September Term, 2013
No. 105

IN THE
COURT OF APPEALS OF MARYLAND

BEN C. CLYBURN, *et al.*,

Appellants,

v.

QUINTON RICHMOND, *et al.*,

Appellees.

On Appeal from the Circuit Court for Baltimore City
(Alfred Nance, Judge)

On Writ of Certiorari to the Court of Special Appeals of Maryland

BRIEF FOR APPELLEE PAUL B. DeWOLFE, JR.

A. STEPHEN HUT, JR.
OFFICE OF THE PUBLIC DEFENDER
6 St. Paul Street, Suite 1400
Baltimore, MD 21202
(410) 767-8460

BRIAN M. BOYNTON
ASHLEY BASHUR
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

March 4, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

LEGISLATIVE MATERIALS

STATUTES AND RULES

INTRODUCTION

On September 25, 2013, this Court held that indigent arrestees have a right to counsel at initial bail hearings before District Court commissioners under Article 24 of the Maryland Declaration of Rights. Five months have passed since the Court issued its decision, and the decision has yet even to be implemented. The District Court Defendants now ask the Court to reverse itself. That request should be denied.

The Public Defender believes the Court's holding that indigent defendants have a right to counsel at initial bail hearings should not be overturned for two reasons. First, the District Court Defendants ask the Court to act on the basis of mere speculation about what the September 25 decision might or might not cause the Legislature to do, and how such predicted legislative action might or might not adversely affect indigent defendants. Such speculation is an inappropriate basis for any action by this Court overruling its earlier decision. Second, reversing a decision just months after it was rendered when no facts, law, or other circumstances have changed to warrant such reversal would be inconsistent with principles of *stare decisis*.

STATEMENT OF THE CASE

The relevant aspects of this case's long procedural history prior to the issuance of the Court's September 25, 2013, opinion are accurately summarized therein, *see DeWolfe v. Richmond*, 434 Md. 444 (2013) ("*DeWolfe II*"), and, accordingly, we will not repeat them here. In *DeWolfe II*, this Court held that "an indigent defendant is entitled to state-furnished counsel at an initial hearing before a District Court Commissioner" under

Article 24 of the Maryland Declaration of Rights. *Id.* at 464.[1] The circuit court issued a declaratory judgment on October 23, 2013. (E. 33.) On October 25, 2013, the State of Maryland, which moved to intervene in the lawsuit as a defendant-appellant on April 13, 2012 (App. 163-67), but is not an appellant in the current proceedings, moved to reconsider the Court's September 25 opinion (App. 200-05) and moved for a stay of enforcement of the judgment (E. 111-20). These motions were denied by the Court on November 6, 2013. (E. 137-38.)

On December 5, 2013, Appellees Quinton Richmond, *et al.* ("Plaintiffs") filed a petition for further relief in the circuit court pursuant to Md. Code Ann., Cts. & Jud. Proc. ("CJP") § 3-412, requesting that the court (1) order the District Court Defendants[2] to show cause why the relief should not be granted, (2) grant the petition for further relief, and (3) enter an affirmative injunction directing the District Court Defendants to appoint counsel for Plaintiffs at their initial bail hearings or, (4) in the alternative, enter a negative injunction prohibiting the District Court Defendants from conducting initial bail hearings for Plaintiffs without appointing counsel for them, and directing the incarceration of

[1] The Court did not hold any provision of the amended Public Defender Act unconstitutional, noting that "[i]f the other branches of government decide that compliance with this holding is to be accomplished by means other than Public Defender representation at initial appearances before Commissioners, they are, of course, free to do so." *DeWolfe II*, 434 Md. at 464 n.15.

[2] The "District Court Defendants" are Appellants Ben C. Clyburn, Chief Judge of the District Court of Maryland; Barbara Baer Waxman, Administrative Judge for the District Court of Maryland for Baltimore City; David W. Weissert, Coordinator of Commissioner Activity for the District Court of Maryland; Linda Lewis, Administrative Commissioner for the District Court of Maryland for Baltimore City; and the Commissioners of the District Court of Maryland for Baltimore City.

Plaintiffs who have not been provided counsel at such hearings, and (5) provide such further relief as the nature of this cause may require. (E. 151.) The circuit court issued an injunction containing the Plaintiffs' requested language on January 10, 2014 (E. 225-26), and subsequently issued an amended injunction with no substantive changes (E. 231-32).[3] The District Court Defendants noticed their appeal on January 13, 2014 (E. 29), and on January 14, 2014, they petitioned for a writ of certiorari and moved for an order staying the circuit court's injunction pending disposition of the certiorari petition, which was granted (E. 234). On January 23, 2014, this Court granted the petition and extended the stay until March 7, 2014. (E. 235-36.)

QUESTION PRESENTED

Should this Court revisit and overrule its five month-old decision in *DeWolfe II* holding that indigent arrestees have a constitutional right to representation at initial bail hearings under the Article 24 of the Maryland Declaration of Rights?[4]

STATEMENT OF FACTS

On January 4, 2012, this Court held that the version of the Public Defender Act then in effect guaranteed indigent defendants a right to appointed counsel at initial bail hearings. *DeWolfe v. Richmond*, 434 Md. 403, 430-31 (2012). On May 22, 2012, the Governor signed House Bill 261 into law as emergency legislation, which amended the

[3] As the District Court Defendants note, the Public Defender is not subject to the terms of the injunction. *See* District Court Defendants ("DCD") Br. 2 n.1. However, his Office provides representation to indigent defendants in Maryland, including members of the Plaintiffs' class.

[4] The Public Defender takes no position as to the first two issues presented in the District Court Defendants' brief, and accordingly, they are not discussed herein.

Public Defender Act to require public defenders to provide counsel at bail review hearings, but further provided that they would not do so at initial bail hearings before District Court commissioners. *See* 2012 Md. Laws ch. 505; Md. Code Ann., Crim. Proc. § 16-204(b)(2). The bill also implemented certain procedural protections at the initial bail hearings, including requirements that the commissioner make a written record of his or her probable cause determination and that all communications by the parties be made in writing, on the record, and openly at the proceeding. *See* Md. R. 4-216(a) & (b). The amended statute provides that statements made during the course of an initial bail hearing may not be used as evidence against the defendant in later proceedings. *See* Md. Code Ann., Cts. & Jud. Proc. § 10-922. Finally, any defendant "who is denied pretrial release by a commissioner or who for any reason remains in custody after a commissioner has determined conditions of release pursuant to Rule 4-216 shall be presented *immediately* to the District Court if the court is then in session, or if not, at the next session of the court." Md. R. 4-216.1(a)(1) (emphasis added); *accord* Md. Code Ann., Crim. Proc. § 5-215.

The new legislation also created a task force with members from numerous stakeholders in the Maryland criminal justice system, called the Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defendants by the Office of the Public Defender ("OPD Task Force"). *See* 2012 Md. Laws ch. 505, § 4. The legislation charged the OPD Task Force with (1) studying the adequacy and cost of State laws and policies relating to representation of indigent criminal defendants by the Office of the Public Defender ("OPD") and the District Court commissioner and pretrial

release systems, and (2) considering and making recommendations regarding options for and costs of improving the system of representation of indigent criminal defendants and the District Court commissioner and pretrial release systems. *Id.* The legislation also required the OPD Task Force to submit an interim report of its findings and recommendations to the Governor and, in accordance with Md. Code Ann., State Gov't § 2-1246, the Senate Judicial Proceedings Committee and the House Judiciary Committee, on or before November 1, 2012, and to submit a final report on or before November 1, 2013. *Id.*

Because of the legislative amendments, the Court ordered the parties to submit supplemental briefs on July 9, 2012, in order to resolve the remaining constitutional claims that had not been decided in the Court's January 4, 2012 opinion. (App. 173-75.) The Court heard oral arguments on January 4, 2013.

The legislatively-created OPD Task Force met for the first time on October 16, 2012, and set up four subcommittees: Criminal Citations, District Court Commissioner Study, Pretrial Release, and Public Defender Access. (App. 78-79.) The OPD Task Force issued an interim report on November 1, 2012, and held subsequent meetings on December 4, 2012, February 4, 2013, April 22, 2013, June 3, 2013, and September 10, 2013. (App. 79.)

On September 25, 2013, the Court issued its decision holding that "an indigent defendant is entitled to state-furnished counsel at an initial hearing before a District Court

Commissioner" under Article 24 of the Maryland Declaration of Rights. *DeWolfe II*, 434 Md. at 464.[5]

The OPD Task Force met on October 9, 2013 to discuss the impact of the *DeWolfe II* decision. (App. 79.) On November 14, 2013, the OPD Task Force met and heard a presentation on a nationally validated pretrial release risk assessment tool developed by the Arnold Foundation. (App. 80.) A summary of the information in this presentation was included as Appendix 1 to the final report issued by the OPD Task Force. (OPD Apx. 1-7.)[6] Written reports were submitted by the Criminal Citations, Pretrial Release, and District Court Commissioner Subcommittees, which are included as Appendices 2-4 of the final report. (*See* OPD Apx. 9-121.) The Pretrial Release Subcommittee's Final Report and Recommendations (OPD Apx. 35-37) attached a report issued by the Pretrial Justice Institute ("PJI"), which examined the current status of pretrial release decision-making in Maryland and issued a set of recommendations (OPD Apx. 39-89). The PJI found that only 11 of Maryland's 24 jurisdictions have pretrial services programs, and in those 11 jurisdictions, there is no consistent compliance with national standards and evidence-based practices. (OPD Apx. 54-55.) In Baltimore City, where 88% of the jail

[5] On October 24, 2013, Chief Judge Barbera, by administrative order, established the Task Force on Pretrial Confinement and Release (the "Judiciary Task Force") to study pretrial release and confinement issues from the perspective of the judiciary. (App. 1-4.)

[6] References to the Public Defender's Appendix are denoted as "OPD Apx." The District Court Defendants included the report issued by the OPD Task Force in the Appendix to their brief (*see* App. 69-81), but did not include Appendices 1-4 to the report in their Appendix. These appendices are included the Appendix to the Public Defender's brief. (*See* OPD Apx. 1-121.) Accordingly, references to the OPD Task Force report are to the District Court Defendant's Appendix, and references to the report's appendices are to the Public Defender's Appendix.

population is comprised of pretrial detainees (OPD Apx. 59), the PJI found that the court often does not take the action recommended by pretrial services as to decisions regarding release (OPD Apx. 64). The Pretrial Release Subcommittee concluded that changes were needed to improve Maryland's pretrial release system, "in which many low risk defendants are unable to secure ordered release and many higher risk defendants are permitted to purchase release unencumbered by conditions of supervision." (OPD Apx. 37.)

On December 12, 2013, the OPD Task Force met to discuss and agree upon the recommendations to be included in the final report, which included the following ones relevant to this case:

> **Recommendation 6:** That the use of secured, financial conditions of pretrial release (cash, property, or surety bond) that require a low-risk defendant to pay some amount of money in order to obtain release, while permitting high-risk defendants with the resources to pay their bonds to leave jail unsupervised, be completely eliminated.
>
> **Recommendation 7:** That a statewide system that utilizes a standard, validated pretrial risk screening tool at which the pretrial detention/release decision is made be implemented.
>
> **Recommendation 8:** That a statewide system that utilizes risk-and-need-based supervision, referral, and treatment options in all Maryland counties be implemented.
>
> **Recommendation 9:** That a shared jail management database system to ensure consistency in data collection across the State be implemented.
>
> **Recommendation 10:** That an annual statewide jail report that provides for indicators of process and outcomes related to pretrial and post-adjudication policies and practices be mandated.

> **Recommendation 11:** That a statewide pretrial services agency ("PSA") be created, to be located within the executive branch.
>
> **Recommendation 12:** That an objective, validated risk assessment tool for use by pretrial services agents be adopted.
>
> **Recommendation 13:** That the PSA release those persons for whom the validated risk assessment tool recommends release without conditions. Until such time as a validated risk assessment tool is developed for domestic violence offenses and sexual offenses, the PSA may not be authorized to release persons charged with those offenses.
>
> **Recommendation 14:** That the PSA provide continued supervision of those persons released under conditions as may be deemed appropriate.
>
> **Recommendation 15:** That the judiciary deploy judges in such a manner as to ensure that all defendants not released by the PSA have benefit of an initial appearance/bail review before a judge within 24 hours of arrest.
>
> **Recommendation 16:** That whatever system the legislature passes, the critical principle of prompt presentment no later than 24 hours of arrest [remain].

(App. 81.)

On January 3, 2014, the Judiciary Task Force also issued a report recommending substantial changes to the pretrial system. (App. 5-24.) Several bills have since been introduced in the General Assembly to implement the Court's decision. (*See*, *e.g.*, App. 25-68.)

Senate Bill 973, introduced by Senator Brian Frosh on February 7, 2014, would implement two of the primary recommendations by the OPD Task Force. First, it authorizes the use of a validated pretrial release risk assessment tool for detention or release decisions. (App. 46.) Second, it creates a statewide pretrial release services program within the executive branch. (App. 45.) Through the use of a risk assessment

tool, Maryland would be able to more accurately predict those individuals who should be detained before trial. (OPD Apx. 135.) This tool would eliminate the need for initial bail hearings before District Court commissioners. (*See* App. 42, 49, 52.)

Under the proposed amendments in SB 973, arrested individuals who score "low risk" under the risk assessment tool would be administratively released on their own recognizance, while those who score above low risk would be presented to a judge immediately or at the next court session, where he or she would be represented by counsel. (*See* OPD Apx. 133; App. 58.) The judge would make a determination whether the defendant should be released on his or her own recognizance, released on bond, or detained. (*See* App. 56.) The judge may also impose conditions on the defendant's pretrial release, which would be enforced and monitored by the pretrial release services program. (App. 45.)

SB 973 is supported by a number of state actors and entities within the criminal justice system, including the OPD (with amendments); the Governor's Office of Crime Control & Prevention and the Department of Public Safety and Correctional Services, on behalf of Governor Martin O'Malley and the Administration; the Maryland Correctional Administrators Association (with amendments); the Maryland Association of Counties (with amendments); Gregg Bernstein, State's Attorney for Baltimore City; Scott Shellenberger, State's Attorney for Baltimore County; and L. Jesse Bane, Sheriff of Harford County.[7] Several non-profit entities also support SB 973, including the

[7] *See* OPD Apx. 122-29, 133-41; *Hearing on SB 973 Before Md. S. Judicial Proceedings Comm.*, 2014 Leg. Session (Feb. 19, 2014), *media available at*

American Civil Liberties Union (ACLU) of Maryland (with amendments) and the Pretrial Justice Institute. (*See* OPD Apx. 130-32, 142-44.)

ARGUMENT

The Public Defender opposes the District Court Defendants' request that the Court overrule its holding in *DeWolfe II* that indigent arrestees are entitled to representation at initial bail hearings under Article 24 of the Maryland Declaration of Rights. First, in determining whether there is a constitutional right to counsel, this Court should not consider predictions, founded almost wholly on pure speculation, of what the General Assembly may or may not do to comply with the Court's *DeWolfe II* ruling. Even if it were to consider such predictions, the District Court Defendants' argument that the *DeWolfe II* ruling will likely lead to diminished liberty for indigent defendants is contradicted by the wide support for comprehensive pretrial release reforms that will benefit indigent defendants. Second, overruling the *DeWolfe II* decision when it is just five months old, it has yet to take effect, and nothing has changed would disregard the principles of *stare decisis*.

I. THIS COURT SHOULD NOT REVERSE ITS PRIOR CONSTITUTIONAL DECISION BASED ON SPECULATION ABOUT POTENTIAL FUTURE LEGISLATIVE ACTIONS.

The District Court Defendants claim that *DeWolfe II* will have the unintended consequence of diminishing liberty for indigent arrestees because proposed legislative

---

http://mgahouse.maryland.gov/house/play/48cd9ead009f4d59aa63824d77c6a3f6/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c&playfrom=2702867 ("SB 973 Hearing") (statements of Scott Shellenberger, State's Attorney for Baltimore County; Gregg Bernstein, State's Attorney for Baltimore City; L. Jesse Bane, Sheriff of Harford County).

reforms would eliminate initial bail hearings as they currently exist. *See* DCD Br. 19, 27. They argue that the implementation of some of these legislative reform proposals in response to *DeWolfe II* will result in the delay of many arrestees' opportunities for prompt release from custody after being arrested. *Id.* at 19-20. The District Court Defendants accordingly urge the Court to reconsider and overrule *DeWolfe II* in part because of these legislative proposals. *See id*.

But in deciding a constitutional issue, a court should not take action based on predictions about what a legislature *may* do. In any event, if the Court were to consider possible future legislation, it is more likely that such legislation would be beneficial to indigent criminal defendants than harmful to them.

A. The Court Should Not Rely On Speculation About The Possible Impact Of Potential Legislative Action.

This Court should not reconsider its prior decision based on the District Court Defendants' speculation about the impact on indigent arrestees of proposed legislative reforms. Courts "cannot conjecture what the law may be in the future" and "are not at liberty to speculate upon the future action of the General Assembly." *Farris v. Blanton*, 528 S.W.2d 549, 555 (Tenn. 1975) (refusing to consider how election law might apply in the future based on action of General Assembly in determining the law's present constitutionality). There are a number of proposed bills that have been introduced in the General Assembly in response to *DeWolfe II*, *see, e.g.*, App. 25-68, and any one of them, or an entirely different proposal, could be enacted.

It is equally, if not more, difficult to determine if any particular legislative reform that is chosen will be more or less beneficial to indigent defendants than the current system. *See Am. Fed'n of Labor v. Am. Sash & Door Co.*, 335 U.S. 538, 553 (1949) (Frankfurter, J., concurring) ("Most laws dealing with economic and social problems are matters of trial and error. That which before trial appears to be demonstrably bad may belie prophesy in actual operation. It may not prove good, but it may prove innocuous. But even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat.").

Because courts should look only at current laws, not potential future legislative action, when determining whether a constitutional right exists, this Court should not overrule its prior holding that a constitutional right to counsel exists at initial bail hearings based on the District Court Defendants' predictions of legislative reform.

B. Potential Legislation Is More Likely To Help Than Hurt Indigent Defendants.

The Public Defender disagrees with the assertion that *DeWolfe II* is "likely to produce perverse results" for indigent arrestees. *See* DCD Br. 19-20. Because Maryland's current pretrial release system uses secured, financial conditions of pretrial release, many low-risk defendants are unable to secure release, while many high-risk defendants are able to purchase their release without any conditions of supervision. (*See* OPD Apx. 37.)[8] The Court's decision that indigent arrestees have the right to counsel at

[8] While 11 of Maryland's 24 jurisdictions use pretrial services programs, there is no consistent compliance with national standards and evidence-based practices in those

initial bail hearings has resulted in a step in the right direction for pretrial release and bail reform in the legislature, which is critical to enhancing the liberty of indigent arrestees.

The OPD Task Force made three primary recommendations in its December 13, 2013 report: (1) implementation of a statewide system that utilizes a standard, validated pretrial risk assessment tool to make the pretrial detention or release decision; (2) creation of a statewide pretrial services agency within the executive branch of government; and (3) elimination of the use of secured, financial conditions of pretrial release (cash, property, or surety bond). (App. 81.)

Senate Bill 973, which was introduced in the General Assembly in response to *DeWolfe II*, would implement two of the three primary recommendations by the OPD Task Force: use of a validated pretrial risk assessment tool for detention or release decisions, and creation of a statewide pretrial release services program within the executive branch. (App. 45-46.) These reforms would provide numerous benefits to indigent arrestees. The statewide pretrial release services program would utilize a validated risk assessment tool to make objective determinations about an arrestee based on certain historical information. (*See* App. 45-46; OPD Apx. 134.) Through the use of a risk assessment tool, Maryland would be able to more accurately predict those individuals who should be detained before trial. (OPD Apx. 135.) Arrested individuals who score low risk under the risk assessment tool would be administratively released on

---

jurisdictions. (OPD Apx. 54-55.) And in Baltimore City, 88% of the jail population is comprised of pretrial detainees. (OPD Apx. 59.)

their own recognizance,[9] while those who score medium or high risk would be presented to a judge immediately, or at the next court session, where he or she would be represented by counsel.[10] The judge would determine whether the defendant should be released on his or her own recognizance, released on bond, or detained. (*See* App. 56.) The judge may also impose conditions on the defendant's pretrial release, which would be enforced and monitored by the pretrial services commission. (*See* App. 45, 56.)

The reforms in SB 973 would address the District Court Defendants' primary concerns. First, while SB 973 would eliminate initial bail hearings before commissioners,[11] use of a pretrial risk assessment tool would "allow[] for a quick assessment…of whether the arrestee should, or should not, be released on his or her own recognizance or upon satisfying a reasonable bail amount." DCD Br. 33 (quoting *DeWolfe II*, 434 Md. at 469 (Barbera, C.J., dissenting) (internal quotation marks omitted)). SB 973 would replace the *subjective* determination by a commissioner with a

[9] Cherise Fanno Burdeen, Chief Operating Officer of the Pretrial Justice Institute, testified that administering the pretrial assessment tool would take approximately three to 10 minutes. *See* SB 973 Hearing, *supra* note 7, at 1:30 – 1:31 (statement of Cherise Fanno Burdeen).

[10] (*See* OPD Apx. 133; App. 58.) This aspect of SB 973 is crucial to ensuring that indigent arrestees receive the same or better protections under current Maryland law. Several supporters of SB 973 have proposed amendments that would require courts to be in session seven days a week, so that defendants arrested on a weekend or holiday do not have to wait several days to be presented to a judge. (*See, e.g.*, OPD Apx. 137, 140, 143.)

[11] To be sure, the initial appearance was designed to benefit arrestees, *see* DCD Br. 34, but it is not necessarily the only beneficial way to handle pretrial release. The District Court Defendants even acknowledge that many of the reform proposals have "laudable features." DCD Br. 19. Further, the fact that *DeWolfe II* has caused the legislature to consider proposals that would fundamentally alter the State's existing pretrial procedures is not a valid basis for holding that there is no constitutional right to counsel.

validated *objective* determination. *See* SB 973 Hearing, *supra* note 7 (statement of Cherise Fanno Burdeen). Research has demonstrated that "subjective methods often lead to the release of high-risk defendants and the detention of low-risk, non-violent defendants pending trial." (OPD Apx. 134.) Second, use of the pretrial release risk assessment tool would allow low risk defendants to be released administratively in a matter of minutes. *See supra* note 9. This would address the concern that arrestees will encounter increased detention time as a result of *DeWolfe II*. *See* DCD Br. 33. SB 973 would maintain the requirement that a defendant who is detained (using the pretrial release risk assessment tool) be presented to a judge immediately or at the next court session. (App. 58.) *See* DCD Br. 33 ("Prompt presentment after arrest assures impartial judicial supervision of the defendant's rights at the earliest possible stage of detention.") (citing *Logan v. State*, 289 Md. 460, 493 (1981) (internal citations and quotations omitted)).

SB 973 has garnered wide support from a number of state actors within the criminal justice system and individuals representing diverse interests, including representatives from all three branches of government. *See supra* at 9-10. This historic legislation, which would be a major step forward for pretrial and bail reform in Maryland, would benefit indigent defendants and is at least as likely an outcome as the other legislative proposals discussed by the District Court Defendants. These important legislative reforms would not have been proposed if the Court had not held that there is a constitutional right to counsel at initial bail hearings. A reversal would in all likelihood halt these reforms. The District Court Defendants' argument that *DeWolfe II* will likely

lead to diminished liberty for indigent defendants in Maryland is speculative, at best, and is contradicted by the wide support for comprehensive pretrial release and bail reforms that will benefit indigent defendants. In all events, such speculative prediction is an inadequate and inappropriate basis for action by this Court at this procedural juncture.

II. THE COURT'S RECENT RULING THAT INDIGENT ARRESTEES ARE ENTITLED TO COUNSEL AT INITIAL BAIL HEARINGS SHOULD NOT BE OVERRULED BECAUSE IT WOULD BE CONTRARY TO PRINCIPLES OF *STARE DECISIS*.

This Court should not reconsider or overrule its decision in *DeWolfe II* because doing so would invite disrespect for the law and judicial process. In the last round of briefing in this case before the Court, the Public Defender argued that in order to comply with the Constitution and the Maryland Declaration of Rights, indigent arrestees who have not been released after their initial bail hearings must have their bail review hearings before a judge within 24 hours of their initial bail hearing, and judges must review the initial decisions *de novo*. While the Court's holding in *DeWolfe II* went further than what the Public Defender argued, the Public Defender supports the Court's articulation of the due process-based right to counsel at initial bail hearings, and the Office stands ready, willing, and able to provide representation to its clients at these hearings.

To abandon the grant of a constitutional right to counsel now, just five months after the *DeWolfe II* decision, would be contrary to principles of *stare decisis*. This Court has emphasized that it "remain[s] deeply respectful of the doctrine," explaining:

> Adherence to *stare decisis* is our "preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Only a

> fundamental change in factual or legal circumstances will justify departing from this principle.

Houghton v. Forrest, 412 Md. 578, 586-87 (2010) (internal citations omitted) (refusing to overturn rule denying common-law immunity to public officials who commit intentional torts because no evidence was presented that "the factual or legal landscape has changed unto the point where we would be justified in departing from our precedents"); *see also Unger v. State*, 427 Md. 383, 418 (2012) (Harrell, J., dissenting) (The majority opinion "ignores the long-standing principles of stare decisis," and "[t]he only thing that appears to have changed in the few intervening years…is the composition of the Court."); *Townsend v. Bethlehem-Fairfield Shipyard*, 186 Md. 406, 417 (1946) ("[I]t is a well recognized and valuable doctrine that decisions, once made on a question involved in a case before a court, should not thereafter be lightly disturbed or set aside (except by a higher court). This is because it is advisable and necessary that the law should be fixed and established so far as possible, and the people guided in their personal and business dealings by established conclusions, not subject to change because some other judge or judges think differently.").

While there may be times when it is appropriate to disregard prior precedent, *see, e.g.*, *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 459-460 (1992) (overruling the "implied malice" test for awarding punitive damages in non-intentional tort actions, because it had been "overbroad in its application and ha[d] resulted in inconsistent jury verdicts involving similar facts"), these instances should be few and far between. None of the cases cited in the District Court Defendants' brief in support of ignoring *stare*

decisis are apt here, as none of these cases overturned a prior decision just five months after it had been rendered, in the same litigation, when no relevant facts or circumstances had changed. And, so far as our research discloses, this Court has never reversed a prior decision declaring a constitutional right after so brief a period of time.

Finally, the State made many of the same arguments the District Court Defendants now raise in its motion for reconsideration. *See, e.g.*, App. 201 ("If the liberty protected by Article 24 of the Declaration of Rights truly requires the State to furnish a lawyer whenever it implements a procedure that offers an opportunity for a prompt release following arrest, then the constitution has perversely made it more costly…"). The Court denied that motion for reconsideration, and the District Court Defendants fail to provide a more compelling reason as to why the decision was wrong. No relevant facts or circumstances have changed since that time. No bills have been passed in the General Assembly, and the decision has not been implemented in any meaningful way. The State's predictions that the right to counsel might slow down release and diminish liberty is not based on any actual empirical data, for no experience with the new constitutionally-mandated system has yet been had. *See Gov. of Md. v. Exxon Corp.*, 279 Md. 410, 428 (1977) ("[T]he courts are under a special duty to respect the legislative judgment as to the proper means of solving the problem. … As of now there has been no evidence by which to judge the effects of these statutes and predictions as to the effects of the Act are at best speculative."). Thus, there is no basis to reconsider the Court's five month-old decision granting indigent arrestees the constitutional right to counsel at initial bail hearings.

CONCLUSION

The Court should deny the District Court Defendants' request that *DeWolfe II* be overruled.

Respectfully submitted,

BRIAN M. BOYNTON
ASHLEY BASHUR
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

A. STEPHEN HUT, JR.
OFFICE OF THE PUBLIC DEFENDER
6 St. Paul Street, Suite 1400
Baltimore, MD 21202
(410) 767-8460

Counsel for Appellee
Paul B. DeWolfe, Jr.

Font: Times New Roman 13

Dated: March 4, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 4th day of March, 2014, a copy of the foregoing brief was served by electronic mail and first class mail, postage prepaid, on:

William F. Brockman
Deputy Solicitor General
Julia Doyle Bernhardt
Assistant Attorney General
Office of the Attorney General
200 St. Paul Place, 20th Floor
Baltimore, MD 21202

Counsel for Appellants the Hon. Ben C. Clyburn, et al.

Michael Schatzow, Esq.
Mitchell Y. Mirviss, Esq.
Venable LLP
750 East Pratt Street, Suite 900
Baltimore, MD 21202

Counsel for Appellees Quinton Richmond, et al.

Ashley Bashur

Counsel for Paul B. DeWolfe, Jr.

PERTINENT PROVISION

Constitution of Maryland, Declaration of Rights, Article 24:

That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.
(amended by Chapter 681, Acts of 1977, ratified Nov. 7, 1978)

APPENDIX

Appendix 1

ljaf RESEARCH SUMMARY

DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT

Every day in America, judges have to answer a critical question again and again: What are the chances that a recently arrested defendant, if released before trial, will commit a new crime, a new violent crime, or fail to appear for court?

This may be the single most important decision made in the criminal justice system because it impacts everything that follows: whether or not a defendant is sentenced to jail or prison, how long he is incarcerated, and most importantly, how likely he is to commit violence or other crimes in the future. Yet most of these decisions are made in a subjective manner, without the benefit of data-driven, objective assessments of the risks individual defendants pose to public safety.

Today, in many jurisdictions, judges do their best to apply their experience and instinct to the information they have about a defendant to make a subjective determination of whether he will commit a new crime or fail to return to court if he is released. In other jurisdictions, judges may follow court guidelines that require that all defendants arrested for a specific crime receive the same conditions of release (such as supervision, bail, or drug testing), regardless of risk. But neither method of deciding whether a defendant should be detained or released – a subjective evaluation, or an offense-specific one-size-fits-all approach – provides a reliable measure of the risk that a defendant poses. And yet this decision – whether to release or detain a defendant – is far too important to be left to chance.

Each year, 12 million people are booked into local jails across the country, the vast majority for nonviolent crimes. More than 60% of inmates in our jails today are awaiting trial, and we spend more than $9 billion annually to incarcerate them. The goal of most criminal justice decisionmakers is to detain defendants who pose a risk to public safety – particularly those who appear likely to commit crimes of violence – and to release those who do not.

Yet data collected by the Laura and John Arnold Foundation (LJAF) during the past two years shows that although this may be our goal, it is far from being a reality. Indeed, our research has shown that defendants who are high-risk and/or violent are often released. In two large jurisdictions that LJAF examined in detail, nearly half of the highest-risk defendants were released pending trial. And, at the

other end of the spectrum, our data shows that low-risk, non-violent defendants are frequently detained. Moreover, soon-to-be-released LJAF research on low-risk defendants shows that when they are detained pretrial, they are more likely to commit new crimes in both the near and long term, more likely to miss their day in court, more likely to be sentenced to jail and prison, and more likely to receive longer sentences. In other words, failing to appropriately determine the level of risk that a defendant poses impacts future crime and violence, and carries enormous costs – both human and financial.

In other words, failing to appropriately determine the level of risk that a defendant poses impacts future crime and violence, and carries enormous costs – both human and financial.

AN OPPORTUNITY FOR TRANSFORMATIONAL CHANGE

Two years ago, LJAF decided to use data, analytics, and technology to promote transformational change in criminal justice. With the goal of making the system safer, fairer, and less costly, we set out to improve how decisions are made during the earliest part of the criminal justice process, from the time a defendant is arrested until the case is resolved. (Criminal justice professionals refer to this as the "pretrial" period.)

From the beginning, we believed that an easy-to-use, data-driven risk assessment could greatly assist judges in determining whether to release or detain defendants who appear before them. And that this could be transformative. In particular, we believed that switching from a system based solely on instinct and experience to one in which judges have access to scientific, objective risk assessment tools could further our central goals of increasing public safety, reducing crime, and making the most effective, fair, and efficient use of public resources. We understood that judges already consider many of the most critical factors related to a defendant's risk of committing a new crime or failing to return to court; however, we also knew that it is extremely difficult for judges to know how to accurately and objectively weigh these factors, or to know which factors, when combined with one another, increase the risk of failure exponentially. We were also able to see the impact that risk assessments have had in the limited number of U.S. jurisdictions in which they are presently used: although less than 10% of jurisdictions use data-driven pretrial risk assessments, these jurisdictions have been able to spend less on pretrial incarceration, while at the same time enhancing public safety.

We initially looked for an existing pretrial risk assessment that could be used by any judge throughout the country. This sort of universal risk assessment has been used effectively for probation and parole. However, we quickly found that there was nothing equivalent for the pretrial release/detention decision.

Moreover, there appeared to be no risk assessment instrument that could be scaled to provide data-driven risk analysis to courts across America. In large part, this is because existing pretrial risk assessments are often costly and resource-intensive to administer, since they rely on data that can only be gathered through defendant interviews. Th ese interviews are time-consuming and expensive to conduct and cannot be completed when a defendant refuses to cooperate or provides information that cannot be verified. (For these and other reasons, 40% of all defendants in one jurisdiction we studied were not evaluated for risk.) Further, most existing pretrial risk assessments were developed using data from a single jurisdiction, and other states and counties did not believe they could adopt a tool that was based on case records from

somewhere else. In addition, existing tools also present a single risk level for each defendant, combining – and assigning equal weight to – the risk that a defendant will fail to appear and the risk that he will reoffend. And none of the existing tools determine risk of new violent criminal activity, which is perhaps judges' greatest concern.

