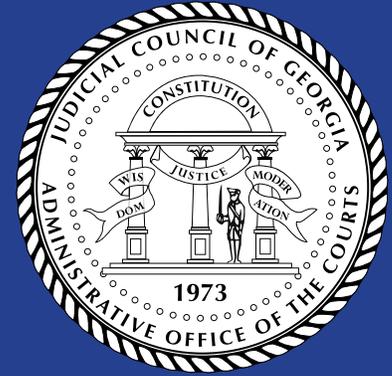


Report of the Judicial Council Ad Hoc Committee on Misdemeanor Bail Reform

Hon. Wayne M. Purdom
Committee Chair



[O]ur present attitudes toward bail are not only cruel but really completely illogical. What has been demonstrated here is that usually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is simply money. How much money does the defendant have?"

*Attorney General Robert F. Kennedy
1964 National Conference on Bail and Criminal Justice*

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Executive Summary

Research and Background Information

Current Federal Litigation and Georgia Law

O.C.G.A. § 17-6-1(b)(1) gives defendants a statutory right to an initial bond in all misdemeanor cases, but there is little authority as to what that means in setting the amount of a secured bond. Recent important federal authority, particularly *O'Donnell v. Harris County*, hold that the procedure for setting misdemeanor bonds is subject to heightened, intermediate scrutiny. The State must show a “link between financial conditions of release and appearance at trial or law-abiding behavior before trial.” Examining the evidence presented, the Court found that the State in *O'Donnell* had failed to meet this burden. The Fifth Circuit laid out requirements for the review of defendants’ financial condition within 48 hours with a hearing and factual findings if continuing a secured bond.

In Georgia, *Walker v. City of Calhoun* (N. Dis. Ga. Civil Action No.: 4:15-CV-0170-HLM) also subjected money bonds to intermediate scrutiny. The current district court order requires the court to evaluate the financial circumstances of arrestees within 24 hours of arrest. Currently, this case is before the 11th Circuit for review of the District Court’s preliminary injunction. Similar litigation has been conducted or is pending in many jurisdictions.

Research on Bail Practices

The Committee received technical assistance from the Pretrial Justice Institute, heard presentations from Professor Lauren Lucas, Georgia State College of Law, and Professor Sandra Mayson, University of Georgia Law School. Professor Mayson’s study of Harris County’s bail practices was of particular interest to the Committee because of its large and rich data base and the fact that it has been found authoritative in federal court. It also presented an opportunity to conduct

a natural experiment in addition to standard statistical analysis on Houston’s bail practices. One key finding was that the negative consequences of a short term pretrial incarceration could be severe. Jail stays as short as two to three days resulted in a significant increase in the likelihood of a new charge while the initial case was pending and also in an increased likelihood of recidivism after the initial case was adjudicated. Research shows that short periods of pretrial incarceration also actually increase the likelihood of a failure to appear for a low risk defendant.

Defendants who are detained pretrial often receive much harsher sentences than those who are released. Research reviewed by the Committee consistently showed that detained defendants classified as low or medium risk, as well as detained misdemeanor defendants generally, were much more likely to receive a jail sentence than those who were released. In addition to harsher sentences, misdemeanor defendants who were incarcerated pretrial pleaded guilty at a substantially higher rate than those who were released.

The research reviewed by the Committee showed that many of these negative outcomes due to pretrial detention have a disproportionate effect on people of color. Despite all the negative outcomes associated with pretrial detention, the Committee found the use of secured bonds had no statistically significant difference in arrestees’ court appearance rate or public safety rate. While the Committee found it difficult to find precise numbers on the cost of pretrial incarceration in Georgia, it is clear that jail costs for defendants detained pretrial represent a significant expense to local governments. Furthermore, jail costs do not include the indirect costs of pretrial detention in the form of greater recidivism.

National Bail Reform Efforts

The past four years have seen a significant expansion of bail reform efforts across the country. Policy papers from the Conference of State Court Administrators, supported by the Conference of Chief Justices, endorsed the use of evidence based risk assessments. In addition to Georgia's efforts in bail reform, four other states have recently reformed their bail laws; several other states have appointed task forces to do

the same. Of particular note is the state of New Jersey. New Jersey conducted a major reform of its bail laws, and went so far as to mandate the use of pretrial risk assessments for all levels of crimes. Judge Glenn Grant, Director, New Jersey Administrative Office of the Courts, spoke with the Committee via video conference, about the political challenge of his state's reform efforts as well as the issues involved in the adoption of a pretrial risk assessment tool.

Stakeholder Recommendations

The Committee heard presentation from several stakeholders. Groups from the law enforcement community, social justice groups, the bail bonding industry, and local government associations all voiced their thoughts and concerns on bail reform.

Many groups voiced support for the increased use of citations for lower level offenses; however, there was no consensus as to which offenses

should be eligible for citation in lieu of arrest. There was also concern from law enforcement groups regarding identity theft.

Risk assessment tools were controversial for many of the stakeholder groups. Some groups were concerned about pre-existing biases in risk assessment tools, while other groups had concerns about risk assessment tools usurping judicial discretion.

Findings & Recommendations

The Committee made several recommendations in its interim report. Many of these recommendations were submitted to the Criminal Justice Reform Council with the intention that these rec-

ommendations become part of the Reform Council's legislative package. Other recommendations were created to set out a number of best practices courts could adopt in setting bail.

Ability-to-Pay Determination

The Committee recommended a statutory requirement for courts to consider financial circumstances in setting bail, and that courts conduct an ability-to-pay hearing within 24 hours of arrest. These recommendations were accepted by the

Ability-to-Pay Determination

The Committee recommended a statutory requirement for courts to consider financial circumstances in setting bail, and that courts conduct an ability-to-pay hearing within 24 hours of arrest. These recommendations were accepted by the Reform Council, and were included in the Council's reform bill, SB 407 (2018). However, the bill did not include a set time for an ability-to-pay hearing, only stating that the hearing must take place, "as soon as possible."

Citations in Lieu of Arrest

The Committee recommended the increased use of citations by police officers on certain low-level misdemeanors. To that end, the Committee also recommended that the Judicial Council develop a uniform misdemeanor citation form for low level misdemeanors. While there was general agreement among stakeholders that the increased use of citations for low level misdemeanors would have a net positive effect, there was no consensus over which misdemeanors would be eligible for citations, and there were concerns over identification of defendants, particularly repeat offenders, by members of the law enforcement community.

Ultimately, this recommendation was accepted, but only as it applied to O.C.G.A. § 16-7-21, Criminal Trespass; O.C.G.A. § 16-8-14, Theft by Shoplifting; O.C.G.A. § 16-8-14.1 Theft by Refund Fraud; and O.C.G.A. § 16-13-30, misdemeanor drug offenses. SB 407 also created a requirement that persons issued a citation for non-traffic misdemeanors be fingerprinted before they are released which could eliminate the advantage of citations in allowing efficient use of law enforcement's time.

Reform Council, and were included in the Council's reform bill, SB 407 (2018). However, the bill did not include a set time for an ability-to-pay hearing, only stating that the hearing must take place, "as soon as possible."

Alternatives to Monetary Bond

The Committee recommended several measures to give courts alternatives to monetary bonds in misdemeanor cases. Permitting a court to release a defendant on a non-monetary bond for charges that do not authorize jail time and creating a statutory provision to authorize unsecured bonds were two of the Committee's recommendations. The Committee also recommended the creation of a body to study the use of statutory authorized alternatives to monetary bond. None of the above recommendations were included in SB 407.

Individualizing Bail Determinations

The Committee recommended allowing any judge of a court of inquiry to have the ability to set a bond and allowing non-elected judges the ability to set bond on bail restricted offenses when they are sitting by designation. The Committee also recommended eliminating bail schedules for family violence offenses. All of these recommendations were accepted by the Reform Council and included in SB 407.

The Council also recommended that arrestees be released on the least restrictive conditions. This recommendation was accepted by the Council and included in SB 407. However, the language was changed during the legislative process to read "not impose excessive bail and shall impose only the conditions reasonably necessary to ensure such person attends court appearances and to protect the safety of any person or the public given the circumstances of the alleged offense and the totality of circumstances."

Effective Pretrial Release

A recommendation to establish authority for pretrial release programs was tabled so that more research could be done. No legislation was created, but the Judicial Council may wish to consider changing uniform court rules to follow this recommendation. The recommendation for funding risk assessment tool pilot programs was not accepted by the Reform Council. The Committee also recommended establishing a uniform definition of failure to appear, but this recommendation did not result in any new legislation. The Council agreed to accept the Committee's recommendation of a statewide judicial inquiry system, but the Council also agreed that this recommendation was aspirational. Many aspects of a statewide judicial inquiry system will be included in the Criminal Justice Data Exchange.

The Reform Council accepted the recommendation that courts increase the use of electronic reminders, and court notices be exempt from the opt in requirements of text messages. These recommendations did not require new state legislation.

Conclusion and Next Steps

While significant changes have been made to Georgia's misdemeanor bail laws, there is still much work to be done. More data is needed to establish which pretrial practices are most effective. Additional work in the use of misdemeanor citations is needed to establish a workable and efficient citation system for non-traffic misdemeanors. Further efforts should be made in the study of risk assessment tools as these tools develop. While these tools are no substitute for judicial

Best Practices

In addition to legislative recommendations, the Committee recommended a set of best practices that do not require legislation, but which, if adopted, will lead to more effective and just bail practices.

First among these is the promotion of judicial education on bail reforms and best practices for pretrial release. This can be accomplished through ICJE as well as bench cards.

The Committee recommended that the Judicial Council create a committee to institute a system of data collection in order to determine the effectiveness of various pretrial practices. During its research, one of the problems consistently encountered by the Committee was a lack of statewide data on bail practices, and further study and data is needed in this area. The Committee also recommended the establishment of a statewide repository of bond schedules.

The Committee saw the need for courts to have additional options for pretrial release, and it was recommended that the Uniform Superior Court Rules be updated to effect this change.

discretion, they can assist judges in making bail decisions provided the tool has been properly validated for effectiveness and lack of bias. Felony bail reform was not within the scope of this Committee, but it is clear that reform in this area of law and court practices is needed as well.

The Judicial Council Ad Hoc Committee on Bail Reform respectfully submits this report to the Judicial Council.

Committee Members, Technical Advisors & Staff

The committee, which was led by Chief Judge Wayne M. Purdom of DeKalb County State Court, included members from the Superior Court, State Court, Magistrate Court, Probate Court and Municipal Court.

Committee Members

- Chief Judge Wayne M. Purdom, DeKalb County State Court (Chair)
- Chief Judge Brenda Weaver, Appalachian Circuit Superior Court
- Senior Judge Melodie Clayton, Cobb County State Court
- Chief Judge Russ McClelland, Forsyth County State Court
- Chief Judge Ben Studdard, Henry County State Court
- Judge Mark Mitchell, Thomas County State Court/Thomasville Municipal Court
- Judge Michael Barker, Chatham County Magistrate Court
- Chief Judge Robert Turner, Houston County Magistrate Court
- Chief Judge Berryl Anderson, DeKalb County Magistrate Court/Decatur Mun. Crt.
- Chief Judge W. Allen Wigington, Pickens County Magistrate Court/Probate Court
- Judge Rooney Bowen, Dooly County Probate Court
- Judge Matthew McCord, Stockbridge Municipal Court
- Chief Judge Mary Kathryn Moss, Chatham County Magistrate Court

Supreme Court Liaison

- Justice Michael P. Boggs

Technical Advisors

- Bob Bray, Executive Director, Council of State Court Judges
- Sharon Reiss, Executive Director, Council of Magistrate Court Judges
- Tracy "T.J." BeMent, District Court Administrator, 10th Judicial District

Administrative Office of the Courts Staff

- James Rodatus, Policy Analyst
- Robert Aycock, Trial Court Liaison

Foreword

The committee would like to extend its appreciation for the hard work and effort of all of its members, technical advisors and project staff. Thanks goes as well to the stakeholder representatives and others who have shared their thoughts. And finally, the committee thanks both the Judicial Council/Administrative Office of the Courts and the Criminal Justice Reform Council for supporting the committee in its mission.

