



FREQUENTLY ASKED QUESTIONS ABOUT PRETRIAL RELEASE DECISION MAKING

1. What are the goals of a pretrial release decision?

There are two goals of a pretrial release decision: first to assure the appearance of the defendant in court, and second - in most states and the federal system - to assure community safety.

2. What is the difference between bail and pretrial release?

“Bail” is the process a court undertakes to determine if a person charged with a crime can be released before trial. Bail also determines what conditions may be required as part of the pretrial release. Black’s Law Dictionary defines bail as “[t]he process by which a person is released from custody either on the undertaking of a surety or on his or her own recognizance.”¹

During the bail process, a judge has several options and should choose the option that best balances defendant’s individual right to liberty with concerns over community safety and whether the defendant will appear in court. These options include:

- Release on his or her own recognizance;
- Release on non-financial conditions that require monitoring the defendant in the community²;
- Setting a money bail in the form of property, cash, or surety³ that the defendant must post to be released⁴;
- Ordering the defendant detained without bail.⁵

¹ BLACK’S LAW DICTIONARY 161 (9th Ed. 2009).

² Non-financial conditions may include regular contact with a pretrial services program, drug testing, curfew, or electronic monitoring.

³ Black’s Law Dictionary defines “surety” as “a person who is primarily liable for paying another’s debt or performing another’s obligations.” BLACK’S LAW DICTIONARY 1579 (9th Ed. 2009).

⁴ Financial bail requires the defendant or someone on the defendant’s behalf to post a money amount with the court before the defendant can be released.

⁵ ABA Pretrial Release Standards 10-1.2 and 10-1.4.

If a defendant is released – with or without conditions – this is referred to as “pretrial release.”

Bail is commonly misused as a term referring to large sums of money posted to secure a defendant’s release from jail before trial. The terms “bail” and “money bail” are commonly used interchangeably; however these two terms do not legally mean the same thing.

3. How do judges currently make pretrial release decisions?

Statutes and court rules list factors judges must consider when making pretrial release decisions. These include: the nature of the offense and weight of the evidence; the defendant’s criminal history and prior appearances in court; the defendant’s residence, employment status, and ties to the community; and any problems the defendant has with substance abuse or mental health.

Under most state statutes, there is a legal presumption that defendants should be released on the least restrictive conditions necessary to assure community safety and court appearance. This presumption must be overcome to impose more restrictive conditions of release. Detention without pretrial release should only be used for defendants who cannot be released while reasonably assuring community safety or court appearance. This policy is supported by the American Bar Association’s (ABA) Standards on Pretrial Release.⁶

ABA Standards also specify that money bail “should be imposed only when no other less restrictive conditions of release will reasonably ensure the defendant’s appearance in court.” These standards advise that money bail should not cause a defendant to remain detained because he lacks the means to post bail.⁷ Money bail is not a way to enforce community safety⁸; otherwise potentially dangerous defendants could obtain release by simply posting a dollar amount.

4. What are some concerns about the current process for making pretrial release decisions?

In the summer of 2011 the U.S. Attorney General Eric Holder identified several “serious problems, as well as significant inefficiencies” in the existing pretrial decision making process. These problems include:

- Two-thirds of county jail inmates are defendants awaiting trial;
- County jail inmates are poor and remain in jail nearly two weeks because of an inability to pay the required money bail; and
- County jail inmates are kept in jail at a considerable cost to taxpayers amounting to roughly \$ 9 billion annually.

Money bail can be a significant source of these problems, mainly because defendants often languish in jail simply because they cannot pay the monetary amounts even though they may not necessarily pose risks to the community or a risk of not appearing in court. For example, money

⁶ American Bar Association, *ABA Standards for Criminal Justice: Pretrial Release, Third Edition*, Washington, DC, 2007, Standard 10-5.1(a).

⁷ ABA Pretrial Release Standards 10-5.3(a).

⁸ ABA Pretrial Release Standards 10-5.3(b).

bail is a required condition of release in 70% of felony cases nationwide. Of those felony defendants, 53% remain in jail mostly because they cannot pay the money bail. Of those felony defendants that remain in jail, 88% of felony defendants remain detained throughout a pretrial period solely because they cannot afford their bails.⁹ Furthermore, as use of money bonds increase, rates of pretrial release may decrease.¹⁰

Money bail also exacerbates pretrial release problems for misdemeanor charges. For example, 87% of defendants in New York City charged with misdemeanors in 2008 who had money bail amounts of \$1,000 or less were unable to post these amounts. These defendants remained detained throughout the pretrial period. Almost three-fourths of these misdemeanor defendants were charged with non-violent, non-weapons-related offenses.¹¹