Our challenge was to figure out how to provide objective, scientific, data-driven risk assessments to the more than 90% of jurisdictions that did not use them. No existing model did what we wanted it to do: separately analyze risk of new crime, new violent crime, and failure to appear; be useable by every judge in the country; be applicable to every defendant; and be highly predictive of the most important risks. In short, what we needed was an instrument that would be accurate, inexpensive to administer, easy to use, and scalable nationally. So we decided to try to create a new, second-generation risk assessment that could be adopted by judges and jurisdictions anywhere in America.

When judges can easily, cheaply, and reliably quantify defendant risk, they will be much better able to identify the high-risk defendants who must be detained and the low-risk defendants who can safely be released.

DEVELOPING THE RISK ASSESSMENT

The first step was a study to assess the feasibility of eliminating the costly and time-consuming defendant interviews from the risk assessment process. LJAF's research team – led by two of the country's top criminal justice researchers, Dr. Marie VanNostrand and Dr. Christopher Lowenkamp – began its work in Kentucky, which was already using an interview-based risk assessment, and has long been a national leader in the pretrial field. An initial study focused on the core question of whether eliminating the interview would decrease the predictive power of the tool. To test this, the research team looked at the existing Kentucky risk assessment, which consisted of 12 total factors: nine that were drawn from the defendant's criminal history and three that were elicited during the interview process. The team created a new tool, relying solely on criminal history factors from the state's original instrument. We then used this non-interview tool to evaluate more than 190,000 Kentucky defendants who had already gone through the existing interview-based assessment. The study compared the risk prediction of the new tool – the one without an interview – to the existing interview-dependent tool, and found that the non-interview risk assessment was just as predictive as the existing one.

That finding led us to the next step: to gather the most comprehensive dataset of pretrial cases ever assembled in the United States with the goal of developing a universal risk assessment. Researchers started with 1.5 million cases drawn from more than 300 U.S. jurisdictions. From the initial dataset, the research team was able to study 746,525 cases, since these defendants had been released at some point in the pretrial process. The researchers had two primary objectives. First, to determine the best predictors across jurisdictions of new criminal activity, failure to appear, and, for the first time, new violent criminal activity. Second, to develop a risk-assessment tool based on these predictors. Although we believed that the interview could likely be eliminated, we considered both interview and non-interview factors in an effort to build the most predictive risk assessment possible.

The study identified and tested hundreds of risk factors, which fell into broad categories, including prior arrests and convictions, prior failures to appear, drug and alcohol use, mental health, family situation, employment, residence, and more. The researchers identified nine factors that

were the most predictive – across jurisdictions – for new crime, new violence, and failure to appear. These factors were drawn from the existing case (e.g., whether or not the current offense is violent) and from the defendant's prior criminal history. The researchers looked at numerous interview-based factors, including employment, drug use, and residence, and found that, when the nine administrative data factors were present, none of the interview-based factors improved the predictive analytics of the risk assessment. In other words, for all three categories – new criminal activity, new violent crime, or failure to appear – the addition of interview-dependent variables did not improve the risk assessment's performance.

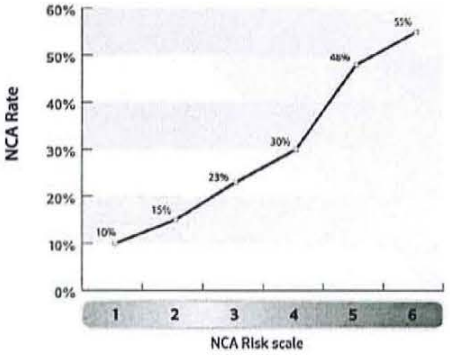
The resulting product is the Public Safety Assessment-Court (PSA-Court), a tool that reliably predicts the risk a given defendant will reoffend, commit violent acts, or fail to come back to court with just nine readily available data points. What this means is that there are no time-consuming interviews, no extra staff, and very minimal expense. And it can be applied to every defendant in every case.

PROMISING RESULTS

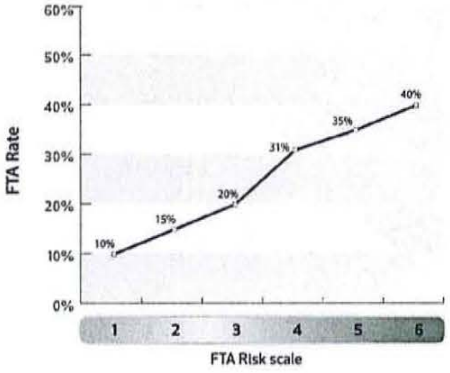
The PSA-Court's three six-point scales – one each for new crime, new violence, and failure to appear – do a remarkable job distinguishing among defendants of different risk levels. As the charts demonstrate, the likelihood of a negative pretrial outcome increases with each successive point on the scale. Each scale begins with the lowest level of risk, identified by the number one, and increases point-by-point until reaching the highest level of risk, identified by the number six.

PSA-Court Failure Rates by Risk Level

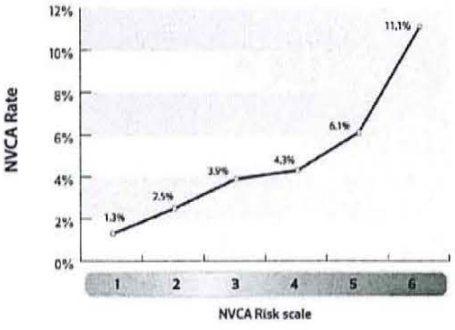
New Criminal Activity



Failure to Appear



New Violent Criminal Activity



The promise of the PSA-Court was further validated using historical data from one state and one major city. Moreover, researchers found that defendants in each category failed at similar rates, regardless of their race or gender. The results confirmed that the assessment does not over-classify non-whites' risk levels, which has been a concern in some other areas of risk assessment.

failures put the public in danger and place unnecessary strain on budgets, jails, law enforcement, families, and communities. The PSA-Court, and instruments like it, can help recalibrate the equation. When judges can easily, cheaply, and reliably quantify defendant risk, they will be much better able to identify the high-risk defendants who must be detained and the low-risk

Our goal is that every judge in America will use a data-driven, objective risk assessment within the next five years. We believe that this one change can make our communities safer and stronger, our corrections budgets smaller, and our system fairer.

All of Kentucky's 120 counties began using the instrument in July of 2013. Preliminary analysis shows that the PSA-Court is, thus far, successfully predicting criminal reoffending and failing to return to court.

LJAF plans to roll out the PSA-Court in additional pilot sites soon and then to make the tool widely available. We will also continue to collect more data, as this will allow us to rigorously evaluate whether we can improve upon the existing universal risk assessment. LJAF also plans to create data-driven risk assessments for police and prosecutors; and to evaluate or create tools that will specifically predict the likelihood of repeat domestic violence and driving under the influence.

LOOKING AHEAD

Under the current system, we make decisions based on gut and intuition instead of using rigorous, scientific, data-driven risk assessments. This has led to a public safety crisis nationally, where too many high-risk defendants go free, and too many low-risk defendants remain locked up for long periods. These systemic

defendants who can safely be released. They will also be able to better identify what conditions can be imposed on defendants to minimize risk.

It is critically important to note that tools such as this are not meant to replace the independent discretion of judges; rather, they are meant to be one part of the equation. We expect that judges who use these instruments will look at the facts of a case, and at the risk a defendant poses, and will then make the best decision possible using their judgment and experience.

Our goal is that every judge in America will use a data-driven, objective risk assessment within the next five years. We believe that this one change can make our communities safer and stronger, our corrections budgets smaller, and our system fairer. The Laura and John Arnold Foundation is dedicated to bringing transformational change to criminal justice through advanced data analysis and technology. Getting the PSA-Court in the hands of judges across America is one of our first major steps in that effort.

About Laura and John Arnold Foundation

Laura and John Arnold Foundation is a private foundation that currently focuses its strategic investments on criminal justice, education, public accountability, and research integrity. LJAF has offices in Houston and New York City.

Appendix 2

INITIAL REPORT TO THE STATE OF MARYLAND IMPLEMENTATION OF THE CRIMINAL CITATION POLICY UNDER SENATE BILL 422/CHAPTER 504

Maryland Statistical Analysis Center,

Governor's Office of Crime Control & Prevention

August 2013

19

I. INTRODUCTION

The 2012 Maryland General Assembly passed legislation (Senate Bill 422/Chapter 504) mandating the issuance of a criminal citation for certain criminal offenses *if the defendant meets certain criteria*. The law allows an officer who has grounds to make a warrantless arrest to:

- Issue a citation in lieu of making an arrest ("cite and release"), or
- To make the arrest, process (i.e. fingerprint and photograph the defendant), and subsequently issue a citation in lieu of continued custody and appearance before a court commissioner ("book, cite and release").

QUALIFYING OFFENSES for charge by Citation:

- Any misdemeanor or local ordinance violation that does not carry a penalty of imprisonment;
- Any misdemeanor or local ordinance violation for which the maximum penalty of imprisonment is 90 days or less; and
- Possession of marijuana under § 5-601 of the Criminal Law Article.
- At no time is a juvenile (person under the age of 18) to be issued a criminal citation.

***See Appendix A for the "TOP 20" qualifying offenses that require the issuance of a criminal citation.*

EXCEPTIONS for the issuance of a Criminal Citation:

- Failure to comply with a peace order under § 3–1508 of the Courts Article;
- Failure to comply with a protective order under § 4–509 of the Family Law Article;
- A violation of a condition of pretrial or post-trial release while charged with a sexual crime against a minor under § 5–213.1 of the Criminal Procedure Article;
- Possession of an electronic control device after conviction of a drug felony or crime of violence under § 4–109(b) of the Criminal Law Article;
- Violation of an out–of–state domestic violence order under § 4–508.1 of the Family Law Article; and
- Abuse or neglect of an animal under § 10–604 of the Criminal Law Article.

CRITERIA for issuance of a Criminal Citation:

Although the law mandates the issuance of a citation for qualifying offenses, a defendant must meet certain criteria to be released without the requirement of appearing before a court commissioner. If the defendant cannot meet the criteria listed below, the officer must charge the

individual on a statement of charges and ensure the defendant's appearance before a court commissioner. Senate Bill 422 requires a law enforcement officer to charge a defendant by citation only if:

- Defendant is an adult;
- Defendant is positively identified. (The officer is satisfied with the defendant's evidence of identity);
- Defendant does not pose a threat to public safety;
- Defendant is not being charged with any other violation in the same incident, regardless if the additional violation(s) are required to be charged on a citation;
- Defendant complies with the lawful orders of the officer;
- Officer believes the defendant will comply with the citation;
- Officer has grounds for a warrantless arrest.

The Maryland Chiefs of Police Association and the Maryland Sheriff's Association encourage law enforcement agencies to consider the public safety benefits of arresting and processing a defendant prior to their release upon their signature on a criminal citation. These considerations include: (1) verification of an individual's identity; (2) prior arrest history or alerts; (3) warrant status; (4) triggering a reportable event reported in CJIS and alerting DPSCS of possible parole/probation violations; (5) a reduction in financial and resource impacts on law enforcement personnel who must engage in post-conviction processing and fingerprinting; and, (6) allowing for search incident to arrest (SIR) which would otherwise be disallowed with the issuance of criminal citation.

I. METHODOLOGY

For the purposes of the Criminal Citations Subcommittee Report of the Indigent Defense Task Force, the following three tasks were completed:

1. Obtain the criminal citations policies of various law enforcement agencies in Maryland to compare and contrast implementation strategies;
2. Conduct a law review of criminal citation legislation around the country;
3. Determine the impact that the criminal citations law has had on public safety year to date in 2013;
    a. The number of criminal citations issued;
    b. The number of arrests made for qualifying crimes;

c. The number of offenders arrested and processed in 3 large jurisdictions in Maryland.

Criminal Citations Policy Survey

The 2013 Criminal Citation report represents research and analysis conducted on existent Criminal Citation policies currently in effect in each jurisdiction within the State of Maryland as of January 1, 2013. Policies were submitted voluntarily in the survey conducted by GOCCP. These policies were developed by individual agencies and represent the needs of each county or municipality while remaining in compliance with the law. Policies became effective during the Calendar Year 2013 (January 1, 2013 through December 31, 2013). Beginning January 1, 2013, agencies were expected to adopt such policies regarding the issuance of Criminal Citations to be used as a management tool to promote nondiscriminatory law enforcement and appropriate training. For the purpose of this study, seventy (70) law enforcement agencies submitted written policies for review and they were then subdivided into six (6) Agency Types for analysis.

The Agency Types are as follows:

- The "Big Seven" (7) Agencies by number of sworn personnel: (n=7)
  - Anne Arundel County Police Department;
  - Baltimore County Police Department;
  - Baltimore Police Department;
  - Howard County Police Department;
  - Maryland State Police;
  - Montgomery County Police Department; and,
  - Prince George's County Police Department.
- Sheriff's Offices throughout the state of Maryland (n=24);
- Large Municipal Law Enforcement Agencies within major counties in Maryland classified by the highest number of sworn personnel (average of 97), excluding the local Sheriff's Office or County Police departments. (n=11);
- Maryland Transportation Authority (n=1);
- University-based Law Enforcement agencies (n=5); and,
- Law Enforcement Agencies within major counties in Maryland classified by a number of sworn personnel of approximately less than 50. (n=22).

This survey was conducted for purposes of differentiation of those agencies where the "cite and release" policy is used in combination with or in lieu of the "book, cite, and release"

alternative and to determine which offenses, considered "qualifying offenses," were cited and which were chargeable under the given policy. Agencies were asked to indicate positives and negatives concerning the implementation of this policy. This study was intended to determine the level of compliance to field-based changes required in the new Criminal Citation Law and to determine whether all agencies had a working policy in effect. It was also intended to reflect upon changes in the function and operation of each law enforcement agency after implementation of the new law, and to assess the degree and nature of training for each law enforcement agency in Maryland.

As a qualifier, consideration was given to the following factors:

- *The inherent differences between smaller and larger agencies based on sworn personnel;*
- *The geographic differences between rural agencies and suburban agencies and, accordingly the distribution of criminal activity; and*
- *The number of sworn officers in the field employed by each agency*

Criminal Citations Law Review

GOCCP conducted a law review to provide an overview of other states' legislation regarding the issuance of criminal citations. This process involved various internet searches to create a comprehensive list of all states that have active criminal citations legislation.

Public Safety Impact of the Criminal Citations Law

Back in 2012, GOCCP received 2011 arrest data from the Department of Public Safety & Correctional Services (DPSCS) Criminal Justice Information Systems (CJIS) on the roughly 350 or so offenses that law enforcement can now issue a criminal citation (offenses with a penalty of 90 days or less, and marijuana possession). It was determined that 20 of these 350 offenses represented over 99% of the arrests made. For the purposes of this study, GOCCP will receive additional arrest data from CJIS on these top 20 criminal citation qualifying offenses (See Appendix A for a list of these qualifying offenses) in 2013 YTD compared to the same point of time in 2012. The hypothesis here would be that the numbers of arrests issued for these qualifying crimes would be lower in 2013. In addition, GOCCP received various levels of intake/processing data from 5 jurisdictions (Baltimore City, Anne Arundel, Harford, Howard, and Prince George's County) to determine if there were any difference in the number of citations issued or the number of offenders/arrested processed and brought before a District Court Commissioner.

II. RESULTS

Criminal Citations Policy Survey

1. The "Big Seven" (7) Agencies :

- Of the seven (7) large agencies surveyed, 100% reported with a written policy and General Orders.
- All seven of these agencies provide training in some manner: (1) roll call logs; (2) power-point presentations; (3) testing based on scenarios found in the field.
- There is 100% compliance to the law for these 7 agencies per these written policies though there is some variation in procedure and operations.
- 4 of the 7 agencies surveyed cite and release for all qualifying offenses.
- Of those 3 agencies who charge on a limited number of the qualifying offenses, 2 of the 3 have identical chargeable offenses and their policies state the following (by the verbiage of the law…)
    - "…In order to aid with successful prosecution and based on the request of the Office of the State's Attorney's for (the given county), the following offenses shall automatically be handled as Custodial Citations or, if circumstances warrant based on officer discretion and experience, a Full Custody Arrest:
        - Possession of marijuana over 10 grams [CR 5-601 (c)(2)(i)];
        - Possession of marijuana under 10 grams [CR 5-601 (c)(2)(ii)];
        - Theft under $100 [CR 7-104 (g)(3)];
        - Trespass (Private) [CR 6-402 (a)];
        - Trespass (First Time – Posted) [CR 6-403 (b)];
        - Disorderly/Disturbing the Peace [CR 10-201 (c)(2)];
        - Failure to Obey [CR 10-201 (c)(3)];
        - Malicious Destruction (under $500) [CR 6-301 (c)];
        - Harassment [CR 3-803 (a)]
    - In addition, in any instance in which an officer must physically apprehend a suspect committing one of the listed offenses, the officer shall follow the procedures for a Custodial Citation.
    - In one of the "Top 7", an Officer who has the grounds to make an arrest for possession of marijuana, or theft under $1000, or the sale of an alcoholic beverage to a minor or intoxicated person, OR an offense for which the maximum penalty of imprisonment is 90 days, will make the arrest, and transport the defendant to a district station for booking. An officer may deviate from this policy only with the permission of a

supervisior with the rank of Police Sergeant or above or in emergency situations defined as a major incident taking place where officers are needed to remain in the field or a high volume of calls for service is causing depletion of manpower.

- One agency requires mandatory booking, processing and subsequent release for marijuana possession, only if the defendant satisfies the criteria for a criminal citation, without regard to the quantity of drug possessed.
- In every agency, "book, cite and release" is based not only upon the circumstances surrounding the offense, but is highly dependent upon officer discretion.

2. Sheriff's Offices throughout the State of Maryland:
   - 24 of 24 (100%) of agencies reporting have a Criminal Citation Policy in place which has been effective since January 2013.
   - 15 out the 24 (62.5%) Agencies reporting elect to "book, cite, and release" in lieu of issuing a criminal citation for all "qualifying offenses" and "custodial arrest" remains the primary means of enforcing warrantless misdemeanor offenses for applicable crimes. (qualifying offenses)
   - 9 of the 24 (37.5%) agencies reporting require their Deputies to "cite and release" for all "qualifying offenses."
   - One agency reported that Deputies were strongly encouraged to use a cell phone or digital camera (in the written policy) upon issuance of a citation to ensure a photograph of the defendant to be run through ILEADS[1]. This is applicable to both the Sheriff's Office and the County Police Department in that particular jurisdiction.
   - Three agencies reported the below listed qualifying offenses as those which require an individual to be processed, booked, and photographed. Defendants with these violations will be processed prior to the issuance of a citation allowing their release.
     - Two of the three agencies require Deputies to make an arrest for "Qualifying Offenses," conduct a search incident to arrest, process the defendant, and then issue a citation in lieu of continued custody if the defendant has met all of the criteria as listed in the Introduction section of this paper.

[1] ILEADS is a records management system by some law enforcement agencies which serves to consolidate data entry, field reporting forms, report and analysis of crimes statistics and jail management (shared dbase containing pictures of inmates, mug shots, activities and criminal history.) Remote use is supported from any computer.

- One agency requires that defendants be charged with the following offenses and should be arrested and processed before being released upon issuance of a citation. This policy is present in both one Sheriff's Office and one of the "Top 7" agencies. A smaller agency of >50 officers located within one of the "Top 7" agencies also reported adherence to the policy of the larger ("Top 7") agency.
- The following are the charges listed in each agency's policy:
  - Possession of marijuana over 10 grams, CR 5-601(c)(2)(i);
  - Possession of marijuana under 10 grams, CR 5-601-(c)(2)(ii);
  - Theft under $100, CR 7-104(g)(3);
  - Trespass on private property, CR 6-402(a);
  - Trespass on posted property, CR 6-403(b);
  - Disorderly conduct/Disturbing the peace, CR 10-201(c)(2);
  - Failure to obey a lawful order, CR 10-201(c)(3);
  - Malicious destruction of property under $500, CR 6-301(c);
  - Harassment, CR 3-803(a)
- The offenses listed above will be charged by citation after processing, unless the Deputy Sheriff can articulate one of the five exceptions listed in the Introduction section of this paper, in which case the defendant will be issued a SOC (upon which the statement of probable cause shall include the specific reason why a citation is not appropriate under 4-101(c) (2)) and taken to the Commissioner.

➢ 2 of the 24 agencies require that a Deputy obtain a Commander's approval if they choose to arrest a defendant meeting all of the required criteria at the scene in lieu of issuing a "cite and release" for qualifying offenses.

➢ Use of discretion is strongly supported by all agencies reporting regarding whether a Deputy issues a criminal citation for a qualifying offense or makes a decision to arrest and process the defendant.

➢ For marijuana related incidents, 95% of the Sheriff's Offices are estimated to "book, cite and release" only if the individual meets all five of the criteria for such release and signs the criminal citation at the law enforcement agency where they were transported.

- In smaller Sheriff's Offices, there is a reduced level of personnel and, as such, the issuance of a criminal citation saves time, decreases officer overtime, and makes officers available for other calls for service, on a positive note.
- 9 out of 24 agencies reported an inability to access Live Scan; the lack of funding to purchase expensive investigative equipment; rural locations with municipal Police Departments too great a distance away to travel to for use of such equipment. The issuance of citations in lieu of arrest, in some cases, is based on the discretion of the officer as well as taking these factors into consideration.

3. Large Municipal Law Enforcement Agencies Within Major Counties In Maryland:

Of a survey of Fourteen (14) Municipal Police Departments having more than 50 sworn personnel located within major County jurisdictions, the following was determined:

- 92.8% (13 of the 14) of these agencies had a policy in effect and/or Directive in place for the issuance of Criminal Citations.
- 11 of the 14 (78.6%) agencies surveyed submitted a written policy for review.
- 1 of the 14 agencies reported that they had no written policy.
- 1 of the 14 agencies reported that they had a policy which was being revised at the time of this survey and not yet available.
- 1 of the 14 agencies reported adherence to the policy written by one of the "Top 7" agencies.
- "Cite and Release" and the issuance of criminal citations for misdemeanor infractions (with the criteria met in each case) are favored to booking and processing by 9 of the 14 agencies.
- 90% foster adherence to strict guidelines concerning searches, allowing only "Terry pat-downs" for officer safety unless such a search is a 'SIR" (Search Incident to Arrest.)
- 90% of these agencies disallow the taking of defendant photos in instances of the issuance of criminal citations while on the scene of an incident.
- 9 of these 14 agencies do not charge, book, cite and release based on the qualifying offenses, but rather issue a criminal citation on the scene for all qualifying offenses.
- 2 of the 14 agencies reporting listed any of the qualifying offenses (see listed below) as those requiring mandatory "book, cite and release" criteria.
    - Possession of marijuana over 10 grams, CR 5-601(c)(2)(i);

- Possession of marijuana under 10 grams, CR 5-601-(c)(2)(ii);
- Theft under $100, CR 7-104(g)(3);
- Trespass on private property, CR 6-402(a);
- Trespass on posted property, CR 6-403(b);
- Disorderly conduct/Disturbing the peace, CR 10-201(c)(2);
- Failure to obey a lawful order, CR 10-201(c)(3);
- Malicious destruction of property under $500, CR 6-301(c);
- Harassment, CR 3-803(a)

- 100% of agencies defer to officer discretion in "book, cite, release" cases.
- There is a general consensus (nearly 100%) of all agencies reporting that charges associated with possession would best be dealt with by processing, positive identification, and search incident to arrest.
- These agencies are unique in that they all favor alternative resolutions to a full arrest or, for approximately 90% of all qualifying offences, they favor cite and release. Some of the alternatives discovered were: (1) criminal citations or summonses; (2) warnings, when applicable; (3) referrals to outside agencies like Social Services; and, (4) alternative dispute resolution between the victim of a crime and the defendant.
- Training has improved over the past few months as law enforcement officers become more familiar with the issuance of criminal citations. Presentations at roll call of updates or revisions and periodic written training reminders have been made available and have been uploaded to the terminals in the patrol vehicle s for reference.
- Issues have arisen concerning the amount of time that is required to write Probable Cause forms at the time of issuance of a criminal citation in 14.2% of these agencies (2 out of 14).
- 2 agencies expressed concerns regarding the initial impact of being booked and processed on the part of the defendant. It is felt that losing that initial impact is not a deterrent to crime for repeat offenders. It is, however, also stated that it is realized that the issuance of a citation does expedite the process at the scene and therefore free-up much needed manpower.
- One agency expressed a concern that community members become upset with the police if a citation is issued and then the offender subsequently returns to engage in the same type of illegal behavior again. This agency also further explained that

these incidents could then result in a trip to the Commissioner which could have been avoided if the offender was arrested the first time around, resulting in manpower issues, redundancy in calls for service, and overtime costs.

4. Maryland Transportation Authority Police Department:

   - They are in compliance with a written directive and policy for the issuance of Criminal Citations.
   - Standard language for the policy includes: "...If an officer has the grounds to make an arrest for an offense that does not carry a penalty of imprisonment or determines a defendant meets the criteria for issuance of a criminal citation, a Uniform Criminal Citation will be used at the scene. If an officer has the grounds to make an arrest for the possession of marijuana (Criminal Law Article 5-601) or an offense for which the penalty of imprisonment is 90 days or less and which has a fine that does not exceed $500, and meets the criteria for issuance of a criminal citation, the officer may cite and release or book, cite, and release at his/her discretion.
   - Again discretion plays an important role in the choice to follow the route of processing and booking.

5. University-Based Law Enforcement Agencies:

   Of a survey of five university-based police departments across the state of Maryland, the following was determined regarding the issuance of Criminal Citations:

   - Training is remarkably improved over any other agencies in the state. 100% of the University-based Police Departments have substantial training materials. One agency in particular has an extensive power point presentation which all sworn staff are expected to view and understand.
   - The general wording in 4 of the 5 (80%) University-based policies is consistent in stating that "...When a police officer, who has grounds to make an arrest; and the offense does not carry a penalty of imprisonment; and, the officer determines a defendant meets the statutory criteria, the officer shall issue a Uniform Criminal Citation in lieu of arrest. The defendant shall be released upon his or her signature on the citation. If a police officer who has grounds to make an arrest for possession of marijuana or an offense for which the maximum penalty of imprisonment is 90 days or less: Will make a physical arrest, Conduct a search incident to arrest, and Process (i.e. fingerprint and photograph) the defendant. If the officer determines the defendant meets the "Criteria for Issuing Citation," a defendant shall be charged by Uniform Criminal Citation. The

offender will be released upon signature on the citation in lieu of continued custody."

- In 100% of these agencies, the booking process is mandatory for marijuana involved incidents.
- Officers at one University have deemed the Criminal Citation Policy a "great tool." Officers who had been tasked with criminally charging shoplifting, disorderly conduct, and a host of other charges are now taken care of by the criminal citation issuance. Officers are not removed from service to transport a prisoner to the Commissioner.

6. Law Enforcement Agencies within major counties in Maryland classified by the number of sworn personnel approximated at less than fifty (50) members.

Of a random selection of 22 agencies across the state of Maryland the following was determined:

- 20 of the 22 agencies (91%) reporting follow the "cite and release" policy as written in the law for all qualifying offenses; however, 2 of the 22 agencies have additional qualifying offenses which are handled mandatorily as a "book, cite, and release" offenses.
- "Cite and Release" and the issuance of criminal citations for misdemeanor infractions (with the criteria met in each case) are favored to booking and processing in about 80% of the these representative agencies.
- 100% of all agencies defer to officer discretion in "book, cite, release" cases.
- 2 of the 22 agencies reporting listed any of the qualifying offenses (listed below) as those requiring mandatory "book, cite and release" criteria.
    - Possession of CR 5-601(c)(2)(i) and 5-601-(c)(2)(ii);
    - Theft under $100, CR7-104(g)(3;
    - Trespass (private and posted property) CR 6-402(a) and 6-403 (b);
    - Disorderly conduct/Disturbing the peace, CR 10-201 (c)(2);
    - Failure to obey a lawful order, CR 10-201(c)(3);
    - Malicious destruction of property under $500, CR 6-30 l(c);
    - Harassment, CR 3-803(a);
    - Credit card/Another Charge, L/T $100, CR S-206(a)

- 50% or more of the larger municipal police departments within the jurisdictions of the "Top 7" agencies have adopted the policy of the county police department.
- There is a general consensus (nearly 100%) of all agencies reporting that charges associated with possession of marijuana would best be dealt with by processing, establishing positive identification, and searching incident to arrest.

  Training has been an issue early on; however, several agencies have produced periodic training updates, scenario-based exams which must be passed, and mandatory attendance required at PowerPoint presentations to describe the rules and regulations of the law for the issuance of Criminal Citations.

Criminal Citations Law Review

A total of 24 other states (excluding Maryland) have legislation that specifically addresses the issuance of a criminal citation. 1/3 of these states, similar to Maryland, are SHALL issue states where assuming all grounds for cite and release are met, law enforcement shall issue a criminal citation for qualifying offenses. The other 16 states are MAY issue states which give police officers the discretion to issue a citation in lieu of an arrest or continued custody. There was little variance amongst the states in the qualifying crimes in which a criminal citation can be issued. Similar to Maryland, these qualifying offenses include local ordinance violations, misdemeanors which carry no penalty of imprisonment, and misdemeanors with a penalty of 90 days or less. Lastly, the conditions in which an officer SHALL or MAY issue a criminal citation were pretty universal among these 24 states including:

1. Positive identification of the suspect is made;
2. The officer feels the defendant will reasonably comply with the citation;
3. The defendant is compliant with the law enforcement officer's orders;
4. The subject does pose a threat to public safety;
5. The offender is not being charged for any other offenses during the same incident.

Public Safety Impact of the Criminal Citations Law

The top 20 citation qualifying crimes represented over 61,178 arrests in 2011 and 59,296 in 2012. As of 9/27/13, there have been 33,815 arrests for the same offenses in 2013. When these numbers are projected out to the end of the calendar year, it is estimated at roughly 45,000 – 46,000 arrests will be made for the same offenses by the end of the year. This also projects out to a 22-24% decrease in the number of arrests issued for these crimes. As depicted in the chart below, the reduction in the number of arrests made can largely be explained by the reduction in arrests for 3 offenses: possession of marijuana, CDS possession of paraphernalia, and failure to appear for a citation.

CJIS Code	Charge	2012 Arrests	2013 Arrests (Projected)	Number Change	% Change
1 0573	POSS: MARIJUANA	29,004	16,685	-12,319	-42.5%
5 3550	CDS:POSS PARAPHERNALIA	12,325	10,945	-1,380	-11.2%
1 1476	FAIL APPEAR-CITATION	1,423	1,019	-404	-28.4%
3 4025	MAL DEST PROP/VALU - $500	3,683	3,442	-241	-6.5%
1 0350	ALC BEV./RETAIL AREA DRINK	130	66	-64	-49.0%
2 2210	TRESPASS-POSTED PROPERTY	2,204	2,156	-48	-2.2%
1 0592	FAIL COMPLY W/LAWFUL ORDER	68	62	-6	-8.6%
1 1143	BAD CHECK/STOP PAY/LESS THAN $100	13	14	1	4.0%
7 4100	ALC BEV/PROHIB PLACE DRINK	199	200	1	0.5%
1 0005	CONFINE UNATTENDED CHILD	98	100	2	2.1%
2 0060	DISTURB THE PEACE	392	400	8	2.1%
1 0349	ALC BEV./RETAIL AREA DRINK	135	145	10	7.1%
1 0581	CRDT CRD/ANTHR CHG L/T $100	74	89	15	20.6%
1 0640	LITTER/DUMP UNDER 100 LBS	159	174	15	9.7%
1 0353	ALC BEV OPEN CONT RETL EST	97	127	30	31.0%
8 0000	ALC BEV/OPEN CONT/RETL EST	164	196	32	19.5%
1 0047	SCHOOL:FAIL SEND CHILD	84	160	76	89.9%
1 4200	ALC. BEV./INTOX:ENDANGER	912	992	80	8.8%
1 0191	HARASS; A COURSE OF CONDUCT	344	426	82	23.8%
1 0521	THEFT LESS THAN $100.00	7,788	8,315	527	6.8%
	Total	**59,296**	**45,713**	**-13,583**	**-22.9%**

The chart below shows the overall number of arrestees processed and brought before a Court Commissioner has decreased in the 3 counties studied in 2013 YTD when compared to 2012. It is unknown whether these reductions are a direct result of more criminal citations being issued on the street. While the percentage of arrestees processed did not decline significantly overall in Anne Arundel County, further analysis was conducted to determine which charges processed were qualifying offenses for a criminal citation. In this light, 811 offenders charged with qualifying offenses were brought before a court commissioner in 2012 YTD compared to 707 in 2013 YTD which represents a 12.8% reduction.

County	Arrestees Processed 1/1 - 9/1/12	Arrestees Processed 1/1 - 9/1/13	% Change
Anne Arundel	9,671	9,295	-3.9%
Harford	3,621	3,227	-10.9%
Prince George's	19,520	17,883	-8.4%

14

To date, Howard County and Prince George's County have issued 266 and 140 criminal citations respectively in lieu of continued custody. The average monthly population of Baltimore City's 2 facilities runs by DPSCS, the Baltimore City Detention Center (BCDC) and the Baltimore Central Booking and Intake Center (BCBIC) has not changed over the past year.