Committee Mission

Research nationwide bail practices, interview interested stakeholders in Georgia, and produce a report on the Committee's findings to be shared with the Judicial Council, and the Council on Criminal Justice Reform.

Committee Goal

Review current misdemeanor pretrial detention, bail and release in Georgia to make recommendations for possible reforms with a focus on maintaining current practice, but allowing greater options ("tools") for judges to be able to use locally. The Committee's goals in considering changes to bail practices were threefold:

- 1) Maximize public safety;
- 2) Maximize pretrial appearances;
- 3) Maximize personal liberty.

Summary of Activities

In addition to numerous meetings, conference calls and discussions, the committee received technical assistance, conducted a site visit, and received input from numerous stakeholders.

Technical Assistance Invitees and Site Visits

- ❖ Pretrial Justice Institute
- ❖ Fulton County Pre-trial Services Office
- ❖ Georgia State University Law School's Center for Access to Justice
- ❖ University of Georgia Law School
- ❖ New Jersey Administrative Office of the Courts
- ❖ Kentucky Administrative Office of the Courts – Pretrial Services

Stakeholder Invitees

- ◆ Georgia Sheriff's Association
- ◆ Georgia Association of Chiefs of Police
- ◆ American Civil Liberties Union
- ◆ Southern Center for Human Rights
- ◆ Georgia Association of Professional Bondsmen
- ◆ Georgia Municipal Association
- ◆ Association County Commissioners of Georgia
- ◆ Prosecuting Attorneys' Council
- ◆ Georgia Association of Solicitors-General

Information Gathering Efforts

- ✓ Legal analysis of pending litigation around the country (GSU Law School)
- ✓ Review of bail and pretrial detention in Houston, TX (UGA Law School)
- ✓ Current bail and bond practices in Georgia (Survey of over 275 judges)
- ✓ Review of articles, caselaw, and research
- ✓ Review of possible statutory and rulemaking changes

Enacted Legislation – SB 407

During the course of several months, the members of the committee met with representatives of various stakeholder groups and developed a set of recommendations. These recommendations were presented to the Criminal Justice Reform Council, which reviewed them and incorporated several into SB 407. This bill was part of Governor Nathan Deal's criminal justice reform package during the 2018 legislative session. The language of SB 407, including provisions relating to bail reform, was revised during the legislative process prior to the bill receiving final passage.

What Bail is and Why it is Used ¹

When a person is arrested, the court must evaluate whether the person will be unconditionally released pending trial, released subject to a condition or combination of conditions, or held in jail during the pretrial process. Any outcome other than unconditional release should be justified by a finding of a significant risk that the defendant will not appear at future court appearances or will commit a serious crime in the community during the pretrial period. In some very rare instances, a judge will determine that there is no condition or combination of conditions that can adequately address those risks; in those instances, a judge decides that the person is non-bailable and should be subject to pretrial detention.

If, however, the judge decides that the person may be released prior to their court date, then the person is bailable and several options are available. The judge can release the person on their own personal recognizance, meaning that the person promises to reappear for scheduled court dates in the future. Alternatively, the judge may conditionally release the person such that their continued freedom is subject to certain nonmonetary conditions, such as pretrial supervision or participation in a substance treatment program.

The court can also conditionally release the

person by imposing a secured or unsecured bond. A secured bond typically allows a defendant to be released only after s/he pays the monetary amount set by the court, though a bond may also be secured by the defendant's property (such as a house). When bond is unsecured, the defendant will owe the unsecured bond amount if s/he fails to appear in court.

When secured money bonds are used, the amount of money set by the court that a person is obligated to pay as a condition of their release is that person's cash bail or money bail. The person may be released upon posting a bond, or in some cases a percentage, usually around 10 percent, of the total bond amount. Sometimes the person may be able to make that 10 percent payment directly to the court, which will often return the percentage payment if the defendant makes all required pretrial appearances. But in many instances, if the person does not have enough money to pay the money bail set by the court, a bail bonds agent, also known as a surety, may make the payment for them via a surety bail bond. If the person cannot make the payment, either personally or through a surety, s/he will remain incarcerated due on their inability to pay the money bail.

¹The following is excerpted from Harvard Law School's *Moving Beyond Money: A Primer on Bail Reform* found at <http://cjjp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>

Georgia Laws on Bail and Pretrial Release

Georgia Law on Misdemeanor Bail

Ga. Const. Art. I, § I, Para. XVII provides that “[e]xcessive bail shall not be required,” however, this provision does not grant a right to bail. The right to bail instead is governed by statutory provisions.² O.C.G.A. § 17-6-1(b)(1) gives defendants a right to an initial bond prior to trial in all misdemeanor cases.³ The Court may impose reasonable conditions as a condition of bond to protect the safety of third parties and avoid intimidation of witnesses, as well as to enhance the likelihood of a defendant’s appearance at trial. The court has “the inherent power of the trial court to impose conditions of bail in order to safeguard against the factors that otherwise would prevent release on bail bond.”⁴ Even when there are no conditions of bond, bond may be revoked when there is evidence of subsequent criminal conduct directed at the victim.⁵ The right to bail in misdemeanor cases extends only to the initial bail; once bail has been revoked, the automatic right to bail ceases.⁶

In contrast to appellate authority on conditions of release, there is little authority in Georgia analyzing monetary bond amounts in misdemeanors, with the most recent case appearing to

be from 1964. “Excessive bail is the equivalent of a refusal to grant bail;” however, this holding has been tempered by the principle that decisions as to bond amounts would only be reversed for a clear abuse of discretion.⁷ In one of the few misdemeanor cases analyzing the amount of a monetary bond, the Supreme Court concluded that the inability of the defendant to post bail for a prolonged period showed the bond to be excessive despite his poor risk factors and his eighteen months sentence.⁸

Historically, Georgia only analyzed bond amounts in misdemeanor cases in terms of risk of non-appearance with the seriousness of the crime considered with reference to the likelihood of the defendant appearing at trial.⁹ The circumstances, if any, under which a misdemeanor bond in an amount in excess of that the defendant is capable of posting can be a reasonable bond is unclear.¹⁰

As a practical matter it appears, based upon the Committee’s inquiries, that the initial setting of bond often takes place in the absence of any detailed examination of the defendant’s record. For many offenses, whether the crime is a misdemeanor or a felony depends upon whether the defendant is a recidivist.¹¹

²*Constantino v. Warren*, 285 Ga. 851, 684 S.E.2d 601 (2009).

³O.C.G.A. § 17-6-1 (b)(1) provides: “Except as provided in subsection (g) of this Code section, at no time, either before a court of inquiry, when indicted or accused, after a motion for new trial is made, or while an appeal is pending, shall any person charged with a misdemeanor be refused bail.” The exceptions in subsection (g) all involve appeal bonds.

⁴*Clarke v. State*, 228 Ga. App. 219, 221, 491 S.E.2d 450, 452 (1997); accord, *King v. State*, 300 Ga. 180, 794 S.E.2d 110 (2016) (appeal bond in county ordinance case); but see *Dudley v. State*, 230 Ga. App. 339, 341, 496 S.E.2d 341, 343 (1998) (reasonable conditions insufficiently related to offense).

⁵*Clarke*, 228 Ga. App. at 491 S.E.2d at 453; see O.C.G.A. § 17-17-7(f): “If the court has granted a pretrial release or supersedeas bond, the victim shall have the right to file a written complaint with the prosecuting attorney asserting acts or threats of physical violence or intimidation by the accused or at the accused’s direction against the victim or the victim’s immediate family. Based on the victim’s written complaint or other evidence, the prosecuting attorney may move the court that the bond or personal recognizance of an accused be revoked.”

⁶O.C.G.A. § 17-6-13; see *Clarke v. State*, 228 Ga. App. 219, 221, 491 S.E.2d 450, 452 (1997).

⁷*Jones v. Grimes*, 219 Ga. 585, 585, 134 S.E.2d 790, 791 (1964). The remedy for excessive bail is a writ of habeas corpus, however, which is normally impractical in a misdemeanor case, and accounts for the dearth of appellate cases analyzing pretrial release bail in misdemeanor cases.

⁸[T]he defendant has no business, no property, and no residence in this State, has no fixed abode anywhere, lives on a government pension paid from California, came to visit his sister in Georgia and has been here only a few months and has been in and out of jail since coming here; his fingerprint record shows arrests in Louisiana, Mississippi, Maryland, New Mexico, Indiana, Oklahoma, North Carolina, Pennsylvania, Florida, and Texas; he has been a frequent law violator having served a Federal sentence of eight months in Kentucky; sixty days and six months in Louisiana; \$ 500 and six months in Mississippi; paid fines in Louisiana and New Mexico; thirty days sentence in Florida and is now out on appeal bond in Marshall, Texas.” However, the defendant had no history of non-appearances. *Jones v. Grimes*, 219 Ga. 585, 587-88, 134 S.E.2d 790, 792 (1964); but see *Reid v. Perkerson*, 207 Ga. 27, 60 S.E.2d 151 (1950) (with two ordinance counts, punishable by a maximum of 180 days and \$400 fine, a bond of \$1000 was upheld, and the court held the standard for reversal to be a “flagrant” abuse of discretion).

⁹“The gist of the problem confronting a court in setting the amount of bail is to place the amount high enough to reasonably assure the presence of the defendant when it is required, and at the same time to avoid a figure higher than that reasonably calculated to fulfill this purpose, and therefore excessive. Many factors are to be considered in fixing bail, some of which are ability of the defendant to give bail, the seriousness of the offense, penalty, char-

Federal Litigation

Recent Federal Case Law on Monetary Bonds

Recent federal authority imposes federal constitutional limitations on the imposition of monetary bonds in criminal cases. The leading case at present in this area is *O'Donnell v. Harris County*.¹² That case found due process procedural rights in the process of adjudicating misdemeanor bonds, including financial circumstances, to be a category subject to heightened intermediate scrutiny in the setting of bonds. The effect of this heightened analysis was that the burden was on the State to show a “link between financial conditions of release and appearance at trial or law-abiding behavior before trial,” and that a thorough review by the trial court of bond studies, as well as the empirical data in Harris County, showed that the State had failed to establish any such link.¹³

Further, the Fifth Circuit recognized that “when the accused is indigent, setting a secured bail will, in most cases, have the same effect as a detention order.”¹⁴

The procedural protections required in bail setting were found to begin with notice to the defendant of a process for presenting financial information by affidavit to the court. When the defendant attests that he is unable to post the secured bond set by the court, further requirements come into play. Those are: (1) a hearing at which the arrestee has an opportunity to be heard and to present evidence; (2) an impartial decision-maker; (3) a written or recorded statement by the factfinder as to the evidence relied on to

find that a secured bond is the only reasonable way to assure the arrestee’s appearance at hearings and law-abiding behavior before trial; and, (4) timely proceedings within 48 hours of arrest.¹⁵ Additionally, in the specific context of Harris County, the Fifth Circuit found that further specific injunctive relief was warranted, including requiring pretrial services to inform defendants of the process of completing a financial affidavit, that the financial affidavits be completed within 24 hours, detailed specifications of the contents, strict time limits on any verification, and specifications of how defendants with other holds were to be processed. Finally,

The question is neither the arrestee’s immediate ability to pay with cash on hand, nor what assets the arrestee could eventually produce after a period of pretrial detention. The question is what amount the arrestee could reasonably pay within 24 hours of his or her arrest, from any source, including the contributions of family and friends.¹⁶

Also, of special interest in Georgia are the trial level decisions in *Walker v. City of Calhoun* (N. Dis. Ga. Civil Action No.: 4:15-CV-0170-HLM). In this case, the district court similarly found that monetary bonds were subject to a heightened intermediate scrutiny analysis under the equal protection clause, but in contrast to *O'Donnell* determined that the 48-hour period for conducting probable

acter and reputation of the accused, health, probability of the defendant appearing to serve sentence, forfeiture of other bonds, and whether a fugitive. In setting the amount of bail, the principal factor considered, to the determination of which most other factors are directed, is the probability of the appearance of the accused, or of his flight to avoid punishment.” *Id.* (internal quotations and citations omitted).

