutional standards."

Dixon v. City of St. Louis, 950 F.3d 1052 (8th Cir. 2020), *as corrected* (Mar. 23, 2020)

Plaintiffs, a group of pretrial arrestees who were detained in St. Louis jails, filed suit pursuant to 42 U.S.C. § 1983, challenging the constitutionality of the procedures by which defendants, state and city officials, set money bail. By allegedly failing to consider non-monetary conditions of release, and the plaintiffs' respective abilities to afford bond, these officials oversaw, it was claimed, an illegal wealth-based detention regime. On June 11, 2019, the District Court granted the plaintiffs' motion for class certification and entered a preliminary injunction enjoining the enforcement of any monetary condition of release resulting in detention, unless a finding was made that detention is necessary because there are no less restrictive alternatives to ensure the arrestee's appearance or public safety.

On appeal, the Eighth Circuit found that the District Court gave too little weight to the recent changes to the Missouri rules governing pretrial release. The State of Missouri amended its Supreme Court Rule 33.01 which took effect on July 1, 2019, requiring release of defendants without pretrial conditions unless the court finds that conditions are necessary and, if so, it must seek non-monetary conditions first. If the court

finds that there are no conditions that will ensure that the defendant will return to court and ensure the safety of the community, under clear and convincing evidence, the court can detain the defendant.

On remand, the Eighth Circuit directed the District Court to consider the new Rule as well as the necessity of an injunction in light of the course of conduct since the District Court opinion was issued.

Ninth Circuit

Buffin v. City & Cty. of San Francisco, No. 15-CV-04959-YGR, 2019 WL 1017537 (N.D. Cal. Mar. 4, 2019)

On March 4, 2019, the District Court issued an order granting the plaintiffs' motion for summary judgment, holding that the use of a bail schedule to determine pretrial release violates the Due Process and Equal Protection Clauses of the U. S. Constitution. The parties then reached a settlement on most issues on August 30, 2019. However, on September 3, 2019, the District Court filed a final judgment enjoined the sheriff from using the bail schedule. The judgment and injunction provide a process for determining bail of individuals based on charge and a pretrial risk assessment instrument. Under the stipulated judgment, the court is waiting for the City and County of San Francisco to enact legislation that mimics the settlement. The court has retained jurisdiction for 18 months to await further information from the City and County of San Francisco.

Eleventh Circuit

Cooper v. City of Dothan, No. 1:15-CV-425-WKW, 2015 WL 10013003 (M.D. Ala. June 18, 2015)

The plaintiff filed suit against the City of Dothan, Alabama on behalf of himself and similarly situated individuals, alleging that the City's arrest and detention policies and practices routinely resulted in the confinement of individuals solely due to their poverty in violation of the Fourteenth Amendment's Due Process and Equal Protection Clauses. Specifically, plaintiff argued that the City's post-arrest detention scheme featuring preset and undifferentiated bond amounts forced indigent individuals arrested on misdemeanor offenses to remain behind bars for as long as a week, while allowing those who could afford the scheduled bond to walk free.

The case was dismissed on June 26, 2015 based on a settlement reached by the parties. On April 13, 2016, the parties entered a Consent Decree which included a Standing Order signed by the municipal court judge for the City of Dothan. The Standing Order allows for release of defendants on an unsecured bond if an individual does not have any prior failures to appear. If there are prior failures to appear, then money bail is requested according to a bail schedule. If, after 48 hours, the defendant is unable to pay the money bail, he/she is entitled to a bail hearing for indigency consideration.

Walker v. City of Calhoun, GA, 901 F.3d 1245 (11th Cir. 2018), *cert. denied sub nom. Walker v. City of Calhoun, Ga.*, 139 S. Ct. 1446, 203 L. Ed. 2d 681 (2019)

Indigent arrestee brought a putative class action against City of Calhoun, alleging that the City's bail policy violated the Equal Protection and Due Process Clauses by conditioning immediate release from jail on the arrestee's ability to pay a preset amount of cash without providing alternatives. The District Court granted a preliminary injunction in favor of the plaintiff. The City appealed.

While litigation was pending, the City of Calhoun revised its bail practices and issued a Standing Bail Order which adopted a bail schedule where the bail amounts were aligned with the fines and fees a defendant would receive if found guilty. If a defendant is unable to pay the bail amount, he or she must be seen by a judge within 48 hours. At the initial appearance, the defendant may claim indigency and the judge must make an individualized determination of indigency and the defendant must be released on recognizance. If the initial appearance occurs after more than 48 hours, the defendant must be released on recognizance. If the charge is a low-level charge only, the defendant must be released on an unsecured bond.

The 11th Circuit vacated the District Court's preliminary injunction and remanded the case. The court held that indigency is not an equal protection class requiring heightened scrutiny, but rather that due process analysis was the correct analysis. The court held that the Standing Bail Order was constitutional in requiring an appearance within 48 hours and having a judicial determination of indigency. Petitioner filed a writ of certiorari with the U.S. Supreme Court that was denied on April 1, 2019.