DISCUSSION AND RECOMMENDATIONS

The survey of agencies conducted by GOCCP regarding the implementation of the new Criminal Citation Law across the State of Maryland has demonstrated that this Law, effective on January 1, 2013, has clearly been integrated into the procedural and field guidelines in predominantly every law enforcement agency. In the largest agencies, those having greater than 600 sworn personnel, the "cite and release" policy has become routine in the handling of incidents involving qualifying events. In some cases, a short list of qualifying offenses has been mandatorily designated as "book, cite and release" incidents per the agency's established protocol. Consideration must be given to the fact that the new law was intended to provide officers, as well as individual agencies, with the flexibility and discretion to decide on which course of action would best address each field-based situation. The overall tendency of each of the larger agencies to follow the "cite and release" policy has become the primary manner in which to handle misdemeanor violations by criminal citation. Marijuana based incidents were handled by the majority of agencies in a similar manner. The tendency was to proceed with the booking and processing of anyone in possession of marijuana and ensure that this individual was fingerprinted, photographed, and booked prior to being released on citation, if applicable. One agency made the process of booking mandatory and another agency focused on the quantity of drug in possession to determine whether the intent to distribute, and therefore the need for booking to ensue, was necessary. Each county agency listed the criteria used to determine if the situation warranted the use of a criminal citation and every agency was in compliance with the designated criteria.

In the larger municipal law enforcement agencies, those designated in this research study as having 97 sworn members on average, there was also a propensity to favor a "cite and release" policy over booking and processing. Again, some agencies clearly designated some of the top 20 qualifying events as those which would be handled procedurally as "book, cite and release." It is also apparent that some of these agencies do defer to the policy made effective by the larger agency which presides in their county thereby making it simply to recognize a uniform application of the law in that jurisdiction. Again, incidents involving marijuana resulted in booking and processing in almost all jurisdictions. University based police departments were enthusiastic about handling petty "nuisance" offenses by the issuance of a criminal citation at the scene as well. The booking and processing for marijuana charges was a given on a college campus and ensured that the University officials were better able to track whether college

students or off-campus individuals were involved in drug-related incidents. University-based law enforcement was astute in determining the manner in which their sworn personnel would be trained and produced quality materials. In one agency, an extensive PowerPoint presentation was used to help officers gain a better understanding of the criminal citation policy.

Overall, Sheriff's Offices were more inclined to "book, cite and release" and some expressed in their written policy that "custodial arrest" would continue to be the primary manner in dealing with misdemeanor charges committed in the presence of a Deputy as well as warrantless misdemeanor offense. In many cases Sheriff's offices favored the issuance of a criminal citation in lieu of custody to decrease the need for presentment before a Commissioner which would prove timely for a Deputy, often resulting in overtime, decreased manpower to respond to other calls for service, and traveling to other agencies at a distance to complete the fingerprinting, photographing and booking processes. In other cases, however, Sheriff's offices required their Deputies to "cite and release" any defendant who met the criteria and who had committed a qualifying event. In a few cases it was necessary for a Deputy to obtain Command approval in order to arrest an individual for committing a misdemeanor qualifying offense who met the criteria for issuance of a criminal citation. Again, as in all agencies, officer discretion was a key element in making the determination of which way to proceed at the scene of the event.

The implementation of this law has been viewed by agencies in a number of ways.

- Beneficial aspects which were conveyed are as follows:
    - Time savings in processing, fingerprinting, and booking were mentioned often;
    - Time saved from leaving the field to bring a defendant before the Commissioner;
    - A decrease in the number of defendants appearing before the Commissioner has decreased the workload in the Courts according to law enforcement agencies statewide; however, this statement would require follow-up with Commissions in order to verify these statements;
    - A decrease in the time spent on "nuisance" crimes;
    - Simplification of the "paper-trail" on a defendant with the issuance of a criminal citation at the scene of a misdemeanor violation; and,
    - Increased manpower in the field and less overtime pay being generated by law enforcement agencies.
    - Procedural issues and training issues have gradually been resolved internally by each agency through increased attention to training protocols and presentations with some including scenario-based testing to foster understanding and use of the new law;

- Agencies are well aware of the finer points of the positive reinforcement to the community accompanying the booking and processing of the defendant. Officers are well aware that public safety may be at risk in some instances and, therefore, if there is any degree of doubt that a criminal citation should not be issued in lieu of arrest and processing, the defendant will be brought before a Commissioner;
- If the defendant meets the given criteria, they will be released at the scene resulting in less congestion at the station and eliminating the need for space to contain the defendant for further processing;
- Reduction in manpower, issues with overtime, and lack of sufficient personnel in smaller jurisdictions have been well served by the issuance of criminal citations; and,
- Delta+ software developed by the Maryland State Police will assist in gathering agency data and gaining a better understanding of the volumes of citations which are issued and in what jurisdictions. This data in conjunction with data from the Administrative Office of the Courts will be sent to the Maryland Statistical Analysis Center (MSAC) who will compile an annual report each September on data pertaining to the issuance of criminal citations in Maryland.
- The local judges appear to embrace the concept of cite and release and no one has spoken of any adverse Court rulings as a result.

- Issues of concern which were conveyed are as follows:
  - The greatest concern was for public safety. Many officers felt that it was difficult to make a positive identification which they said was limited by only supplemental information taken directly from the defendant;
  - Some expressed a negative public sentiment concerning the release of an individual after the commission of an offense often witnessed by constituents of a community. Law enforcement officials said that the public viewed this as not doing their job and letting someone go back into the community making them feel unsafe;
  - Concerns about the public's lack of understanding of the new policy and the manner in which it was viewed by the general public often resulting in people being "angry" with the police;
  - A larger problem was that of officer safety – as they were not allowed to check for alerts or outstanding warrants in a "cite and release" scenario, they often felt unsure of their own safety and the surrounding public. A Terry frisk is allowed

for instances where an officer believes the defendant to be armed; however, this is not the standard approach;

- There were officer based issues with the ability to search a defendant in lieu of performing a terry-frisk often resulting in an arrest simply to lawfully perform a search incident to arrest to ensure that the defendant did not leave the scene when they may in fact have committed more than one violation;
- The officer's ability, even following training, to make the correct decision to cite and release or to make an arrest where an agency policy states that it is mandatory to cite and release unless Command staff was contacted;
- Commanders have suggested that the time spent writing and documenting probable cause forms at the scene of the issuance of criminal citation is too long and cumbersome creating manpower issues. This also presents a problem with jurisdictions that have central booking because officers still have to travel to the booking facilities to present these documents to the offender. This issue has since been rectified. A new rule will now allow officers to electronically submit charging documents so other officers can present these documents to the defendant;
- Others have suggested that their officers simply did not like the policy as they felt that it greatly comprised their ability to gain the necessary information that only booking and processing would supply;
- The defendant takes the citation as a non-legal issue and returns to commit the same crime believing that he or she will not be arrested because a citation was issued at the first incident. This results in arrest and being taken before a Commissioner and actually doubles the time of one call by dealing with the same incident at different scenes two times for some officers;
- The defendant does not show up for the intended Court date and a warrant must be issued causing further manpower issues and an increased amount of time dedicated to one case;
- The Senate Bill eliminates the "shock value" of going to Central Booking for the first time offender. Many of these individuals arrested for minor infractions will act unaffected until they reach Central Booking and recognize the reality;
- The policy does little to deter repeat offending; and
- Issues have arisen in court regarding the need for officer to be present at the defendant's initial appearance before the judge. The main issue being overtime in this case.

- GOCCP provided further follow up with Baltimore City on how the implementation of the Criminal Citation Policy had affected their public safety agencies.
  - DPSCS Pretrial no longer processes defendants who are released on criminal citation. Criminal history checks are done by State's Attorney staff which supports early resolution court.
  - Every defendant who is arrested and released by citation is set in early resolution court and may elect diversion, be given probation to jail, or is set in trial court. For defendants issued citations and released on the street, they may elect diversion, be nolle prossed due to legally insufficient charging documents, or set in trial court.
  - Since January 2013, Baltimore City Police Department general orders have been changed. Now all citations issued require a police report with full statement of probable cause. Officers are now trained to verify identification and include correct charging codes. Additionally, officers call dispatch to do warrant checks on all defendants issued a citation on the street.
  - Reduction of offenders released without charges (RWOCs): An unintended benefit of the new law is that the Baltimore City State's Attorney's Office now releases defendants with qualifying charges upon criminal citation in lieu of "abatement by arrest." This has significantly reduced RWOCs in Baltimore City.
  - Return to Paper Signature Charging Documents: In October 2012, Judge Clyburn determined that current Rules do not allow the Courts to accept an electronic signature from an arresting officer. Since October, the City has been in a position where arresting officers must print, sign, and courier charging documents to Central Booking. Currently the face sheet of a citation may be signed by a peace officer but probable cause must be submitted in original signature paper form to Central Booking. The 177th Rules Committee approved of a rules change in August 2013 that will rectify this issue. Baltimore City may now return to its previous electronic procedures and eliminate courier transmission of charging documents.
  - Dismissal Rate & Data Tracking: Prior to January 1, approximately 75% of all citations issued in Baltimore City were dismissed by the State's Attorney's Office because of three issues:
    - Officers did not include verifiable identification;
    - Officers did not utilize correct charging codes; and
    - Officers failed to provide adequate probable cause and there was no requirement to do companion police report.

- Although no official statistics were available upon the writing of this memo, anecdotal evidence suggests that the dismissal rate has significantly dropped. In near future this data will be available to GOCCP as the Baltimore City State's Attorney's Office has begun to track:
    - Arrested and released by statement of charges;
    - Arrested and released by criminal citation; and
    - Released by criminal citation on the street.

Recommendations

- It would be suggested that follow-up surveys be conducted quarterly with law enforcement agencies to evaluate how this new law has further affected the delivery of services to the public.
- It would also be suggested that a simple report be devised for Commanders to complete and return via e-mail, fax, or web service to GOCCP relating any positive or negative sentiments that are brought before them by their officers. That information would prove useful in further addressing issues surrounding the law and its implementation throughout the State of Maryland.
- A survey of the Commissioners in the State of Maryland is suggested and should be conducted to determine whether a significant decrease in the number of defendants brought before them has indeed taken place and what the actual numbers can tell us about the effectiveness of this law.
- It would also be recommended that a follow-up study be conducted to correlate the number of defendants issued citations who fail to appear (FTA's) for their court date to gain knowledge of how seriously the defendant views the issuance of a criminal citation.
- Also recommended would be a recidivist study which analyzed the behavior of a set of individuals over a period of time who were arrested for offenses (now deemed qualifying offenses) and those who were issued criminal citations and differentiate between the number of crimes committed and the number of new offenses. Race-based data, geographical occurrences, and population density should be factors in this study.

APPENDIX A: Qualifying Offenses

Top 20

Note: Those "qualifying offenses" listed in red are those which are most frequently listed as "chargeable offenses" when an agency states that "some" qualifying offenses MUST be handled by "book, cite, and release."

CJIS Code	Statute 1	Statute 2	Statute 3	Statute 4	Charge Description	Type of Charge	Penalty	Fine	Arrest Number (2011)
1 0573	*CR*	*5*	*601*		*POSS: MARIJUANA*	*MISDEMEANOR*	*1 YEAR*	*1000*	*23,822*
5 3550	CR	5	619	(c)(1)	CDS:POSS PARAPHERNALIA	MISDEMEANOR	0	500	11,022
2 0060	*CR*	*10*	*201*	*(c)(4)*	*DISTURB THE PEACE*	*MISDEMEANOR*	*60 DAYS*	*500*	*8,866*
1 0521	*CR*	*7*	*104*		*THEFT LESS THAN $100.00*	*MISDEMEANOR*	*90 DAYS*	*500*	*5,979*
2 2210	*CR*	*6*	*402*		*TRESPASS-POSTED PROPERTY*	*MISDEMEANOR*	*90 DAYS*	*500*	*5,158*
3 4025	*CR*	*6*	*301*		*MAL DEST PROP/VALU - $500*	*MISDEMEANOR*	*60 DAYS*	*500*	*3,030*
1 1476	*CP*	*5*	*212*		*FAIL APPEAR-CITATION*	*MISDEMEANOR*	*90 DAYS*	*500*	*1,285*
1 4200	2B	19	101		ALC. BEV./INTOX:ENDANGER	MISDEMEANOR	90 DAYS	100	563
1 0191	*CR*	*3*	*803*		*HARASS; A COURSE OF CONDUCT*	*MISDEMEANOR*	*90 DAYS*	*500*	*328*
1 0640	CR	10	110	(c)	LITTER/DUMP UNDER 100 LBS	MISDEMEANOR	30 DAYS	1500	160
1 0349	2B	19	101		ALC BEV./RETAIL AREA DRINK	MISDEMEANOR	90 DAYS	100	150
1 0353	2B	19	301		ALC BEV OPEN CONT RETL EST	MISDEMEANOR	0	100	117
7 4100	2B	19	202		ALC BEV/PROHIB PLACE DRINK	MISDEMEANOR	0	100	115
1 0005	FL	5	801		CONFINE UNATTENDED CHILD	MISDEMEANOR	30 DAYS	500	98
1 1143	*CR*	*8*	*103*	*(b)*	*BAD CHECK/STOP PAY/LESS THAN $100*	*MISDEMEANOR*	*90 DAYS*	*500*	*95*
1 0350	2B	19	202		ALC BEV./RETAIL AREA DRINK	MISDEMEANOR	0	100	94
8 0000	2B	19	301		ALC BEV/OPEN CONT/RETL EST	MISDEMEANOR	0	100	92
1 0581	CR	8	206	(a)	CRDT CRD/ANTHR CHG L/T $100	MISDEMEANOR	90 DAYS	500	74
1 0047	ED	7	301		SCHOOL:FAIL SEND CHILD	MISDEMEANOR	10 DAYS	50	67
1 0592	*NR*	*1*	*206*		*FAIL COMPLY W/LAWFUL ORDER*	*MISDEMEANOR*	*3 MONTHS*	*500*	*63*

Appendix 3

MD Governor's Task Force – Pretrial Release Subcommittee

Memo

To: Members of the Governor's Task Force On Laws and Policies Relating to Representation of Indigent Criminal Defendants

From: Pretrial Release Subcommittee

Date: November 14, 2013

Re: Final Report and Recommendations

Since October 16, 2012, members of the Pretrial Release Subcommittee have conducted a number of activities in order to fulfill the legislatively mandated study of the pretrial justice system in Maryland. Members include Cherise Fanno Burdeen, Judge Ben Clyburn, Paul DeWolfe, Major Tanya Jackson, David Rocah and Mary Lou McDonough. In January 2013, the Pretrial Justice Institute submitted, on behalf and with the approval of the Task Force, a proposal to the Abell Foundation for funding to conduct a study of the pretrial practices and polices in five Maryland counties. That grant was awarded in February 2013. During the following six months, as the Task Force awaited the Court of Appeals outcome, staff of the Pretrial Justice Institute completed data collection, analysis, and report writing.

On August 28, 2013, the Pretrial Justice Institute's report was presented to the Pretrial Release Subcommittee, and then on September 10, 2013, the final findings from the Pretrial Justice Institute study were presented to the full Task Force. On October 24, 2013, the Pretrial Release Subcommittee met to devise a final set of recommendations to accompany the report. This memorandum reflects six "statement of principle" recommendations based on law, research and evidence-based practices as articulated in the attached report. Implementation plans are not included in this report.

Recommendations

Recommendation 1: Completely eliminate the use of secured, financial conditions of pretrial release (cash, property or surety bond) that require a low-risk defendant to pay some amount of money in order to obtain release, while permitting high-risk defendants with the resources to pay their bond to leave jail unsupervised.

Recommendation 2: Implement a statewide system that utilizes a standard, validated pretrial risk screening tool at the "initial hearing" at which the pretrial detention/release decision is made.

Recommendation 3: Implement a statewide system that utilizes risk-and-need-based supervision, referral and treatment options in all Maryland counties. The implementation of the Affordable Care Act is likely, over time, to allow for expanded referral and treatment options for formerly uninsured defendants with behavioral health problems that contribute to their failure to obey the law.

Recommendation 4: Implement a shared jail management database system to ensure consistency in data collection across the state.

Recommendation 5: Mandate an annual statewide jail report that provides for indicators of process and outcomes related to pretrial and post-adjudication policies and practices.

Recommendation 6: Set up a Commission on Pretrial and Criminal Justice that will have the mission to enhance public safety, ensure justice, and provide protection of the rights of victims through the cost-effective use of public resources. The work of the commission would focus on evidence-based recidivism reduction initiatives and the cost-effective expenditure of limited criminal justice funds. The commission would be set up through enabling legislation, and should be staffed appropriately through existing resources or by adding additional analytic capacity. Models exist in other states.

Possible commission duties may include:

- Conducting an empirical analysis and collecting evidence-based data about sentencing policies and practices, including but not limited to the effectiveness of sentences in meeting the purposes of sentencing and preventing recidivism and re-victimization;

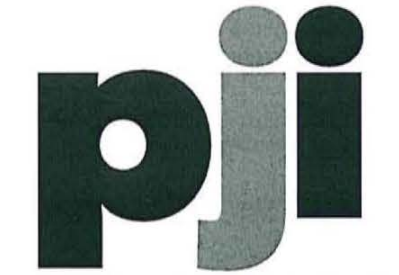
- Investigating effective alternatives to incarceration, the factors contributing to recidivism, evidence-based recidivism reduction initiatives, and cost-effective crime prevention programs;
- Presenting an **annual** report of findings and recommendations, including evidence-based analysis and data;
- Studying and evaluating the outcomes of commission recommendations as they are implemented;
- Conducting new studies and reviewing existing studies, including but not limited to, resources compiled for other policies and practices in the pretrial and criminal justice systems. The commission would prioritize areas of study based on the potential impact on crime and corrections and the resources available for conducting the study. The commission will include the reduction of racial and ethnic disparities within the criminal justice systems as an area of study; and
- Collaborating with other state-established boards, task forces, or commissions that study or address pretrial and criminal justice issues.

While we respect the logistical and administrative challenges presented by these recommendations, we encourage a bold stand on the issue of improving Maryland's current system of pretrial injustice, in which many low risk defendants are unable to secure ordered release and many higher risk defendants are permitted to purchase release unencumbered by conditions of supervision. The current mandate to provide defense representation at bail hearings provides Maryland with this once-in-a-lifetime opportunity to undertake full system reengineering to devise economical solutions that are grounded in public safety principles and evidence-based practice.

Attachments:

- *Report to the Pretrial Release Subcommittee of the Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defendants by the Office of the Public Defender.* Washington, DC: Pretrial Justice Institute. Clark, J. (2013)
- *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option.* Washington, DC: Pretrial Justice Institute. Jones, M. R. (2013)

REPORT TO THE PRETRIAL RELEASE SUBCOMMITTEE OF THE TASK FORCE TO STUDY THE LAWS AND POLICIES RELATING TO REPRESENTATION OF INDIGENT CRIMINAL DEFENDANTS BY THE OFFICE OF THE PUBLIC DEFENDER



PRETRIAL JUSTICE INSTITUTE

October 2013

47

Table of Contents

INTRODUCTION

In 2012, the Maryland General Assembly passed a law (HB 261) requiring the establishment of a Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defendants by the Office of the Public Defender.[1] Under the law, the Task Force was charged with the following tasks:

- Study the adequacy and cost of State laws and policies relating to representation of indigent criminal defendants by the Office of the Public Defender, and of the District Court commissioner and pretrial release systems; and
- Consider and make recommendations regarding options for and costs of improving the system of representation of indigent criminal defendants, and the District Court commissioner and pretrial release systems.

To address these tasks, at a meeting in October 2012, the Task Force established four subcommittees: Criminal Citations; District Court Commissioner Study; Pretrial Release; and Defender Access. The Pretrial Release Subcommittee was charged with looking at the pretrial release system in Maryland and for making recommendations for improving that system.

Cherise Fanno Burdeen, the Chief Operating Officer for the Pretrial Justice Institute (PJI), was appointed to chair this subcommittee, and PJI has been conducting research on behalf of the subcommittee. This is PJI's report to the Subcommittee.

This is not the first report that has looked at pretrial release in Maryland in the past 15 years. In a study that began in the late 1990's the Baltimore City Lawyers at Bail Project collected data over an 18-month period that showed indigent defendants who were provided counsel at the bail review hearing in District Court were 2 ½ times more likely to be released on recognizance as defendants without counsel.[2] Based on the Bail Project's results, the Maryland State Bar Association requested that the Maryland Court of Appeals appoint a committee to study the state of pretrial release decision-making throughout Maryland. That committee released its report, to as the Deeley Report, in 2001.[3] That same year, the Abell Foundation published its own report on pretrial release decision-making in Maryland. That report concluded that there was a "dearth of essential information" available to judicial officers when making pretrial release decisions. The report went on to note:

> "Lack of counsel for the accused, a complete pretrial release investigation, and an assistant state's attorney input means a lack of critical data about the defendants' community ties and financial ability to pay. As a result, judicial officers impose

[1] Another provision of this law required that legal representation be provided to indigent defendants at the bail
[2] Ray Paternoster and Shawn Bushway, *An Empirical Study of the Lawyers at Bail Project*, University of Maryland..
[3] *Report of the Pretrial Release Advisory Committee*, October 2001.

full financial bond for nearly half of arrestees and set bail too high for low income defendants, particularly those charged with nonviolent offenses."

In short, the report tied the lack of information and input to the judicial officers with the high use of monetary bonds.

Both the Deeley Report and the Abell Foundation Report made the following recommendations:

- Maryland should expand its pretrial release investigative services statewide and invest greater resources in supervising pretrial detainees, particularly those charged with nonviolent offenses.
- The Public Defenders Office should represent indigent defendants statewide at the initial appearance before a commissioner and at the bond review hearing.
- An assistant state's attorney should be present at bond review hearings.
- Monetary bonds should be used sparingly, limited to situations when, according to Court Rule 4-216(c), "no other condition of release will reasonably assure" appearance and community safety.
- Judicial officers should receive training and education on pretrial release decision-making prior to assuming judicial duties and at annual training seminars.

Looking at the status of these recommendations, in the years since these recommendations were made, pretrial services remains essentially as it was before – the state continues to fund and operate the Baltimore City pretrial services program and all other programs in the state are county-run. While at least two pretrial services programs operating in the state – Baltimore City and Montgomery County – have implemented empirically validated pretrial risk assessment instruments in recent years, there is no evidence of any significant expansion of pretrial services in the state, and there have been no legislative proposals to establish pretrial services as a statewide entity.

In the years since these recommendations were made, pretrial services remains essentially as it was before.

As to representation by the Public Defenders Office of indigent defendants at the initial appearance before a commissioner, in 2012, the Maryland Court of Appeals issued a ruling that the Public Defender Act required such representation. In response to this ruling the Maryland General Assembly passed HB 261, which repealed this requirement of the Public Defender Act, and required instead that the Office of the Public Defender provide representation at the initial bond review hearing in District Court. As a result, all indigent defendants began receiving representation at this hearing throughout the state beginning in 2012. In September of 2013, the

Court of Appeals issued a ruling (*DeWolfe v. Richmond*) on the question of whether the Maryland Constitution required representation of indigent defendants at initial appearance before a commissioner. The court ruled that such representation was constitutionally required.

Thus there has been some movement on having public defenders appearing at the initial bond review hearing, but only as a result of the particular turn of events relating to the required presence of public defenders at the hearing.

Regarding the recommendation that monetary bonds be used sparingly, data presented later in this report show that monetary bonds are still used with great frequency.

Thus, the recommendations of the Deeley Report and the Abell Foundation report have not been implemented. This report examines the current status of pretrial release decision making in Maryland, looks at whether the analyses and recommendations of the 2001 report remain current, and issues a new set of recommendations.

This report has four sections. Section 1 looks at the legal and evidence-based pretrial justice policies and practices as defined by law, national standards and the state-of-the-art research on evidence-based decision-making. Section II looks at the current pretrial release decision-making practices in Maryland. Section III reviews existing statutes and court rules relating to pretrial release decision-making to assess whether these laws, as currently constructed, can support necessary enhancements to fully implement the latest in legal and evidence-based pretrial justice practices, and to identify areas where new laws are required. Section IV presents the PJI's conclusions and recommendations.

SECTION I. LEGAL AND EVIDENCE-BASED PRETRIAL JUSTICE PRACTICES

Over the past decade, a growing emphasis has been placed on assuring that criminal justice interventions are evidence-based; that is, that they are informed by what the research says, rather than by what our intuition tells us, about what works and what does not. In the pretrial arena, the call for evidence-based practices has been coupled with the need to honor the unique legal rights of those accused, but not yet convicted, of crimes. These include the presumption of innocence, the right to a bail that is not excessive, and the right to a hearing before liberty can be restricted. As a result, the term Legal and Evidence-Based Practices is used to describe the ideal in pretrial release practices, the goal towards which all jurisdictions should seek to strive. Legal and Evidence-Based Practices is defined as "interventions and practices that are consistent with the pretrial legal foundation, applicable laws, and methods research have proven to be effective in decreasing failures to appear in court and danger to the community during the pretrial stage."[4]

Early Efforts at Legal and Evidence-Based Pretrial Justice Practices

Up until the 1960s, a person who was arrested for a criminal charge anywhere in the country typically would have had to pay a monetary bond to be released pending trial, with the bond amount determined by the charge. This began to change with the establishment of pretrial services programs, which demonstrated through research that many defendants could be safely released if the courts were provided information about them, including an assessment of their risks. In 1966, Congress passed the Federal Bail Reform Act, which, for the first time in any statute set forth clear criteria that the court was to consider in making a pretrial release decision, including information about the defendant's community ties and criminal history. The law also included a list of options from which the court was to select the least restrictive that was necessary to reasonably assure appearance in court.[5]

In 1968, the American Bar Association issued standards for the pretrial release decision that incorporated provisions of the Federal Bail Reform Act. Updated twice since,[6] these standards include the following elements:

- There is a presumption for least restrictive release that will reasonably assure appearance in court and community safety (ABA Standard 10-1.2)
- Least restrictive conditions begin with release on recognizance (ABA Standard 10-5.1)

---

[4] Marie VanNostrand, *Legal and Evidence-Based Practices: Applications of Legal Principles, Laws and Research to the Field of Pretrial Services*, U.S. Department of Justice, National Institute of Corrections, 2007.

[5] Congress added assurance of public safety as a purpose of the pretrial release decision when it amended the Bail Reform Act in 1984.

[6] The second edition of the American Bar Association Standards on Pretrial Release were issued in 1985, and the third in 2002.

- The presumption for release on recognizance must be overcome by a showing of "substantial risk" that the defendant will present a danger to the community or fail to appear in court (Standard 10-5.1)
- If that presumption is overcome, the court should impose the least restrictive condition or conditions that will reasonably assure community safety and court appearance (Standard 10-5.2)
- Financial conditions should be imposed "only when no other less restrictive condition of release will reasonably ensure the defendant's appearance in court" (Standard 10-5.3)
- The court "should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay" (Standard 10-5.3)
- The court should not impose financial conditions "to prevent future criminal conduct or to protect the safety of the community or any person ((Standard 10-5.3)
- When defendants pose unmanageable risks, the court may order the detention of the defendant without bond subject to procedural protections (Standards 10-5.7, 9, 10 and 11)
- Every jurisdiction should establish a pretrial services program that collects information and assesses risks of pretrial misconduct for defendants making their initial appearance, and that supervises conditions of release set by the court (Standard 10-2.2)
- The pretrial services program's risk assessment should be based on objective criteria shown through research to effectively identify each defendant's risk level (Standard 10-4.2).

Over the years, many state statutes and court rules were re-written to reflect parts of these standards, including the presumption for release on the least restrictive conditions and the prohibition of using monetary bonds to address concerns about public safety. In addition, many jurisdictions established pretrial services programs to assess risks of defendants and supervise them on pretrial release.

Under these new policies and practices, the result should be more defendants released on non-monetary bonds and fewer defendants having monetary bonds. For a period, this is what happened. By 1990, 41% of felony defendants were being released on recognizance, and 54% were having monetary bonds set. By 2004, the number of felony defendants released on recognizance fell to 28%, while the number of defendants with financial bonds set rose to 69%.[7] As the use of monetary bonds have gone up, pretrial release rates have gone down – falling from 65% of felony defendants in 1990 to 58% in 2006.[8]

BOND IN FELONY CASES

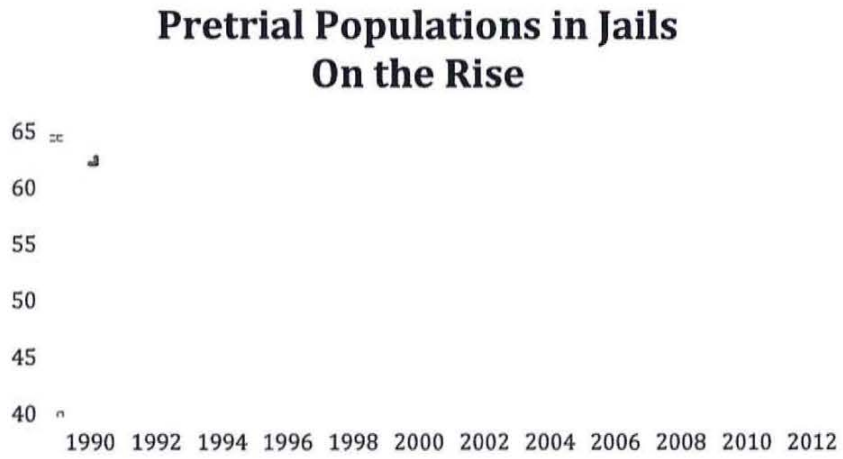
1990
41% released on recognizance, 54% had monetary bond set.

2004
28% released on recognizance, 69% had monetary bond set.

[7] Thomas H. Cohen and Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts, State Court Processing Statistics, 1990-2004* (Washington, D.C.: Bureau of Justice Statistics, 2007); and Thomas H. Cohen and

The increased use of monetary bonds has had a dramatic effect on jail populations. Between 1990 and 2008, the jail population in the United States doubled from 400,000 inmates to 800,000. The number of defendants held in jail pending trial has driven much of this increase. Up until 1996, jail populations were comprised evenly of about 50% sentenced and 50% pretrial inmates. Beginning in 1996, the number of pretrial inmates began growing at a much faster pace than the sentenced inmates. Currently, 61% of inmates in local jails have not been convicted, compared to 39% who are serving sentences.[9]

Chart 1. Percentage of Jail Population That is Pretrial



Source: Bureau of Justice Statistics Annual Survey of Jails

While these trends were unfolding, research was being done in a number of jurisdictions that proved that empirically validated pretrial risk assessment instruments could successfully sort defendants into risk categories, showing their likelihood of endangering the public or failing to appear in court.[10] And there was one important study on the effects of supervision. That study,

---

Tracy Kyckelhahn, *Felony Defendants in Large Urban Counties, 2006* (Washington, D.C.: Bureau of Justice Statistics, 2010).

[8] Id.

[9] Todd Minton, *Jail Inmates at Mid Year 2010: Statistical Tables* (Washington, D.C.: Bureau of Justice Statistics, 2011).

[10] Marie VanNostrand, *Assessing Risk Among Pretrial Defendants in Virginia: The Virginia Pretrial Risk Assessment Instrument* (Richmond: Virginia Department of Criminal Justice Services, 2003); Christopher T. Lowenkamp and Kristen Bechtel, *Meeting Pretrial Objectives: A Validation of the Summit County Pretrial Risk Assessment Instrument* (Cincinnati: University of Cincinnati, 2007); Marie VanNostrand and Kenneth Rose, *Pretrial Risk Assessment in Virginia*, St. Petersburg: Luminosity, Inc., 2009); Marie VanNostrand and Gena Keebler, *Pretrial Risk Assessment in the Federal Court* (St. Petersburg:, Luminosity, Inc., 2009); Edward Latessa, Paula

done through random assignment of defendants to one of two groups – one that received supervision and one that did not – found that those who received supervision had lower rearrest and failure to appear rates.[11] Other research began to show that simply reminding defendants of their upcoming court dates has a significant impact on reducing failure to appear rates.[12]

Key Stakeholder Groups Call for Renewed Emphasis on Legal and Evidence-Based Pretrial Justice Practices

With the problems of the monetary-based pretrial release process becoming more apparent and research showing that a risk-based approach, coupled with supervision of higher risk defendants and reminding defendants of their court dates, was much more effective, in 2011 the Office of Justice Programs of the U.S. Department of Justice, together with the Pretrial Justice Institute, convened a National Symposium on Pretrial Justice. The purpose of the Symposium was to bring together high-level representatives from key stakeholder groups from around the country – judges, prosecutors, defenders, law enforcement, jail administrators, court administrators, researchers, victims groups, and county and state elected and appointed officials – to talk about the current state of pretrial justice and to identify ways to improve it.