¹⁰In *O'Donnell v. Harris Cty.*, 882 F.3d 528 (5th Cir., 2018), the Fifth Circuit reversed the trial court’s determination that Texas law giving a right to bail in misdemeanor cases always required a bond that the defendant was financially able to post.

¹¹Some of the most common examples are family violence battery (O.C.G.A. § 16-5-23.1 (f)(2)(B)), shoplifting (O.C.G.A. § 16-8-14(b)(1)(C)), refund fraud (O.C.G.A. § 16-8-14.1), and battery against the same victim (O.C.G.A. § 16-8-23.1(e)). In several circumstances, determining whether the recidivist qualification applies requires more information than is available in a GCIC report.

¹²*O'Donnell v. Harris Cty.*, 882 F.3d 528 (5th Cir., 2018).

¹³See *Consequences of the Use of Cash Bail*, *infra*.

¹⁴*O'Donnell*, 882 F.3d at 541.

¹⁵The Fifth Circuit found that the basic time requirements for the finding of probable cause following a warrantless arrest in *Riverside County v. McLaughlin*, 500 U.S. 44, 53 (1991), were applicable to the examination of financial capacity to post a secured bond.

¹⁶*O'Donnell*, 882 F.3d at 547

cause review was not satisfactory in the context of monetary bonds. The initial injunctive relief ordered by the trial court was rejected by the Eleventh Circuit as too indefinite an order under F.R.C.P. 65(d) and, upon remand, the trial court issued new injunctive relief with more specific direction. The order required the city to release city ordinance violators on unsecured bonds, enable arrestees to fill out financial affidavits for the court with an administrative or judicial review within 24 hours, and release defendants without holds in other misdemeanor cases who meet the federal poverty guidelines within 24 hours. The *Walker* case is presently before the Eleventh Circuit on the issue of the preliminary injunction.¹⁷

As suggested in *O'Donnell*, since monetary conditions on pretrial release are subject to an intermediate scrutiny analysis, this impacts how courts should view research and other evidence on the effects of monetary bonds. Generally, “[t]o withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.”¹⁸ In other words, “[i]n applying intermediate scrutiny courts determine whether there is a reasonable fit between the law and an important government objective [internal quotations omitted].”¹⁹ Such a standard would seem to imply, as suggested by *O'Donnell*, that the burden is on the government to demonstrate the reasonable fit between the government’s use of monetary bonds and the objectives of enhancing the appearance rate of defendants or the safety of the community.

*Other Federal Litigation*²⁰

Mock, et al v. Glynn County (S.D. Ga. 2018) (pending)

The plaintiffs accuse officials in the county of operating a two-tiered system of justice based on wealth, in violation of the right-to-counsel and due process clauses of the U.S. Constitution’s Sixth and Fourteenth amendments, and equal protection clause of the Fourteenth Amendment. The ACLU filed a motion for class certification and motions for a temporary restraining order and a preliminary injunction.

Similar suits are pending around the country: e.g., *Parga, et al. v. Tulsa County, et al.*, (N.D. Ok. 2018); *Daves, et al. v. Dallas County, et al.* (N.D. Tex 2018).

Little v. Frederick, et al., (W.D. La. 2017) (pending)

Challenge to bail policy similar to *O'Donnell*. Defendants motion to dismiss denied based upon the *O'Donnell* decision.

Martinez v. City of Dodge City (D. Kan. 2016)

Plaintiff filed suit against Dodge City, claiming that the City’s bail policy violated his Fourteenth Amendment right to due process and equal protection by jailing him when he could not afford to pay the amount generically set for bail. In the order, the court held that it is inconsistent with the Equal Protection Clause to put a person in custody after a non-warrant arrest because he is too poor to post a monetary bond. It also entered an injunction ordering that individuals arrested in Dodge City for violation of munic-

¹⁷*Walker* contains no due process analysis, and the preliminary injunction only protects indigent defendants without procedural protections for the non-indigent unable to make a secured bond set by the court. It does not contain a comparable standard to *O'Donnell* as to the capacity to make a secured bond within 24 hours.

Plaintiff filed suit against the City of Calhoun, claiming that his Fourteenth Amendment rights to equal protection and due process were violated when the City held him in pretrial detention due to his inability to make a generically set monetary payment. In January 2016, the court issued a preliminary injunction ordering the City to implement post-arrest procedures that comply with the Constitution (and specifying that, until then, it had to release any misdemeanor arrestees on their own recognizance or on an unsecured bond) and that the City could not keep arrestees in custody for any amount of time solely because they cannot afford to pay a monetary bond. The City appealed the district court’s order, and the U.S. Court of Appeals for the Eleventh Circuit vacated the district court’s preliminary injunction (682 Fed. App’x 721 (2017)) on the grounds that it failed to provide specific direction to the City as to how to make its misdemeanor bond practices constitutional.

¹⁸*Clark v. Jeter*, 486 U.S. 456, 461 (1988).

¹⁹*Hertz v. Bennett*, 294 Ga. 62, 66-67, 751 S.E.2d 90, 94 (2013).

²⁰Much of the following is excerpted from material provided to the Committee by the Georgia State University’s Center for Access to Justice found at <https://law.gsu.edu/files/2017/08/9.13-Final-Bail-Reform-Report-Center-for-A2J.pdf>

ipal ordinances be released on their own recognizance without further conditions of release and without requiring any monetary bond.

Varden v. Clanton (M.D. Ala. 2015)

Plaintiff filed suit against the City of Clanton, claiming that the terms of Clanton's generic bail schedule violated her Fourteenth Amendment rights to substantive and procedural due process, the Eighth Amendment's prohibition on Excessive Bail, and the Supreme Court's rulings requiring individual consideration of circumstances for non-excessive and reasonable bail. While the case was pending, the City changed its municipal court policies with respect to bail such that any person arrested for a misdemeanor would be released on an unsecured appearance bond as long as she had no outstanding warrant for failure to appear. Individuals with an outstanding failure to appear warrant may still post a cash, commercial, or signatory bond. The parties then reached a settlement that the court adopted and retains jurisdiction to enforce for three years.

Pierce et al v. The City of Velda City (E.D. Mo. 2015)

Plaintiff filed suit against Velda City, claiming that the City violated her Fourteenth Amendment rights to due process and equal protection by keeping her in jail when she was unable to pay the amount set by the generic bail schedule. The parties eventually entered into a settlement agreement under which the city agreed to end the use of the challenged cash bond system. The court issued an order adopting the settlement and setting forth a declaratory judgment that it is a violation of equal protection to keep an arrestee in custody because the person is too poor to post a monetary bond.

Powell v. The City of St. Ann (E.D. Mo. 2015)

Plaintiff filed suit against the City of St. Ann, claiming that it violated his Fourteenth Amendment rights to due process and equal protection by keeping him in jail when he was unable to

pay the amount set for bail. In its order, the court adopted the parties' settlement agreement. Under the terms of the settlement, the City agreed to stop requiring arrestees to post a secured bail for release. Instead, the City agreed to release arrestees if they agreed to provide an unsecured bond or on their own recognizance, except when the arrestee is a threat and detention is required to protect the community. The City also agreed to improve its procedures for notifying arrestees of court dates, and to release persons arrested for failure to attend court dates on unsecured bonds.

Thompson v. Moss Point, Mississippi (S.D. Miss. 2015)

Plaintiff filed suit against the City of Moss Point, claiming that Moss Point violated his Fourteenth Amendment rights to due process and equal protection by keeping him in jail when he was unable to pay the amount set for bail. In its order, the court adopted the parties' settlement agreement, under which the City agreed to abandon its secured bail requirement for persons seeking release from jail after a warrantless arrest or after an initial warrant arrest, and to instead release those persons on recognizance or on an unsecured bond. The City also agreed to improve its procedures for notifying arrestees of court dates.

Snow v. Lambert (M.D. La. 2015)

Plaintiff filed suit against the Parish of Ascension, claiming that its bail policy violated his Fourteenth Amendment rights to due process and equal protection by jailing him when he could not afford to pay the amount generically set for bail. The court's order outlines the final settlement between the parties, in which the Parish agreed to create a new policy for misdemeanor arrestees and to stop holding misdemeanor arrestees in jail due to an unaffordable monetary bond.

Other Litigation

Additional litigation is pending in the state courts. The most prominent is: *In re Humphrey*, 19 Cal. App. 5th 1006, 1006, 228 Cal. Rptr. 3d 513, 516 (2018) (cert. granted May 23, 2018). In this case, the California Court of Appeals applied the analysis of *Bearden v. Georgia*, 461 U.S. 660 (1983) to money bail. Courts must make adequate inquiry into defendant's financial circumstances - detaining a defendant on a bond that he lacked the ability to post could not be justified in the absence of clear and convincing evidence that "no condition or combination of conditions of release would ensure the safety of the community or any person." Detailed findings of fact are required when making such a determination. Bond must be individually set based upon the circumstances of the case, rather than through a bond schedule: "For poor persons arrested for felonies, reliance on bail schedules amounts to a virtual presumption of incarceration."

Consequences of the Use of Cash Bail

Short-term detention increases the likelihood of pretrial misconduct

Research has identified the negative consequences of current money-based bail practices, including the impact of short-term incarceration – the few days it may take a person who does not have the financial resources to post a secured bond to come up with the money to do so. One study found that, when controlling for other factors, persons who scored on a pretrial assessment as having the lowest risk of failure to appear and new criminal activity on pretrial release and who were held in jail for just 2-3 days after arrest were 39% more likely to be arrested on a new charge while the first case was pending than those who were released on the first day. Those who stayed 4-7 days were 50% more likely to be arrested for new criminal activity.

The same pattern holds true for failure to appear. Low-risk defendants who remain in jail for 2-3 days after arrest are 22% more likely to fail to appear than those released on the first day. Those who were held 4-7 days were 50% more likely to have a failure to appear.²¹

Pretrial detention increases likelihood of recidivism (post-adjudication misconduct)

There are also major consequences relating to public safety for persons who remain incarcerated throughout the pretrial period because they are unable to post secured bonds. Research has found that, controlling for other factors, persons who scored as “low risk” on the pretrial assessment who were held in jail throughout the pretrial period due to their inability to post their bonds were 28% more likely to recidivate within 24 months after adjudication than low risk persons who were released pretrial.²²



²¹Christopher Lowenkamp, Marie VanNostrand, and Alex Holsinger, *The Hidden Costs of Pretrial Detention*, Laura and John Arnold Foundation (2013), [hereinafter *Hidden Costs*]. This Kentucky study, involving 300,000 defendants including charges of both felonies and misdemeanors, used the Arnold Foundation’s pretrial assessment to characterize defendants as low, medium, and high risk.

²²Id.