5. How can a county or state improve pretrial release decision making practices?

At the 2011 National Symposium of Pretrial Justice, Assistant Attorney General Laurie Robinson noted some improvements in pretrial release decisionmaking achieved by using evidence-based pre-trial “risk assessment instruments.”¹² Attorney General Holder added that these more accurate evidence-based tools can assist judges to better achieve the goals of pretrial release decisionmaking. One method Attorney General Holder mentioned was engaging pretrial service providers to help judges make informed decisions “that improve cost effectiveness and preserve safety needs, as well as due process.”¹³ Pretrial service providers save costs by encouraging pretrial release in appropriate situations, thereby reducing the high incarceration costs incurred by pretrial detainees. Pretrial service providers ensure safety by gathering information that helps identify defendants who do not pose a safety concern to the community.

Other recommendations include methods designed to reduce reliance on pre-trial detention which include:

- Making pre-trial release the default;¹⁴
- Limiting use and amount of monetary bail;
- Limiting time between arrest and arraignment;¹⁵ and
- Releasing more detainees pretrial because the majority of inmates do not pose any safety risk to the public¹⁶

⁹ Ibid.

¹⁰ Thomas H. Cohen and Tracy Kyckelhahn, *Felony Defendants in Large Urban Counties, 2006*, Washington, DC, U.S. Department of Justice, Bureau of Justice Statistics, 2010.

¹¹ Human Rights Watch, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City* at http://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf (evaluating pretrial detention in New York City).

¹² Pretrial risk assessment instruments work to predict the likelihood that defendants will appear for all court dates and not be rearrested during the pretrial release period. Instruments typically include the following elements: primary charge type, pending charges at time of arrest, criminal history, employment status, length of time in the community, and history of drug abuse. See www.pretrial.org/pages/bail-decision.aspx (information about advancement in the science of pretrial risk assessment and completed meta-analysis).

¹³ Transcripts from these and other speeches from the Symposium can be found at www.pretrial.org/symposium.html.

¹⁴ See Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO STATE L.J. (2011)

¹⁵ ACLU, *Smart Reform Is Possible*, 10-11 (August 2011), http://www.aclu.org/files/assets/smartreformispossible_web.pdf#page=10

6. What are “pretrial service providers”?

The first pretrial services program was implemented in 1961 in New York City. Today there are 300 to 400 state and local pretrial services programs in the country including programs in each of the 94 federal districts. These pretrial service providers have several functions.

- a. **Gather Information.** Pretrial service providers gather information about a defendant to assess a defendant’s risk of endangering the community or failing to appear in court. This information includes: a defendant’s residence, employment, and community ties; a defendant’s criminal history; and whether defendant is on probation, parole, or pretrial release.
- b. **Assess Risks.** After gathering this information, pretrial service providers synthesize the information in order to assess the defendant’s risk. The most successful pretrial services programs use an evidence-based risk assessment tool to make these assessments. The service providers then present this information and assessment to the court during the defendant’s initial appearance. Judges use this information to help determine an appropriate release option that assures the community’s safety and the defendant’s appearance.
- c. **Provide Supervision.** Pretrial service programs supervise defendants who have been released under specified conditions. These conditions include requiring a defendant to report in regularly, undergo drug or alcohol testing or treatment, or be monitored electronically. Pretrial service programs report to the court on a defendant’s compliance with pretrial conditions.

7. Why should my jurisdiction consider starting a pretrial services program?

Several organizations recommend or endorse the use of pretrial services programs. ABA standards recommend every jurisdiction establish and use a pretrial service program to gather information about defendants, assess each defendant’s risk of endangering the community or failing to appear in court, and use that information to make recommendations to the court. The programs may also be responsible for certain defendants who are granted conditional release by the court.¹⁷ Additionally the National Association of Counties advocates each county be capable of screening all arrestees to help inform judges’ pretrial release decisions.¹⁸

Other national criminal justice associations have issued policy statements supporting risk-based pretrial release decision making and various supervision options to mitigate identified risks. These associations include: the Association of Prosecuting Attorneys; the American Council of

¹⁶ Shima Baradaran & Frank McIntyre, *Predicting Violence*, Tex. L. Rev. (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1756506; Shima Baradaran, *The Right Way to Shrink Prisons*, N.Y. TIMES (May 30, 2011).

¹⁷ ABA Pretrial Release Standard 10-1.10.

¹⁸ National Association of Counties, 2009-2010 Justice and Public Safety Platform and Resolutions.

Chief Defenders; the International Association of Chiefs of Police; the American Jail Association; and the American Probation and Parole Association.¹⁹

The benefits of a pretrial services program include:

- Better informed judges;²⁰
- Cost savings;²¹
- More proportional and fair sentences;
- Improved plea bargaining;²²
- Better predictions of defendants' pretrial misconduct;²³
- Better predictions of risks posed to a community; and
- More efficient pretrial decisionmaking.