> "We can design reforms to make the current system more equitable, while balancing the concerns of judges, prosecutors, defendants, and advocacy organizations. We can help those serving on the bench make informed decisions that improve cost-effectiveness and preserve safety needs, as well as due process."
>
> Attorney General Eric Holder
> National Symposium on Pretrial Justice

At the Symposium, participants produced a list of recommendations for enhancing pretrial justice centered around legal and evidence-based principles. Among the

---

Smith, Matthew Makarios, and Christopher Lowenkamp, *Creation and Validation of the Ohio Risk Assessment System: Final Report* (Cincinnati: University of Cincinnati, 2009); David J. Levin, *Validation of the Coconino County Pretrial Risk Assessment Tool* (Washington, D.C.: Pretrial Justice Institute, 2010); James Austin, Roger Ocker, and Avi Bhati, *Kentucky Pretrial Risk Assessment Validation* (Washington, D.C.: JFA Institute, 2010); David J. Levin, *Development of a Validated Pretrial Risk Assessment Tool for Lee County, Florida* (Washington, D.C.: Pretrial Justice Institute, 2011); James Austin, Avi Bhati, Michael Jones, and Roger Ocker, *Florida Pretrial Risk Assessment Instrument* (Washington, D.C., JFA Institute, 2012); Michael Jones, *The Colorado Pretrial Assessment Tool*, (Washington, D.C.: Pretrial Justice Institute, 2012).

[11] John S. Goldkamp and Michael D. White, "Restoring Accountability in Pretrial Release: The Philadelphia Pretrial Release Supervision Experiments," *Journal of Experimental Criminology*, 2(2), (2006), 143-181.

[12] *Jefferson County, Colorado Court Date Notification Program: FTA Pilot Project Summary*, November 2005; Matt Nice, *Court Appearance Notification System: Process and Outcome Evaluation* (Multnomah County: Multnomah County Budget Office, March 2006); Matt O'Keefe, *Court Appearance Notification System: 2007 Analysis Highlights* (June 2007); Mitchel N. Herian and Brian H. Bornstein, "Reducing Failure to Appear in Nebraska: A Field Study," *The Nebraska Lawyer*, (September 2010).

recommendations was that jurisdictions across the country move toward developing a system of pretrial justice that would have the following elements:

- Screening of criminal cases by an experienced prosecutor before the initial court appearance to make sure that the charge that goes before the court at that hearing is the charge on which the prosecutor is moving forward.
- Presence of defense counsel at the initial appearance who is prepared to make representations on the defendant's behalf on the issue of pretrial release.
- Existence of a pretrial services program or similar entity that:
  - conducts a risk assessment on all defendants in custody awaiting the initial appearance in court using empirically validated pretrial risk assessment tools;
  - provides supervision of defendants released by the court with conditions of pretrial release;
  - reminds defendants of their upcoming court dates; and
  - regularly reviews the pretrial detainee population in the jail to see if circumstances may have changed to could allow for pretrial release.
- Availability and use of detention without bail for defendants who pose unmanageable risks to public safety or appearance in court.

Symposium participants also issued recommendations specific to several stakeholder groups. In its recommendations to legislators, the group noted: "The law, professional standards and science have demonstrated pretrial release decisions should be guided by risks, not the defendant's access to money, that money bail is not designed to and does nothing to address concerns for community safety, and that jurisdictions should establish a pretrial services function to provide information and viable options to the court in every case....It is recommended that legislators review any bills governing pretrial release and detention policy for compatibility with evidence-based practices, the law and standards of legal practice."[13]

In the past two years, several national associations have issued policy statements or resolutions supporting the concepts for pretrial justice set forth by the Symposium and the ABA Standards. These include the following:

- American Council of Chief Defenders
- American Jail Association
- Association of Prosecuting Attorneys
- Conference of Chief Justices
- Conference of State Court Administrators
- International Association of Chiefs of Police

---

[13] *National Symposium on Pretrial Justice: Summary Report of Proceedings*, Bureau of Justice Assistance and Pretrial Justice Institute, 2011, at 41.

- National Association of Counties
- National Association of Criminal Defense Lawyers
- National Sheriff's Association.[14]

In its Policy Paper, the Conference of State Court Administrators summed up the need for enhancing pretrial justice:

> "Pretrial judicial decisions about release or detention of defendants before disposition of criminal charges have a significant, and sometimes determinative, impact on thousands of defendants every day while also adding great financial stress to publicly funded jails holding defendants who are unable to meet financial conditions of release. Many of those incarcerated pretrial do not present a substantial risk of failure to appear or a threat to public safety, but do lack the financial means to be released. Conversely, some with financial means are released despite a risk of flight or threat to public safety… Finally, there are individuals who, although presumed innocent, warrant pretrial detention because of risks of flight and threat to public safety if released."[15]

The Conference of Chief Justices "urge[s] that court leaders promote, collaborate and accomplish the adoption of evidence-based assessment of risk in setting pretrial release conditions and advocate for the presumptive use of non-financial release conditions to the greatest degree consistent with evidence-based assessment of flight risk and threat to public safety and to victims of crime. "[16]

Experiences of Jurisdictions That Have Implemented Legal and Evidence-Based Pretrial Justice Practices

While widespread system support for these enhancements to pretrial justice is important, of greater importance is the fact that these enhancements have been implemented in several jurisdictions, with good outcomes.

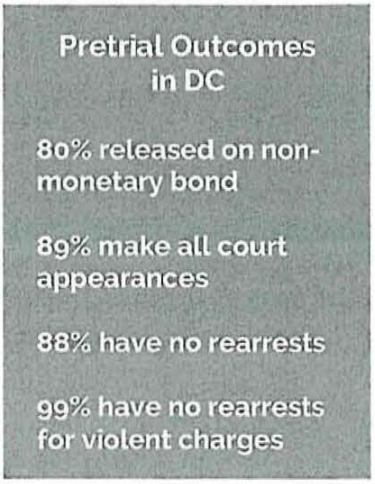
---

[14] These Policy Statements and Resolutions can be viewed by going to: www.pretrial.org/get-involved/pretrial-national-coalition/.

[15] *Evidence-Based Pretrial Release: 2012-2013 Policy Paper*, Conference of State Court Administrators, page 2, available at: available at: http://tinyurl.com/COSCAPolicyPretrial.

[16] Conference of Chief Justices, Resolution 3, *Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial Release*, 2013. The endorsement is available at: http://tinyurl.com/CCJPretrial.

In the District of Columbia, for example, a veteran prosecutor reviews all cases before the initial court appearance to weed out the weak cases at that point. Indigent defendants are represented by counsel at the initial appearance. Both the defense and prosecution receive the report from the pretrial services program before court outlining the results of the program's investigation, including the findings of its risk assessment and its recommendation to the court. The judge is handed the report in court as the case is called. The pretrial services program, using an empirically validated risk assessment tool, either recommends non-financial release – with or without conditions, depending on the assessed risk level – or that a hearing be held to determine whether the defendant should be held without bond. The program never makes a recommendation for a monetary bond. The program also supervises conditions of release imposed by the court and sends court date reminder notices to all defendants who have been released.



The outcomes are impressive. Eighty percent of defendants are released on non-monetary bonds and 15 percent are held without bond.[17] Of those released, during FY 2012, 89 percent made all their court appearances and 88 percent were not rearrested on new charges while their cases are pending. Only one percent was rearrested for a violent offense. Moreover, 88 percent of defendants remained on release at the conclusion of their cases without a revocation for non-compliance with release conditions.[18] These results were achieved without the use of monetary bonds.

Kentucky is another example of a jurisdiction that is incorporating the latest in evidence-based practices, including reducing reliance on monetary bonds and basing recommendations on the results of an empirically validated pretrial risk assessment tool. In Kentucky, pretrial services is run at the state level, and it serves every county in the state. In previous years, the statewide pretrial services program and the courts had put heavy reliance on monetary bonds.

This began to change after the Kentucky legislature passed a bill in 2011, HB 463, which was intended to reduce the costs of housing those incarcerated in the state's prisons and jails. Among the changes in the bill were requirements that:

- pretrial services use an empirically validated risk assessment instrument and provide supervision of defendants incorporating the latest in evidence-based supervision practices

[17] The remaining five percent are in custody on other charges.
[18] *Pretrial Services Agency for the District of Columbia: FY 2012 Organizational Assessment*, District of Columbia Pretrial Services Agency, December 2012, at 10.

- defendants who score as low risk on the validated pretrial risk assessment tool be released on their own recognizance, unless the court makes a finding on the record that such a release is not appropriate
- defendants who score as moderate risk be released to the supervision of the pretrial services program, unless the court makes a finding that such a release is not appropriate
- for defendants charged with misdemeanor offenses who are given a monetary bond that the bond amount not exceed the maximum fine plus court costs that the defendant could receive if convicted.

Pretrial Outcomes in Kentucky

66% released on non-monetary bond

90% make all court appearances

92% have no rearrests

An analysis that looked at outcomes before and after HB 463 went into effect found that the overall pretrial release rate rose from 65 percent to 70 percent in just the first few months after the law's enactment, which resulted in over 1,000 more defendants being released each month. Fifty-one percent of all releases were on non-monetary bonds before the law's enactment, compared to 66 percent of all releases after the law took effect. This increase in non-financial release rates was achieved without any decrease in court appearance or public safety rates. Before the law, 89 percent of defendants made all their court appearances and 91 percent were not rearrested on new charges while their cases were pending. After the law, these figures actually rose slightly – to 90 percent making all court appearances and 92 percent having no rearrests.[19]

Two recent developments in Colorado have put that state on a path toward implementing the elements called for by the Symposium, the ABA and the other key stakeholder groups. First, 10 pretrial services programs in Colorado embarked on an effort to develop an empirically validated risk assessment instrument using data from all 10 counties. The resulting validated instrument, which was released in 2012, is now being implemented in those programs and in other counties around the state.

A new law in Colorado encourages counties to establish pretrial services programs, states that all pretrial services programs in the state must use an empirically validated risk assessment tool, and discourages the use of monetary bonds.

Second, in 2011 the Colorado Commission on Criminal and Juvenile Justice, which is required by law to, among other things, investigate evidence-based initiatives and alternatives to incarceration, appointed a Bail Subcommittee to make recommendations for legislative changes that could result in more evidence-based pretrial release decision-making. That

[19] Tara Boh Klute and Mark Heyerly, *Report on Impact of House Bill 463: Outcomes, Challenges and Recommendations*, Kentucky Pretrial Services, 2012.

subcommittee spent a year studying federal and state legal and evidence-based pretrial justice practices. Based on the recommendations of the subcommittee, the Colorado legislature this year passed, and the governor signed, a bill (HB 1236) that, among other things, encourages all the jurisdictions within Colorado to establish pretrial services programs, states that all pretrial services programs in the state must use an empirically validated risk assessment tool, and discourages the use of monetary bonds.

While it is too soon to have any outcomes of this new law, a forthcoming study of the validated pretrial risk assessment instrument looks at the effect of the type of release on the likelihood of the defendant being rearrested on a new offense while pending adjudication of the original charge or of failing to appear in court. The study was comprised of 1,919 defendants who were scored by the risk assessment instrument into one of four risk categories, going from lowest risk to highest. As Table 1 shows, regardless of the risk level, as ascertained through the use of the scientifically validated pretrial risk assessment instrument, there were little differences in defendant success rates while on pretrial release between those released on unsecured bond[20] and those released on secured bonds. What differences did exist were not statistically significant.

Table 1. Colorado Study Results

	Public Safety Rate		Court Appearance Rate	
Risk Level	Unsecured Bond	Secured Bond	Unsecured Bond	Secured Bond
1 (Lowest)	93%	90%	97%	93%
2	84%	79%	87%	85%
3	69%	70%	80%	78%
4 (Highest	64%	58%	43%	53%
Average	85%	76%	88%	81%

While this study found that defendants released on unsecured bonds perform just as well as defendants released on secured bonds when controlling for risk levels, the study also looked at the jail bed usage of defendants on the two types of bonds. Not surprisingly, defendants on unsecured bonds spend far less time in jail than defendants with secured bonds, since defendants with secured bonds must find the money or make arrangements with a bail bonding company. Also, 39% of defendants with secured bonds were never able to raise the money and spent the

The study found that unsecured bonds offer the same public safety and court appearance benefits as secured bonds, but do so with substantially less use of jail bed space.

[20] Unsecured bonds do not require the defendant to post any money to be released, but the defendant can be liable for paying a bond amount if the defendant fails to appear in court.

entire pretrial period in jail.

In summary, the study found that unsecured bonds offer the same public safety and court appearance benefits as secured bonds, but do so with substantially less use of jail bed space.[21]

The experiences of these three jurisdictions – the District of Columbia, Kentucky and Colorado – provide support for the use of empirically validated pretrial risk assessment tools to sort defendants into risk categories, and then matching the identified risks with the appropriate non-monetary conditions of release to assure high pretrial release rates and high success rates while on pretrial release.

[21] Jones, M. R. (2013). *Unsecured Bonds: The "As Effective" and "Most Efficient" Pretrial Release Option.* Washington, DC: Pretrial Justice Institute.

SECTION II. CURRENT PRETRIAL RELEASE PRACTICES IN MARYLAND

This section presents the information obtained by for the subcommittee about current pretrial release decision-making practices in Maryland.

Extent and Nature of Pretrial Services in Maryland

PJI staff contacted each of Maryland's 24 jurisdictions (23 counties plus Baltimore City) to determine whether a pretrial services program was operational in the jurisdiction. As Table 2 shows, 11 of Maryland's 24 jurisdictions indicated that they have pretrial services programs, and 13 indicated that they do not. All of the most populous jurisdictions in the state – Montgomery County, Prince George's County, Baltimore City, Baltimore County, and Anne Arundel County – have pretrial services programs.

Table 2. Maryland Pretrial Services Programs

Jurisdictions With Pretrial Services Programs	Jurisdictions With No Pretrial Services Programs
Anne Arundel County	Allegany County
Baltimore City	Caroline County
Baltimore County	Cecil County
Calvert County	Charles County
Carroll County	Garrett County
Dorchester County	Howard County
Frederick County	Kent County
Harford County	Queen Anne's County
Montgomery County	St. Mary's County
Prince George's County	Somerset County
Wicomico County	Talbot County
	Washington County
	Worcester County

In the Maryland jurisdictions that have pretrial services programs, there is no consistent compliance with national standards and evidence-based practices.

The pretrial services programs in the 11 jurisdictions were contacted and asked to complete a survey on their current policies and practices. Seven of the programs responded. The results of the survey appear in Table 3, which shows the national standards and evidence-based practices in the left column, and the corresponding practice in the Maryland pretrial services programs in the right column.

As the table shows, even in jurisdictions that have pretrial services programs, there is no consistent compliance with national standards and evidence-based practices. For example, the Pretrial Release Standards of the American Bar Association and of the National Association of Pretrial Services Agencies both call for the use of objective risk assessment instruments that have been shown through research to be able to effectively sort defendants into categories showing their likelihood of presenting a danger to the community and of failing to appear in court. Also, extensive research has shown that it is possible to sort defendants into such risk categories. Yet, as seen in the table, two of the seven programs that responded to the survey do not conduct any risk assessments, and of the five that do, only three use only objective criteria, and only two of these use an instrument that was empirically validated – i.e., it was tested through rigorous research to assure that it measures what it is supposed to measure.

Standards and evidence-based practices say that pretrial services programs should make recommendations to the court that are based upon the risk assessment findings. Three of the seven make no recommendations to the court, and of the four that do, none base their recommendations primarily on the risk assessment findings.

To even work from an evidence-based platform, pretrial services programs must collect data on their processes and outcomes. As the table shows, most of the seven programs surveyed could not provide fundamental data on the number of defendants that they process and on outcomes.

Table 3. Comparison of Maryland Pretrial Services Program Practices With National Standards and Evidence-Based Practices

National Standards and Evidence-Based Practices	Maryland Pretrial Services Program Practices
A pretrial services program should interview all defendants in custody prior to their initial appearance before a judge.	Three of the seven programs exclude categories of defendants from being interviewed and investigated; two of the seven do not conduct their initial investigation until after the first bond review hearing.
A pretrial services program should conduct an assessment of the risk that each defendant poses to present a danger to the community or fail to appear in court.	Two of the seven programs do not conduct a risk assessment.
The risk assessment should be based on objective criteria, shown through research to be effective at sorting defendants into risk categories.	Of the five programs that conduct risk assessments, three use exclusively objective criteria, based upon research. Of the three, two use a risk assessment instrument that was validated in their own jurisdictions using rigorous research methods, and one uses an instrument that includes criteria shown in other studies to be correlated with risks.
A pretrial services program should make recommendations to the court, and those recommendations should be based upon the findings of the risk assessment.	Only four of the seven routinely make recommendations to the court at the bond review hearing. In one of those four, the risk assessment finding merely influences the recommendation. In three of the four, the risk assessment finding is just one piece of information considered in formulating the recommendation.
The recommendations should be the least restrictive to reasonably assure court appearance and community safety, and monetary conditions should not be recommended or imposed to address concerns about community safety.	Three of the four that make recommendations recommend monetary bonds and specific dollar amounts.
A pretrial services program should supervise all defendants referred by the court.	All seven of the programs provide supervision, but 1 of them has the option to refuse to accept supervision of a defendant referred by the court
A pretrial services program should regularly collect and report key process and outcome data.	Two of the four programs that make recommendations could not provide data on the recommendations that they make to the court. Only three of the seven programs that supervise defendants could provide data on the number of defendants supervised in the last year. Four of the six indicate that they calculate failure to appear rates for defendants under their supervision, but one of these could not provide that figure.

Observations of Bond Review Hearings in Five Maryland Jurisdictions

PJI staff observed bond review hearings in five Maryland jurisdictions: Baltimore City, Frederick County, Harford County, Montgomery County, and Prince George's County.[22]

At district court bond review hearings, judges review the bond status of:

- defendants who have had a financial bond set by the commissioner that they have not yet posted
- defendants who were ordered held with no bond by the commissioner
- defendants who have had a financial bond pre-set by a judge on a warrant; and
- defendants who had a no bond pre-set by a judge on a warrant.

District court judges are not reviewing bonds at these hearings of defendants (1) who were released on citation, (2) who were released on their own recognizance by the commissioner, or (3) who posted before the bond review hearings financial bonds that had been set by the commissioner or pre-set in warrants. Data are not available the number or percent of defendants released on citations or who post their bonds before the bond review hearing.

Table 4, however, shows data on number and percent of defendants were released on recognizance by the commissioners during 2012 in the five Maryland jurisdictions where observations were made. As the table shows, about half are released on recognizance in Baltimore City, Harford, and Prince George's County. Montgomery County has the lowest rate of release on recognizance by the commissioners of the five sites – at 37 percent.

Table 4. 2012 Initial Appearance Before Commissioners

Jurisdiction	Total Number of Appearances	Released ROR
Baltimore City	51,073	51%
Frederick & Washington*	6,336	42%
Harford	3,244	52%
Montgomery	14,565	37%
P.G.	31,900	49%

*Frederick and Washington Counties fall in the same district, and it is not possible to separate out the cases specific to Frederick County.

[22] While the preference would have been to observe bail review hearings in all Maryland jurisdictions, financial considerations necessitated limiting the jurisdictions to these five. The five jurisdictions selected mirror those included in the 2001 Abell Foundation report, with the exception that Montgomery County was included and Baltimore County was excluded. Montgomery County was substituted since its pretrial services program, which has a national reputation for excellence, had recently validated its pretrial risk assessment tool – thus introducing evidence-based practices to the pretrial release decision making process in that jurisdiction.

The bonds that are under review at the initial bond review hearing were set when limited information was available, before prosecution and defense had weighed in, and before pretrial services, where available, had conducted its investigation and assessment of the risks posed by the defendant to be a danger to the community or to fail to appear in court.[23]

To learn more about how the presence of prosecution and defense and the availability of additional information at the bond review changed the initial decision, PJI staff attended a total of 548 bail review hearings between February and April 2013. Staff observed 260 hearings in Baltimore City, 38 in Frederick County, 34 in Harford County, 92 in Montgomery County, and 124 in Prince George's County.

Before turning to the results of these observations, Tables 5 and 6 present data on the jail populations in these five jurisdictions. As Table 5 shows, the overall jail population (pretrial plus sentenced) has generally declined in each of the five sites, and statewide, over the past five years, with the exception of slight rises in Baltimore, Harford and P.G. between FY 2012 and FY 20123.

Table 5. Average Daily Population – Maryland Jails

Jurisdiction	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Baltimore	4,005	3,713	3,596	3,320	3,571
Frederick	452	419	426	397	350
Harford	483	453	423	396	410
Montgomery	1,110	1,123	1,107	980	941
P.G.	1,299	1,229	1,181	1,313	1,332
Statewide	13,482	12,785	12,519	12,223	12,154

[23] Prosecutors in one of the five sites, Baltimore City, review cases before the defendant's initial appearance before a commissioner and frequently make bail recommendations to the commissioner, but they typically are not present at that hearing.

The percentage of the jail populations that were comprised of pretrial detainees in a snapshot conducted on March 1, 2013 ranged from a low of 40% in Harford County to a high of 88% in Baltimore City.

Chart 2. Percentage of Jail Populations Comprised of Pretrial Detainees

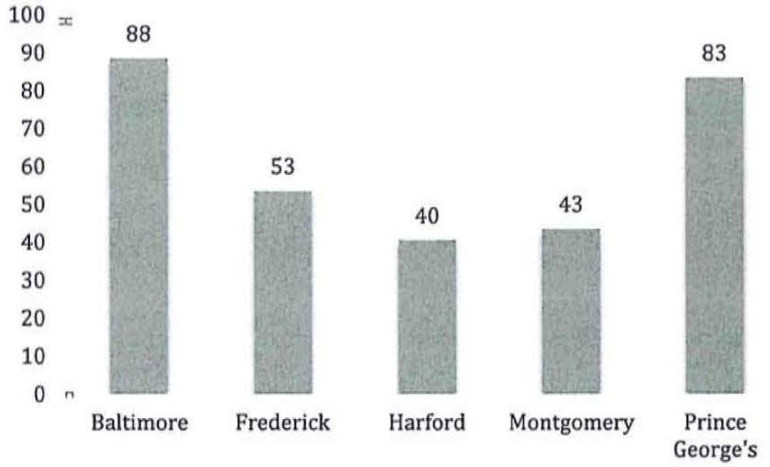


Table 6 summarizes what occurred at the bond review hearings that were observed in these five jurisdictions.[24] It includes the recommendations that were made by the prosecutor, defense, and pretrial services, and the decision that was reached by the district court. In the table, in the categories "Lower Existing Bond," "Maintain Existing Bond," and "Raise Existing Bond," the existing bond refers to either bonds that had been set by the commissioner at the initial appearance for all warrantless arrests or bonds that had been pre-set by the court in arrests resulting from warrants.

The bonds that are under review at the initial bond review hearing were set when limited information was available, when prosecution and defense typically were not present, and before pretrial services, where available, had conducted its investigation and risk assessment. Yet by far the most frequent recommendation of pretrial services at bond review was to maintain the bond that had been set before pretrial services had done its investigation and risk assessment.

[24] The Appendix presents additional tables on the findings from the bond review observations.

Regarding the recommendations that were made by the respective parties, the table shows large differences among the prosecutor, defense, and pretrial services. While it should be expected that the prosecution and defense are going to differ significantly in their recommendations, given their adversarial roles, pretrial services is expected to be a neutral information gatherer. One finding that stands out from this table is that the district court released on non-financial bond or lowered the existing bond on substantially more defendants than were recommended by pretrial services. Fifteen percent of defendants were recommended for a non-financial release or a lowered bond by pretrial services, but the court released non-financially or lowered the bond of 48% of defendants – or more than three times as many. Moreover, by far the most frequent recommendation of pretrial services, when one was made, was to maintain the bond that had been set before pretrial services had done its investigation and risk assessment.

Regarding the district court decisions, as the table shows, the most frequent decision was to maintain the existing bond, which occurred in 41% of the observed cases, followed by lower the existing bond, which occurred in 31% of the cases.

Table 6. Summary of Bond Review Hearings – Five Sites Combined

	Recommendation			Decision
Recommendation/ Decision	Prosecutor	Defense	Pretrial Services	District Court
Release Non-Financially	1%	16%	10%	17%
Lower Existing Bond	7%	44%	5%	31%
Maintain Existing Bond	26%	6%	41%	41%
Raise Existing Bond	14%	0	9%	8%
No Recommendation Made	53%	34%	35%	N/A

Table 7 shows the decisions made by the court at the bond review hearings by each individual site. Between 41% and 45% of the time the judges in four of the five jurisdictions decided to maintain the bond that was in place. The percentage of cases in which the court released the defendant on non-financial bond in those four jurisdictions – Baltimore, Frederick, Harford and Prince George's – ranged from 9% to 13%. By contrast, in Montgomery County, the court released 44% of defendants on non-financial bond, and maintained the existing bond in 29% of the cases. Moreover, no bond amounts were raised at Montgomery County bond review hearings, but they were raised in between 5% and 15% of cases in the other jurisdictions.

Table 7: Bond Review Decisions in District Court

	Baltimore	Frederick	Harford	Montgomery	P.G.
Release Non-Financially	12%	13%	9%	44%	10%
Lower Existing Bond	33%	26%	35%	15%	38%
Maintain Existing Bond	44%	45%	41%	29%	43%
Raise Existing Bond	10%	5%	15%	0	7%
Other (Case continued, mental health, etc.)	2%	11%	0	12%	2%

Table 8 summarizes the bond review hearings in each of the five jurisdictions by looking at the actual decisions of the court, including types of bonds (i.e., full versus 10% deposit) and median bond amounts set. A full financial bond was set in Montgomery County much less frequently than in the other jurisdictions, and when set, the median dollar amount was much lower. In addition, fewer defendants were held on no bond in Montgomery County.

Table 8. Summary of Bond Review Decisions – by Jurisdiction

	Baltimore	Frederick	Harford	Montgomery	P.G.
% Released Non-Financially	12%	13%	9%	44%	10%
% Full Financial Bond	50%	55%	59%	27%	55%
Median Full Bond Amount	$15,000	$10,000	$20,000	$6,500	$10,000
% 10% Deposit Bond	20%	13%	6%	9%	23%
Median 10% Deposit Bond Amount	$5,000	$13,750	$1,000	$4,000	$2,500
% Held on No Bonds	13%	5%	18%	2%	7%
Other (i.e., mental health evaluations)	5%	14%	8%	18%	5%

Caution must be used in making interpretations of the findings from the preceding two tables. The number of cases observed in each jurisdiction was small and it was not possible to draw a random sample of cases, meaning that the findings are not scientific. In addition, a number of different variables may explain the differences that were noted between Montgomery County and the other jurisdictions. For example, as was shown in Table 3 above, just 37% of defendants are released by commissioners in Montgomery County compared to half in

Baltimore, Harford and Prince George's. Moreover, of the cases observed, Montgomery County had a lower percentage of defendants who were facing violent felony charges than Baltimore, Harford, and Prince George's (see Table A-4 in the Appendix), and the lowest rate of the five of defendants facing just one charge at the hearing (see Table A-8). On the other hand, of the cases observed, Montgomery County had the highest percentage of defendants who had holds on other charges (see Table A-9).

One way to get a better understanding of what may be occurring in the individual jurisdictions regarding pretrial release decision-making practices is to look at how the decisions of the district court compare to the recommendations that were made by the pretrial services program – at least in those jurisdictions where the program made a recommendation at the initial bond review hearing. Since pretrial services is a neutral entity, and since it seeks to objectively assess the risk levels of defendants, the differences observed in release decisions in Montgomery County compared to the other jurisdictions may reflect nothing more than the courts in all the jurisdictions giving significant weight to the recommendations of pretrial services. In other words, perhaps the judges in Montgomery County were releasing a higher percentage of defendants non-financially and on lower bonds because pretrial services in that jurisdiction was identifying higher percentages of defendants who were lower risk, and thus recommending less restrictive releases.

The pretrial services programs made recommendations in three of the five jurisdictions – Montgomery County, Baltimore City, and Harford County. Data showing the concurrence of the District Court with the recommendations of pretrial services in each of those three jurisdictions appears in Tables 9, 10 and 11. The highlighted cells in the tables show the instances where the court took the action that was recommended by pretrial services.

Looking first at Montgomery County (Table 9), of the 45 defendants that pretrial services recommended for non-financial release, the court agreed with that recommendation 35 times, for a concurrence rate of 78%. Of the 40 defendants where the court released the defendant non-financially, pretrial services had recommended 35, or 88%. Of the 33 defendants where pretrial services recommended maintaining the existing bond, the court agreed 22 times, or 67%. Pretrial services did not recommend increasing the bond in any cases, and the court did not take that action in any cases.

Judges in Montgomery County generally follow the recommendations of pretrial services.

These findings suggest that the District Court judges in Montgomery County have faith in the pretrial services program's ability to identify risk levels of defendants.

Table 9. Comparison of Pretrial Services Recommendation and District Court Decision – Montgomery County

	District Court Judge's Bond Review Decision – Montgomery County					
Pretrial Services Recommendation	Release Non-Financially	Lower Existing Bond	Maintain Existing Bond	Raise Existing Bond	Other	Total
Release Non-Financially	35	6	4	0	0	45
Lower Existing Bond	2	0	0	0	0	2
Maintain Existing Bond	3	8	22	0	0	33
Raise Existing Bond	0	0	0	0	0	0
No recommendation	0	0	1	0	11	12
Total	40	14	27	0	11	92

A much different pattern emerges when looking at the concurrence rate between the pretrial services program's recommendation and the court's decision in Baltimore City. As Table 10 shows, there is very little agreement. Pretrial services recommended eight defendants for non-financial release, but the court accepted that recommendation only four times, or 50%. On the other hand, of the 31 defendants released by the court at bond review on non-financial bond, pretrial services had recommended only four – or 12%. Thus, the court is finding substantially more defendants as being good candidates for non-financial release than is the pretrial services program.

Of the 165 cases where pretrial services recommended maintaining the existing bond, the court took that action only 76 times, or 46%. In the 35 cases where pretrial services recommended raising the existing bond, the court took that action in only 10 cases, or 29%.

Judges in Baltimore City show little faith in the risk assessment and recommendations of pretrial services.

These figures suggest that the District Court judges in Baltimore City have little faith in the risk assessment and recommendation policies of the pretrial services program. Either the pretrial services program is overestimating the risk levels of defendants, or the court is underestimating those levels.

Table 10. Comparison of Pretrial Services Recommendation and District Court Decision – Baltimore City

	District Court Judge's Bond Review Decision – Baltimore					
Pretrial Services Recommendation	Release Non-Financially	Lower Existing Bond	Maintain Existing Bond	Raise Existing Bond	Other	Total
Release Non-Financially	4	2	2	0	0	8
Lower Existing Bond	3	14	3	0	0	20
Maintain Existing Bond	19	53	76	14	3	165
Raise Existing Bond	0	11	14	10	0	35
No recommendation	5	5	20	1	1	31
Total	31	85	115	25	4	260

Only 34 cases were observed in Harford County, and pretrial services made no recommendation in 11 of those cases, so it is difficult to draw any conclusions about the concurrence rate between pretrial service's recommendations and the court's decisions. But as Table 11 shows, in the limited number of cases available, there was substantial concurrence. Pretrial services had not recommended any defendants for non-financial release and the court declined to release any non-financially. The program recommended lowering the bond in three cases, and the court agreed with that recommendation in all three cases. The program recommended maintaining the existing bond in 10 cases, and the court followed that recommendation in eight of those cases.

Table 11. Comparison of Pretrial Services Recommendation and District Court Decision – Harford County

	District Court Judge's Bond Review Decision – Harford County					
Pretrial Services Recommendation	Release Non-Financially	Lower Existing Bond	Maintain Existing Bond	Raise Existing Bond	Other	Total
Release Non-Financially	0	0	0	0	0	0
Lower Existing Bond	0	3	0	0	0	3
Maintain Existing Bond	0	1	8	1	0	10
Raise Existing Bond	0	3	3	4	0	10
No recommendation	3	5	3	0	0	11
Total	3	12	14	5	0	34

While the information presented in this section is not as comprehensive as the committee may like it to be, PJI believes that it is sufficient to draw the conclusion that the pretrial release decision-making process in Maryland currently does not match the ideal policies and practices described in Section I.

PJI's findings also suggests that the conclusion of the Abell Foundation report that the lack of information and input to the district court at the bond review hearing may have been causing the high use of monetary bonds may not fully explain the reliance on those bonds. At most of the bond review hearings that PJI staff observed the court was provided with input from prosecution and defense and information and a recommendation from pretrial services. Still, as noted, the most frequent decision of the district court was to maintain the bond that had been set before that input and information had been provided.

Lack of information and input at the bond review hearing may not fully explain the court's reliance on monetary bonds. At most of the hearings observed, the court was provided with information and input from a prosecutor, defense counsel, and pretrial services, but still the most frequent decision of the court was to maintain the bond that had been set before any information or input had been provided.

This suggests that more than input and information is needed. The next section examines how the existing code and court rules in Maryland could be enhanced to provide additional support for enhanced pretrial release decision-making.

SECTION III. EXISTING PROVISIONS OF MARYLAND LAW AND LEGAL AND EVIDENCE-BASED PRETRIAL JUSTICE

As described in Section I, legal and evidence-based pretrial justice practices, as defined by the American Bar Association Standards, the 2011 National Symposium on Pretrial Justice, the policy statements and resolutions of key stakeholder groups, and the latest research findings, should encompass the following elements:

- Participation of both prosecution and defense at the defendant's initial appearance in court, and the review of the case by the prosecutor before that hearing
- Use of an empirically validated risk assessment tool to sort defendants into risk groups
- Release on the least restrictive conditions necessary to reasonably assure appearance in court and public safety
- Reducing the reliance on monetary conditions
- Providing supervision for higher risk defendants released by the court with conditions
- Detaining without bond defendants who pose unmanageable risks.

This section examines what legislative changes could enhance the implementation of these elements.