Another study, which focused on misdemeanor cases from Harris County (Houston), Texas, estimated the impact on future crimes of those detained pretrial compared to those released. The study found “that a representative group of 10,000 misdemeanor offenders who are released pretrial would accumulate an additional 2,800 misdemeanor charges in Harris County over the next 18 months, and roughly 1,300 new felony charges. If this same group were instead detained they would accumulate 3,400 new misdemeanors and 1,700 felonies, an increase of 600 misdemeanors and 400 felonies.”²³

Pretrial detention leads to harsher outcomes

Research has consistently shown that, all else being equal, those who are detained throughout the pretrial period receive much harsher outcomes than those who obtain release. A recent study quantified just how harsh these outcomes are for those people found by an empirically-derived risk assessment tool to be low and moderate risk. The study found that low-risk persons who were detained throughout the pretrial period were five times more likely to get a jail sentence and four times more likely to get a prison sentence than their low-risk counterparts

who were released pretrial. Medium risk persons who were detained pretrial were four times more likely to get a jail sentence and three times more likely to get a prison sentence. Both low- and medium-risk persons who were detained pretrial also received much longer jail and prison sentences than their counterparts who spent the pretrial period in the community.²⁴

Another study,²⁵ this one focused solely on misdemeanors, found similar results. Controlling for dozens of factors, the study found that those who remained detained throughout the pretrial period pleaded guilty at a 25% higher rate than their similar counterparts who were released during the pretrial period.²⁶ Furthermore, those detained were 43% more likely to receive a jail sentence and receive sentences that were two to three times as lengthy as those of released persons. Notably, the impact of pretrial incarceration was twice as large on those with no criminal record as defendants with priors, and also twice as large on those unable to meet the lowest financial bonds (\$500 or less) as those unable to post the highest (\$2,500 or more). The harmful effects of incarceration were also confirmed through a quasi-experimental test as noted in the figure on next page.²⁷

²³Paul Heaton, Sandra Mayson, and Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, University of Pennsylvania Law School, 2016. This study included almost 400,000 misdemeanor defendants over a six-year period. Although the data base used was without the necessary information to apply a validated risk assessment measure based upon prior criminal history, it contained rich demographic information which allowed the authors to assess and offset numerous alternative factors affecting outcomes, and provides a conservative measure of the impact on misdemeanor outcomes attributable solely to pretrial detention. This study was found to be authoritative in the O'Donnell case, a determination upheld by the Fifth Circuit.

See also Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUD. 471, 472-73 (2016) (finding a 6-9% increase in the yearly probability of receiving a new charge); Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges 3* (Nat'l Bureau of Econ. Research, Working Paper No. 22511, 2016), <http://www.nber.org/papers/w22511.pdf> (finding a 37% increase in re-arrest pretrial as well as a 27% increase in the probability of conviction).

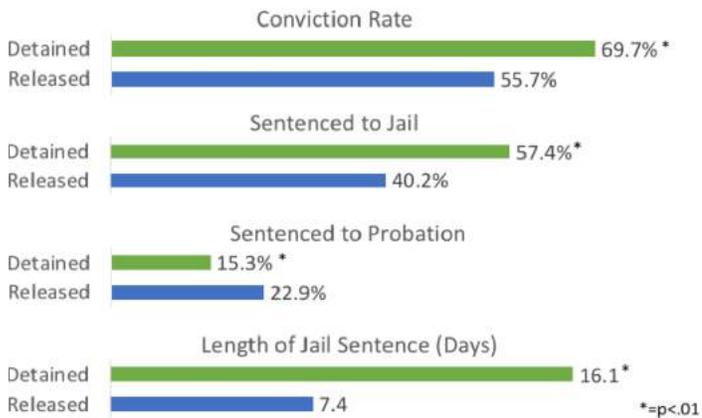
²⁴Christopher T. Lowenkamp, Marie VanNostrand, and Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, Laura and John Arnold Foundation, 2013.

²⁵Heaton, supra note 23. As noted above, this study did not undertake risk assessment, to these lesser impacts are across the entire population of defendants, not just the low-risk defendants. The impact of pretrial detention on high-risk defendants is less severe.

²⁶Even when a guilty plea results in no additional jail time, the future collateral consequences for the defendant can be significant. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1316-17 (2012) (reporting that a misdemeanor conviction can limit a person's access to “employment, as well as educational and social opportunities”; can limit eligibility for “professional licenses, child custody, food stamps, student loans, health care,” or public housing; can “lead to deportation”; and “heightens the chances of subsequent arrest, and can ensure a longer felony sentence later on”); Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1090 (2013) (noting that misdemeanor convictions “can affect future employment, housing, and many other basic facets of daily life”). See Conference of Chief Justices, Resolution 3, Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial Release (January 30, 2013), <http://www.pretrial.org/wp-content/uploads/> (hereinafter CCJ, Resolution 3). 2013/05/CCJ-Resolution-on-Pretrial.pdf.

²⁷Heaton, supra note 23. Observing that group of defendants arrested on Tuesday and Wednesday were identical to those arrested on Thursday on all relevant measures, and that higher percentages of defendants could post bond on Friday and Saturday, the authors were able to use the Thursday defendants as a control group to measure the effects of additional short-term incarceration faced by defendants arrested earlier. They found even larger harmful impacts with fewer defendants being able to post bond, more impact on conviction rates, and sentences over three times as long. See also MARY T. PHILLIPS, N.Y.C. CRIMINAL JUSTICE AGENCY, PRETRIAL DETENTION AND CASE OUTCOMES, PART 1: NONFELONY CASES (2007) [hereinafter PHILLIPS, NONFELONY CASES], http://www.nycja.org/lwdcms/doc-view.php?module=reports&module_id=669&doc_name=doc. Marian R. Williams, *The Effect of Pretrial Detention on Imprisonment Decisions*, 28 CRIM. JUST. REV. 299, 306, 313 (2003) (showing that pretrial detention is correlated with increased incarceration sentences using a small sample of Florida felony cases).

Detained Defendants Experience Worse Case Outcomes Than Similarly-Situated Releasees



As recognized by the U.S. Supreme Court pretrial incarceration often decisively tilts the scales of justice against the incarcerated defendant: “the traditional right of accused to freedom before conviction permits unhampered preparation of defense and serves to prevent infliction of punishment prior to conviction, and presumption of innocence, secured only after centuries of struggle, would lose its meaning unless such right to bail before trial were preserved.”²⁸ As acknowledged by Conference of Chief Justices the decision on bail release “has a “significant, and sometimes determinative” impact on individual defendants and their families.²⁹ Pretrial incarceration also cuts off the opportunity for pretrial diversion and the court’s opportunity to impose a more productive sentence involving restitution to the community or victims or rehabilitative programs. Further, obvious wealth-based discrimination in outcomes undermines confidence in the justice system.

Unnecessary pretrial detention runs counter to procedural fairness

A defendant released on bond and asserting his rights obviously may consume more court time than a defendant disposing of his case in order to be released from jail. This may prompt concerns about the impact on strained local court systems. A jail plea calendar quickly disposing of multiple cases may give the superficial appearance of efficiency; the apparent savings are a false economy viewed in the light of the system as a whole. As pretrial detainees became an ever-higher proportion of jail populations the burden on local governments soared.³⁰ Obviously, a reduction in guilty pleas resulting from a reform of bail practices may place additional burdens on court time, but procedural fairness dictates that criminal rights not be governed by wealth but instead with procedural justice and fairness. The courts, rather than focusing on the “instrumental factors” of perceived savings from guilty pleas that may result from pretrial detention, should instead be focusing on the quality of defendants’ interactions with judges and their experiences within the court system.³¹ Those defendants who are treated as such are ultimately more likely to feel they were treated fairly and thus comply with any rulings of the court.

In addressing the impact of money bonds on defendants’ rights in criminal cases, the Conference of Chief Justices closed its amicus brief in *O’Donnell* with a quote from an illustrious prosecutor:

The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, *the spirit of the procedure is to enable them*

²⁸*Stack v. Boyle*, 342 U.S. 1, 72 S. Ct. 1, 96 L. Ed. 3 (1951).

²⁹CCJ, Resolution 3.

³⁰The following figures were cited by the Conference of Chief Justices in their amicus brief to the Fifth Circuit. The proportion of detainees in local jail populations rose from 40 to 60% over the last thirty years; in 2011, local governments spent \$26.2 billion on corrections; in 2015, 24% of jail jurisdictions with an average daily population of 1,000 to 2,499 inmates were operating at over 100% capacity. BRIEF OF CONFERENCE OF CHIEF JUSTICES AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY in *O’Donnell v. Harris Cty.*, 882 F.3d 528 (5th Cir., 2018), pp. 7-9.

³¹Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want for the Law and Legal Institutions?* 19 BEHAV. SCI. & L. 215 (2001).

to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense.³²

Current money-based bail practices most negatively impact persons of color

Disparities unleashed by secured money bonds fall most heavily upon certain racial groups. Studies have consistently shown that African-Americans have higher secured bond amounts and are detained on secured bonds at higher rates than their white counterparts, a factor contributing to the disproportionate confinement of persons of color.³³

Secured bonds provide no greater assurances of safety or appearance than unsecured bonds

The use of secured bonds has persisted out of the belief that they are more successful in getting people back to court. But a study, which for the first time was able to control for risk when comparing different release types, has shown that that is not the case. That study found that, across all risk levels, there were no statistically significant differences in outcomes (i.e. court appearance and public safety rates) between persons released without having to post financial bonds and those released after posting such a bond. The table below looks at the outcomes by risk level.³⁴

The study also looked at the jail bed usage of persons on the two types of bonds. Those who did not have to post financial bonds before being released spent far less time in jail than those

Favorable Outcomes for Unsecured Versus Secured Bonds

Risk Level	Public Safety Rates		Court Appearance Rates	
	Unsecured Bond	Secured Bond	Unsecured Bond	SecuredBond
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%

³²*Stack v. Boyle*, 342 U.S. 1, 7-8 (1951) (Jackson, J., concurring) (emphasis added in amicus).

³³Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST Q., 170, 187 (2005); Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release and Decisions and Outcomes: A Comparison of Hispanic, Black and White Felony Arrestees*, 41 CRIMINOLOGY 873, 880-81 (2003); J.C. Oleson et al., *The Effect of Pretrial Detention on Sentencing in Two Federal Districts*, 33 JUST. Q. 1103, 1117-19 (2014) (showing that pretrial detention is associated with an increased prison sentence in federal courts); Christine Tartaro & Christopher M. Sedelmaier, *A Tale of Two Counties: The Impact of Pretrial Release, Race, and Ethnicity upon Sentencing Decisions*, 22 CRIM. JUST. STUD. 203, 203-04, 208, 218 (2009) (examining heterogeneity in the effects of pretrial detention on sentences of incarceration for minority defendants in different Florida counties).

³⁴Michael R. Jones, *Unsecured Bonds: The “As Effective” and “Most Efficient” Pretrial Release Option* (2013), [hereinafter *Unsecured Bonds*]. This study was conducted from data on 1,970 persons from 10 different counties in Colorado in 2011. This study seems to be singular in comparing bail outcomes in the context of a validated risk assessment instrument. Other studies examining the effect of secured bonds generally do not compare apples to apples in analyzing persons with similar criminal histories. To the extent that discrimination in release based upon financial circumstances is subject to heightened scrutiny the burden of proof as to effectiveness may rightly be placed upon those justifying financial conditions on bonds. See “Recent Federal Case Law on Monetary Bonds,” supra.

who had to post. This is not surprising, since persons with secured bonds must find the money to satisfy the bond or make arrangements with a bail bonding company in order to obtain release. Also, 39% of those with secured bonds were never able to raise the money and spent the entire pretrial period in jail.

In summary, the study found that unsecured bonds, which do not require persons to post money before being released, offer the same public safety and court appearance benefits as secured bonds, but do so with substantially less use of jail bed space.

Current bail practices adversely impact taxpayers

Detaining persons pretrial also greatly affects taxpayers, with no return benefit. It has been estimated that budgets for the operation of county jails rose from \$5.7 billion in 1983 to \$22.2 billion in 2011. These figures do not, however, take into consideration the costs that come out of other county budget lines, such as employee pension benefits and contracted health care to jail inmates, leaving the total costs to taxpayers unknown. According to the Vera Institute of Justice:

Because the costs provided are too often incomplete, policymakers and the public are seldom aware of the full extent of their community's financial commitment to the operations of the local jail. Given the outsize role that jails play in the country's criminal justice system – incarcerating millions of people annually – it is striking that the national price tag for jails remains unknown and that taxpayers who foot most of the bill remain unaware of what their dollars are buying.³⁵

Further, given the significant growth in jail spending, it is not surprising that 40% of jails in a national survey state that reducing jail costs is one of their most serious issues.³⁶ In the Harris County study, an economist estimated the savings that would have accrued to the county had Defendants with the lowest bonds (\$500) simply been released on an unsecured bond. There would have been 40,000 more releases, 5,900 fewer convictions, 400,000 days fewer of incarceration, 1600 fewer felonies and 2400 fewer misdemeanors committed, and twenty million dollars of cost savings to the county.³⁷

³⁵Christian Henrichson, Joshua Rinaldi, and Ruth Delaney, *The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration*, Vera Inst. Justice, 5 (2015).