8. Generally how much does a pretrial release services program cost?

Pretrial release services programs should be evaluated by its cost effectiveness, meaning its costs compared to its cost savings. A relatively small upfront investment in a pretrial services program often produces huge cost savings. These savings come from freeing up jail space and saving on the costs associated with incarceration (feeding, housing, building maintenance, staff, etc.). Okaloosa County, Florida provides an example of such savings. In fiscal year 2007, the population of the county jail averaged 695 inmates each day, which was 117% of capacity. That same year the county planned a major expansion of bed space at the jail at an estimated construction cost of \$12.5 million with an annual operating cost of \$3.5 million. In 2008 before

¹⁹ Copies of these policy statements can be found at:

<http://www.pretrial.org/OurServices/Advocacy/Pages/default.aspx>.

²⁰ In jurisdictions where pretrial services programs are not present, judicial officers must make decisions with very limited information, often just the charge. In such cases judicial officers are much more likely to set a financial bail that the defendant may or may not be able to meet.

²¹ For specific examples of cost savings from a variety of jurisdictions see: Marie VanNostrand, "Alternatives to Pretrial Detention: Southern District of Iowa" at <http://www.pretrial.org/Docs/Documents/Alternatives%20to%20Pretrial%20Detention%20Southern%20District%20of%20Iowa%20Case%20Study%20Final%20Report%206-30-10.pdf> (evaluating pretrial services programs in Iowa, showing pretrial services resulted in cost savings of \$15,393 per defendant and a cost avoidance of \$5.33 million in the 2008 and 2009 fiscal years); Melinda Tanner, Dillon Wyatt, & Douglas Yearwood, *Pretrial Services Programs in North Carolina* at <http://www.ncgccd.org/pdfs/pubs/psp.pdf> (evaluating pretrial services programs in North Carolina which had average cost savings of \$1.05 million based on 2005-2006 fiscal year); Human Rights Watch, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City* at http://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf (evaluating pretrial detention in New York City which saves \$161 per inmate per day in lieu of incarceration); Bryan Taylor, *Utah County Pretrial Services: A Program Implementation Plan*10 (2011).

²² See John S. Goldkamp, *TWO CLASSES OF THE ACCUSED: A STUDY OF BAIL AND DETENTION IN AMERICAN JUSTICE*, (1979) (showing defendants receive more severe sentences, are offered less attractive plea bargains, and are more likely to become "reentry" clients for no other reason than their pretrial detention—regardless of charge or criminal history); Malcom M. Feely, *THE PROCESS IS PUNISHMENT: HANDLIN CASES IN A LOWER CRIMINAL COURT*, (1992) (demonstrating four times as many defendants serve time pretrial than are incarcerated after conviction); Jeffrey Manns, *LIBERTY TAKINGS: A FRAMEWORK FOR COMPENSATING PRETRIAL DETAINEES*, (2005).

²³ The risk assessment tools used by pretrial release programs predict pretrial misconduct more effectively than professional judgment alone; See The Advocate, *KY Supreme Court Bail Project, Method of Assessing Risk, Varying Release Rates and Unchanged Failure to Appear Rates, and Initial Appearance Counsel* at https://docs.google.com/viewer?a=v&pid=explorer&chrome=true&srcid=0B2aU9MljC05GMjU1YzZlYmItOTY1O-C00MjBkLWI0ODAtOWQ2Y2VhYTA4MmZj&hl=en_US&pli=1.

proceeding with the expansion, the county invested in improving its pretrial services program in order to safely reduce its jail population. By March 2011, the average daily population dropped to 464 inmates, 22% below capacity and saved the county \$27 million. The county then placed on hold its plans for the jail expansion.²⁴

The cost of pretrial release programs vary dramatically, usually because of variations in jurisdiction size. In 2009 about 26% of pretrial programs reported an operating budget of less than \$200,000. Another quarter of the jurisdictions had costs of at least \$1.5 million. Generally new programs tend to be established in smaller jurisdictions and accordingly have smaller costs.²⁵

Numerous jurisdictions have had great success implementing pretrial services programs. Below are some notable examples of these programs.