Involvement of Prosecution and Defense at Initial Bail Setting

On September 25, 2013, the Maryland Court of Appeals issued its ruling in the case of *DeWolfe v. Richmond*, in which the court addressed the question of whether the Maryland Constitution requires that indigent defendants be entitled to representation by a public defender at the initial appearance before a commissioner. Ruling that such defendants have the right to representation, this issue is now settled.

What this means for the prosecutor's presence at the commissioner's hearing remains to be seen. This is an issue for the individual State's Attorneys Offices to address – not one to be decided by legislation.

Empirically Validated Pretrial Risk Assessment Tool

Maryland Court Rule 4-216 sets forth the factors that the judicial officer is to consider in making a pretrial release decision. These include factors that are typical in most state's laws:

the nature and circumstances of the offense charged; the defendant's prior record of appearance in court; prior criminal history; and the defendant's family ties, employment status and history, length of residence in the community. The Rule also says that judicial officers are to consider any recommendations of the State's Attorney, defense, and pretrial services. Finally, the Rule requires the judicial officer to consider "the danger of the defendant to the alleged victim, another person, or the community."

While statutes and court rules specify what factors the court is to consider, they do not provide any guidance to judges in how to define and what weight to assign each of these factors when assessing the risks the defendant poses to public safety and non-appearance in court, and when setting bond conditions to mitigate those risks. This is where empirically validated pretrial risk assessment tools can help.

In the past two years, at least four states have written into their statutes the requirement that judges consider the results of pretrial risk assessment tools in making their pretrial release decision.

> ***Colorado Statutes § 16-4-103 (3)(b):*** In determining the type of bond and conditions of release, the court shall use an empirically developed risk assessment instrument designed to improve pretrial release decisions by providing to the court information that classifies a person in custody based upon predicted level of risk of pretrial failure.
>
> ***Kentucky Revised Statutes § 431.066:*** (2) When a court considers pretrial release and bail for an arrested defendant, the court shall consider whether the defendant constitutes a flight risk, is unlikely to appear for trial, or is likely to be a danger to the public if released. In making this determination, the court shall consider the pretrial risk assessment for a verified and eligible defendant (defined as a defendant whom pretrial services has confirmed the defendant's identity and conducted a risk assessment) along with the factors set forth in KRS 431.525. (3) If a verified and eligible defendant poses a low risk of flight, is likely to appear for trial, and is not likely to be a danger to others, the court shall order the defendant released on unsecured bond or on the defendant's own recognizance subject to other conditions that the court may order. (4) If a verified and eligible defendant poses a moderate risk of flight, is likely to appear for trial, and is not likely to be a danger to others, the court shall order the defendant released under the same conditions as in subsection (3) of this section but shall consider ordering the defendant to participate in global position system monitoring, controlled substance testing, increased supervision, or such other conditions as the court may order.

Delaware Statutes § 2104(d): In making a release determination, or imposing conditions set forth is § 2108 of this title, the court shall employ an objective risk assessment instrument to gauge the person's risk of flight and re-arrest and the safety of the victim and the community.

Hawaii Statutes § 353-10: (The Hawaii pretrial services program) shall conduct internal pretrial risk assessments on adult offenders within three days of admission to a community correctional center which shall then be provided to the court for its consideration.

There are currently no similar provisions in Maryland statutes or court rules.

Release of Least Restrictive Conditions

Section 5-101(b) of the Maryland Code states that, except in certain specified instances, "if, from all the circumstances, the court believes that a minor or adult defendant in a criminal case will appear as required for trial before verdict or pending trial, *the defendant may be released on personal recognizance"* (Emphasis added). Such wording does not convey a presumption for release on the least restrictive conditions.

Maryland Court Rule 4-216(c) states that "a defendant is entitled to be released before verdict on personal recognizance or on bail, in either case with or without conditions imposed, unless the judicial officer determines that no condition of release will reasonably assure (1) the appearance of the defendant as required, and (2) the safety of the alleged victim, another person, or the community." Rule 4-216 (f) (3) states that "If the judicial officer determines that the defendant should be released other than on personal recognizance without any additional conditions imposed, the judicial officer shall impose on the defendant the least onerous condition or combination of conditions of release set out in section (g) of this Rule" that will reasonably assure appearance and safety. These provisions may imply that release on recognizance is "the least onerous condition," but they do not explicitly state so.

The federal statute offers a good example of an explicit statement of release on the least restrictive conditions, beginning with release on recognizance or unsecured bond. 18 USC § 3142 (b) states that "[t]he judicial officer shall order the pretrial release of the person on personal recognizance, or upon the execution of an unsecured appearance bond....unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any person or the community." Part (c) of that provision states that if the court finds that such release will not reasonably assure appearance and safety, the court "shall order the pretrial release of the person ... subject to the least restrictive

condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community."

The new Colorado pretrial release statute, which was based upon the recommendations of the Bail Subcommittee, addresses release on least restrictive conditions in the following way: "When the type of bond and conditions of release are determined by the court, the court shall: (a) presume that all persons in custody are eligible for release on bond with the appropriate and least restrictive conditions . . . unless a person is otherwise ineligible for release" pursuant to that state's provisions on detention without bond (§ 16-4-103(4)(a)). This provision goes on to say that any pretrial release condition "must be tailored to address a specific concern" (§ 16-4-103(4)(a)). Moreover, the court shall "consider all methods of bond and conditions of release to avoid unnecessary pretrial incarceration and levels of community supervision as conditions of pretrial release." (§ 16-4-103(4)(c)).

Reducing the Reliance on and Impact of Monetary Conditions

Maryland Court Rule 4-216(g) lists the conditions of release, include monetary bonds, that the court is allowed to set, but places no limitations on the imposition of monetary bonds.

The federal statute, by contrast, contains this provision: "The judicial officer may not impose a financial condition that results in the pretrial detention of the person" 18 USC § 3142 (c)(2). The statue also states that financial conditions should only be set "in such amount as is reasonably necessary to assure the appearance of the person as required...." 18 USC § 3142 (c)(1)(B)(xii).

The new Colorado statute states that in setting bond the court must consider "the individual characteristics of the person in custody, including the person's financial condition" (§ 16-4-103(3)(a).

Supervision of Pretrial Release Conditions

Maryland Court Rule 4-216(g) states that the court can order a defendant to be supervised by an entity or organization. Similar provisions are found in statutes and court rules in other jurisdictions.

There are provisions in the Maryland Code, however, that limit the court's authority to order a defendant to be supervised while on pretrial release. There are several "individual county provisions" in the law that allow particular counties in the state to set up pretrial services in their

corrections departments and then establish their own criteria for whom they will agree to supervise. For example, the Frederick County provision (§ 11-712) says that the "court may order a defendant to participate in the pretrial release program" but only if the defendant "meets the eligibility criteria," one of which is that the defendant is recommended for placement in the pretrial services supervision program by the program staff. These provisions run counter to national standards and legal and evidence-based practices, which recognize that moderate and higher risk defendants often require supervision to reasonably assure community safety and court appearance, and that pretrial services programs have the obligation to supervise all defendants that judicial officers conclude need to be supervised.

Detention Without Bond

There are several provisions under Maryland Code § 5-202 that address detention without bond. Under the law, there is a rebuttable presumption that the defendant will be a danger to the community or to fail to appear, and therefore should be detained by the judge, in any of these circumstances:

- The defendant is charged as a drug kingpin
- The defendant is charged with a crime of violence and has a conviction for a crime of violence
- The defendant is on pretrial release on another charge
- The defendant is charged with certain weapons offenses and has been convicted of certain weapon offenses
- The defendant is charged with violating a protection order
- The defendant is a registered sex offender.

Most state statutes that allow for detention without bond contain similar provisions.

SECTION IV: CONCLUSION AND RECOMMENDATIONS

Any discussion about pretrial release decision-making must begin with the acknowledgement that there are significant risks involved – risks that can weigh heavily on the judicial officers who are making those decisions. While very high percentages of defendants who are released into the community awaiting disposition of their charges do perfectly fine, there are some who will commit serious offenses, and some who have no intention of returning to court voluntarily. These risks can never be totally erased. What judicial officers need when making a pretrial release decision is reasonable assurance that the defendant will not endanger the public or fail to appear for court.

The pretrial release decision involves risks – risks that cannot be totally erased. What judicial officers need when making a pretrial release decision is reasonable assurance that the defendant will not endanger the public or fail to appear for court.

As the 2001 Abell Foundation report recognized, an important ingredient to providing that assurance is through providing the judicial officer with information and input. That report's recommendation that indigent defense and the prosecutor be present earlier in the bail-setting process has only come about very recently and only as a result of the rulings from the Court of Appeals. Still, no matter what route was taken to bring those information resources to the bail-setting decision, the fact is that they are now available.

But as this report has shown, more than just information and input is needed. Little has changed in decision-making since the prosecution and defense began appearing at the initial bond review hearing. There have been several developments in recent years, however, that point to other ways to achieve the Abell Foundation's recommendations to expand pretrial services and to use monetary bonds sparingly in Maryland.

First, as noted in Section I, in the intervening years since the Abell Foundation report, significant progress has been made in testing and validating pretrial risk assessment tools. The tools have shown, through extensive and rigorous research, to be very effective at sorting defendants into risk categories showing their likelihood of failing to appear in court or being rearrested on new charges. Many of the tools were developed and tested within individual counties, based upon the assumption that every jurisdiction was different and a risk assessment tool that worked in one jurisdiction would not work in another. This assumption began to be challenged with the development and testing of tools built to work in all jurisdictions within particular states. Virginia, Kentucky, Colorado, Ohio, and Florida are examples of states that have implemented statewide validated pretrial risk assessment tools.

The success of these tools led to a study, funded by the Laura and John Arnold Foundation, to see if a universal pretrial risk assessment tool could be developed – that is, a tool that can be used in any jurisdiction in the country. That study, which has now been completed and the results are being written up, has produced such a tool – hereafter referred to as the Arnold Risk Assessment Tool. Aside from the great benefit that this tool brings by being appropriate for any jurisdiction, the tool also can be completed by examining only criminal history records. In other words, no interview with the defendant is required. This new Arnold Risk Assessment Tool will now, for the first time, allow for validated pretrial risk assessments to be conducted in jurisdictions that do not have pretrial services programs that interview defendants before the bond setting appearance in court.[25]

Second, as also noted earlier, despite the long-held conventional wisdom among many justice system practitioners and policy makers that monetary bonds are more effective at assuring appearance in court and community safety, research is showing that this assumption is false. Controlling for level of risk, defendants released without having to post monetary bonds appear in court and go through the pretrial period without any new arrests at the same rate as those released on monetary bonds. And they do so without consuming the jail bed days that are used by those who must sit in jail while they or their families make financial arrangements for their release.

Third, there are now examples of jurisdictions that have reduced or even eliminated the use of monetary bonds and seen outcomes that far exceed anything achieved by jurisdictions that rely heavily on monetary bonds. As noted previously, as Kentucky began using its validated pretrial risk assessment tool and implemented laws that gave stronger preferences for non-monetary releases, the total release rate and the non-monetary release rate both went up, as did the appearance rate and the public safety rate. The District of Columbia, as noted earlier, has essentially eliminated the use of non-monetary bonds and has very high success rates.

There are now examples of jurisdictions that have reduced or even eliminated the use of monetary bonds and seen outcomes that far exceed anything achieved by jurisdictions that rely heavily on monetary bonds.

Fourth, there is now firm support for expanding risk assessment and reliance on non-monetary bonds across a wide range of justice system stakeholder groups, including law enforcement, courts, prosecution, defense, sheriffs and jail administrators.

Fifth, several states have changed their laws to require evidence-based pretrial release decision-making, including the use of validated pretrial risk assessment, and to place a greater emphasis on non-monetary bonds. The experiences of Kentucky, for example, can serve to

[25] The release of this free access tool by the Laura and John Arnold Foundation is imminent.

reassure Maryland legislators and policy makers that making such statutory changes can lead to excellent results.

Sixth, forthcoming research funded by the Laura and John Arnold Foundation shows that, when controlling for risk levels, defendants who spend even a few days in jail trying to find the money to post monetary bonds have higher recidivism rates than defendants who are released right after their initial appearance. This finding introduces a new implication for pretrial release decision-making. Research has shown for years that, when controlling for other factors, defendants who are incarcerated during the pretrial period are convicted more often and get harsher sentences than those who were in the community pending trial. But it is now clear that even short periods of pretrial incarceration serve to lengthen an individual's criminal career.

With these developments and the findings presented in this report in mind, PJI offers the following recommendations for the Pretrial Release Subcommittee to consider and forward to the Task Force.

Recommendations

Recommendations Pertaining to Maryland Law

Maryland law, whether through code or court rule, should be amended to incorporate the following provisions:

- Require the use of a validated risk assessment in every pretrial release decision made by a commissioner and at the district court bond review.
- Establish a clear presumption for release on least onerous conditions, beginning with release on recognizance.
- List the release options from least to most onerous.
- Require that any conditions of pretrial release must be tied to the identified risks.
- Eliminate the option of monetary bonds.
- Revoke the individual county provisions that give some pretrial services programs the option of deciding whether they will supervise a particular defendant.

Recommendations Pertaining to the Initial Appearance Before A Commissioner

1. As soon as it becomes available, commissioners should begin using the Arnold Risk Assessment Tool. Since the risk factors included in the tool can all be gathered using criminal history information already available to commissioners at bail setting, and since the instrument is short and easy to administer, it should not create an added burden to commissioners. This is

important since the commissioners are already struggling trying to figure out the best ways to accommodate the participation of public defenders in these hearings, as required by the recent Court of Appeals ruling.

2. **The District Court should issue a directive to commissioners that commissioners are to inform the public defender's office and the state's attorneys office, if present, of the results of the risk assessment.** With the results of the risk assessment, the public defender and state's attorney, if present, can make more informed representations regarding release.

3. **The District Court should issue a directive to commissioners to (1) release on personal recognizance those defendants who score in the lowest risk category on the Arnold Risk Assessment Tool, unless the commissioner makes written findings explaining why such release is not appropriate; and (2) release on recognizance with appropriate non-monetary conditions those defendants who score as moderate risk on the Arnold Risk Assessment Tool, unless the commissioner makes written findings explaining why such release is not appropriate**. PJI can work with the commissioners to develop a matrix for matching risk levels with appropriate non-monetary conditions of release.

4. **The District Court should issue a directive that, for defendants not released by the commissioner, the commissioner's office forward to the appropriate District Court the risk assessment findings obtained by the commissioner using the Arnold Risk Assessment Tool.** Once the commissioner has completed the risk assessment, there is no need to re-do that assessment once the case arrives in District Court for the bond review hearing. The risk assessment findings should be transmitted as part of the defendant's file to the court that is hearing bond reviews.

5. **The District Court should begin collecting data on the failure to appear and rearrest rates of defendants released by a commissioner with or without non-monetary conditions, by risk levels.** For example, what percentage of defendants who were rated by the risk assessment tool as low risk made all their court appearances and completed their cases without new arrests? For moderate risk defendants? For high risk defendants? When calculating failure to appear and rearrest rates, the correct equation is to divide the number of defendants who were released by the number of defendants who had at least one failure to appear or rearrest.

6. **The commissioners should undergo comprehensive training on any changes made to the Maryland Code or Court Rules resulting from the work of the Task Force, and on the use of the Arnold Risk Assessment Tool.** PJI, in conjunction with the National Judicial College, has developed a Judicial Curriculum on pretrial release decision-making that could be adapted to provide such training.

Recommendations Pertaining to the Initial Bond Review Hearing in District Court

1. **District Court judges should receive, review, and consider the findings of the Arnold pretrial risk assessment tool.** As recommended earlier, the results of the Arnold Risk Assessment Tool should be transmitted with the case file from the commissioner to the District Court judge presiding at bond review.

2. **In considering the risk assessment findings, District Court judges should seek to match the release conditions or detention decisions to the identified risk level.** PJI can work with the District Court to develop a matrix for matching risk levels with appropriate non-monetary conditions of release.

3. **The District Court should begin collecting data on the failure to appear and rearrest rates of defendants released at bond review on non-monetary and monetary conditions, by risk levels.** For example, what percentage of defendants who were rated by the risk assessment tool as low risk made all their court appearances and completed their cases without new arrests? For moderate risk defendants? For high risk defendants? When calculating failure to appear and rearrest rates, the correct equation is to divide the number of defendants who were released by the number of defendants who had at least one failure to appear or rearrest.

4. **The District Court judges should undergo comprehensive training on any changes made to the Maryland Code or Court Rules resulting from the work of the Task Force, and on the use of the Arnold Risk Assessment Tool.** PJI, in conjunction with the National Judicial College, has developed a Judicial Curriculum on pretrial release decision-making that could be adapted to provide such training.

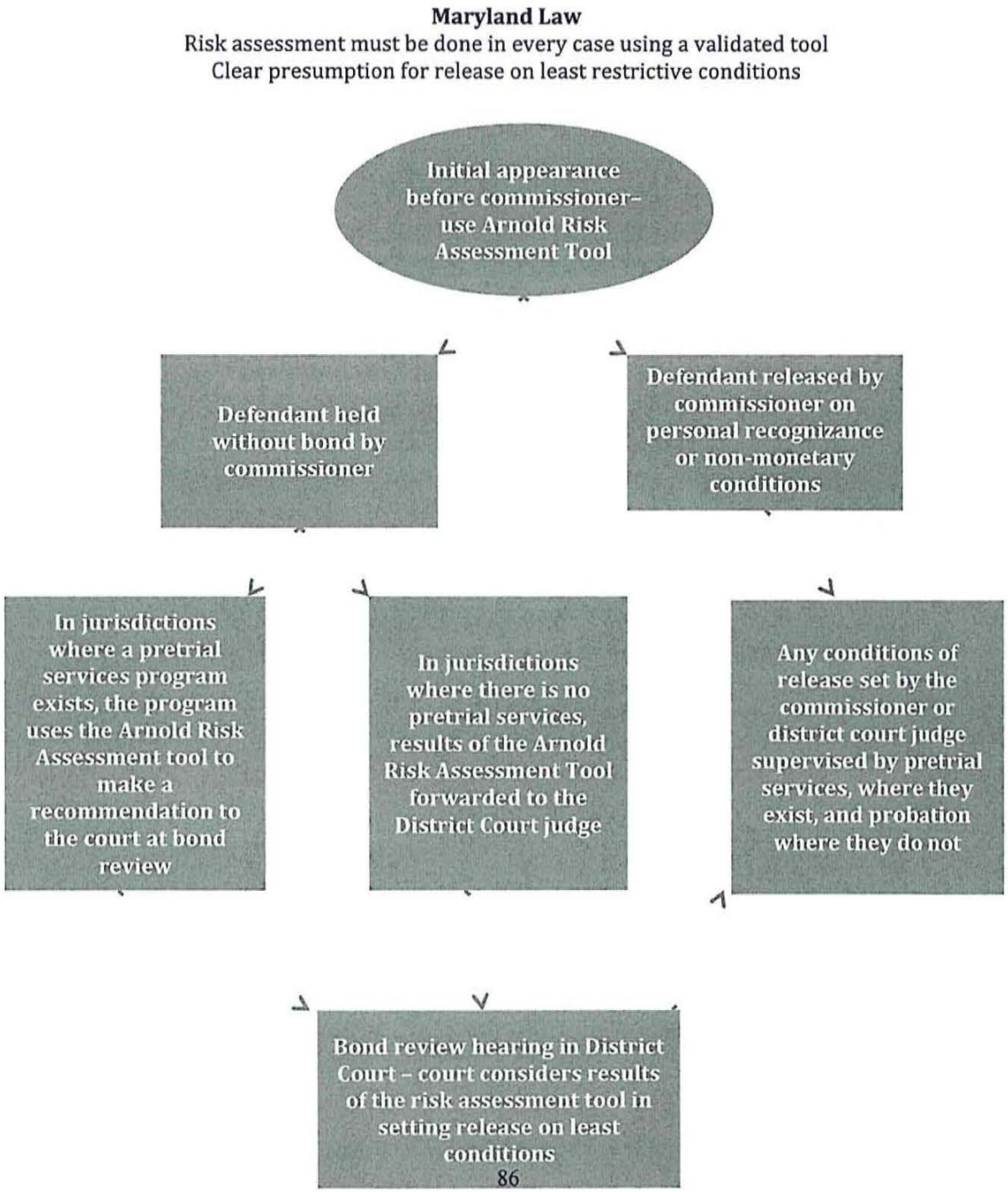
Recommendations Pertaining to Pretrial Services Programs

1. **In jurisdictions where pretrial services programs exist, program administrators should begin using the Arnold Risk Assessment Tool in making their recommendations to the court at the bond review hearing, and establish written policies requiring that recommendations match the risk assessment findings, only supervisors have the authority to override the risk assessment findings – and they must put their reasons for doing so in writing.** It is important for the court to have faith in both the findings of the risk assessment and in the recommendation of the pretrial services program. It is not possible for courts to have that faith when the recommendations of pretrial services are not aligned with the risk assessment findings. Whenever a supervisor does override a risk assessment finding, that fact, and the reasons for doing so, should be conveyed to all the parties – judge, prosecutor and defense – at the bond review hearing.

2. **In jurisdictions where pretrial services programs exist, program administrators should begin exploring shifting the resources dedicated to interviewing defendants before the bond review hearing to enhancing its supervision functions.** As noted earlier, a significant benefit of the Arnold Risk Assessment Tool is that it can be completed using information readily available from criminal history records. Completing the tool does not require an interview with the defendant. This may provide an opportunity for existing Maryland pretrial services programs to shift their resources away from doing interviews and conducting risk assessment and more towards the supervision of defendants on pretrial release. The existence of the Arnold Risk Assessment Tool provides an excellent opportunity for these pretrial services programs to (1) safely expand the number of defendants that they are able to supervise, and (2) improve the quality of the supervision that they provide.

3. **In jurisdictions where there is no pretrial services programs, the Task Force should engage the assistance of the Maryland Department of Public Safety and Correctional Services to explore the arrangements that need to be made to have defendants released with conditions to be supervised by state probation officers.** As noted in Section II, most of the higher populated jurisdictions in Maryland are currently served by pretrial services programs. In the rural and less populated areas of many states, it is the probation department that handles supervision of defendants with pretrial release conditions. In such smaller jurisdictions it is often not economically feasible to set up a distinct program to serve a small population.

The below diagram illustrates how these recommendations would fit into the pretrial release decision-making process.



APPENDIX: Additional Tables from Bond Review Hearing Observation Data

Characteristics of Cases Heard at Bond Review

Table A-1. Demographic Characteristics

	Baltimore	Frederick	Harford	Montgomery	P.G.
Number of Cases					
	260	38	34	92	124
Gender					
Male	95%	100%	94%	87%	84%
Female	5%	0	6%	13%	16%
Race					
White	17%	60%	41%	36%	14%
African American	83%	40%	59%	63%	86%
Asian	0	0	0	1%	0
Other	0	0	0	0	0
Ethnicity					
Hispanic	5%	5%	0	17%	9%
Non=Hispanic	95%	95%	100%	83%	91%

Table A-2. Bond Amounts Under Review in District Court

	Baltimore	Frederick	Harford	Montgomery	P.G.
Commissioner Set	$25,000	$10,000	$25,000	$3,500	$10,000
Pre-Set In Warrants	$5,000	$6,000	$10,000	$9,000	$5,000

Table A-3. Review in District Court of Defendants Held Without Bond

	Baltimore	Frederick	Harford	Montgomery	P.G.
Commissioner Set	18%	3%	18%	10%	15%
Pre-Set	2%	8%	9%	0	2%
Total	20%	11%	27%	10%	17%

Table A-4. Most Serious Charge Type at Bond Review

	Baltimore	Frederick	Harford	Montgomery	P.G.
Violent Felony	18%	0	24%	14%	22%
Violent Misdemeanor	22%	11%	9%	5%	18%
Property Felony	7%	21%	18%	20%	14%
Property Misdemeanor	4%	10%	6%	24%	8%
Drug Felony	17%	18%	21%	8%	8%
Drug Misdemeanor	12%	8%	3%	5%	7%
DUI Felony	2%	5%	0	1%	4%
DUI Misdemeanor	0	3%	0	0	1%
Weapon Felony	3%	3%	0	0	1%
Weapon Misdemeanor	3%	0	0	0	1%
Other Felony	5%	11%	9%	11%	6%
Other Misdemeanor	8%	11%	12%	12%	11%
Total Felony	52%	58%	72%	54%	55%

Table A-5. Median Commissioner Set Bond Amounts Under Review At Bond Review Hearing By Charge Type

	Baltimore	Frederick	Harford	Montgomery	P.G.
Violent Felony	$100,000	N/A	$500,000	$10,750	$50,000
Violent Misdemeanor	$25,000	$10,000	$15,000	$6,500	$6,500
Non-Violent Felony	$25,000	$17,500	$25,000	$5,000	$13,000
Non-Violent Misdemeanor	$5,000	$5,000	$7,500	$1,750	$3,000

Table A-6. Commissioner No Bonds Under Review At Bond Review Hearing By Charge Type

	Baltimore	Frederick	Harford	Montgomery	P.G.
Violent Felony	63%	N/A	38%	39%	37%
Violent Misdemeanor	7%	0	33%	0	0
Non-Violent Felony	15%	5%	6%	11%	18%
Non-Violent Misdemeanor	1%	0	14%	0	6%

Table A-7. Median Pre-Set Bond Amounts Under Review At Bond Review Hearing By Charge Type

	Baltimore	Frederick	Harford	Montgomery	P.G.
Violent Felony	$16,000	N/A	N/A	N/A	N/A
Violent Misdemeanor	N/A	N/A	N/A	N/A	$7,500
Non-Violent Felony	$10,000	N/A	$15,000	$9,000	$7,500
Non-Violent Misdemeanor	$5,000	$6,000	$5,000	$7,500	$4,000

Table A-8. Total Number of Charges at Bond Review

	Baltimore	Frederick	Harford	Montgomery	P.G.
One	80%	68%	77%	61%	76%
Two	16%	18%	15%	26%	15%
Three	3%	11%	9%	7%	3%
Four	0	0	0	4%	2%
Five or more	1%	3%	0	2%	4%

Table A-9. Defendants At Bond Review Who Had Holds On Other Charges

	Baltimore	Frederick	Harford	Montgomery	P.G.
Yes	8%	21%	18%	23%	15%
No	92%	79%	82%	77%	85%

Bond Review Hearings

Table A-10. District Court Decision By Charge Type – Total, Five Jurisdictions

	Violent Felony	Violent Misdemeanor	Non-Violent Felony	Non-Violent Misdemeanor
Release Non-Financially	5%	18%	11%	29%
Lower Existing Bond	26%	41%	33%	24%
Maintain Existing Bond	63%	32%	38%	38%
Raise Existing Bond	4%	8%	12%	4%
Other	1%	1%	6%	6%
Total	100%	100%	100%	100%

Table A-11. Summary of District Court Bond Review Decisions by Charge Type

	Violent Felony	Violent Misdemeanor	Non-Violent Felony	Non-Violent Misdemeanor
Percent Released Non-Financially	1%	3%	4%	9%
Percent Given Full Financial Bond	7%	8%	20%	13%
Median Full Bond Amount Set At Bond Review	$62,500	$15,000	$15,000	$4,000
Percent Given 10% Deposit Bond	1%	4%	1%	4%
Median 10% Bond Amount Set At Bond Review	$7,500	$5,000	$5,000	$2,000
Percent Held Without Bond	6%	1%	2%	1%

Table A-12. Prosecutor Recommendations and Court Decisions

	District Court Judge's Bond Review Decision					
Prosecutor Recommendation	Release Non-Financially	Lower Existing Bond	Maintain Existing Bond	Raise Existing Bond	Other	Total
Release Non-Financially	1	3	0	0	0	4
Lower Existing Bond	5	23	2	1	0	31
Maintain Existing Bond	10	41	68	4	1	124
Raise Existing Bond	3	15	25	23	0	66
No Recommendation or Not Present	68	69	88	9	18	262
Total	87	151	183	37	19	477

Table A-13. Defense Recommendations and Court Decisions

	District Court Judge's Bond Review Decision					
Defense Recommendation	Release Non-Financially	Lower Existing Bond	Maintain Existing Bond	Raise Existing Bond	Other	Total
Release Non-Financially	26	32	25	4	0	87
Lower Existing Bond	14	103	102	20	1	240
Maintain Existing Bond	1	4	22	6	0	33
Raise Existing Bond	0	0	0	0	0	0
No Recommendation	50	29	77	11	21	188
Total	91	168	226	41	22	548

Table A-14. Pretrial Services Recommendations and Court Decisions

	District Court Judge's Bond Review Decision					
Pretrial Services Recommendation	Release Non-Financially	Lower Existing Bond	Maintain Existing Bond	Raise Existing Bond	Other	Total
Release Non-Financially	39	8	6	0	0	53
Lower Existing Bond	5	16	3	1	0	25
Maintain Existing Bond	22	62	107	15	3	209
Raise Existing Bond	0	14	17	14	0	45
No Recommendation or Not Present	19	58	76	9	15	177
Total	85	158	209	39	18	509

Breakdown of Bond Review Hearings by Jurisdiction

Table 15. Recommendations Made By Prosecutors at Bond Review Hearings

	Baltimore	Frederick	Harford	Montgomery	P.G.
Release Non-Financially	1%	3%	0	0	2%
Lower Existing Bond	4%	3%	0	1%	17%
Maintain Existing Bond	31%	42%	56%	15%	14%
Raise Existing Bond	23%	16%	32%	1%	4%
No Recommendation Made	42%	37%	12%	83%	64%

Table A-16: Recommendations Made by Defense Counsel at Bond Review Hearings

	Baltimore	Frederick	Harford	Montgomery	P.G.
Release Non-Financially	19%	13%	9%	7%	20%
Lower Existing Bond	53%	47%	74%	10%	40%
Maintain Existing Bond	8%	0	6%	0	8%
Raise Existing Bond	0	0	0	0	0
No Recommendation Made	20%	40%	12%	84%	32%

Table A-17: Recommendations Made by Pretrial Services at Bond Review Hearings

	Baltimore	Frederick	Harford	Montgomery	P.G.
Release Non-Financially	3%	N/A	0	49%	0
Lower Existing Bond	8%	N/A	6%	2%	0
Maintain Existing Bond	64%	N/A	32%	36%	0
Raise Existing Bond	14%	N/A	29%	0	0
No Recom-mendation Made	12%	N/A	32%	13%	100%

Table A-18. District Court Decision By Charge Type – Baltimore City

	Violent Felony	Violent Misdemeanor	Non-Violent Felony	Non-Violent Misdemeanor
Release Non-Financially	4%	12%	8%	21%
Lower Existing Bond	26%	48%	36%	20%
Maintain Existing Bond	61%	31%	38%	51%
Raise Existing Bond	7%	9%	15%	6%
Other	2%	0	3%	2
Total	100%	100%	100%	100%

Table A-19. District Court Decision By Charge Type – Frederick County

	Violent Felony	Violent Misdemeanor	Non-Violent Felony	Non-Violent Misdemeanor
Release Non-Financially	N/A	25%	5%	25%
Lower Existing Bond	N/A	25%	31%	17%
Maintain Existing Bond	N/A	25%	46%	50%
Raise Existing Bond	N/A	25%	4%	0
Other	N/A	0	14%	8%
Total	0	100%	100%	100%

Table A-20. District Court Decision By Charge Type – Harford County

	Violent Felony	Violent Misdemeanor	Non-Violent Felony	Non-Violent Misdemeanor
Release Non-Financially	0	0	0	43%
Lower Existing Bond	38%	67%	31%	29%
Maintain Existing Bond	50%	33%	44%	29%
Raise Existing Bond	12%	0	25%	0
Other	0	0	0	0
Total	100%	100%	100%	100%

Table A-21. District Court Decision By Charge Type – Montgomery County

	Violent Felony	Violent Misdemeanor	Non-Violent Felony	Non-Violent Misdemeanor
Release Non-Financially	15%	100%	39%	50%
Lower Existing Bond	23%	0	19%	11%
Maintain Existing Bond	62%	0	31%	21%
Raise Existing Bond	0	0	0	0
Other	0	0	11%	18%
Total	100%	100%	100%	100%

Table A-22. District Court Decision By Charge Type – Prince George's County

	Violent Felony	Violent Misdemeanor	Non-Violent Felony	Non-Violent Misdemeanor
Release Non-Financially	4%	17%	2%	18%
Lower Existing Bond	26%	30%	42%	47%
Maintain Existing Bond	70%	44%	38%	27%
Raise Existing Bond	0	4%	13%	9%
Other	0	4%	5%	0
Total	100%	100%	100%	100%

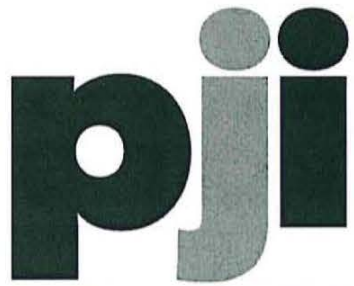
Table A-23. District Court Decision by Prosecutor Recommendation – Baltimore City

	District Court Judge's Bond Review Decision – Baltimore					
Prosecution Recommendation	Release Non-Financially	Lower Existing Bond	Maintain Existing Bond	Raise Existing Bond	Other	Total
Release Non-Financially	0	1	0	0	0	1
Lower Existing Bond	3	4	0	1	0	8
Maintain Existing Bond	4	21	31	1	1	58
Raise Existing Bond	3	9	15	16	0	43
No Recommendation or Not Present	21	50	69	7	3	79
Total	31	85	115	25	4	189

Table A-24. District Court Decision by Defense Recommendation – Baltimore City

	District Court Judge's Bond Review Decision – Baltimore					
Defense Counsel Recommendation	Release Non-Financially	Lower Existing Bond	Maintain Existing Bond	Raise Existing Bond	Other	Total
Release Non-Financially	17	15	13	3	0	48
Lower Existing Bond	10	58	58	11	1	138
Maintain Existing Bond	0	4	13	4	0	21
Raise Existing Bond	0	0	0	0	0	0
No Recommendation	4	8	31	7	3	53
Total	31	85	115	25	4	260

UNSECURED BONDS: THE AS EFFECTIVE AND MOST EFFICIENT PRETRIAL RELEASE OPTION



PRETRIAL JUSTICE INSTITUTE

Michael R. Jones
Washington, D.C.
October 2013

TABLE OF CONTENTS

ACKNOWLEDGEMENTS

This project was supported by Grant No. 2012-DB-BX-K001 awarded to the Pretrial Justice Institute by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the SMART Office, and the Office for Victims of Crime. Points of view or opinions in this document are those of the author and do not represent the official position or policies of the United States Department of Justice.