³⁶Natalie R. Ortiz, *County Jails at a Crossroads: An Examination of the Jail Population and Pretrial Release*, Nat'l Assn. of Counties, (2015), at 8.

³⁷Heaton, supra note 23.

National Bail Reform Efforts³⁸

Over the past four years, there have been significant and unprecedented calls from key and diverse justice system stakeholders for implementing the kind of legal and evidence-based pretrial justice practices recommended by the Ad Hoc Committee. For example, in 2012, after a year of study, the Conference of State Court Administrators issued a Policy Paper concluding that “[m]any 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, ...” The Policy Paper went on to say that “[e]vidence-based assessment of the risk a person will fail to appear or will endanger others if released can increase successful pretrial release without financial conditions that many persons are unable to meet. Imposing conditions on a person that are appropriate for that individual following a valid pretrial assessment substantially reduces pretrial detention without impairing the judicial process or threatening public safety.”³⁹

Endorsing this Policy Paper, the Conference of Chief Justices issued a resolution that “urge[d] 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.”⁴⁰

Several other national associations also have issued policy statements or resolutions calling for bail reform. These include: the International Association of Chiefs of Police, the National Sheriffs’ Association, the American Judges’ Association, the American Bar Association, the American Jail Association, the Association of Prosecuting Attorneys, the National Legal Aid and Defenders Association, the National Association of Criminal Defense Lawyers, the American Probation and Parole Association, and the National Association of Counties.⁴¹

Georgia is not alone in exploring bail reform. Legislatures in four states – Colorado, Kentucky, New Jersey and Alaska – recently re-wrote their bail laws to bring them in line with legal and evidence-based pretrial justice practices.⁴² Several other states, including Arizona, Delaware, Illinois, Indiana, Maine, Maryland, Nevada, New Mexico, Ohio, Texas, and Utah, have appointed commissions or task forces examining statutory or court rule changes needed to incorporate legal and evidence-based practices.⁴³

³⁸The following is largely excerpted from material provided to the Committee by the Pretrial Justice Institute.

³⁹*Evidence-Based Pretrial Release Policy Paper* available on the National Center for State Court’s website at: <http://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/Evidence%20Based%20Pre-Trial%20Release%20-Final.ashx>.

⁴⁰Resolution available at the National Center for State Court’s website at: <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/01302013-pretrial-release-Endorsing-COSCA-Paper-EvidenceBased-Pretrial-Release.ashx>.

⁴¹Statements available at www.pretrial.org/pjwg/; see also, www.americanbar.org/content/dam/aba/images/abanews/2017%20Annual%20Resolutions/112C.pdf.

⁴²Colorado House Bill 13-1236 (2013), Kentucky House Bill 463 (2011), New Jersey Senate Bill 946 (2014), Alaska Senate Bill 91 (2016).

⁴³In Arizona, the chief justice has appointed a Task Force on Fair Justice for All, tasked with identifying what changes are needed to assure that people are “not jailed pending the disposition of charges merely because they are poor.” See: www.ncsc.org/~media/Microsites/Files/PJCC/Pretrial%20Justice%20Brief%203%20-%20AZ%20final.ashx. In Indiana, the chief justice appointed a Committee to Study Pretrial Release to advise the court on the use of an empirically-derived pretrial risk assessment tool for the state, and on alternatives to secured bonds. See: www.ncsc.org/~media/Microsites/Files/PJCC/Pretrial%20Justice%20Brief%203%20-%20AZ%20final.ashx. In Maine, the governor, chief justice, president of the senate and speaker of the house, have established a Task Force on Pretrial Justice Reform charged with producing recommendations for legislative action that will “reduce the financial and human costs of pretrial incarceration” without compromising public safety or the integrity of the criminal justice system. The directive establishing the task force is available at: www.courts.maine.gov/maine_courts/committees/2015%20PJR.pdf. In Maryland, the governor appointed a Commission to Reform Maryland’s Pretrial Release System; the Commission issued a report calling for statewide pretrial risk assessment using empirically-derived risk assessments. The Commission report is available at: <http://goccp.maryland.gov/pretrial/documents/2014-pretrial-commission-final-report.pdf>. In Nevada, the Supreme Court appointed a Committee to Study Evidence-Based Pretrial Release with the purpose of identifying an empirically-derived pretrial risk assessment tool for that state. Information about that committee is available at: <http://nvcourts.gov/AOC/Templates/documents.aspx?folderID=19312>. In New Mexico, the Supreme Court appointed an Ad Hoc Pretrial Release Committee to make recommendations for rule changes that would incorporate legal and evidence-based pretrial release practices. See: https://supremecourt.nmcourts.gov/uploads/FileLinks/68d7e94c91244c3582e80b8272c30db1/2015_55.pdf. In Texas, the chief justice has appointed a Criminal Justice Committee under the Texas Judicial

Stakeholder Recommendations

The Committee met with a wide array of stakeholders during several of its meetings in order to discuss issues and examine the impacts of possible recommendations. Two meetings were dedicated to public testimony from these groups and the committee also invited stakeholders to subsequent meetings for additional guidance.

Data

Many groups presented the committee with prior research or statistical analysis. While some of the data was Georgia specific, much of the inference regarding the effects of bail and incarceration was drawn from national level data or from studies centered in other states. There was a general consensus that Georgia lacked enough detailed, readily available data to study many state-specific questions in further depth. Certain groups urged the state to create mandates regarding jail data and assist counties with collection of this data.

Arrests & Citations

Several stakeholders spoke to the detrimental effects that even short-term detention can have on individuals. One solution that was offered was to lower to number of arrests made by expanding the use of citations in misdemeanor cases. While a few groups offered suggestions on what offenses could be handled by citation, there was no consensus as to how far their use should be expanded. Law enforcement groups seemed open to the concept, but some voiced concerns over logistical matters as well as concerns over identity theft.

Bail Determination & Pre-Trial Hearings

Several social-justice groups urged Georgia to end or significantly decrease the use of cash bail in low-level crimes. To this end, it was suggested

that Georgia create a presumption of release on recognizance and that additional conditions or restrictions could be imposed under limited circumstances which would not include a requirement to pay a bond. Any conditions imposed would be the least restrictive possible and aimed at insuring appearance and public safety. Another recommendation was to expedite the timeline for pre-trial hearings and bail determinations. Some groups urged for timelines as short as within twenty-four hours of arrest. During such hearings, social-justice groups asked that judges be mandated to consider a person's ability to pay if bond is being set. One concern raised on this subject is that many counties will not be able to afford the pre-trial staff and resources needed to facilitate quicker bail determinations and indigency hearings.

Risk Assessment Tools

Risk assessment proved to be divisive amongst the stakeholder groups. Some groups suggested that risk assessment tools such as the Arnold Foundation's Public Safety Assessment (PSA) could assist judges in determining which defendants qualify for automatic release or stricter conditions. This being said, many groups had reservations or concerns regarding risk assessment tools. No stakeholder believed that an algorithm-based risk assessment tool should be the sole guidance when determining release conditions. Furthermore, the need for extensive validation of risk assessment tools was stressed by several groups. Social-justice groups also expressed concerns regarding implicit biases that could be present in risk assessment algorithms. These groups were afraid that such tools could further exacerbate racial disparities in pre-trial detention and asked that the state ensure that any risk assessment tool used would be "race

Council to explore ways of enhancing pretrial justice in that state. See: www.txcourts.gov/tjc/news/judicial-council-creates-criminal-justice-committee.aspx. In Utah, a committee of the Utah Judicial Council, the rule-making body for the judiciary, has recommended court rule changes that would include a clear statement of the presumption of release, free of financial conditions; use of a risk assessment for every person booked into a jail in the state; the availability across the state of supervision for moderate- and higher-risk persons; and uniform, statewide data collection on relevant pretrial process and outcome measures. *Report to the Utah Judicial Council on Pretrial Release and Supervision Practices*, Utah State Courts, November 2015.

neutral.” These groups also requested that the algorithm used in the risk assessments be made available to the public. Law-enforcement groups expressed concerns that risk assessment based determinations had released people who had later committed additional, violent offenses. It was noted that most of these examples involved people who were released on bond for felonies and not misdemeanors.

Failure to Appear

A common area of concern during the public hearings was ensuring that reforms did not increase failure to appear (FTA) rates. Some law-enforcement groups stated that they were already short staffed, and increased FTAs would be a further drain on limited resources. Various stakeholders gave presentations regarding how FTA rates varied under different bond conditions, and some suggested tactics such as text or call reminders to increase appearance rates.

Findings & Recommendations

“The purposes of the pretrial release decision include providing due process to those accused of crime, maintaining the integrity of the judicial process by securing defendants for trial, and protecting victims, witnesses and the community from threat, danger or interference. . . .The law favors release of defendants pending adjudication of charges. Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support.”

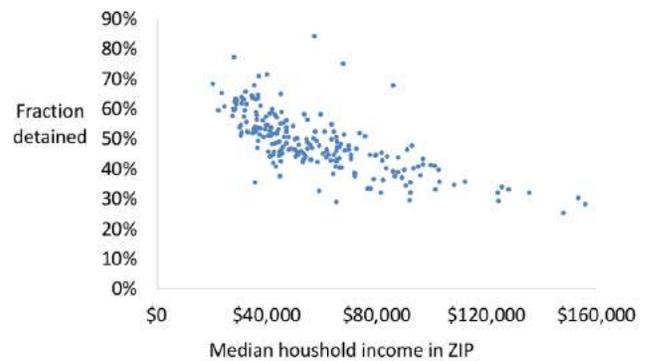
ABA Criminal Justice Standards on Pretrial Release, Third Edition Standard 10-1.1.

Ability-to-Pay Determination

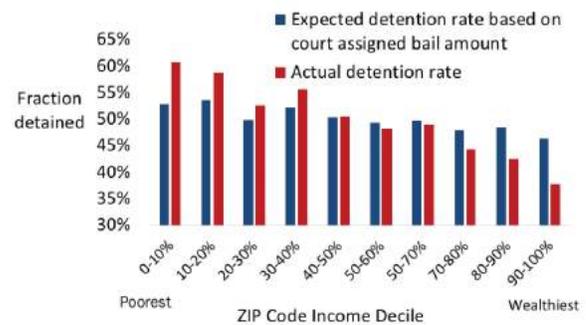
Recommendation: Make explicit the requirement to consider financial circumstances of defendant in setting bail.

Discussion: Wealthier pre-trial defendants have historically been able to be released more than those who are poor. Most of the legal challenges noted earlier have focused on this aspect and are rooted in growing case law.⁴⁴ Perpetuation of a wealth-based pre-trial release system tends to disproportionately affect the poor, immigrants, and minorities. In February 2018 in the Harris County case, the 5th Circuit Court of Appeals ruled that a “wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree.”⁴⁵ As noted in the charts below, wealthier defendants are afforded greater access to pre-trial release.⁴⁶

Wealthier Misdemeanor Defendants Have Greater Access to Pretrial Release



Wealthier Misdemeanor Defendants Have Greater Access to Pretrial Release



⁴⁴See e.g., *Bandy v. United States*, 82 S. Ct. 11, 13 (1961), in which Justice Jackson, sitting as circuit justice to decide the bail issue, stated: “[N]o man should be denied release because of indigence. Instead, under our constitutional system, a man is entitled to be released on ‘personal recognizance’ where other relevant factors make it reasonable to believe that he will comply with the orders of the Court.”

⁴⁵*O'Donnell v. Harris Cty.*, 882 F.3d 528 (5th Cir., 2018).