- The District of Columbia has successfully implemented the vision of the ABA Pretrial Release Standards, led by the work of the District's pretrial services program. Currently 80% of defendants are released either on their own recognizance or with non-financial conditions individually tailored to each defendant. Fifteen percent of defendants are held without bail, principally because no condition can reasonably assure the safety of the community or the defendant's appearance in court. Only 5% have a financial bail set. Of the defendants who are released, 97% finish the pretrial period without being arrested on a new felony charge and 91% without being arrested on a new misdemeanor charge. Eighty-eight percent make all their court appearances.²⁶
- The Commonwealth of Kentucky established a statewide pretrial services program in 1976, the same year that it outlawed commercial bail bonding for profit. Recent figures from Kentucky Pretrial Services show that 74% of defendants are released while their cases are pending. Of those who were released, 92% made all their court appearances, and 93% completed the pretrial period without a new arrest.²⁷
- Another jurisdiction with a successful pretrial services program is Allegheny County (Pittsburgh), Pennsylvania. In 2007 court officials transformed an outdated, limited service program into an evidence-based program that conforms to ABA standards. The program went from recommending a money bail in most cases to using a validated risk assessment instrument to identify defendant risks and recommend appropriate release conditions based upon individual risk levels.²⁸

²⁴ *Pretrial Release: A Tremendous Success in Okaloosa County, Florida*, Fact Sheet, March 2011, available at: <http://www.pretrial.org/Pages/costs.aspx>.

²⁵ See Pretrial Justice Institute. "[2009 Survey of Pretrial Services Programs](#)" 2009. Pp. 18-19. See also Pretrial Justice Institute. "[Pretrial Services Program Implementation: A Starter Kit](#)" 2009. Pp. 17-18.

²⁶ Pretrial Justice Institute, *The D.C. Pretrial Services Agency: Lessons Learned From Five Decades of Innovation and Growth*, Washington, DC, 2010.

²⁷ James Austin, Roger Ocker, and Avi Bhati, *Kentucky Pretrial Risk Assessment Validation*, Washington, D.C., the JFA Institute and the Pretrial Justice Institute, 2010.

²⁸ Pretrial Justice Institute, *The Transformation of Pretrial Services in Allegheny County, Pennsylvania: Development of Best Practices and Validation of Risk Assessment*, Washington, D.C., 2007.

9. *If our jurisdiction already has a pretrial services program, how do we assess its effectiveness?*

To evaluate the performance of a pretrial services program, the National Institute of Corrections suggests several factors to consider. Those factors are divided into different categories called outcome measures, performance measures, and mission critical data.²⁹

Outcome Measures:

- **Appearance Rate** - the percentage of supervised defendants who make all scheduled court appearances.
- **Safety Rate** - the percentage of supervised defendants who are not charged with a new offense during the pretrial stage.
- **Concurrence Rate** - the ratio of defendants whose supervision level or detention status corresponds with their assessed risk of pretrial misconduct.
- **Success Rate** - the percentage of released defendants who (1) are not revoked for technical violations of the conditions of their release, (2) appear for all scheduled court appearances, and (3) are not charged with a new offense during pretrial supervision.
- **Pretrial Detainee Length of Stay** - the average length of stay in jail for pretrial detainees who are eligible by statute for pretrial release.

Performance Measures:

- **Universal Screening** - the percentage of defendants eligible for release by statute or local court rule that the program assesses for release eligibility.
- **Recommendation Rate** - the percentage of time the program follows its risk assessment criteria when recommending release or detention.
- **Response to Defendant Conduct** - the frequency of policy-approved responses to compliance and non-compliance with court-ordered release conditions.
- **Pretrial Intervention Rate** - the pretrial agency's effectiveness at resolving outstanding bench warrants, arrest warrants, and capiases.

Mission Critical Data:

- **Number of defendants released by release type and condition** - the number of release types ordered during a specified time frame.
- **Caseload ratio** - the number of supervised defendants divided by the number of case managers.
- **Time from nonfinancial release order to start of pretrial supervision** – the time between a court's order of release and the pretrial agency's assumption of supervision.
- **Time on pretrial supervision** – the time between the pretrial agency's assumption of supervision and the end of program supervision.
- **Pretrial detention rate** – the proportion of pretrial defendants who are detained throughout pretrial case processing.

10. *How does a jurisdiction successfully start a pretrial services program?*

²⁹ The National Institute of Corrections Pretrial Executive Network, "[Measuring What Matters Most](#)," Washington, DC, National Institute of Corrections (2011).

The Pretrial Justice Institute has created a Starter Kit for implementing a pretrial services program. That document and related materials can be found at www.pretrial.org.³⁰

The ABA strongly encourages every jurisdiction to provide a pretrial service program. The ABA Standards for Pretrial Release can be downloaded at:

http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_toc.html. If you have any questions or need more information about these provisions, please contact the [Crime Prevention, Pretrial & Police Practices Committee](#) (Co-Chairs: Shima Baradaran, Tim Murray and James Williams).

³⁰ See <http://www.pretrial.org/OurServices/TechnicalAssistance/SelfHelpMaterials/Pages/default.aspx>