I thank the multiple pretrial justice experts who peer-reviewed this study. Several researchers, attorneys, and practitioners provided helpful suggestions that improved the study's quality and usefulness to policy-makers. In particular, I thank my colleagues at the Pretrial Justice Institute and the following individuals:

- Jim Austin, PhD
- Kim Ball, JD
- Avi Bhati, PhD
- Claire Brooker, MA
- Thomas Cohen, PhD
- Kim English, PhD
- Seema Gajwani, JD
- KiDeuk Kim, MA
- David Levin, PhD
- Cynthia Lum, PhD
- Tim Schnacke, JD, LLM, MCJ

The Pretrial Justice Institute is a non-profit organization dedicated to advancing safe, fair, and effective pretrial justice practices and policies. For more information, visit www.pretrial.org.

STUDY SUMMARY

This study was done to provide judicial officers, prosecutors, defense attorneys, sheriffs, jail administrators, county commissioners, pretrial services program directors, and other decision-makers in Colorado as well as in other states empirical evidence that can directly inform their pretrial release and detention policies and practices. Specifically, the simultaneous influence of unsecured bonds (personal recognizance bonds with a monetary amount set) and of secured bonds (surety and cash bonds) on the three most important pretrial outcomes: (1) public safety; (2) court appearance; and (3) jail bed use, were compared. The study, using data from over 1,900 defendants from 10 Colorado counties, found the following:

For defendants who were lower, moderate, or higher risk:

- Unsecured bonds are as effective at achieving public safety as are secured bonds.
- Unsecured bonds are as effective at achieving court appearance as are secured bonds.
- Unsecured bonds free up more jail beds than do secured bonds because: (a) more defendants with unsecured bonds post their bonds; and (b) defendants with unsecured bonds have faster release-from-jail times.
- Higher monetary amounts of secured bonds are associated with more pretrial jail bed use but not increased court appearance rates.
- Unsecured bonds are as effective at "fugitive-return" for defendants who have failed to appear as are secured bonds.
- Many defendants are incarcerated for the pretrial duration of their case and then released to the community upon case disposition.
- Jurisdictions can make data-guided changes to local pretrial case processing that would achieve their desired public safety and court appearance results while reserving more jail beds for unmanageably high risk defendants and sentenced offenders.
- Judicial officers now have data and law to support changing their bail setting practices to maintain their effectiveness while increasing their efficiency.

This study provides empirical evidence about the effectiveness of secured and unsecured bonds. Findings support judicial officers changing their practices to use more unsecured releases, to include unsecured bonds if currently permitted by law, to achieve the same public safety and court appearance rates while using far fewer jail beds. These unsecured bonds could be used in conjunction with an individualized bond setting hearing.

INTRODUCTION

Multiple criminal justice and government decision-makers have a role in the decision to release or detain defendants on pretrial status, either at the policy level or on a case-by case basis. Jail administrators are commonly granted authority by the court to release many defendants on their own recognizance or through the use of a money bond schedule, and those administrators are responsible for housing defendants who are not released. Pretrial services staff members perform risk assessment and information gathering, and provide the results and any release-condition recommendations to the court. Prosecutors and defense attorneys at pretrial hearings often request certain release conditions, including substance testing, electronic monitoring, or changes to a previously set monetary bond amount, based on their perception of the defendant's pretrial risk to court appearance or public safety. Judges make the final decisions about the types of bond and conditions of bond, including financial and non-financial release conditions. County commissioners or state legislators fund the staff and court and jail facilities that comprise the pretrial system and/or pass laws, but often do so with little or no evaluative feedback about the system's effectiveness or efficiency.

Whether in the role of making daily, case-by-case pretrial release or detention decisions or policy-level funding decisions, many of these criminal justice decision-makers have had to do so without scientific evidence to help guide their decisions. As a result, they may assume that the current pretrial justice process meets their standards for effectiveness and efficiency, and that the money bail system motivates defendants to return to court or to refrain from criminal activity upon release from jail pending the disposition of their case.

Researchers have recently attempted to determine to what extent, if any, secured monetary forms of pretrial release (e.g., surety or cash bonds) improve court appearance and public safety over non-monetary or unsecured forms of pretrial release (e.g., recognizance bonds). Unfortunately, for the reasons that Cohen and Kyckelhahn (2010) and Bechtel, Clark, Jones, and Levin (2012) have recently explained, researchers have not had access to data that has allowed them to determine simultaneously the effect of different bond types on the three most important pretrial outcomes: (1) public safety; (2) court appearance; and (3) pretrial release and jail bed use. To summarize, previous research has either: (a) had data or methodological limitations that limit the generalizability of the findings to other jurisdictions (see, for example, Morris, 2013; Krahl & New Direction Strategies, 2011); (b) has not sufficiently accounted for possible alternate explanations of the findings (see, for example, Block, 2005); and/or (c) was limited to measuring the effect of various forms of pretrial release on a singular outcome - court appearance, but not on both of the other two important pretrial outcomes - public safety and jail bed use (see, for example, Helland & Tabarrok, 2004; Morris, 2013). Indeed, as Bechtel et al. (2012) explain, the optimal outcome for any pretrial justice system from both an effectiveness (justice system goals) and efficiency (resource management) perspective is to:

(1) Maximize public safety
and
(2) Maximize court appearance
while
(3) Maximizing release from custody.

Achieving only one or two of these pretrial outcomes without or at the expense of realizing the remain-

der would be less optimal than achieving all three simultaneously. Indeed, Osborne and Hutchinson (2004) make a compelling case for governments to maximize results while expending the minimal public resources to achieve those results.

The purpose of this study is to overcome some of the limitations of previous research and provide information to pretrial release decision-makers and criminal justice funding decision-makers that will enable them to accomplish a win-win situation: to achieve their desired public safety and court appearance outcomes while most efficiently using their costly jail resources. Because the study uses data from multiple Colorado counties, the results are generalizable throughout Colorado. Factors that may affect the extent to which the results are generalizable outside of Colorado are addressed later in the paper.

Furthermore, due to Colorado statute's requirement of financial conditions of release, this study is an evaluation of the effect of different types of monetary bonds on public safety, court appearance, and jail bed use. As described in more detail later, some of these monetary bonds in Colorado require the defendant to post the entire monetary amount in cash or some portion thereof through a commercial bail bondsman prior to leaving jail custody, whereas other monetary bonds do not require any money to be posted prior to release.[1]

After each statistical analysis, a brief explanation of the meaning of the findings is provided. Practical implications of this study for pretrial release decision-making and policy-making are discussed in the final section.

1 This study does not evaluate the effectiveness of commercial bail bonding in achieving court appearance results, nor does it evaluate the effectiveness of pretrial services program supervision in achieving certain court appearance or public safety results. Rather, the focus is on outcomes associated with various forms of monetary bonds set by the court.

METHOD

Data for this study came from the dataset used to develop Colorado's 12-item empirically-derived pretrial risk assessment instrument, the Colorado Pretrial Assessment Tool (CPAT; Pretrial Justice Institute & JFA Institute, 2012). The dataset has hundreds of case processing and outcome variables collected on 1,970 defendants booked into 10 Colorado county jails over a 16-month period.[2] Each local jurisdiction collected data on a pre-determined, "systematic random sampling" selection schedule to minimize bias in selecting defendants and to enhance the generalizability of the findings. For example, each jurisdiction collected data at an interval of every 2nd, 4th, or 7th defendant who was booked into the jail on new charges. Over 80% of the state's population resides in the 10 counties that participated: Adams, Arapahoe, Boulder, Denver, Douglas, El Paso, Jefferson, Larimer, Mesa, and Weld.

DEFENDANTS WERE ASSESSED FOR THEIR PRETRIAL RISK, AND NEARLY 70% SCORED IN THE LOWER TWO OF FOUR RISK CATEGORIES.

Based on the CPAT's scoring procedures, 1,970 defendants in the dataset were assigned a CPAT risk score, ranging from 0 (lower risk) to 82 (higher risk), and to a corresponding risk category, ranging from 1 (lower risk) to 4 (higher risk). Some relevant data were missing for 51 defendants, so they were removed from all analyses. Thus, the final sample used in the analyses was 1,919 defendants, with 1,309 (68%) of them having been released on pretrial status prior to case disposition. Table 1 shows the percentage of released defendants and the public safety and court appearance success rates associated with each risk category.

Table 1. Average Risk Score, Percent and Number of Defendants, and Public Safety and Court Appearance Rates by Released Defendants' Risk Category

CPAT PRETRIAL RISK CATEGORY	CPAT RISK SCORE RANGE	AVERAGE CPAT RISK SCORE	PERCENT (AND NUMBER) OF DEFENDANTS	PUBLIC SAFETY RATE[a]	COURT APPEARANCE RATE[b]
1 (lower)	0 to 17	8	20% (265)	92% (243/265)	95% (252/265)
2	18 to 37	28	49% (642)	81% (517/642)	86% (549/642)
3	38 to 50	44	23% (295)	70% (205/295)	78% (231/295)
4 (higher)	51 to 82	57	8% (107)	59% (63/107)	51% (55/107)
Average/Total	0 to 82	30	100% (1,309)	79% (1,028/1,309)	83% (1,087/1,309)

a. On the CPAT and for this study, the public safety rate is defined as the percentage of defendants who did not have a prosecutorial filing in court for any new felony, misdemeanor, traffic, municipal, or petty offense that allegedly occurred during the pretrial release time period. Thus, public safety is defined very broadly as any new filing and is not limited to physical harm against a person or to felony or misdemeanor charges.
b. The court appearance rate is defined as the percentage of defendants who attended all of their court hearings during their pretrial release (i.e., they did not have any notations of failure to appear indicated in the Colorado Judicial Branch's statewide database).

2 Risk assessment data were collected over the 16-month period from February 2008 to May 2009, and pretrial outcome data were collected after cases closed up until December 2010, thus allowing at least 19 months for all cases to close after defendants were booked into jail because of new charges. Ninety-nine percent (99%) of the cases closed within the minimum 19-month time period.

Summary of Findings

The CPAT effectively sorts defendants into one of four risk categories, with each category having different rates for the desired outcomes of public safety and court appearance. Nearly 70% of defendants scored in the lower two risk categories. These risk categories can be used when examining the impact of different forms of money bonds on public safety, court appearance, and jail bed use.

DEFENDANTS RECEIVED EITHER UNSECURED OR SECURED BONDS, AND WERE SEPARATED INTO FOUR GROUPS TO ENABLE ANALYSIS OF BOND-TYPE COMPARISONS.

Table 2 shows the percentage of released defendants who received unsecured or secured (surety or cash) money bonds within each of the four risk categories. Statutorily, all bonds in Colorado must have a financial condition.[3]

Table 2: Percent and Number of Released Defendants by Bond Type and Risk Category

PRETRIAL RISK CATEGORY	BOND TYPE	
	UNSECURED[a]	SECURED[b]
1 (lower)	52% (137/265)	48% (128/265)
2	32% (208/642)	68% (434/642)
3	15% (45/295)	85% (250/295)
4 (higher)	13% (14/107)	87% (93/107)
Average	31% (404/1,309)	69% (905/1,309)

a. Unsecured bonds do not require defendants to post money prior to their pretrial release from jail. While Colorado law uses the term "personal recognizance," the term "unsecured" is used in this paper to distinguish these bonds from "pure" personal recognizance bonds (or "own recognizance" bonds), as they are called in many other states. Financial conditions are rarely allowed or used with "pure" or "own" recognizance bonds.
b. Secured bonds require defendants to post some amount of money prior to their pretrial release from jail.[4]

3 Unsecured bonds in Colorado are known in statute as personal recognizance bonds and although they are required to have a financial condition in some monetary amount, they do not require the defendant to post any money with the court prior to pretrial release from jail. If the defendant fails to appear, the court can hold the defendant liable for the full amount of the bond. The court can also require the signature of a co-signor on unsecured bonds prior to the defendant's release from jail. The co-signor is typically a family member who promises the court that he or she will assist the defendant in appearing in court and who may be held liable for the full monetary amount if the defendant fails to appear. In this study, as noted above, these personal recognizance bonds are called "unsecured" bonds because they have a financial condition for which the defendant or co-signor could be fully liable. The unsecured bond group is for the most part a "defendant-only (with no co-signor) unsecured" group because 344 (85%) of the 404 unsecured bonds did not require a co-signor.

4 Secured bonds in Colorado require money to be posted with the court on the defendant's behalf prior to pretrial release, and can be in the form of cash, surety, or property. If the defendant fails to appear, the court can hold the defendant or a commercial bail bondsman (for a surety bond) liable for the full amount of the bond. The secured bond group is for the most part a "surety bond" group because 849 (94%) of the 905 secured bond defendants posted a surety bond rather than a cash bond. Surety bonds were the most prevalent form of bond set by the court during the time this study's data were collected. Property bonds are very rarely used in Colorado, and were not used for any of the defendants in this study.

Summary of Findings

Data show that judicial officers set both unsecured and secured bonds for defendants in each of the four risk groups. All of these bonds carry the possibility that the court could hold the defendant or other party (i.e., co-signor or bail bondsman) legally liable for the bond's full monetary amount if the defendant fails to appear in court. For surety bonds, defendants are still liable for the full monetary amount, albeit indirectly. If a defendant released on surety bond fails to appear, the court, within the confines of statute, may hold the bail bondsman liable for the full monetary amount. If so, then the bail bondsman may offset this expense by collecting the full monetary amount of the bond pursuant to the contract with the defendant or the defendant's family member or friend, and turn over the full bond amount to the court.

Placing defendants into one of four risk categories stratifies defendants based on their overall level of risk, thus helping increase the chances that defendants' bond type, rather than their degree of pretrial risk, accounts for the observed results. Specifically, the stratification was done because in the total sample there was a relatively higher proportion of lower risk defendants in the unsecured bond group and a relatively higher proportion of higher risk defendants in the secured bond group. This pattern of data is found across most criminal justice systems nationwide. In addition, the total sample size of defendants in this study and in the four separate risk groups is large enough to detect statistical differences between the two bond-type groups if differences indeed do exist (see Cohen, 1988).[5]

Moreover, the Colorado jurisdictions that have already implemented the CPAT or that will be implementing it in the near future use the CPAT's four-category risk scheme to guide daily pretrial release and detention decision-making, so using the CPAT's risk scheme in this study enables the study to provide decision-makers with findings that directly inform their daily practice.

5 The social science conventional standard of 0.05 for statistical significance testing was used throughout this study. Statistical significance at the 0.05 level means that we can be at least 95% confident that the observed results are not due to chance. To statistically determine that defendants with unsecured bonds were similar in pretrial risk to defendants with secured bonds, stratification, or the separation of the defendants into incremental groups, was done. Separate t-tests (tests used to determine if two groups have different averages on a measure) were performed on the four pretrial risk groups. These analyses showed that the average risk score for defendants with unsecured bonds was not statistically significantly different than the average risk score for defendants with secured bonds in risk categories 1, 3, and 4 (all $p > 0.19$). For risk category 2, the average score for defendants with unsecured bonds (27) was two points less than the average score for defendants with secured bonds (29) ($p < .001$). However, given that there was no significant difference for the other three risk categories, including the categories both below (i.e., category 1) and above (i.e., categories 3 and 4) category 2, and because the two-point score difference was no larger than the non-significant score difference in the other three risk categories, the statistically significant difference observed in category 2 is determined not to be practically significant. That is, the difference is likely not meaningful enough to be useful for purposes of informing practice. Additionally, there were no significant differences in the percentages of defendants who were ordered to pretrial supervision among the four risk groups (ranging from 48% to 50% for each of the four groups), indicating that pretrial supervision likely did not interfere with the effects of bond type on the outcome measures.

GOALS OF THE STUDY

This study evaluates the extent to which, if at all, one type of money bond (unsecured) is associated with better pretrial outcomes than is the other type of money bond (secured, in the form of cash or surety) while also accounting for jail bed use. Because all bonds in Colorado have a monetary condition, this study was not able to test whether bonds with no financial condition could have achieved the same public safety or court appearance outcomes as did bonds with a financial condition.

For the following analyses, defendants were sorted into two groups depending on the type of money bond they received – unsecured or secured. Defendants' performance on the three pretrial outcomes most important to pretrial decision-makers - public safety, court appearance, and jail bed use - was examined. Defendants in the two bond-type groups were compared separately within each of the four pretrial risk categories to mitigate the influence of defendants' risk levels on the observed outcomes.

RESULTS

UNSECURED BONDS ARE AS EFFECTIVE AS SECURED BONDS AT ACHIEVING PUBLIC SAFETY.

Table 3 shows the percentage of defendants who were not charged with a new crime during pretrial release (i.e., the public safety rate) for the unsecured and secured bond groups in each of the four risk categories.

Table 3: Public Safety Outcomes by Bond Type and Risk Category

PRETRIAL RISK CATEGORY	PUBLIC SAFETY RATE	
	UNSECURED BOND	SECURED BOND
1 (lower)+	93% (128/137)	90% (115/128)
2+	84% (174/208)	79% (343/434)
3+	69% (31/45)	70% (174/250)
4 (higher)+	64% (9/14)*	58% (54/93)
Average**	85% (342/404)	76% (686/905)

+ All statistical comparisons showed no statistically significant differences. All $p > 0.16$.

* The 64% observed in this cell is based on a small sample size (n=14) and thus should be interpreted with caution. For example, if one more defendant in the unsecured bond group had no new charges, the percentage would increase to 71%. If one more of these defendants had a new charge, the percentage would decrease to 57%.

** The public safety rate for all unsecured bond defendants was not compared to the rate for all secured bond defendants because that analysis would fail to control for defendants' degree of pretrial risk.

Chi-square tests[6] revealed that there were no statistically significant differences in defendants' public safety outcomes for the two different types of bond in each of the four risk categories. This finding also holds when only person crimes are analyzed. That is, defendants from both bond-type groups did not significantly differ from one another in their rate of receiving new charges for alleged crimes against a person while on pretrial release ($p > 0.65$).

Summary of Findings

Whether released defendants are higher or lower risk or in-between, unsecured bonds offer the same public safety benefit as do secured bonds. This finding is expected because although defendants can have their bond revoked if they receive a new charge while on pretrial release, they legally cannot be ordered to forfeit any amount of money or property under any bond type. Thus, the financial condition of an unsecured or secured bond cannot legally have an impact on defendants' criminal behavior. This study's failure to find a public safety benefit for one bond type over another is consistent with previous research (Helland & Tabarrok, 2004; Morris, 2013).

6 The Chi-square statistic tests the degree of agreement between observed data and the data expected under a certain hypothesis. It can be used to compare the differences in frequencies on a measure between two groups.

UNSECURED BONDS ARE AS EFFECTIVE AS SECURED BONDS AT ACHIEVING COURT APPEARANCE.

Table 4 shows the percentage of defendants who made all of their court appearances during pretrial release (i.e., the court appearance rate) for the unsecured and secured bond groups in each of the four risk categories.

Table 4: Court Appearance Outcomes by Bond Type and Risk Category

PRETRIAL RISK CATEGORY	COURT APPEARANCE RATE	
	UNSECURED BOND	SECURED BOND
1 (lower)[+]	97% (133/137)	93% (119/128)
2[+]	87% (181/208)	85% (368/434)
3[+]	80% (36/45)	78% (195/250)
4 (higher)[+]	43% (6/14)*	53% (49/93)
Average**	88% (356/404)	81% (731/905)

[+] All statistical comparisons showed no statistically significant differences. All $p > 0.12$.

* The 43% observed in this cell is based on a small sample size (n=14) and thus should be interpreted with caution. For example, if one more defendant in the unsecured bond group made all court appearances, the percentage would increase to 50%. If one more of these defendants had a failure to appear, the percentage would decrease to 36%.

** The court appearance rate for all unsecured bond defendants was not compared to the rate for all secured bond defendants because that analysis would fail to control for defendants' risk.

Chi-square tests revealed that there were no statistically significant differences in defendants' court appearance outcomes for the two different types of bond in each of the four risk categories.

Summary of Findings

Whether released defendants are higher or lower risk or in-between, unsecured bonds offer decision-makers the same likelihood of court appearance as do secured bonds. The lack of benefit from using one financial bond type versus another is not surprising given that both bond types carry the potential for the defendant to lose money for failing to appear.

UNSECURED BONDS FREE UP MORE JAIL BEDS THAN DO SECURED BONDS BECAUSE MORE DEFENDANTS WITH UNSECURED BONDS POST THEIR BONDS.

Table 5 shows the percentage of defendants who were released from jail on pretrial status for the unsecured and secured bond groups in each of the four risk categories.[7]

Table 5: Pretrial Release Rates by Bond Type and Risk Category

PRETRIAL RISK CATEGORY	RELEASE RATE+	
	UNSECURED BOND	SECURED BOND
1 (lower)+	93% (137/147)	83% (128/155)
2+	95% (208/220)	65% (434/669)
3+	96% (45/47)	54% (250/464)
4 (higher)+	88% (14/16)*	46% (93/201)
Average**	94% (404/430)	61% (905/1,489)

+ All statistical comparisons were statistically significant. All $p < 0.006$.

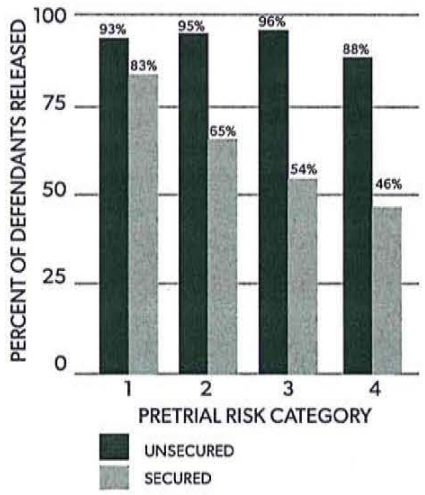
* The 88% observed in this cell is based on a small sample size (n=16) and thus should be interpreted with caution. For example, if one more defendant in the unsecured bond group were released, the percentage would increase to 94%. If one more of these defendants were not released, the percentage would decrease to 81%.

** The release rate for all unsecured bond defendants was not compared to the rate for all secured bond defendants because that analysis would fail to control for defendants' risk.

Chi-square tests revealed that the release rates for unsecured bond defendants were statistically significantly higher than the release rates for secured bond defendants for all four of the pretrial risk categories.

The findings shown in Table 5 are illustrated in Figure 1.

Figure 1: Pretrial Release Rates by Bond Type and Risk Category



7 The number of defendants who post their bonds and the time to post those bonds, as opposed to the number of defendants released on pretrial status and their time to release, are better measures for more accurately determining pretrial jail bed use because once a bond is posted, the defendant is no longer utilizing a jail bed for pretrial reasons. The defendant may or may not remain in jail after bond-posting because of other cases or holds. However, for this study, like in most pretrial research, data on dates that bonds were posted were not available, so the next best measures for determining pretrial jail bed use - release on pretrial status and time to pretrial release - were used.

Both Table 5 and Figure 1 show that judicial officers used both unsecured and secured bonds with defendants of all risk levels - higher risk, lower risk, and those in between. For defendants at all risk levels, defendants with an unsecured bond were statistically significantly more likely to be released than defendants with a secured bond.[8]

Summary of Findings

Whether released defendants are higher or lower risk or in-between, unsecured bonds enable more defendants to be released from jail than do secured bonds. Findings show that many defendants of all risk levels never post their secured bond. This finding is expected because defendants who receive unsecured bonds, or their family or friends, do not have to pay some monetary amount to the court or a commercial bail bondsman prior to the defendants' release from jail custody. Secured bonds, however, do require pre-release payment. Consequently, secured bonds used more jail beds. This finding is consistent with previous research using data from across the United States that shows that secured bond defendants are much more likely to be detained for their entire pretrial period than are unsecured bond defendants (Cohen & Reaves, 2007).

THE MONETARY AMOUNT OF SECURED BONDS AFFECTED PRETRIAL RELEASE RATES BUT NOT COURT APPEARANCE RATES.

Table 6 shows the percentage of defendants who were released from jail on secured bonds of select monetary amounts.

Table 6: Pretrial Release Rates by Secured Bond Amount

SECURED MONETARY BOND AMOUNT	PERCENT (AND NUMBER) OF RELEASED DEFENDANTS
$500 (12th Percentile)	64% (52/81)
$5,000 (65th Percentile)	58% (100/191)
$50,000 (97th Percentile)	49% (37/76)

Frequency analyses revealed that when the secured bond amount was set relatively very low at $500 (12th percentile of secured bond amounts set by Colorado judicial officers in this study), 64% of defendants were released. When the secured bond amount was set at $5,000 (65th percentile of secured bond amounts), 58% of defendants were released. When the secured bond amount was set at $50,000 (97th percentile of secured bond amounts), 49% of defendants were released. However, correlational analyses revealed that the monetary amount of posted secured bonds was not statistically significantly related to court appearance for any of the four risk groups ($p > 0.09$).

8 It is possible that the lower release rate for secured bond defendants could have been in part associated with judicial officers having accounted for an unmeasured risk factor in these defendants, and thus the public safety and court appearance rates would have been lower for these defendants had they been released. The mechanism for achieving this increase in pretrial detention would have been judicial officers setting secured bonds in a monetary amount the defendant could not post. Several judicial officers have told this author that this practice is not uncommon in Colorado, but have acknowledged its questionable lawfulness given Colorado's constitutional and statutory law. Nonetheless, as indicated by this study's analyses, if more secured bond defendants had been released, the secured bonds would likely not have associated with increased public safety or court appearance.

Summary of Findings

As the monetary amount of secured bonds increases, fewer defendants post their bonds. However, regardless of whether defendants are higher or lower risk or in-between, higher bond amounts are not associated with better court appearance outcomes for released defendants. Thus, higher secured bond amounts are associated with more pretrial incarceration but not more court appearances. The finding of increased incarceration associated with secured bonds is consistent with previous research using data from across the United States: As the monetary amount of secured bonds increases, the probability of release decreases (Cohen & Reaves, 2007).

UNSECURED BONDS ALSO FREE UP MORE JAIL BEDS THAN DO SECURED BONDS BECAUSE DEFENDANTS WITH UNSECURED BONDS HAVE FASTER RELEASE TIMES.

Table 7 shows the cumulative percent of defendants who were released on pretrial status for the unsecured and secured bond groups by the amount of time in jail that elapsed prior to pretrial release.

Table 7: Time to Pretrial Release by Bond Type

DAYS TO PRETRIAL RELEASE*	CUMULATIVE PERCENT OF DEFENDANTS RELEASED ON UNSECURED BONDS	CUMULATIVE PERCENT OF DEFENDANTS RELEASED ON SECURED BONDS
<1 to 1.9†	80% (325/404)	58% (525/905)
2 to 2.9†	83% (336/404)	68% (611/905)
3 to 3.9†	85% (344/404)	73% (663/905)
4 to 4.9†	86% (348/404)	77% (699/905)
5 to 5.9†	87% (351/404)	80% (721/905)
6 to 6.9†	88% (356/404)	81% (731/905)
7 to 7.9†	88% (356/404)	82% (741/905)
8 to 8.9†	89% (358/404)	84% (758/905)
9 to 9.9†	89% (360/404)	85% (768/905)
10 to 10.9**	89% (360/404)	86% (774/905)
11 to 11.9**	89% (361/404)	86% (781/905)
12 to 12.9**	90% (362/404)	87% (784/905)

† All statistical comparisons were statistically significant. All $p < 0.05$.

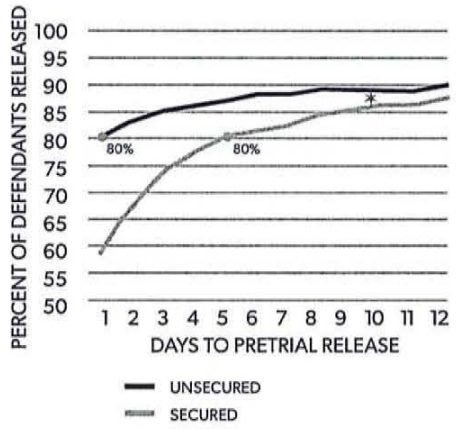
* Defendants across all risk categories were grouped together for this analysis because a defendant's pretrial risk level can have no legal bearing on the amount of time a defendant remains in pretrial incarceration after a judicial officer sets the bond. In contrast, the monetary amount of a secured bond, holds from other jurisdictions, or requirements from a defendant's other cases can affect whether and when the defendant can be released from jail even if the defendant has posted his bond, regardless of bond type and regardless of his pretrial risk level.

** Beginning on the tenth day of pretrial incarceration, the percent of defendants in the two bond type groups who had not been released on pretrial status was no longer statistically significantly different ($p > 0.07$). Because there was no significant difference after day 9, it was assumed for the purposes of this analysis that after day 9 other factors, such as the defendants' other cases or possible holds, contributed to defendants' continued pretrial incarceration to the degree that the bond type was no longer the primary factor contributing to continued pretrial incarceration. In addition, a t-test revealed that the average time to pretrial release for the unsecured bond group (0.7 days) was statistically significantly lower than that for the secured bond group (1.5 days) when the analysis of pretrial incarceration was capped at 9 days for the reasons described above ($p < 0.0001$). The 9-day cap also makes it likely that the 1.5-day average for the secured bond defendants is an underestimate because 10 or more days may actually elapse before a defendant or his family can meet the court's cash bond or bondsman's surety bond requirements; however, this cap was derived from the best data available for this study. Moreover, the use of this average for the secured bond defendants is still sufficient for statistically demonstrating the increased jail use that results from secured bonds, and is sufficient for demonstrating practical significance for policy-making.

Chi-square tests revealed that statistically significantly more defendants with unsecured bonds were released on pretrial status than were defendants with secured bonds for each of the first nine days after defendants' bonds were set. A t-test revealed that the average number of days spent in jail on pretrial status was statistically significantly less for defendants with unsecured bonds than the average for defendants with secured bonds up to the first nine days after defendants' bonds were set.

The findings shown in Table 7 are illustrated in Figure 2.

Figure 2: Time to Pretrial Release by Bond Type



Note. The * symbol denotes that after day 9, the difference in the percent of released defendants between the two groups was no longer statistically significant. The time at which the 80% threshold was achieved is indicated for both groups.

Figure 2 depicts that released defendants with unsecured bonds spent fewer days incarcerated on pretrial status than did defendants with secured bonds. Moreover, Figure 2 depicts:

- Five days of jail incarceration were required for defendants with cash or surety bonds to achieve the same release threshold of 80% that defendants with unsecured bonds experienced by day one.
- Ten days of jail incarceration were required for defendants with cash or surety bonds to achieve the same overall release threshold as defendants with unsecured bonds because there were statistically significant differences for the first nine days.

Summary of Findings

After judicial officers set defendants' bonds, unsecured bonds enable defendants to be released from jail more quickly than do secured bonds. This finding is expected because nearly all defendants who receive unsecured bonds can be released from custody immediately upon signing their bond, whereas defendants with secured bonds must wait in custody until they or a family member or friend negotiates a payment contract with a commercial bail bondsman or their family member or friend posts the full monetary amount of a cash bond at the jail. This finding indicates that the process of posting a secured bond takes much longer than the process of posting a unsecured bond for released defendants. Furthermore, this finding is consistent with previous research using data from across the United States that shows released defendants with secured bonds remained in jail longer than did released defendants with bonds that did not require a pre-release payment (Cohen & Reaves, 2007).

UNSECURED BONDS ARE AS EFFECTIVE AS SECURED BONDS AT "FUGITIVE-RETURN" FOR DEFENDANTS WHO HAVE FAILED TO APPEAR.

Table 8 shows the percent of defendants whose case was still open up to 19 months after they were released from jail and who were at-large because of a failure to appear warrant, among all released defendants who had failed to appear (i.e., the at-large rate), for the unsecured and secured bond groups.

Table 8: At-Large Rate by Bond Type

AT-LARGE RATE†*	
UNSECURED BOND	SECURED BOND
10% (5/48)	9% (15/174)

† The comparison was not statistically significantly different ($p > 0.69$). Non-significance was also found when data from just the surety bond defendants were compared to the unsecured bond defendants - that is, when the cash-only bond defendants were removed from the secured bond group ($p > 0.48$).
* There were too few at-large cases in each of the four risk categories to permit analyses within each of the risk categories.