⁴⁶Heaton, supra note 23.

CJRC Commentary: The Council noted that many courts are doing this already. This recommendation passed unanimously.

Status: This recommendation was accepted by the Council and adopted into Senate Bill 407 (2018)/AP. The bill changes O.C.G.A. § 17-6-1 so that the court must consider certain factors. The court is required to consider: (A) The accused's financial resources and other assets, including whether any such assets are jointly controlled; (B) The accused's earnings and other income; (C) The accused's financial obligations, including obligations to dependents; (D) The purpose of bail; and (E) Any other factor the court deems appropriate. There is no set time limit for this hearing. The bill only specifies that the hearing take place, "as soon as possible."

Recommendation: Provide for an expedited financial ability-to-pay determination for purposes of bail only.

Discussion: When a defendant is arrested upon a warrant and a monetary surety, property, or cash bond is required, an inquiry as to the person's financial ability to post the required bond should be made within 24 hours of arrest. In cases in which a warrantless arrest is made a financial inquiry should be made within 48 hours of arrest or 24 hours of issuance of a post-arrest warrant, a written order determining probable cause, or other charging document, whichever time is less. Most courts use a post-arrest warrant to reflect the finding of probable cause of a specific offense that is required to be determined within 48 hours. The court could authorize a court-annexed administrative review, such as through pre-trial ser-

vices, to undertake such review. Consideration of financial ability to post a monetary bond should not be limited to situations where the defendant meets a general indigency standard; the standard would be the ability to promptly meet the financial bond requirements of the initial bond set by the court. This determination would not be controlling on a later finding of indigency.

In the event that a jurisdiction opts to expedite the first appearance timeline, a court would have the option to combine proceedings, such as the conduct of the first appearance hearing, the determination of indigency for provision of counsel. The committee will also recommend to the appropriate Uniform Rules committees that the topics covered in the first appearance hearing should include a review of the financial capacity of the Defendant to post any existing bond if the Defendant has not previously been heard on that issue.

CJRC Commentary: This recommendation passed, although concerns were raised as to the impact implementation would have on small jurisdictions, and the lack of judicial resources in rural areas.

Status: This recommendation passed as well as was included in SB 407 (2018)/AP. As mentioned above, however, the hearing must only take place "as soon as possible." There is no statutory time limit for the ability to pay hearing. The O'Donnell⁴⁷ case discussed above, however, strongly suggests a constitutional time limit of not more than 48 hours, similar to that required for a judicial determination of probable cause after a warrantless arrest.

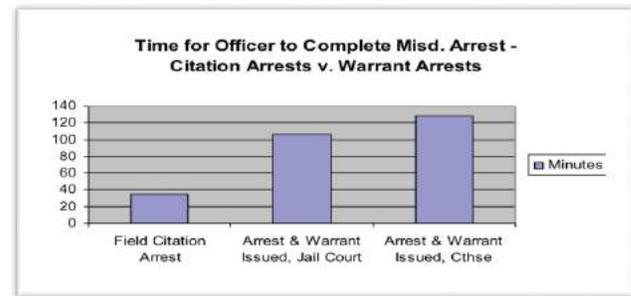
⁴⁷O'Donnell v. Harris Cty., 882 F.3d 528 (5th Cir., 2018),

Citations in Lieu of Arrest

In the course of the committee hearing from interested stakeholders, several matters became apparent. Expansion of the use of citations in recent years has been a significant element in pretrial release reform across the country. Advocates for reducing pretrial detention in Georgia expressed a great interest in a broad expansion of the use of citations. In this vein, the American Bar Association's Standards for Criminal Justice (Pretrial Release) state that "[i]t should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law. This policy should be implemented by statutes of statewide applicability."⁴⁸ Examples of recent expansion of the use of citations include Alaska, Kentucky, Maryland, and New Jersey.

Law enforcement stakeholders also showed considerable interest in the expansion of misdemeanor citation jurisdiction, given the significant manpower savings for law enforcement. A number of studies have shown this time saving, at least when citations are processed in a manner similar to ordinary traffic citations. For instance, a Georgia study in Gwinnett County by Judge Warren Davis confirmed that use of citations for non-violent offenses can result in dramatic savings in officers' time without an adverse impact on court appearances if combined with a single follow-up court notice. Average time for an officer to issue a citation for shoplifting was 35 minutes, whereas to effectuate an arrest took about two hours. And when the initial citation was followed up with a supplemental notice, failure to appear rates were below those for release on bond after arrest.⁴⁹

In contrast, the attitude of prosecutors towards citation expansion was more mixed. The position of the Prosecuting Attorney's Council



*Citations are 70% more time efficient for officers

and the Solicitors' association was that the number of misdemeanors, the issue of fingerprinting requirements, and interaction with victims' rights legislation, Amake this more of a long-term process that cannot be reformed in a short period of time. We stand ready to participate in an in-depth study and recommendations for the issue."

The committee also identified barriers to the greater use of citations. There were varying provisions for misdemeanor citation jurisdiction in various courts—magistrate, municipal and probate—with no provision for non-traffic citations in the state courts. Solicitors were not always eager to staff two or more courts, discouraging the prosecution of citations in magistrate court. Additionally, outside of traffic tickets and municipal courts, there was no clear authorization for issuance of citations by police officers, although the prosecution of such cases was occurring without challenge in numerous locations. Finally, there was no recognized form that citations should take, outside of the uniform traffic citation.

SB 407 addressed many of these concerns, offering clarity and more uniformity in the law on citations, but it also undermined the utility of citations for law enforcement in manpower utilization. Thus, O.C.G.A. § 17-4-23(a)(2) specifically provides for police officers to issue citations for misdemeanor violations of O.C.G.A. §§ 3-3-23, 16-7-21, 16-8-14, 16-8-14.1, and 16-13-30, and O.C.G.A. § 15-7-42 specifically authorizes their prosecution in the state court. A new provision

⁴⁸American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release (2007) Std. 10-2.1, at 63.

⁴⁹Should Georgia's Misdemeanor Arrest Laws Be Changed To Authorize Issuing More Field Citations?, 22 GA. ST. U. L. REV. Iss. 2, Art. 6 (2006). Examples of prior studies on citations appear in the literature review section of this article. For instance, another study showed a cost of over \$120 in processing an arrest as opposed to a \$20 cost in processing a citation. J. David Hirschel and Charles W. Dean, *The Relative Cost Effectiveness of Citation and Arrest*, 23 J. of Crim. Just. 1 (1995). In the absence of supplemental court notices this advantage was reduced, however, with a larger failure to appear rate requiring increased expenses with more subsequent arrests.

O.C.G.A. § 15-5-21.1 provides for the Judicial Council to develop and approve a new misdemeanor citation and summons to be used for arrest on ordinances and designated misdemeanors, and to prescribe rules for use in each class of court. SB 407 also clarified that the issuance of a bench warrant after a failure to appear is not the equivalent of a failure to appear after arrest and bail; there being no revocation of bail, the court is required to issue a new reasonable bond.

SB 407 also sought to address concerns about identity and securing fingerprints by including new language requiring research into the detainee's criminal record, and the obtaining of fingerprints. When an arrest is made for such offense, prior to releasing the accused on citation, the arresting law enforcement officer shall review the accused's criminal record as such is on file with the Federal Bureau of Investigation and the Georgia Crime Information Center within the Georgia Bureau of Investigation and ensure that the accused's fingerprints are obtained.⁵⁰

The review of the defendant's criminal record likely does not impose any great barrier to the use of citations. But in addressing the concerns of prosecutors with respect to obtaining fingerprints, establishing identity, and alerting to cases of recidivism, this fingerprinting requirement provision likely eliminates any incentives for law enforcement to utilize citations.

Questions raised by citation legislation for future consideration

Does the statute's requirement that the police officer "ensure that the accused's fingerprints are obtained" require that the fingerprints be obtained before the accused may be released on a citation? Georgia presently does not appear to have any authorization for taking fingerprints in the field using modern technology.⁵¹ Except for marijuana possession, the offenses set forth in O.C.G.A. § 17-4-23(a)(2) require fingerprinting

at the specification of the attorney general. The question is whether the Attorney General has the authority to eliminate the requirement of fingerprinting in crimes covered by this statute. If the statute is read as requiring the defendant to be immediately transported to a police station or jail to obtain fingerprints, the Terry stop will be converted to a custodial arrest for federal law purposes, and the manpower savings for law enforcement resources will largely evaporate. The committee would recommend that the General Assembly in the future consider other acceptable methods of verifying identity through state authorized identifications or photos contained in state on-line databases.

Aside from the issues posed under the new legislation, there is another issue with respect to citations arising out of recent appellate authority. Citations are statutorily authorized to form a charging instrument upon which a criminal prosecution may rest. Recent authority, however, requires a charging instrument to either "(1) recite the language of the statute that sets out all the elements of the offense charged, or (2) allege the facts necessary to establish violation of a criminal statute."⁵² It does not appear possible that paper citations can normally meet such a standard; it is not practical for field officers to carry around numerous different ticket books with the elements of specific crimes written out. Thus, it is recommended the Judicial Council investigate the possibility of utilizing electronic citation forms that could meet the enhanced requirements for charging documents in recent case law. It is also recommended more generally that the General Assembly look for further opportunities to expand the use of citations to simultaneously address the accused's interest in minimizing pre-trial deprivation of liberty and law enforcement's interest in the productive utilization of officer time.

⁵⁰O.C.G.A. § 17-4-23(a)(2).

⁵¹Pursuant to O.C.G.A. § 35-3-33 the Georgia Crime Information Center likely would have the authority to provide for such a technological solution.

⁵²*Jackson v. State*, 301 Ga. 137, 800 S.E.2d 356 (2017). This case analyzes indictments, but the constitutional principles are applicable to accusations (and presumably citations). See e.g., *State v. Harris*, 292 Ga. App. 211, 663 S.E.2d 830 (2008).

Recommendation: Increase the use of citations issued by police officers. State, Magistrate, Probate and Municipal courts should all have the same citation authority.

Discussion: Many low-level misdemeanor offenses may not necessitate the setting of a monetary bail. It is suggested that the certain offenses are released initially without monetary condition other than an unsecured bond: municipal, county, and state authority ordinances, offenses without incarceration as a penalty, offenses which may be prosecuted with a citation in magistrate court (deposit account fraud, etc.). There are slight variants in the citation authority of magistrate, probate and municipal courts. To avoid confusion in the field, it would be preferable if the citation authority was the same.

CJRC Commentary: This recommendation was the subject of much discussion. There was no opposition to this recommendation in principle, but there were concerns about implementation. Identity fraud was one such concern as was providing proof of former convictions if identity was in question. This is already a major problem with traffic citations, and this problem would be compounded by adding to the list of citationable offenses. Fingerprinting is one way to guard against identity fraud, but there was considerable discussion on how this would take place on an offense where there was a citation issued in lieu of arrest. The recommendation ultimately passed to be addressed further in the legislative process.

Status: The Council adopted this regulation, but the legislature only authorized a small number of misdemeanors for a release on citation under SB 407 (2018)/ AP. The changes to O.C.G.A. § 17-4-23 applies to O.C.G.A. § 16-7-21, Criminal Trespass; O.C.G.A. § 16-8-14, Theft by Shoplifting; O.C.G.A. § 16-8-14.1 Theft by Refund Fraud; and O.C.G.A. § 16-13-30, misdemeanor drug offenses. The new code section requires the arresting officer to review the accused's criminal record and ensure the accused finger prints are obtained.

Please see the report's expanded analysis on citations for more information on this topic.

Recommendation: Create statutory authorization for a singular Uniform Misdemeanor Complaint & Summons form through the Uniform Rule process, with limited conditions to be authorized as conditions of release.

Discussion: In order to minimize the need for bail, more charges could be citations instead of arrests. The first step is to authorize citations allowed for one class of court to be permitted in other classes of court with concurrent jurisdiction. In particular, in some jurisdictions, solicitor-generals prefer to prosecute citation-possible cases in state court with other misdemeanors.