Mock v. Glynn Cty. Georgia, No. 2:18-CV-25, 2019 WL 2847122 (S.D. Ga. July 2, 2019)

Plaintiffs filed this putative class action alleging entitlement to a remedy under 42 U.S.C. § 1983. Following a hearing on the plaintiffs' motion for preliminary injunction, the court ordered a settlement conference, at which the parties reached a settlement agreement to release all claims and to dismiss this case pursuant to the agreed upon terms. The settlement included the state court judge of Glynn County, entering an Amended Standing Bail Order, which states that those who are not able to make bond should timely have the bond reduced, have an unsecured bond, or be released on recognizance. This decision must be based on an affidavit of ability to pay completed by the arrestee and must occur within 48 hours of arrest at the initial appearance. There are certain exceptions laid out in the Order, including state and federal holds as well as holds because of intoxication or for mental health reasons.

Schultz v. State, 330 F. Supp. 3d 1344 (N.D. Ala. 2018)

Indigent arrestee brought action for preliminary injunction against state, county sheriff, circuit clerk, and state court judges, alleging that defendants violated Fourteenth Amendment rights to pretrial liberty and freedom from wealth-based detention, and failed to provide a constitutionally adequate process. While litigation was pending, the judicial defendants drafted a Standing Order to amend bail procedures. However, the court still granted the preliminary injunction as the revised bail procedures were not being followed. The opinion of the court also indicated that the bail procedures of Cullman County were unconstitutional. The preliminary injunction requires the defendants to release arrestees with unsecured bond with some exceptions. For the excepted cases, initial appearance must occur within 48 hours. During the initial appearance, the judge must determine, by clear and convincing evidence, that "the defendant poses a significant risk of flight or danger to the community." Those detained must complete a questionnaire about flight or dangerousness and an affidavit about financial means.

Edwards v. Cofield, 301 F. Supp. 3d 1136 (M.D. Ala. 2018), *reconsideration denied*, No. 3:17-CV-321-WKW, 2018 WL 4101511 (M.D. Ala. Aug. 28, 2018)

Indigent arrestee brought putative class action under § 1983 against state court judge, magistrate, court clerk, and sheriff, alleging the county's bond system requiring indigent arrestees to post secured money bond in an amount set in a bond schedule to avoid pretrial detention violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Defendants moved to dismiss, and arrestee moved for preliminary injunction.

The District Court held that the new Standing Bond Order did not moot the plaintiff's suit and that the Due Process and Equal Protection Clauses did not require that indigent arrestees be given appointed counsel for their bail hearing. It further held that the plaintiff did not have a substantial likelihood of success on the merits of her claim that the Due Process and Equal Protection Clauses required arrestees be given an opportunity to be heard, present evidence, and cross examine witnesses; nor did she have a substantial likelihood of success on the merits of her claim that the Due Process and Equal Protection Clauses required a clear and convincing evidentiary standard at bond hearings. Lastly, the court held that the plaintiff did not have substantial likelihood of success on the merits of her claim that maximum delay of 72 hours before a bond hearing was unconstitutional.

Relevant State Cases

New Mexico:

State v. Brown is a case from 2014 in which the Supreme Court of New Mexico held that the district court erred in setting bail at $250,000 and not considering the least restrictive conditions of pretrial release. Under New Mexico's Constitution, a defendant has a right to bail, except for certain capital cases and repeat offenders. The New Mexico Rules of Criminal Procedure provide a list of factors a judge must consider when determining bail. In this case, the trial judge only considered the charge, which is one of the factors. However, the Supreme Court held that the trial judge must consider all the factors. The Supreme Court further held that "[n]either the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release. Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether."

Illinois:

Robinson v. Martin is a case from 2016 that was filed in the Circuit Court of Cook County, Illinois seeking a preliminary injunction because of Cook County's bail practices. In April 2017, the defendants filed a motion to dismiss because the lawsuit was moot after Chief Judge Timothy Evans issued a General Order for bail practices. The General Order went into effect September 2017 for felonies and January 2018 for all other cases. In June 2018, the court granted to motion to dismiss due to the implementation of the General Order.

Nevada:

Valdez-Jimenez v. Clark County is a case from 2019 filed with the Nevada Supreme Court seeking to find the bail system in Clark County, Nevada unconstitutional on Eighth Amendment and Fourteenth Amendment grounds. Oral arguments were held September 4, 2019. The ruling is pending.

California:

In re Kenneth Humphrey is a habeas case out of California from 2018. The First District Court of Appeal in California ruled in January 2018 that the superior court judge violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment by imprisoning the defendant prior to trial solely because he could not afford to pay bail. The ruling required Superior Court judges to consider both a defendant's ability to pay the amount of bail ordered and, if not, whether less restrictive conditions of bail were adequate to serve the government's interests. In this case, the appellate court found that the trial court failed to make either of these findings. In other words, the appellate court found that a trial court could not detain someone based solely on a defendant's inability to pay. The Supreme Court of California has agreed to hear the case. A date for oral arguments has not yet been set.