Chi-square tests revealed that there were no statistically significant differences in defendants' at-large rates for the two different types of bond, as well as for surety-bond-only defendants.

Summary of Findings

When released defendants fail to appear, unsecured bonds offer the same probability of fugitive-return as do secured (including surety-only) bonds. Because the commercial bail bond industry often claims that it locates and captures defendants who have failed to appear or who are fugitives on the run (see Professional Bail Agents of the United States, 2013; Tabarrok, 2011), this topic is discussed in detail.

Nationally, the fugitive-return function has received minimal attention in the empirical research literature, and no empirical research prior to the current study has been done in Colorado. This study failed to find support for the commercial bail bond industry's fugitive-return claim for defendants released on surety bonds because there was no difference in the percent of defendants who were released on surety bonds, who failed to appear, and who still had an open case, when compared to the percent of defendants who were released on unsecured bonds, who failed to appear, and who still had an open case. All defendants who had an open case at the time this study's data collection was completed were at-large on a failure to appear warrant and not in jail custody. If commercial bail bondsmen or hired bounty hunters return defendants at a greater rate than the rate for which defendants on unsecured bonds return to custody or court, then the percent of at-large surety bond defendants would be statistically significantly less than it is for unsecured bond defendants. That difference was not found in this study.

This study's failure to find a fugitive-return benefit for one bond type over another is consistent with previous research designed to measure directly the fugitive-return function allegedly associated with surety bonds. Jones, Brooker, and Schnacke (2009) found no empirical support for Colorado commercial bail bondsmen's claim that they locate or apprehend surety bond defendants who had failed to appear, as indicated by local jail booking data, the court's bondsman-contact tracking logs, and by law enforcement officials' report (p. 83).

Furthermore, in 2012 a committee that consisted of several justice system stakeholders and Colorado bail agents' representatives studied Colorado pretrial case processing and decision-making for a year. A portion of that review included discussion about fugitive-return evidence in Colorado.

Committee members acknowledged that there are no data to support the bondsmen's fugitive-return claim, and that the extent to which bondsmen return defendants to jail, court, or to law enforcement officers in Colorado remains empirically undemonstrated.[9]

MANY DEFENDANTS ARE INCARCERATED FOR THE PRETRIAL DURATION OF THEIR CASE AND THEN RELEASED TO THE COMMUNITY UPON CASE DISPOSITION.

Because some judicial officers, sheriffs, and defense attorneys have expressed concern or puzzlement to this author about their observation that apparently many defendants spend the pretrial duration of their case in custody, sometimes for several weeks or months, and then are released to the community upon conviction or sentencing, data on case dispositions were analyzed to determine the extent to which this phenomenon occurs in Colorado.

Table 9 shows the collective percentage of never-released, secured-bond defendants by type of case disposition from all 10 Colorado jurisdictions.

Table 9: Never-Released Defendants by Case Disposition

CASE DISPOSITION	PERCENT (AND NUMBER) OF DEFENDANTS OR OFFENDERS*
Department of Corrections	14% (79)
Jail, Work Release, or Time Served in the Local Jail	34% (194)
Community-Based Option (Diversion, Probation, Community Corrections, Home Detention)	37% (210)
Dismissed or Not Filed	13% (76)
Still Open or Had Some Other Sentence	2% (9)
Total	100% (568)

* Each percentage changes 1% or less when unreleased defendants with recognizance bonds were included in the analysis.

9 See the Colorado Commission on Criminal and Juvenile Justice's Bail Subcommittee's March 2012 Meeting Minutes at http://www.colorado.gov/cs/Satellite/CDPS-CCJJ/CBON/1251617151523.

Summary of Findings

These findings have implications for pretrial jail bed use because 50% (37% + 13%) of defendants return to the community upon conviction or case closure.[10] This percentage increases to 84% (50% + 34%) when defendants who return to the community after completing a jail sentence (including those who received sentences for time served while in pretrial custody) are included. This pattern of findings suggests that when judges and other decision-makers consider the likelihood of a defendant's conviction and the most likely type of sentence, they can further reduce pretrial jail bed use by using more unsecured bonds in lieu of secured bonds for defendants who will likely return to the community upon case disposition (i.e., for those defendants who are not likely to be transported to the Department of Corrections to start a sentence).

10 With the exception of some defendants for whom another case results in continued detention.

DISCUSSION AND IMPLICATIONS FOR POLICY MAKING

The findings from this study provide strong evidence that the type of monetary bond posted does not affect public safety or defendants' court appearance, but does have a substantial effect on jail bed use. Specifically, when posted, unsecured bonds (personal recognizance bonds with a financial condition) achieve the same public safety and court appearance results as do secured (cash and surety) bonds. This finding holds for defendants who are lower, moderate, or higher risk for pretrial misconduct. However, unsecured bonds achieve these public safety and court appearance outcomes while using substantially (and statistically significantly) fewer jail resources. That is, more unsecured bond defendants are released than are secured bond defendants, and unsecured bond defendants have faster release times than do secured bond defendants. The amount of the secured monetary bond was associated with increased pretrial jail use but not increased court appearance. Finally, the type of monetary bond did not affect the fugitive-return rate as measured by the percent of cases with a failure to appear warrant remaining open up to one-and-a-half years later.

THE TYPE OF BOND SET BY THE COURT HAS A DIRECT IMPACT ON THE AMOUNT OF JAIL BEDS CONSUMED, BUT IT DOES NOT IMPACT PUBLIC SAFETY AND COURT APPEARANCE RESULTS.

A three-jurisdiction example demonstrates this study's implications for jail bed use. If there were three jurisdictions that use different rates of unsecured and secured bonds, they each would use their local jail resource very differently to achieve the same public safety and court appearance outcomes.[11] Table 10 demonstrates this scenario.

Table 10: Differential Jail Bed Use Resulting from Different Bond Setting Practices in Three Jurisdictions

JURISDICTION	PERCENT OF UNSECURED BONDS	PERCENT OF SECURED BONDS	PRETRIAL BEDS NEEDED FOR UNSECURED BONDS*	PRETRIAL BEDS NEEDED FOR SECURED BONDS*	TOTAL PRETRIAL BEDS NEEDED*	PUBLIC SAFETY RATE**	COURT APPEARANCE RATE**
Status Quo[a]	31%	69%	34	430	**464**	79%	83%
Moderate Unsecured[b]	61%	39%	67	243	**310**	79%	83%
High Unsecured[c]	91%	9%	100	56	**156**	79%	83%

c. The "Status Quo" jurisdiction's use of unsecured bonds was selected to be the same as the average unsecured bond use in the 10 jurisdictions that contributed data to this study (see Table 2).
d. The "Moderate Unsecured" jurisdiction's percent of unsecured bonds was selected to be 30 percentage points higher than that of the Status Quo jurisdiction and centered between the other two jurisdictions. Its bond type percentages are nearly the inverse of the Status Quo jurisdiction.
e. The "High Unsecured" jurisdiction's percent of unsecured bonds was selected to be 30 percentage points higher than that of the Moderate Unsecured jurisdiction. It also uses nearly the same percent of unsecured bonds as there are defendants in the three lowest Colorado Pretrial Assessment Tool (CPAT) risk categories (i.e., categories 1, 2, and 3). This would approximately be the case, for example, if a jurisdiction were to use unsecured bonds for defendants whose pretrial risk score is in CPAT risk categories 1 through 3 and use secured bonds for defendants whose pretrial risk score is in CPAT risk category 4.
* Per 10,000 defendants booked into jail on new charges.
** The public safety rate of 79% and the court appearance rate of 83% were averages for all 1,309 released defendants, regardless of their bond type or risk level.

As seen in Table 10, secured bonds require more jail beds than do unsecured bonds when a relatively high number (69% or 39%) of secured bonds are used. In particular, the Status Quo jurisdiction would need 464 jail beds allocated for pretrial detention for every 10,000 defendants booked into jail on new charges, whereas the Moderate Unsecured jurisdiction would need 310 jail beds allocated for pretrial detention for this same pool of defendants.

11 The average length of time that defendants spent in detention for pretrial reasons (calculated for this study as 0.7 days for unsecured bond defendants and 1.5 days for secured bond defendants) and the average length of time of 58 days for all in-custody cases to close were used to calculate the number of beds that defendants would use. See Cunniff (2002) for the formulas used (p. 30).

The Status Quo jurisdiction's higher amount of jail bed use is caused by fewer secured bond defendants being released and when they are released, taking more time to do so when compared to unsecured bond defendants (refer back to Tables 5 and 7).

In contrast, the High Unsecured (i.e., high use of personal recognizance bonds) jurisdiction would need only 156 jail beds allocated for pretrial detention for every 10,000 defendants booked into jail on new charges. In this jurisdiction, more jail beds are actually required for unsecured bond defendants than for secured bond defendants because of the very high volume of unsecured bond defendants. However, this jurisdiction uses substantially fewer pretrial jail beds overall than do the other two jurisdictions because fewer defendants remain incarcerated, and when defendants are released, they are released much more quickly.

In summary, the High Unsecured jurisdiction achieves the same court appearance and public safety outcomes as does the Status Quo jurisdiction, but does so while reserving 197% more jail beds for other purposes (e.g., incarcerating sentenced inmates, reducing jail expenses by closing one or more housing sections). Similarly, the Moderate Unsecured jurisdiction achieves the same court appearance and public safety outcomes as does the High Unsecured jurisdiction, but consumes twice as many jail beds while doing so.

JURISDICTIONS CAN MAKE DATA-GUIDED CHANGES TO LOCAL PRETRIAL CASE PROCESSING THAT WOULD ACHIEVE THEIR DESIRED PUBLIC SAFETY AND COURT APPEARANCE RESULTS WHILE RESERVING MORE JAIL BEDS FOR UNMANAGEABLY HIGH RISK DEFENDANTS AND SENTENCED OFFENDERS.

Criminal justice policy-makers, such as judges, sheriffs and jail administrators, district attorneys, defense attorneys, and county commissioners or city council members, in each local jurisdiction (e.g., county or city-county) could benefit from convening to discuss and analyze their current practices and to identify opportunities for improving their pretrial practices. Colorado jurisdictions use secured money bonds for over two-thirds (69%) of their cases. However, this study provides compelling evidence that the same level of public safety and court appearance that these jurisdictions experience today can be achieved at considerably lower costs to taxpayers who fund local jails, and this finding occurs for defendants of all risk levels.[12] Moreover, this study's findings provide empirical support for a Colorado jurisdiction changing its pretrial practices to be consistent with Colorado's new bail statute enacted in May of 2013.[13]

It will be important for local decision-makers to collaborate to hold each other accountable to maximize their desired public safety, court appearance, and jail bed use outcomes. Judges, sheriffs, district attorneys, and other justice system decision-makers desire to achieve the highest levels of public safety and court appearance as possible, and they rely on county commissioners and legislators to provide them with the resources (e.g., jail and court facilities, staff, programs) to make those outcomes possible. Similarly, county commissioners or legislators fund the jail and program resources, and they rely on judges and other system decision-makers to engage in effective practices that most efficiently

12 The higher financial cost to each local jail created by the use of secured bonds can be demonstrated whether short-run marginal costs and/or step-fixed costs are used in cost calculations (see Henrichson & Galgano, 2013).

13 See House Bill 13-1236 at http://www.leg.state.co.us/.

use those resources. This study indicates that Colorado jurisdictions have the opportunity to be much more effective and efficient with the pretrial use of local jails by using an empirically-based risk assessment instrument such as the Colorado Pretrial Assessment Tool and by maximally using personal recognizance bonds with a financial condition. In this decision-making scenario, defendants' risk for pretrial misconduct would be known prior to defendants' release from custody, and all released defendants would have a personal recognizance bond with a financial condition that the court could enforce if the defendant were to fail to appear.

COLORADO JUDICIAL OFFICERS NOW HAVE DATA AND LAW TO SUPPORT CHANGING THEIR BAIL SETTING PRACTICES TO BE AS EFFECTIVE BUT MUCH MORE EFFICIENT.

This study does not address the question of whether or when judicial officers should use monetary bonds or not use them (i.e., bonds with a financial condition or bonds with no financial condition). That is a research question beyond the scope of this study and is not currently relevant in Colorado, given that statute requires all bonds to have a financial condition. Rather, this study's results, combined with the new bail statute enacted in May of 2013, provide Colorado judicial officers with both empirical and legal justification for changing their bail setting practices to achieve their desired levels of public safety and court appearance while incarcerating only higher risk individuals and no longer incarcerating lower risk defendants who cannot pay their cash or surety bonds. The pretrial release mechanism created in Colorado's new bail statute for achieving all of these outcomes simultaneously are personal recognizance bonds with an unsecured financial condition found in Colorado Revised Statutes Sections 16-4-104(1) (a) and (b). These bonds are the only ones in Colorado that simultaneously (1) allow judicial officers to set an amount of money that they believe may give defendants sufficient incentive to return to court, *and* (2) do not prevent those defendants' release because the amount is too high for them or their family or friends to post.[14]

The new statute and this study's findings also converge to imply two features of a money bond schedule if a jurisdiction's decision-makers choose to have one: (1) The schedule should have the defendant's risk integrated into the formula that is to guide or determine a specific monetary amount of bond for each individual defendant; and (2) the scheduled monetary amounts should only be used for financial conditions associated with recognizance bonds and not for cash or surety bonds. If these two features are not incorporated and integrated into money bail bond schedules and pretrial decision-making, then the jurisdiction is likely to achieve its desired public safety and court appearance outcomes while failing to minimize pretrial detention because of the number of lower risk defendants who will be incarcerated for their lack of pre-release financial resources.

This study shows that defendants who are released from jail on personal recognizance bonds with a financial condition return to court and avoid new charges at the same rate as do defendants who bond out on cash or surety bonds, and they are as unlikely to remain at-large on fugitive status. Nonetheless, as one pretrial legal scholar has proposed (T. Schnacke, personal communication, August 1,

14 The Colorado Commission on Criminal and Juvenile Justice's Bail Subcommittee discussed the possibility that defendants are more likely to appear in court when they have "skin in the game" because of a financial condition of their bond (see http://www.colorado.gov/cs/Satellite/CDPS-CCJJ/CBON/1251617151523). Several justice system decision-makers in other states have suggested the same to this author. This study could not test this hypothesis; however, this study does provide empirical support that if defendants are more likely to appear in court because of a financial condition, this "motivation" is achieved just as effectively with a personal recognizance bond with a financial condition than it is with a cash or surety bond, but without the accompanying unnecessary pretrial jail bed use.

2013), even if the fugitive-return rate were some degree higher for surety bond defendants than for unsecured bond defendants, criminal justice decision-makers in each jurisdiction would need to decide if this gain offsets other costs. Specifically, if commercial bail bondsmen were to return defendants to custody sooner than law enforcement does, these cases could be closed more quickly. However, this benefit needs to be weighed against the high financial cost the local justice system incurs from the pretrial jail bed use that results from the large percent of surety bond defendants who are never released from jail or who take much longer to be released when they are released.

Finally, the pretrial decision-making supported by this study and the new statute has a precedent in Colorado. In early 2010 during Jefferson County's Bail Impact Study, which was a pilot project in which judges set more recognizance bonds with the support from the local criminal justice coordinating committee, a First Judicial District Court Judge set personal recognizance bonds with a financial condition for 75% of defendants who appeared before him at initial advisement. This Bail Impact Study, among initiatives in other jurisdictions and an earlier version of the research done for this paper, ultimately led to the introduction and passage of House Bill 13-1236, which rewrote Colorado's bail statute to encourage more recognizance releases and to reduce unnecessary pretrial detention while still emphasizing public safety and court appearance.[15]

THIS STUDY'S FINDINGS ARE LIKELY MORE GENERALIZABLE TO JURISDICTIONS THAT USE BOND SETTING PRACTICES SIMILAR TO THOSE USED IN COLORADO.

Colorado jurisdictions' pretrial case processes are very similar to one another and are typical of the processes used nationwide. When defendants are booked into jail, typically within a day or two most of them have the opportunity to leave custody after posting their bond via a money bail bond schedule or after first appearing before a judicial officer. Colorado judicial officers use unsecured, cash, and surety bonds in varying proportions, but not in a "sequential' manner as is done in some jurisdictions. For example, Dallas County's (Texas) use of non-financial release occurs almost exclusively in instances when defendants cannot first post their secured bond (L. Gamble, personal communication, March 4, 2013). In Colorado, judicial officers order unsecured bonds regardless of defendants' initial ability to post a secured bond. This non-sequential use, combined with this study's statistical controls for defendants' pretrial risk level, allow for methodologically sound bond-type comparisons on public safety, court appearance, and jail bed use.

Finally, research methods similar to those used in this study should be replicated in jurisdictions outside of Colorado to determine to what extent similar findings emerge. Criminal justice officials in many jurisdictions outside of Colorado also heavily rely on secured money bonds without any data showing the effect, pro or con, of these secured bonds on all three pretrial outcomes simultaneously. These decision-makers could likely improve the efficiency of their systems without detriment to their public safety and court appearance outcomes by using more recognizance bonds with a financial condition in lieu of cash or surety bonds.[16]

15 See C.R.S. 16-4-103(4) (c) (2013), "The Court shall . . . consider all methods of bond and conditions of release to avoid unnecessary pretrial incarceration."

16 As previously noted, the effect on court appearance of recognizance bonds that have no financial condition compared to unsecured or secured bonds could not be examined in this study. If studies show that recognizance bonds with no financial condition outperform unsecured or secured bonds, then they would provide an effective release option for jurisdictions that seek, voluntarily or through statute or court rule, to impose the least restrictive conditions that assure public safety and/or court appearance.

REFERENCES

Bechtel, K., Clark, J., Jones, M. R., & Levin, D. J. (2012). *Dispelling the Myths: What Policy Makers Need to Know about Pretrial Research.* Washington, DC: Pretrial Justice Institute.

Block, M. K. (2005). *The effectiveness and cost of secured and unsecured pretrial release in California's large urban counties: 1990-2000.* Unpublished manuscript, University of Arizona.

Cohen, J. (1988). *Statistical Power Analysis for the Behavioral Sciences* (2nd ed.). Hillsdale, NJ: Erlbaum.

Cohen, T. H., & Kyckelhahn, T. (2010). *Data Advisory: State Court Processing Statistics Data Limitations.* Washington, DC: U.S. Department of Justice.

Cohen, T. H. & Reaves, B. A. (2007). *Pretrial Release of Felony Defendants in State Courts.* Washington, DC: U.S. Department of Justice.

Cunniff, M. A. (2002). *Jail Crowding: Understanding Jail Population Dynamics.* Washington, DC: U.S. Department of Justice.

Helland, E., & Tabarrok, A. (2004). The fugitive: Evidence on public versus private law enforcement from bail jumping. *Journal of Law and Economics,* 47, 93-122.

Henrichson, C., & Galgano, S. (2013). *A Guide to Calculating Justice-System Marginal Costs.* New York: Vera Institute of Justice.

Krahl, D. E., & New Direction Strategies. (2011). *An analysis of the financial impact of surety bonding on aggregate and average detention costs and cost savings in the state of Florida for 2010 by a single Florida insurance company: Continuities from earlier research and extensions in the development and utilization of statistical models to determine the utility and effectiveness of surety bonding.* Unpublished manuscript, University of Tampa.

Morris, R. G. (2013). *Pretrial Release Mechanisms in Dallas County, Texas: Differences in Failure to Appear (FTA), Recidivism/Pretrial Misconduct, and Associated Costs of FTA.* Richardson, TX: University of Texas at Dallas.

Osborne, D., & Hutchinson, P. (2004). *The Price of Government: Getting the Results We Need in an Age of Permanent Fiscal Crisis.* New York: Basic Books.

Pretrial Justice Institute & JFA Institute. (2012). *The Colorado Pretrial Assessment Tool (CPAT): A Joint Partnership among Ten Colorado Counties, the Pretrial Justice Institute, and the JFA Institute.* Washington, DC: Pretrial Justice Institute.

Professional Bail Agents of the United States. (2013). How to become a recovery agent. Retrieved May, 2013, from http://www.pbus.com/display-common.cfm?an=3

Jones, M. R., Brooker, C. M. B., & Schnacke, T. R. (2009). A Proposal to Improve the Administration of Bail and the Pretrial Process in Colorado's First Judicial District. Golden, CO: Jefferson County Criminal Justice Planning Unit.

Tabarrok, A. (2011). The bounty hunter's pursuit of justice. *Wilson Quarterly.* Retrieved May, 2013, from http://www.wilsonquarterly.com/article.cfm?AID=1775

ABOUT THE AUTHOR

Dr. Michael R. Jones has been a senior project associate at the non-profit Pretrial Justice Institute (PJI) since 2010. At PJI, he has assisted dozens of states and local jurisdictions in understanding and implementing more legal and empirically-based pretrial policies and practices. In Colorado, he led the project to develop Colorado's first empirically-based pretrial risk assessment tool, coordinated pretrial services programs' statutorily mandated performance measurement, and assisted justice system decision-makers in their efforts to defeat regressive legislation and pass progressive legislation. He currently provides strategic planning, training, technical assistance, and consulting to a variety of justice system stakeholders in Colorado and nationwide. Prior to PJI, he worked for nine years as a criminal justice planner and manager in Jefferson County, Colorado, where he was lead staff for the local criminal justice coordinating committee. He has also worked as a technical resource provider for the National Institute of Corrections since 2004, providing justice system assessments and assisting local jurisdictions in developing or improving their capacity for systemic collaboration and data-guided policy-making. Mike has a Ph.D. in Clinical Psychology from the University of Missouri-Columbia.

Appendix 4

REPORT OF THE COURT COMMISSIONER SUBCOMMITTEE

The Court Commissioner Subcommittee respectfully submits this report to the Task Force for consideration. The subcommittee, charged with making recommendations regarding the Court Commissioner system as a result of holdings of the Court of Appeals in *DeWolfe v. Richmond*, recommends two substantive changes in Maryland criminal procedure regarding arrest and pre-trial detention.

The subcommittee is mindful of the purposes of the initial contact between a person charged with a crime and the court system: ensuring public safety as well as the appearance of that person at future court proceedings. It is the intent of the subcommittee to make recommendations that accomplish these purposes while also ensuring arrestees are subjected to the least restrictive environment and conditions necessary. That said, the *Richmond* opinion, prompting the creation of this Task Force, presents a rare opportunity to truly evaluate the present system of criminal procedure in Maryland and propose changes that may result in lower incarceration rates, the enhancement of public safety, and significant fiscal savings as opposed to the predicted increases necessary to implement the *Richmond* mandate.

With these objectives in mind, the subcommittee proposes:

PRETRIAL SERVICES

1. **Creation of a statewide pretrial services agency ("PSA").**

   The subcommittee recommends that such a PSA be an entity that exists within the judiciary. That is consistent with other many other states and the District of Columbia.

2. **Utilization of an objective risk assessment tool for use by pretrial services agents.**

   The subcommittee does not recommend any particular model at this time. The presentation on the Kentucky model was helpful, but the subcommittee recommends a review of the statistical methodology and data used to predict future criminal behavior as well as the likelihood of appearance at future court dates. From that review the subcommittee recommends that one tool be selected. We recognize that the Kentucky model, for example, is not as effective in the cases involving alcohol related driving offenses, sex offenses, and domestic violence. Any model selected would have to be effective in these areas, or other criteria would need to be employed in those cases.

3. **Release by the PSA of those persons for whom the assessment tool recommends release.**

   This action results in removal of the bail setting function for the District Court Commissioners. If the current Court Commissioner system is retained, commissioners would continue to provide the other services, including issuance of charging documents and interim protective orders. The result however would be fewer commissioner hours

necessary since the bail setting process is a significant function of the commissioners presently.

4. **Continued supervision by the PSA of those persons released under conditions as may be deemed appropriate.**

   Said conditions may include, but are not limited to, substance abuse evaluation, testing and treatment, anger management counseling, and other such services as the Task Force may deem appropriate. The goal is to provide necessary services as soon as possible. Ideally, many defendants will have successfully completed such programs, or at least show successful participation, when they appear before the court for trial and/or sentencing. Participation in such programs would not interfere with the right to trial. But at sentencing, either by way of guilty plea or verdict, the defendant may benefit from better sentencing outcomes. The court will hopefully be in a better position to gauge a defendant's likelihood of completing a successful probationary period. As a result, the subcommittee believes that lower incarceration rates are likely. Finally, although difficult to quantify or predict, long term savings will be seen in reduced criminal justice contacts for those persons who are afforded services as their case progresses through a system that includes a PSA.

5. **That the judiciary deploy judges in such a manner as to ensure that all defendants not released by the PSA have benefit of an Initial Appearance/Bail Review before a judge within 24 hours of arrest.**

   In the more rural jurisdictions of Maryland use of video-conferencing and the cross-designation of judges would enable judges to conduct hearings in several jurisdictions, particularly during non-normal court hours. The subcommittee believes that it is essential to maintain the requirement that all such persons are seen by a judge within 24 hours of arrest.

ABOLISH THE COMMISSIONER SYSTEM

Initially, the subcommittee's recommendations ended here. The proposed change to create a pretrial services agency and remove bail functions from the commissioner is bold, but likely to have significant positive impact for persons arrested and at the same time result in cost savings to the citizens of Maryland.

The subcommittee inquired further, "Why stop there?" This system as proposed requires judges to work some hours outside those normally considered conventional. Why not shift to those judges the protective order and charging functions currently performed by commissioners? If we do that, shouldn't we expect improvement in those decisions? If we are to ensure access to justice for persons seeking the protection of the courts, why not let them have access to judges, rather than commissioners?

The questions arose as a result of the recommendations outlined above. If we are reducing the functions of the commissioners, and making judges more available at nights and on weekends, it is but little more change to shift other responsibilities to judges.

As such, the subcommittee makes the further recommendation that the court commissioner system be abolished. The creation of pretrial services agency will replace much of what the commissioners do, but with enhancements and cost savings since public defenders will not be needed to appear at the many instances where the pretrial services agency makes a release decision. Regarding the issuance of charging documents, the January, 2013 study, "The District Court Commissioner" which was prepared by the Department of Legislative Services found that of 30 states that replied, 20 allow non-attorneys to issue arrest warrants. That also means that 10 of the 30 states require that the issuer of an arrest warrant be an attorney or law school graduate. Maryland is often considered to be a leader in criminal justice and social issues. This change affirms that position as we would join those jurisdictions that require that a person authorized to issue an arrest warrant, and deprive even temporarily a person of his/her freedom, be an attorney.

The subcommittee recognizes that the fiscal impact of the changes recommended here are speculative, and that the Department of Legislative Services would need to examine the impact. But, that should not prevent us, as a Task Force, from envisioning bold moves based on ideals we believe in and on common sense theories regarding the monetary consequences.

CONCLUSION

The recommendations outlined above are not all or nothing propositions. The subcommittee feels strongly that the creation of a pretrial services agency is real, significant change that stands on its own. We believe that the cost savings are real, both in the short and long terms. Most importantly, however, is that the lives of Marylanders will be improved, including those charged with crimes, victims of crime, and taxpayers. We also believe, however that the additional step of abolishing the commissioner system in favor of providing access to the court system through judges is one worthy of consideration.

Respectfully submitted,

William H. Jones, Chair
Court Commissioner Subcommittee

State of Maryland
Office of the Public Defender

POSITION ON PROPOSED LEGISLATION

BILL: SB 973 – Criminal Procedure – Pretrial Confinement and Release
POSITION: Support with Amendments
DATE: February 18, 2014

Introduction

The Office of Public Defender (OPD) supports SB 973 as the most effective, cost-efficient and reform-based response to implementation of the *Richmond v. DeWolfe* court decision requiring state-furnished counsel at commissioner initial appearances.

OPD particularly supports the creation of statewide pretrial services operations in jurisdictions where they currently do not exist; the implementation of a validated risk assessment instrument; and the expansion of court operations to allow for judicial bail review every day of the week.

SB 973 preserves almost all of the current benefits of our current pretrial system while cost-effectively reforming our two-step pretrial hearing process.

Mandatory Detention Provisions Must Be Removed

SB 973 includes provisions that make significant changes to our existing list of offenses for which an accused may not be released at their initial appearance, and to which we strongly object.

These changes are both qualitative and quantitative.

Qualitative in that unlike our existing lists of exclusionary offenses almost all of which take into account a combination of criminal history (past convictions or charges) AND current charges, SB 973 bases exclusions from release on mere charges alone.

Quantitative in that the final list of exclusionary offenses is far greater than the existing law, and will lead to much greater numbers of accused being put in local detention facilities until they can see a judge the next time court is in session.

The changes are unprecedented and unwarranted.

Our current statutory exclusions were last amended only slightly in 2001. As far as we are aware, in the intervening 13 years, there have been almost no bills and certainly no showing that there is an issue with these statutes. Together our

current statutory exclusions cover over a hundred offenses including crimes of violence, sex offenses and those associated with domestic violence.

More recently, in the two different task forces dealing with Richmond II - the legislative and judiciary task forces - the issue of needing to expand these exclusions never came up. A related but distinct issue, which has garnered much confusion, is whether certain or any risk assessment instruments are validated as to their ability to predict domestic or sex offenses, but this is totally different than deciding that our current statutory exclusions preventing release are inadequate. In fact, adding mandatory exclusions on mere charges alone flies directly in the face of the direction that both task forces are taking – specific recommendations or plans to explore and implement validated risk assessment tools that take into account multiple factors to predict flight and safety risks.

Lastly, the fact that a certain defendant isn't automatically detained pursuant to statute does not mean that they are released. Thousands of such defendants remain detained for their entire pretrial period under money bails they cannot afford to pay.

There Are A Massive Number Of Offenses That Currently Trigger Exclusion From Release

Our current statutory exclusions from release are detailed in § 5-202 of the Criminal Procedure Article. SB 973/HB 1232 keeps all of these exclusions in full effect, only amending them so as to make them binding upon the new pretrial services personnel instead of court commissioners. These exclusions are summarized in detail at the end of this document. They include the following categories of offenses:

- Escapees and drug kingpins;
- Anyone who has a prior conviction for any of the twenty-eight (28) crimes of violence and is charged with any other crime of violence;
- A person currently released on personal recognizance or bail for any one of that provision's list of forty-seven (47) offenses and who is charged again for any other offense from that list;
- Any person charged with violating any provision of a temporary or permanent protective order, regardless of their criminal history or current pre-trial status;
- persons accused of weapons related charges, if they were charged with any one of that provision's list of nine (9) offenses and were also previously convicted for any other offense on that list;
- any person who has been convicted of a crime that required them to be placed on the sex offender registry, including fourteen (14) offenses not otherwise covered above.

Despite All Of The Above, SB 973 Seeks To Expand Mandatory Exclusions From Release In Both Number And Kind

There are four categories of expansion under SB 973, despite any lack of showing for the need for such an expansion.

First Expansion – Domestically Related Crimes

The first expansion requires detention for potentially any charge in our entire criminal code, as long as the relationship between the alleged criminal and victim is "domestic." A "domestically related crime" is defined in § 6-233 of the Criminal Procedure Article as:

> a crime committed by a defendant against a victim who is a person eligible for relief, as defined in § 4-501 of the Family Law Article, or who had a sexual relationship with the defendant within 12 months before the commission of the crime.

A "person eligible for relief" includes:

- the current or former spouse of the respondent;
- a cohabitant of the respondent;
- a person related to the respondent by blood, marriage, or adoption;
- a parent, stepparent, child, or stepchild of the respondent or the person eligible for relief who resides or resided with the respondent or person eligible for relief for at least 90 days within 1 year before the filing of the petition;
- a vulnerable adult; or
- an individual who has a child in common with the respondent.

The current definition of a "domestically related crime" is used in connection with a court determination (a) by a judge (b) upon evidence produced at trial (c) by a preponderance of the evidence.

In contrast, and problematically, SB 973 will require police officers, at arrest, to make that determination themselves, on what information we know not, so as to be able to style a charge as domestically related. In the alternative, the proposed statutory language might allow or require each pretrial services personnel to make that inquiry, potentially in every initial appearance as to every single charge, in order for them to decide whether a given charge is domestically related.

Second Expansion – Sex Offender Registry

Whereas our current law denies release at initial appearances to persons convicted of a crime that requires them to be on the Sex Offender Registry, the

bill would deny release to persons merely accused of any crime for which registration is required.

Third Expansion – CP § 5-202

Similar to the above, where CP § 5-202 includes a multitude of offenses for which some mix of criminal history and current charges might require an accused's continued detention, SB 973 would take this significantly further and deny release to anyone merely charged with the offenses circumscribed by CP § 5-202 (approximately 100 offenses).