The committee recommends the establishment of a set of offenses for which defendants are to be released on non-monetary bonds (not secured or cash). For citations, at least those issued by police officers, State, Magistrate, Probate and Municipal courts should all have the same citation authority, and all should exclude domestic violence criminal trespass as defined by O.C.G.A. § 19-13-1 from being eligible for citation in lieu of arrest. Any arrestees processed on these offenses or any municipal ordinance for which an arrest is authorized would be released on non-monetary bail.

New Jersey conditions associated with summons would be model – conditions such as: do not return to scene of alleged offense [e.g. store with shoplifting], no contact with victims named in the citation without further order of court, etc. In light of court tendency for excessive conditions, these conditions would need to be carefully limited. A uniform citation or summons form may be adopted for such prosecutions by uniform rule pursuant to Article 6, Section 9, Paragraph 1 of the Georgia Constitution.

CJRC Commentary: The main point of discussion on the use of citations was discussed in the previous recommendation. There was no opposition to this recommendation, and it passed unanimously.

Status: A new code section, O.C.G.A. § 15-5-21.1, was created under SB 407 (2018)/ AP that authorizes the Judicial Council to develop a uniform misdemeanor citation for use on non-traffic misdemeanors and local ordinance violations.

Recommendation: Explore permitting release on an initial non-monetary bail for individuals whose offenses do not authorize jail time as a sentence.

Discussion: Several jurisdictions have moved away from reliance on secured bonds and achieved good results. The District of Columbia is one example. In DC, 80% of persons are released on non-monetary bonds and 15% are held without bond. The remaining 5% are held on other charges. Of those released, 89% make all of their court appearances and 88% are not arrested on new charges while their cases are pending. Only 1% were arrested for new criminal activity that involved a violent offense. Moreover, 88% remained on release at the conclusion of their cases without a revocation for non-compliance with release conditions.⁵³ These results were achieved without any use of secured money bonds. Kentucky provides another example. Between 2011 and 2013, Kentucky increased its non-financial release rate 50% to 66%, with no negative impact on court appearance and public safety rates. In fact, the court appearance rate inched up from 89% to 91%, and the public safety rate from 91% to 92%.⁵⁴ In 2014, the non-financial release rate rose to 70%, and the increased release rate was accompanied by a 15% reduction in new criminal activity of defendants on pretrial release.⁵⁵

The Committee recommends greater opportunities for non-monetary release on low-level offenses. For example, in the event that law enforcement arrests an individual on an offense that otherwise would be a citation, as well as any

municipal ordinance violations or any offense for which no jail time is permitted by statute, the court should release such individuals on a non-monetary bond.

In dealing with repeat offenders, it is presumed that should the defendant re-offend while the existing charges are pending the proper remedy is to revoke the initial bond in accordance with the procedure outlined in *Hood v. Carstens*, 267 Ga. 579 (1997). Pursuant to O.C.G.A. § 17-6-13, only the initial bond is a matter of right, and second or subsequent bond could be revoked if another offense occurs while the defendant is released, subject to a hearing on the revocation of the bond. The right to revoke the initial bond upon the commission of a subsequent penal offense could be spelled out in legislation if necessary.

CJRC Commentary: This recommendation was amended to only include offenses where jail time was not authorized as a sentence. It passed unanimously as amended. The recommendation with regard to citation offenses and ordinances was tabled pending further input from the committee.

Status: This recommendation was not adopted into SB 407 (2018)/ AP except with regard to misdemeanor citations. This recommendation will likely find greater support if Georgia adopts some form of misdemeanor classification.

Recommendation: Provide local courts with the option to authorize unsecured bonds on bail schedules for other misdemeanors.

Discussion: Local courts should have the option to authorize unsecured bonds on bail schedules for other misdemeanors.

While a judge reviewing a case on an individ-

⁵³Pretrial Services Agency for the District of Columbia: FY 2012 Organizational Assessment, Dist. of Col. Pretrial Services Agency (2012), at 10.

⁵⁴Pretrial Reform in Kentucky, Administrative Office of the Courts, Kentucky Courts of Justice (2013).

⁵⁵Results from the First Six Months of the Public Safety Assessment – Court in Kentucky, Laura and John Arnold Foundation (2014).

ual basis should have a broad authority to release on an unsecured bond, certain misdemeanors are inappropriate to release on an unsecured bond with no review of the circumstances of the particular case by a judge. nThe Committee recommends that the following offenses be restricted from release on an unsecured bond through a bail schedule: offenses involving an act of domestic violence, any offense excluded from release upon citation under Code Section 40-13-53(b), or violations of Code Sections 16-10-24 (obstruction), 52-7-12 (boating under the influence).

CJRC Commentary: This recommendation passed unanimously. There was discussion about how this practice was currently authorized, but statutory authority would make it explicit that courts could do this.

Status: An early version of SB 407 contained this recommendation. SB 407 LC 29 7857-EC (2018). The recommendation was not included in the final version of SB 407/ AP. The Judicial Council could examine the possibility of unsecured bonds in changes to court rules.

Recommendation: Establish a committee or body to study the use of statutorily authorized alternatives to monetary bond.

Discussion: Current law permits the sheriff to allow a person to post their driver’s license as collateral for bail only after being detained for five days and only for amounts up to \$1,000. Allowing the use of a driver’s license as collateral earlier, and for a greater amount, adds another resource for release.

CJRC Commentary: This recommendation to “Allow for greater use of posting driver’s license as collateral” was tabled in lieu of the more general recommendation noted above. There was discussion on how this process would work, how the Department of Drivers Services should be notified, and whether or not this recommendation would add a large number of people to the current number of people driving on suspended licenses. After further discussion, the general consensus was that the concept of lessening the days and increasing the amount was worth considering pending further input.

Status: This recommendation was not included in SB 407(2018)/ AP.

Individualizing Bail Determinations

Recommendation: Allow for the setting of bond by any judge of a court of inquiry, or sitting thereby by designation.

Discussion: While any court of inquiry should have the ability to set bond per two attorney general opinions which the committee feels are correct (see Atty. Gen. Op. U88-14; U97-19), in practice the reality is that many magistrate courts do not feel they have the authority to issue bonds on municipal cases or the municipal judges feel that they do not.

CJRC Commentary: This motion passed unanimously, and it was suggested that it would help address the problem of expediting ability to pay hearings.

Status: This recommendation was included in SB 407's changes to O.C.G.A. § 17-6-1.

Recommendation: Allow for the release of individuals with bail restricted offenses by any judge of a court of inquiry, or sitting thereby by designation.

Discussion: Current law only allows elected judges to release individuals with bail restricted offenses. Appointed judges and those sitting by designation are not currently authorized.

CJRC Commentary: This motion passed unanimously.

Status: This recommendation was included in SB 407's changes to O.C.G.A. § 17-6-12. Under this change, a judge sitting by designation under the authority of an elected judge may set bail on a bail restricted offense.

Recommendation: Mandate the release on the least restrictive conditions for misdemeanors.

Discussion: At the heart of the bail reform is the concept of the intended use of bail. Generally, bail is for two purposes – to ensure the defendant's return to court and to prevent any additional crimes pending the disposition of their case. Statutory language supports that a misdemeanor defendant is entitled to an initial bond. In the caselaw there is some support for the proposition that a monetary bond the defendant cannot post is excessive bail. In practice, the working presumption in many courts is that absent a special showing a defendant is only released if he can post a "standard bond." A statutory presumption of release further clarifies the current paradigm with respect to misdemeanors by assuming that pretrial release is the desired outcome with pretrial detention only being necessary if the court determines that the defendant is unlikely to return to court or that public safety or the administration of justice is threatened.

The Committee calls for the presumption of release on the least restrictive conditions in appropriate cases. Any conditions set on a person's pretrial release should be the least restrictive necessary to reasonably assure the safety of the public and appearance in court.⁵⁶ Research has shown that putting conditions of non-financial release on persons showing a high probability of success on the pretrial assessment actually increases their likelihood of failure on pretrial release. Rather, the most appropriate response is to release these persons on personal recognizance or unsecured bonds with no specific conditions.⁵⁷

CJRC Commentary: This motion passed unanimously, and it was noted that this presumption codifies what is already constitutional, and that the presumption is not rebuttable.

⁵⁶American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release (2007) Std. 10-5.2 (a) at 106-107.

⁵⁷Marie VanNostrand and Gena Keebler, *Pretrial Risk Assessment in Federal Court*, Office of the Federal Detention Trustee (2009).

Status: While this recommendation was accepted by the Council, the language was changed significantly in the legislative follow-up. Rather than use the language of “least restrictive conditions,” SB 407’s language change to O.C.G.A. § 17-6-1 requires courts to “not impose excessive bail and shall impose only the conditions reasonably necessary to ensure such person attends court appearances and to protect the safety of any person or the public given the circumstances of the alleged offense and the totality of circumstances.”

Recommendation: Eliminate a bail schedule for family violence offenses.

Discussion: Elimination of use of a bail schedule for acts of family violence would require case-by-case review of such offenses to ensure greater safety of the alleged victim. In all family violence cases as defined by O.C.G.A. § 19-13-1, including family violence criminal trespass, bond would be set on a case-by-case basis under the standards set forth in O.C.G.A. § 17-6-1(f)(3), and the “judge shall give particular consideration to the exigencies of the case at hand and shall impose any specific conditions as he or she may deem necessary.”

CJRC Commentary: This motion passed unanimously.

Status: This recommendation was included in SB 407, and it requires a judge to set bail in family violence cases on an individual basis under O.C.G.A. § 17-10-6.1.

Effective Pretrial Release

Recommendation: (Re)Establish statutory authority for pretrial release programs.

Discussion: Currently, state law only specifically authorizes pretrial release programs when electronic monitors are used. Uniform Superior Court Rule 27 permits the creation of pretrial programs. Additional authority may be needed to establish these programs locally and allow for cities or counties to contract for such services.

CJRC Commentary: This motion was tabled in order to take a look at the necessity of this rule change given the changes to O.C.G.A. § 42-3-70. Specific recommendations are needed as to how this code section should be modified or if Uniform Rules alone are sufficient.

Status: No new legislation resulted from this recommendation. The Judicial Council may wish to consider changing Uniform Rules to follow this recommendation.

Recommendation: Authorize and provide funding for pilot programs for release by risk assessment.

Discussion: The Committee report notes that barriers exist to implementing a pretrial assessment system in Georgia in the near term but suggests that it be pursued as a longer-term goal. There are many reasons to do so. First, research

demonstrates that such tools are highly effective in sorting persons into categories showing their probabilities of success on pretrial release in terms of public safety and court appearance. The table below shows the results of the Colorado Pretrial Assessment Tool (CPAT) in Denver, Colorado.⁵⁸ As the table shows, for both safety and appearance, the success rates fall as the risk levels rise. For example, using the CPAT when making a pretrial release decision, a judicial officer in Denver knows a person in Level 1 has a 96% probability of completing the pretrial period without being charged with new criminal activity while on pretrial release, and a 95% probability of making all court appearances. There is nothing in the risk assessment approach currently used by most Georgia counties – the bond schedule– that can produce such quantitative information.