Fourth Expansion – Traffic Offenses

The bill requires persons arrested for the following traffic offenses to go directly to a judge, foregoing presentment before the proposed pretrial services program, which in many cases will mean overnight detention in a local facility until the person can be brought before a judge at the next court session (or even longer if the judiciary cannot be made to operate 7 days a week and holidays):

- A violation of § 21-1411 or § 22-409 of this article, relating to vehicles transporting hazardous materials;
- A violation of § 24-111 or § 24-111.1 of this article, relating to the failure or refusal to submit a vehicle to a weighing or to remove excess weight from it;
- where a person committed or is committing the violation within the view or presence of the officer, and either:
    - The person does not furnish satisfactory evidence of identity; or
    - The officer has reasonable grounds to believe that the person will disregard a traffic citation;
- Driving or attempting to drive while under the influence of alcohol, while impaired by alcohol, or in violation of an alcohol restriction;
- Driving or attempting to drive while impaired by any drug, any combination of drugs, or any combination of one or more drugs and alcohol or while impaired by any controlled dangerous substance;
- Failure to stop, give information, or render reasonable assistance, as required by §§ 20-102 and 20-104 of this article, in the event of an accident resulting in bodily injury to or death of any person;
- Driving or attempting to drive a motor vehicle while the driver's license or privilege to drive is suspended or revoked;
- Failure to stop or give information, as required by §§ 20-103 through 20-105 of this article, in the event of an accident resulting in damage to a vehicle or other property;
- Any offense that caused or contributed to an accident resulting in bodily injury to or death of any person;
- Fleeing or attempting to elude a police officer;

- Driving or attempting to drive without a license in violation of § 16-101 of this article;
- Altered or forged documents or plates under § 14-110(b), (c), (d), or (e) of this article; or
- Race of speed contests under § 21-1116(a) of this article that result in serious bodily injury to another person.

~~~~~~~~~~

For all of the above reasons, OPD requests that the various provisions expanding mandatory detention beyond what is already required in our current law be stricken:

- strike page 5 lines 9-18;
- eliminate changes and restore existing language in the Transportation Article on page 19; and
- strike page 22 lines 1-12.
~~~~~~~~~~

Current Mandatory Detention Provisions

Escapees and **drug kingpins** cannot be released by court commissioners under CP § 5-202 (a) and (b).

Under CP § 5-202 (c), anyone who has a **prior conviction for any crime of violence AND is charged with any other crime of violence** cannot be released, which includes the following twenty-eight (28) offenses (two bullet points contain multiple offenses):

- abduction;
- arson in the first degree;
- kidnapping;
- manslaughter, except involuntary manslaughter;
- mayhem;
- maiming, as previously proscribed under former Article 27, §§ 385 and 386 of the Code;
- murder;
- rape;
- robbery under § 3-402 or § 3-403 of this article;
- carjacking;
- armed carjacking;
- sexual offense in the first degree;
- sexual offense in the second degree;
- use of a handgun in the commission of a felony or other crime of violence;
- child abuse in the first degree under § 3-601 of this article;
- sexual abuse of a minor under § 3-602 of this article if:
    - the victim is under the age of 13 years and the offender is an adult at the time of the offense; and
    - the offense involved:
        - vaginal intercourse, as defined in § 3-301 of this article;
        - a sexual act, as defined in § 3-301 of this article;
        - an act in which a part of the offender's body penetrates, however slightly, into the victim's genital opening or anus; or
        - the intentional touching, not through the clothing, of the victim's or the offender's genital, anal, or other intimate area for sexual arousal, gratification, or abuse;
- an attempt to commit any of the crimes described in items (1) through (16) of this subsection;
- continuing course of conduct with a child under § 3-315 of this article;
- assault in the first degree;
- assault with intent to murder;

- assault with intent to rape;
- assault with intent to rob;
- assault with intent to commit a sexual offense in the first degree; and
- assault with intent to commit a sexual offense in the second degree.

Under CP § 5-202 (d), a person **currently released on personal recognizance or bail** for any one of that provision's list of forty-seven (47) offenses (three bullet points contain multiple offenses), **AND** who is **charged again for any other offense from that list**, cannot be released, including:

- aiding, counseling, or procuring arson in the first degree under § 6-102 of the Criminal Law Article;
- arson in the second degree or attempting, aiding, counseling, or procuring arson in the second degree under § 6-103 of the Criminal Law Article;
- burglary in the first degree under § 6-202 of the Criminal Law Article;
- burglary in the second degree under § 6-203 of the Criminal Law Article;
- burglary in the third degree under § 6-204 of the Criminal Law Article;
- causing abuse to a child under § 3-601 or § 3-602 of the Criminal Law Article;
- a crime that relates to a destructive device under § 4-503 of the Criminal Law Article;
- a crime that relates to a controlled dangerous substance under §§ 5-602 through 5-609 or § 5-612 or § 5-613 of the Criminal Law Article (10 offenses);
- manslaughter by vehicle or vessel under § 2-209 of the Criminal Law Article; and
- a crime of violence (28 offenses)

Under CP § 5-202 (e), any person **charged with the following, regardless of their criminal history or current pre-trial status**, if any, cannot be released:

- a violation of any provisions of a temporary or permanent protective order.

Under CP § 5-202 (f), persons accused of weapons related charges cannot be released, if they **were charged** with any one of that provision's list of nine (9) offenses, **AND** were also **previously convicted** for any other offense on that list, including:

- wearing, carrying, or transporting a handgun under § 4-203 of the Criminal Law Article;
- use of a handgun or an antique firearm in commission of a crime under § 4-204 of the Criminal Law Article;
- violating prohibitions relating to assault pistols under § 4-303 of the Criminal Law Article;

- use of a machine gun in a crime of violence under § 4-404 of the Criminal Law Article;
- use of a machine gun for an aggressive purpose under § 4-405 of the Criminal Law Article;
- use of a weapon as a separate crime under § 5-621 of the Criminal Law Article;
- possession of a regulated firearm under § 5-133 of the Public Safety Article;
- transporting a regulated firearm for unlawful sale or trafficking under § 5-140 of the Public Safety Article; or
- possession of a rifle or shotgun by a person with a mental disorder under § 5-205 of the Public Safety Article.

Lastly, under CP § 5-202 (g), any person who has been **convicted of a crime that required them to be placed on the sex offender registry** cannot be released, including the following fourteen (14) offenses not otherwise covered above:

- possession of visual representation of child under 16 engaged in sexual act
- visual surveillance with prurient intent
- 4th degree sex offense
- house of prostitution
- abduction of a child under 16
- human trafficking
- hiring a minor for a prohibited purpose (sale or display of obscene item to another minor)
- child pornography
- sale of a minor
- sexual solicitation of a minor
- sexual conduct between DOC/DJS employee and inmate/child
- common law false imprisonment
- common law sodomy
- child kidnapping
- kidnapping
- incest
- unnatural or perverted sex practice.

PRETRIAL JUSTICE INSTITUTE

Testimony in Support of SB 973

My name is Cherise Fanno Burdeen; I am the Chief Operating Officer of the Pretrial Justice Institute, a nonprofit organization that has been dedicated to safe, fair, and effective pretrial justice for the past forty years. I am also a long-time Montgomery County resident.

I am testifying in support of two key elements in SB 973.

The bail system in Maryland, like nearly every other state in the country, is broken. It fails to do the job we need it to do – that is, detain dangerous defendants and release low risk defendants to accountable and effective supervision pending trial.

If passed, this bill will benefit the state of Maryland in three important ways:

(1) It will increase public safety and confidence in the system;
(2) It will reduce costs associated with the use of secure jails required to provide security, food and medical care to inmates; and
(3) It will avoid the unnecessary human toll the current system inflicts on families and communities, particularly Marylanders of lower economic status.

At this very moment, two out of every three prisoners in U.S. jails are being held not because they have been convicted of a crime, or because they pose an unmanageable danger to society. Rather, two out of every three of those in jail are there simply because they lack the money needed to make bail.

The converse situation is just as troubling: those with money, regardless of where they got it from or the danger they pose to the community or to their victims, are able to purchase their release and walk the streets unfettered.

In some Maryland counties, nearly *ninety-percent* of the jail population is comprised of pretrial detainees. Fortunately, the bill before your committee, HB 1232/SB 973, will help to fix this growing problem.

For the last 18 months, I have served as the Chair of the Pretrial Release Subcommittee of the Governor's Task Force to Study the Laws and Policies Relating to the Representation of Indigent Criminal Defendants by OPD. Our subcommittee enjoyed a wide range of expertise from a diverse set of stakeholders – it was comprised of a judge, a prosecutor, the defense bar, jail administrators and representative from a sheriff's department.

1101 pennsylvania ave, nw, 600
washington, dc 20004
(202) 756-70238
pji@pretrial.org

Two of our recommendations, accepted by the full Task Force and sent to the Governor, are reflected in SB 973.

The first is the implementation of a pretrial risk assessment tool that aids those who are making the vital decision to either release or detain someone after they have been arrested for a crime.

The second recommendation reflected in the bill is the call for an accountable and transparent program to supervise defendants post-release, to ensure they appear in court, remain arrest free pending trial, and do not endanger the community or victims.

As part of SB 973, these elements will work to allow those who can be safely managed in the community to retain their housing and employment – the two most important predictors of successful reentry after leaving jail.

To provide you with further context, research recently conducted by the Laura and John Arnold Foundation found that **half** of the most dangerous individuals arrested today are released pending trial, with no supervision or services simply because they can afford to make bail.

The same research from the Arnold Foundation found that detaining low-risk defendants— often those who cannot afford to pay their bond— increases their likelihood to reoffend in the future. This is the case even after only 24 hours of incarceration. It is for these reasons that Maryland needs an effective, validated pretrial risk assessment tool.

In addition to implementing risk assessment in pretrial decision making, the bill calls for a pretrial supervision program to provide monitoring of defendants released by the court. Pretrial supervision often includes reminding defendants of their upcoming court dates, and of other court orders. This has been proven to lower failure-to-appear rates and is an essential part of the reform effort.

This legislation offers Maryland an historic opportunity to reform the pretrial justice system to the benefit of the state and its residents.

The establishment of a statewide system will allow for all Maryland residents, not just those in its wealthiest county, to experience the same high-quality decision making that results from the use of a validated risk assessment instrument and provide all residents an increased level of public safety through accountable supervision.

1101 pennsylvania ave, nw, 600
washington, dc 20004
(202) 756-70238
pji@pretrial.org

PRETRIAL JUSTICE INSTITUTE

Risk-based pretrial decision making and supervision is backed by groups such as the National Association of Counties, the International Association of Chiefs of Police, the Conference of Chief Justices, the National Sheriffs Association, and others serving on the front lines to keep us safe.

Thank you for allowing me to testify today. I am attaching to this written testimony a copy of the report on Maryland done for the Task Force, upon which this bill was based. I congratulate the bill's author and am happy to answer any questions.

I am available at any time at 240-338-3827 and cherise@pretrial.org.

Thank you.

Cherise Fanno Burdeen

Cherise Fanno Burdeen
Chief Operating Officer

1101 pennsylvania ave, nw, 600
washington, dc 20004
(202) 756-70238
pji@pretrial.org

GOVERNOR'S OFFICE OF CRIME CONTROL & PREVENTION

300 E. Joppa Road, Suite 1105
Baltimore, Maryland 21286-3016
410-821-2828 / TOLL FREE: 1-877-687-9004
FAX: 410-321-3116
INFO@GOCCP.STATE.MD.US
WWW.GOCCP.MARYLAND.GOV

Martin O'Malley
Governor

Anthony Brown
Lt. Governor

Tammy Brown
Executive Director

February 19, 2014

Chairman Brian E. Frosh and Members of the Senate Judicial Proceedings Committee
2 East, Miller Senate Building
Annapolis, MD 21401

RE: SENATE BILL 973 – Criminal Procedure – Pretrial Release and Confinement

POSITION: SUPPORT

Dear Chairman Frosh and Members of the Senate Judicial Proceedings Committee:

The Governor's Office of Crime Control & Prevention (GOCCP) and the Department of Public Safety and Correctional Services (DPSCS), on behalf of Governor O'Malley and the Administration, support Senate Bill 973. Senate Bill 973 establishes a Statewide Pretrial Release Services Program ("Pretrial Program") to assess and supervise pretrial defendants across the state. The Pretrial Program will utilize a validated risk assessment tool to make pretrial release decisions. The validated risk assessment tool will allow for the immediate release of those defendants who pose a minimal risk to public safety and are at low risk of failing to appear for court. Those defendants who are not immediately released will go before a judge within 24 hours for their initial appearance, in keeping with Maryland Rule 4-212, at which the defendant's counsel and State's Attorney will be present.

Background:

On September 25th, 2013, in *DeWolfe v. Richmond*, the Maryland Court of Appeals ruled in a 4-3 decision that indigent defendants have a state constitutional right to state-furnished counsel at initial hearings before Court Commissioners. To comply with *DeWolfe v. Richmond*, the Office of the Public Defender (OPD) must staff an additional 170,000 – 175,000 commissioner hearings per year, at a cost of approximately $29.55 million dollars to the state.

In response to *DeWolfe v. Richmond,* the State of Maryland established the Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defendants by the Office of the Public Defender ("Task Force"). The Task Force was asked to put together recommendations to address the Court of Appeals decision. Through an analysis of national best practices in pretrial services and Maryland's current pretrial system, the Task Force developed the following recommendations:

- Implement a statewide system that utilizes a standard, validated pretrial risk screening tool at which the pretrial decision/release is made;
- Implement a statewide system that utilizes risk and need based supervision, referral, and treatment options in all Maryland counties;
- Implement a shared jail management database system to ensure consistency in data collections across the state;

- Create a statewide pretrial services agency, to be located within the executive branch;
- Adopt an objective validated risk assessment tool for use of pretrial services agents;
- Provide continued supervision of those persons released pretrial under conditions as may be deemed appropriate; and
- Deploy judges in such a manner as to ensure that all defendants not released pretrial have the benefit of an initial appearance/bail review before a judge within 24 hours of arrest.

Senate Bill 973: A New Plan For Maryland Defendants – Increasing Fairness, Reducing Costs

Building on the recommendations of the Task Force and national best practice, the State of Maryland proposes Senate Bill 973 as a solution to *DeWolfe v. Richmond.* Senate Bill 973 goes further however, by not only addressing the issue raised by *DeWolfe v. Richmond.* Senate Bill 973 also addresses costly inefficiencies in Maryland's current pretrial system and provides a meaningful opportunity for criminal justice reform. Senate Bill 973 does the following:

1. Establishes a statewide Pretrial Program;
2. Adopts a Standardized Risk Assessment Tool to measure risk of failure to appear, risk of re-offense, and risk of future violence;
3. Provides for immediate release of low level defendants who score minimal risk;
4. Eliminates the two-tiered hearing process and provides for an initial appearance before a District Court Judge with defendant's counsel and State's Attorney present.

If passed, Senate Bill 973 would establish the statewide Pretrial Program. The Pretrial Program would reside in the Department of Public Safety & Correctional Services (DPSCS) and would be responsible for all pretrial assessments and defendant supervision. Court Commissioners would no longer conduct initial appearances. All initial appearances and bail determinations would go through a District Court Judge, eliminating the two-tiered hearing system that is currently in place, while maintaining judicial discretion.

The *DeWolfe v. Richmond* decision highlighted Maryland's duplicative pretrial process. In the existing process, first a court commissioner and then a judge compile the same key factors of a defendant's history and weigh those factors subjectively to make a pre-trial release decision. Research has shown that subjective methods often lead to the release of high-risk defendants and the detention of low-risk, non-violent defendants pending trial. Compliance with *DeWolfe v. Richmond* could potentially be costly and may not necessarily improve the effectiveness or efficiency of the pretrial system.

Senate Bill 973 would require the Pretrial Program to utilize a validated risk assessment tool to make objective determinations about a defendant. The validated risk assessment tool will be selected by the Secretary of DPSCS with the approval and collaboration of a commission created within Senate Bill 973 that is comprised of all relevant stakeholders and experts in the field. An empirically validated tool predicts the risk a defendant will commit new offenses, commit new violent offenses, or fail to appear for court. The tool would weigh evidence-based risk factors and present scores categorizing pre-trial defendants as low, moderate or high risk. In Maryland,

approximately 50% of defendants are currently released on their own recognizance (ROR) by court commissioners.

According to the Pretrial Justice Institute (PJI), validated risk assessment instruments provide an objective, standard way of assessing the likelihood of pretrial failure that research shows produces higher accuracy than bond schedules or subjective assessments.[1] A 2003 study found that programs that assess risks of pretrial misconduct in an exclusively subjective manner are more than twice as likely to have a jail population that exceeds its capacity than those programs that assess risk exclusively through an objective risk assessment instrument.[2] Through the use of a risk assessment tool, Maryland will be able to predict with greater accuracy those individuals who should be detained pretrial.

Under Senate Bill 973, defendants who score low risk will be released on their own recognizance. Defendants who score above the low risk category, will go before a judge within 24 hours of arrest for his or her initial appearance, in keeping with Maryland Rule 4-212, where he or she will be represented by counsel. The judge, based on his or her own discretion, outcomes from the risk assessment tool and additional factors presented by the public defender or defense counsel, State's Attorney, and the Judiciary, will decide to release the defendant on his or her own recognizance, set bail, or hold the defendant with no bond. The judge may also decide to impose conditions on the defendants pretrial release. These conditions will also be enforced and monitored by the Pretrial Program. Senate Bill 973 provides the option for existing local pretrial services agencies to choose to retain local programs. Local service agencies however, must adopt the statewide risk assessment tool and implement the tool in making pretrial release decisions. Local program standards and reimbursement eligibility will be formalized under an agreement with the State.

Senate Bill 973 allows for standardization in Maryland's pretrial process by creating the Pretrial Program within the Executive Branch. DPSCS currently has the expertise, staff, programming, technology and operational infrastructure required to supervise court-involved moderate and high risk individuals. Senate Bill 973 also provides for a more efficient pretrial process while still ensuring a defendant's right to be presented before a judicial officer within 24 hours, as prescribed by Maryland Rule 4-212. Additionally, the Maryland Rules allow for videoconferencing of pretrial hearings, which will expedite proceedings. Data collection will also be improved if Senate Bill 973 is passed. Senate Bill 973 creates a centralized jail management database and requires an annual statewide report that includes indicators of progress and outcomes related to pretrial policies and practice.

---

[1] Pretrial Justice Institute Fact Sheet: "Risk Assessment: Evidence-Based Pretrial Decision-Making" available at http://www.pretrial.org/download/risk-assessment/Risk%20Assessment.pdf.

[2] Pretrial Justice Institute Report "State of the Science of Pretrial Risk Assessment" cited the following research (footnote 44):
A study by Clark and Henry (2003) suggests that programs that assess risks of pretrial misconduct in an exclusively subjective manner are more than twice as likely to have a jail population that exceeds its capacity than those programs that assess risk exclusively through an objective risk assessment instrument (56 percent compared with 27 percent). In addition, 47 percent of programs that add subjective input to an objective instrument are in jurisdictions with overcrowded jails. [Clark, J. and D.A. Henry (July 2003) *Pretrial Services Programming at the Start of the 21st Century. A Survey of Pretrial Services Programs.* Washington, DC: U.S> Department of Justice, Office of Justice Programs, Bureau of Justice Assistance.]

Senate Bill 973 comports with national best practices. Validated risk assessment tools are being implemented in jurisdictions across the country because of their reliability and objectiveness. In addition to recommending the use of a risk assessment tool, both the American Bar Association and the Pretrial Justice Institute also recommend pretrial supervision and monitoring. Senate Bill 973 provides for pretrial supervision and monitoring through the establishment of the Pretrial Program. Individuals that are released with conditions, will be supervised and monitored by the Pretrial Program. The Pretrial Program will be able to connect these defendants to services in the community at an earlier stage of the criminal process than currently possible.

In short, Senate Bill 973 creates a standardized system that provides constitutional guarantees, aligns with national best practices, and retains existing local pretrial systems while standardizing a risk assessment tool to be used statewide. Senate Bill 973 not only addresses the concerns raised by *DeWolfe v. Richmond*, but also provides the state with an exciting opportunity to implement meaningful reform that will create a more efficient system, provide long term cost savings, and ensure fairness for all defendants in Maryland.

As such, the Administration requests a favorable report on Senate Bill 973.

Sincerely,

Tammy M. Brown

Tammy M. Brown
Executive Director of Governor's Office of Crime Control & Prevention

Gregg Hershberger

Gregg L. Hershberger
Secretary of the Department of Public Safety & Correctional Services

MCAA
Maryland Correctional Administrators Association

February 19, 2014

TO: Judicial Proceedings

SUBJECT: SB 973 Criminal Procedure – Pretrial Confinement and Release

POSITION: **Support with Amendments**

As Warden of the St. Mary's County Detention Center and President of the Maryland Correctional Administrators Association (MCAA), an organization comprised of our statewide jail wardens and administrators for the promotion and improvements for best correctional practices, please accept this written testimony in **support of Senate Bill 973 with amendments.**

The adoption of SB 973 will change the way all components of the judicial system have done business for decades and the Governor's Office of Crime Control and Prevention (GOCCP) has crafted a good foundation for pretrial confinement and release. However our Association strongly feels elements of the bill require significant modification to meet the needs of local corrections. As such, please find below some of our recommendations for consideration:

1. Establish a Pretrial Executive Director position in concert with the Pretrial Release Commission; similar to the structure of the Maryland Commission on Correctional Standards, and remove the Department of Public Safety and Correctional Services as the statewide oversight agency.

2. Local jail and pretrial services should have equal representation on the Pretrial Release Commission within the designation for membership composition.

3. Guarantee specific statutory language for no reduction in current Commissioner coverage hours and a 24/7 coverage for application of any adopted State Assessment Tool.

4. Judicial hearings must be conducted within 24 hours of arrest, 7 days a week.

5. Ensure the legality of administrative releases by non-judicial officers.

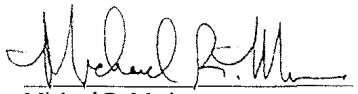
6. Ensure liability coverage by the State for any litigation initiated as a result from the use of the Assessment Tool.

7. Include funding formulas and other language that will be utilized by the designated Pretrial Service to ensure county government is fully compensated for existing and future costs for implementing the new system.

8. Remove "domestically related crime" from the exclusionary component for pretrial eligibility release.

MCAA cannot express its concerns more seriously as to the impact of this legislation, which should not increase the size of our jail populations in Maryland nor create any exemptions that have been in place under the current District Court Commissioner. Consideration must be given to the safeguarding of our institutions as to not overload our infrastructures or collapse existing best correctional practices of pretrial and community supervision within our respective counties.

MCAA has been and will continue to work very closely with GOCCP and the General Assembly in order to come to some common ground on SB 973. We hope you will take our amendments in the spirit of their intent and thank you for allowing us the opportunity to provide input and concerns.



Michael R. Merican
President

MARYLAND Association of COUNTIES

Senate Bill 973

Criminal Procedure - Pretrial Confinement and Release

MACo Position: **SUPPORT WITH AMENDMENTS**

To: Judicial Proceedings Committee

Date: February 19, 2014

From: Natasha Mehu or Michael Sanderson

The Maryland Association of Counties **SUPPORTS** SB 973, **WITH AMENDMENTS.** This broad-based bill proposes a practical reform to Maryland's administration of pre-trial risk assessment, driven by the decision of the recent *Richmond v. DeWolfe* case mandating legal representation during bail hearings. County governments and their funded agencies are an important part of any resolution on this matter, and wish to express a series of principles to help guide the work that lies ahead on these important issues.

MACo has taken a comparable position of Support with Amendments on Senate Bill 920, a bill seeking to address the same issues, and submits this statement to cover both bills.

The Approach: Initial Risk Assessment

SB 973 advances the concept of a Division of Pretrial Confinement and Release, as a new state entity replacing many functions currently performed by District Court Commissioners. The essence of this approach is to offer a statistical-based assessment at an early stage following an arrest, where risk factors may be considered with an eye toward initial release for lower-risk defendants.

With the *Richmond* decision raising both the costs and impracticalities of a full service bail review process at all hours of every day, this revised structure merits consideration.

State Responsibility, With Option to Provide Locally

The pre-arraignment risk assessment is a State responsibility. Counties have a direct stake in this process working efficiently, to minimize needless stays in local detention centers and delays in case processing. In some cases, counties may seek to operate and manage these functions locally – SB 973 is open to this local flexibility, though the mechanism to do so likely requires revision.

169 Conduit Street, Annapolis, MD 21401
410.269.0043 BALT/ANNAP • 301.261.1140 WASH DC • 410.268.1775 FAX
www.mdcounties.org

It is important to recognize that despite the term "pre-trial" being used in both cases, the functions envisioned under the new Pretrial Division are not comparable to current services offered by local correctional centers. Some counties, especially those with central booking facilities and their own pre-trial services, may have the physical space and staff structure to incorporate these new early risks assessment (albeit with new substantial staff costs), but this is not a matter of counties seeking support for current county functions.

Funding Must Remain Secure and Adequate

For counties to elect to offer these early assessment services locally, the State incentive must be both adequate to cover their reasonable costs, and must be secure enough to convince local decision-makers that the decision is sensible. Both of these goals must be addressed in amendments to SB 973 or any bill that moves forward with this hybrid structure.

On adequacy, MACo suggests that the best model is for the State to commit via statute to a reimbursement of actual costs. Counties could work with the appropriate State actor to submit and explain their costs of providing the services comparable to those undertaken by the State pretrial division, and would be compensated by State funds for doing so. This budgeting-by-reimbursement model has worked in other functional areas. A formula-driven approach, mandated in statute, could also be workable, but will likely overlook specific jurisdictional differences and leave many costs uncompensated.

On security, MACo would urge the Committee to include statute directing the Governor to include certain prescribed funding into each annual budget. Statute may bind the actions of the General Assembly, but it may oblige the Executive to provide these funds in clearly delineated amounts or formulas. This model is the only means to offer security to counties that the State funding will be provided each year, rather than an annual funding battle for fully discretionary appropriations.

With reasonable components to address both adequacy and security, the State maximizes the participation of county systems, which likely can better address the justice and administrative needs of those jurisdictions. This partnership is worth defending.

Any New System Should Not Increase Jail Populations

All stakeholders engaged in the process agree that the reforms to the pretrial processes should not yield an increase in jail populations. This policy objective requires several components of legislation to avoid a failure in this regard. Notably:

> A defendant who is not released through the early assessment must be brought to a District Court judge within 24 hours, a 48 hour delay is not reasonable.

The State-provided assessment functions must provide 7 day, 24 hour service– with appropriate staffing levels and redundancies to ensure this.

A major risk of not carefully anticipating and addressing the needs of this system would be an unwieldy or understaffed s\State agency, where caseloads are not attended efficiently. Such a resolution would not only frustrate the goals of swift early screening, but also would lead to greater burdens for short-term stays in correctional facilities. Most counties simply lack the space and staff to adequately respond to a major failing in this regard.

Pretrial Release Commission

The last, uncodified, section of SB 973 establishes the Pretrial Release Commission. This multi-member body is charged with developing the risk assessment tool and overseeing processes to ensure that policy goals of these early assessments are being faithfully upheld. Counties feel this Commission serves a worthy purpose – but should be more than a transitional body.

Pretrial services are currently managed by local correctional facilities, and that is the source of most of Maryland's expertise. Inviting only one member of the Maryland Correctional Administrator's Association denies participation from the breadth of different management structures and procedures being used locally in various counties – MACo suggests that a much wider presence from local correctional administrators would serve the body well.

Further, the short-term nature of the proposed Commission (sunsetting in 13 months in SB 973) likely overlooks the ongoing oversight and collaboration that will be needed as these services evolve. Making the Commission a permanent standing body would better serve these employees and processes.

Conclusion

MACo hopes that the statements and principles above can help guide the Committee in deliberating this important issue. We further attach ourselves to the more substantive and numerous amendments that will be forthcoming from the Maryland Correctional Administrators' Association – whose insights into pretrial processes are absolutely essential.

MACo hopes that county governments, local corrections officials, and state's attorneys will remain deeply involved in the ongoing legislative work on this issue. While we do not believe that SB 973 (or any particular bill) currently represents the full answer to this vexing issue, we are optimistic that a collaborative effort can yield a workable outcome. We urge that SB 973 be amended to reflect the principles stated herein, and would **SUPPORT** such an amended bill.

AMERICAN CIVIL LIBERTIES UNION of MARYLAND

SARA N. LOVE
PUBLIC POLICY
DIRECTOR

Testimony for the Senate Judicial Proceedings Committee
February 19, 2014

SB 973 – Criminal Procedure – Pretrial Confinement and Release

SUPPORT WITH AMENDMENTS

The ACLU of Maryland supports SB 973 and offers several amendments. SB 973 provides many important solutions to the implementation challenges posed by *DeWolfe v. Richmond*, 434 Md. 444, 76 A.3d 1019 (2013)("*Richmond II*") as well as some needed reforms to our pretrial system, and we commend the sponsor for the thoughtful and thorough approach. We raise several points below, along with our proposed amendments.

First and foremost, we support the establishment of a pretrial services division.[1] As detailed in the Pretrial Justice Institute's report to the Pretrial Release Subcommittee of the Governor's Task Force On Laws and Policies Relating to Representation of Indigent Criminal Defendants ("PJI Report" to the "Task Force"), not all counties have a pretrial services division and the only state one is in Baltimore. Having a statewide pretrial services division is a necessary prerequisite to alternatives to detention, as not all defendants are going to be released on their own recognizance and may need supervision, reporting, or other support.

AMERICAN CIVIL LIBERTIES UNION OF MARYLAND

MAIN OFFICE
& MAILING ADDRESS
3600 CLIPPER MILL ROAD
SUITE 350
BALTIMORE, MD 21211
T/410-889-8555
or 240-274-5295
F/410-366-7838

FIELD OFFICE
6930 CARROLL AVENUE
SUITE 610
TAKOMA PARK, MD 20912
T/240-274-5295

WWW.ACLU-MD.ORG

Second, we support the use of a validated risk assessment. As the Pretrial Justice Institute noted, adopting a data-driven risk assessment tool could be 'transformative' to our pretrial justice system. Pretrial release decisions should be made on an evidenced-based standard, rather than instinct, experience and personal perspective. Such a transformation could well further the goals of increasing public safety, reducing crime, and helping individuals get back on track.

The first amendment we propose would be to 5-303(B)(3), listing the responsibilities of the Pretrial Release Services Program (the "Program"). Under 5-303(B)(3), the Program is required to prepare a report for the appropriate judicial officer "with or without a recommendation regarding pretrial release." As the Task Force recommended, the Program should make a recommendation to the judicial officer, based upon the data they get and using the validated risk assessment. If the judicial officer then decides a different outcome for the defendant, the officer should record the reasons for doing so. This is a key check and balance to the system, ensuring that the decisions made for the defendant are appropriately based upon the validated risk assessment and not other, impermissible factors.

[1] Whether this should be housed within the Department of Public Safety and Correctional Services or the Judiciary was the subject of debate within the Pretrial Release Subcommittee of the Governor's Task Force On Laws and Policies Relating to Representation of Indigent Criminal Defendants (established pursuant to HB 261 passed in 2012 and on which ACLU of Maryland Senior Staff Attorney David Rocah served) and there are valid concerns to each.

Third, we support 5-303(c) insofar as it allows the Pretrial Release Services Program to release people per the risk assessment. However, we are concerned that the verbiage in 5-303(c)(2) is "may." Allowing that flexibility for low risk persons invites abuse. We suggest an amendment changing "may" to "shall" with respect to administrative release (with the exception of certain statutory categories) of persons deemed low risk on the validated assessment. In addition, there is no deadline for the administrative release decision. It should be less than 24 hours from arrest.

Fourth, Section 9-614 requires the Secretary of DPSCS to establish and maintain an electronic sharing system on each inmate. Implementing a shared jail management database system was a recommendation by the task force. However, the ACLU of Maryland is very concerned with the amount of information the government collects and keeps on individuals, so we encourage the committee and those charged with establishing and overseeing this system to ensure tight controls on who can access the information and for what purpose. For example, the system should not used to track individuals who have completed their connection with the criminal justice system.

AMERICAN CIVIL
LIBERTIES UNION OF
MARYLAND

Fifth, SB 973 amends Courts and Judicial Proceedings §2-607 to eliminate commissioners from the bail setting/initial appearance process. This is in line with the Task Force recommendation, with one key exception: SB 973 does not appear to maintain the requirement that persons be presented to a judge (in lieu of a commissioner) within 24 hours. The importance of this cannot be understated, both from a constitutional perspective as well as from a public safety and a human standpoint. The constitutional standard for a probable cause determination (for warrantless, on view arrests) is 48 hours. *See City of Riverside v. McLaughlin* 500 U.S. 44 (1991). Under Maryland Court Rule 4-212(f) for warrantless arrests, the bail hearing must take place within 24 hours. Virtually every other state makes an initial bail determination within 24 hours.

More fundamentally, people shouldn't spend longer in jail waiting for a pretrial release decision under a reformed system. The length of pretrial detention is a key determinant of many outcomes: longer than 24 hours and an individual is more likely to lose his job, housing and educational opportunities. Detention longer than 24 hours increases dramatically an individual's risk of recidivism, both in the short-term and in the long-term.

This challenge is exacerbated by completely eliminating commissioners from the initial appearance process. For those times when District Court judges are not available, the initial appearance should be before a commissioner using the same standards as appearances under the new rules before judges. And those defendants who are held should retain the right to bail review hearing within 24 hours in front of a District Court judge.

Our final amendment is the Task Force's recommendation of the elimination of cash bail. A person's liberty should not be determined by their financial ability. A system in which a low-risk individual is incarcerated because they cannot pay

and a high-risk individual is released because they can pay does not support public safety, places a burden on the system due to the need to incarcerate those who cannot pay, damages those individuals who are incarcerated for being poor, and has the effect of creating more crimes and more problems due to that incarceration. Research – reports specific to Maryland as well as country-wide – American Bar Association standards and current examples in jurisdictions across the country show that reducing or eliminating money bonds and relying on validated risk assessment tools and pretrial release services can not only increase release rate but also increase the appearance rate and public safety rate. *See,* PJI Report.

For the foregoing reasons, the ACLU of Maryland supports SB 973 with amendments.

AMERICAN CIVIL
LIBERTIES UNION OF
MARYLAND