Second, such tools can track any disparate impacts that might result through their use on racial and ethnic groups. If disparities do arise, they can be easily identified, which is the first step in addressing them. The chart below shows a breakdown by race and risk level of the Arnold Foundation’s PSA assessment tool. In developing this tool, researchers ran statistical tests designed to identify disparities. As the chart shows, there has been very little variation in assessment levels among African American versus whites using the PSA tool.⁵⁹ The tool currently used in most Georgia counties – the bond schedule– provides no similar opportunity to test for any built-in biases, or to monitor for disparate outcomes. With an empirically-derived pretrial assessment tool –

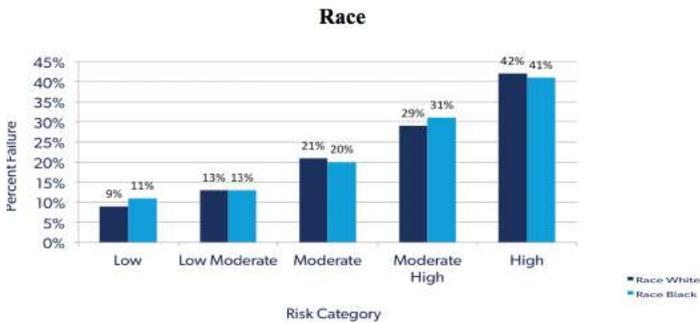
Risk Assessment Outcomes, Denver, Colorado

Assessment Level	Safety Rate	Appearance Rate
1	96%	95%
2	93%	86%
3	86%	84%
4	80%	77%

⁵⁸The Colorado Pretrial Risk Assessment Tool (CPAT), Pretrial Justice Institute and JFA Institute (2012).

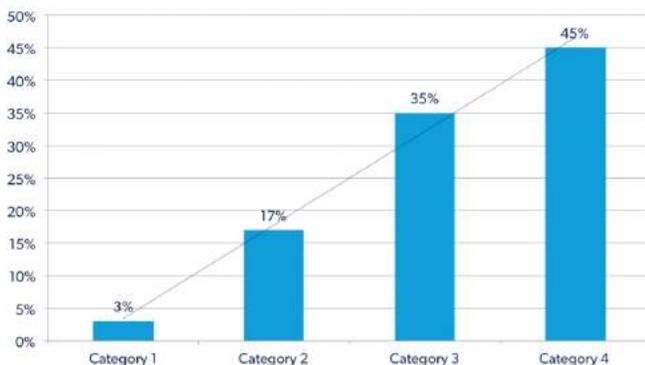
⁵⁹Results of the First Six Months of the Public Safety Assessment – Court in Kentucky, Laura and John Arnold Foundation (2014), at 4.

one that has been tested for disparities – Georgia officials would be able to contextualize race data and begin to address any identified issues.



Third, knowing the pretrial assessments of persons who are in jail helps a jurisdiction determine whether it is using its expensive jail resources for those who need to be there. When Mesa County, Colorado officials first implemented the Colorado assessment tool, they leaped at the opportunity to look at the assessment levels of the pretrial persons they were holding, and they found that there were high percentages of persons in jail who were assessed to have a high probability of success on pretrial release. County officials have been using the assessment levels to track progress in addressing that situation. As

Composition of Mesa County, Colorado Pretrial Jail Population



the chart above shows, officials can now report to their community how they are using the jail for the pretrial population – 80% of the pretrial detainees are scored in the two categories with the lowest probabilities of pretrial success.

Fourth, knowing the assessment levels of persons coming through the system can help officials plan for, and justify to taxpayers, the resources needed to provide adequate supervision and support for those released to the community. Numerous pretrial risk assessment studies have demonstrated that the overwhelming majority of persons fall into categories with the highest probabilities of success, meaning that they should require minimal, if any, resources for monitoring in the community. Knowing assessment levels can help budget officers better project funding needs.⁶⁰

Finally, to the extent that courts are engaged in a heightened scrutiny of issues of pretrial release, the use of statistically validated measures of risk will enable courts to meet that heightened scrutiny.

Recognizing these benefits, at least seven states – Colorado, Delaware, Hawaii, Kentucky, New Jersey, Virginia, and West Virginia – have passed laws requiring the use of statewide empirically-derived pretrial assessment tools.⁶¹

The Arnold Foundation’s PSA tool may be an option for Georgia when it is ready to adopt a pretrial assessment tool. The PSA tool has been validated using data from 1.5 million cases from over 300 local, state and federal jurisdictions all across the country, meaning that it is the most universal pretrial assessment tool in existence. Currently 29 jurisdictions, including three states – Arizona, Kentucky and New Jersey – use the tool.⁶² Additionally, the tool will be publicly available and its methodology made open source. This should give Georgia officials confidence that it will perform well in Georgia.

⁶⁰An analysis of costs in the federal system found that detaining a person pretrial cost an average of \$19,000 per person, while the costs for supervising a person in the community ranged from \$3,100 to \$4,600 per person. The analysis took into consideration the costs of supervision, any treatment, and any costs associated with law enforcement returning persons who had failed to appear for court. Marie VanNostrand and Gina Keebler, *Pretrial Risk Assessment in the Federal Court*, 73 FED. PROB., (2009), at 6.

⁶¹Colo. Rev. Stat. §16-4-106, 4(c); 11 Del. C. §2104(d), §2105; Haw. Rev. Stat. §353-10; Ky. Rev. Ann. §431.066; 446.010(35); N. J. Stat. Ann. §2A:162-16; §2A-162-17; Va. Code Ann. §19.2-152.3; W. Va. Code Ann. §62-11F-1 et seq.

⁶²See: www.arnoldfoundation.org/initiative/criminal-justice/crime-prevention/public-safety-assessment/.

The PSA assessment can also be completed using information typically available at the time of the initial appearance before the judge. It does not require an interview with the person by a pretrial services program or other entity. This is important, given that many Georgia counties do not presently have the capacity to interview persons prior to the initial appearance before the magistrate. It is also a measure that is potentially subject to automation in the future in the context of other criminal database reform efforts that are on-going in Georgia.

Funding is needed for pilot programs for risk assessment and pre-trial services in at least three counties of different size and demographics, starting with a risk assessment measure previously validated in another state. Federal and private grant funds are also likely to be available for such programs. While local courts currently have broad authority to implement such protocols locally, feedback from such pilot efforts may inform the need for legislative and/or court rule changes.

Use of a risk assessment tool requires oversight to provide standards for validation (an adequate statistical showing that it accomplishes what it purports to do specific to the Georgia environment); further, that it is race neutral or closer to race neutral than existing practices. Finally, the process of validation and monitoring needs to be transparent to protect public confidence in the system. From testimony before the committee, it appears that the largest project of pretrial risk assessment in Georgia uses a unique instrument that has not been validated, although the program apparently wishes to switch to an instrument that has been validated in another state.

It is the committee's recommendation that a body or process to fulfill these goals be authorized to be created under the authority of the Supreme Court. There has been controversy in the past over the permissible scope of the Uniform Rule authority (see *Russell v. Russell*, 257 Ga. 177, 356 S.E.2d 884 (1987); *Edwards v. State*, 281 Ga. 108, 111, 636 S.E.2d 508, 510 (2006)), in the

absence of legislative authorization. The exact process or body should be developed after consultation with the Supreme Court. The Pretrial Justice Institute and stakeholders may provide some guidance on governance and parameters of such pilot projects.

CJRC Commentary: The Council did not accept this recommendation. Concerns were that there is no risk assessment tool that is currently open to full public inspection and local funding may be difficult to obtain.

Status: While this recommendation was not accepted by the Council, and no new legislation resulted from this recommendation, there is still work being done on these risk assessment tools. Some Georgia courts are already using risk assessment tools informally. Fulton County has a large pretrial release program that has used a locally developed risk assessment model but was contemplating adopting a validated risk assessment measure used in other jurisdictions. The Judicial Council should continue to monitor the use and development of risk assessment tools.

Recommendation: Develop a statewide judicial inquiry system.

Discussion: Efforts such as risk assessment are predicated on access to not only accurate criminal history, but also certain court information. Development of a statewide judicial inquiry system is therefore a necessity. Such information could be used to automate a risk assessment tool. Funding is needed to support the creation of this tool.

CJRC Commentary: This motion passed unanimously, but it was made clear that this motion was aspirational.

Status: The Criminal Justice e-filing project resulted in the creation of the Criminal Justice Data Exchange Board. The Criminal Justice Data Exchange Board is tasked with creating rules and systems which should result in better commu-

nication between courts with regard to bail and probation status, as well as defendant court dates across different courts. The Committee suggests that the Criminal Data Exchange Board mandate or encourage the collection of data on the causes of pretrial detention, such as holds from other warrants, detention due to failure to appear, and incapacity to make a secured bond. See “Best Practices” below.

Recommendation: Establish a uniform definition of “failure to appear” and a specific procedure for notation and correction in criminal histories.

Discussion: The use of “failure to appear” is a key factor in pretrial risk assessments, whether it is considered case by case or in a formal evidence-based risk assessment scoring. Information from other states, as well as the experience of judges on this committee, suggests that records on failure to appear notations are problematic. It is necessary to create an appropriate data definition for failure to appear notations on criminal records. Notation in the criminal record should be restricted to instances of “no shows” in which an appearance in a court proceeding in front of a judge was required and, ultimately, which is not corrected by the trial court based on any later showing of the reason for non-appearance. There should be an ability for the court to direct the removal of the failure to appear notation upon finding that there was providential cause and then forward a correction withdrawing the reported failure to appear without time limitation. Further, the court should have the discretion to make a finding of non-willfulness on an FTA to be part of the defendant’s criminal record where it determines that the failure to appear was due to excusable neglect, or was not willful, and the defendant voluntarily appears before the court within 180 days of the missed court appearance. Particularly if the courts may rely on such data in the future for formal pretrial risk assessment scoring, better quality assurance of this data is needed. Existing validated risk assessments only

exclude FTAs due to providential cause (like being in jail somewhere else). That information needs to be retained as a separate available data point.

CJRC Commentary: This motion passed unanimously.

Status: This recommendation did not result in any legislation that established a uniform definition of failure to appear. SB 407’s changes will require courts to issue a bench warrant when defendants fail to appear for court after they are released on a citation or on their own unless there is “sufficient excuse” for the FTA.

Recommendation: Promote greater use of court appearance notifications through the use of electronic reminders and plain language notices.

Discussion: Many of the instances of failure to appear are likely due to individuals forgetting their court date or losing the paper notices. Funding is needed to allow local jurisdictions to implement and evaluate the use of electronic court reminders. The Judicial Council should develop contract rates with statewide availability to local courts.

Studies show that Failure to Appear, or FTA, rates can be decreased substantially by reminder notices, and pretrial incarceration after missing a court date is a burden on local governments, as well as causing the same harm as other pretrial incarceration. In particular, there is a Georgia study that shows that adoption of citations without arrest alone increases FTA, but together with a court reminder a better FTA rate than arrest with no reminder can be obtained.

The Committee also recommends the use of a court date reminder system. Several studies have shown that simply reminding persons of their upcoming court dates can have a dramatic impact on reducing the likelihood of failure to appear. One study found that calling and speaking with persons to remind them about their

court dates cut the failure to appear rate from 21% to 8%.⁶³ Another study tested the impact of a pilot court date reminder project that used an automated telephone dialing system to contact persons. The study found that the project led to a 31% drop in the failure to appear rate and an annual cost saving of \$1.55 million.⁶⁴ A 2006 Gwinnett study of shoplifting and traffic offenses showed that mailing an additional notice to shoplifting offenders issued citations reduced their FTA rates from 13.6% to 4.6% (from 10.7% for traffic to 4.3%), an FTA rate less than that of those arrested and released on bond (8.6%). A 2016 pilot in Pickens County showed a decrease of 50-80% in FTAs through the use of a notification system.⁶⁵

The use of plain language in notices has been proven to be more effective than complicated legalese. Similarly, such notices should also plainly describe the consequences of failing to appear for court.

CJRC Commentary: This recommendation passed unanimously. At the December 8, 2017 Judicial Council meeting, the AOC was tasked to develop statewide contract rates and terms for such notices that local courts could utilize.

Status: No new legislation resulted from this recommendation. The AOC is currently working on developing contract rates with statewide availability to local courts.

Recommendation: Request that court-approved notices for appearances and jury service be exempted from the “opt in” requirement for text messages, like the exemption granted for medical appointments.

Discussion: While the courts are probably exempt from these provisions under current law, electronic notices are most economically conveyed by private vendors who are often commercial entities that may be subject to opt-in regulations and liable for penalties for non-compliance. The committee recommends a request to the appropriate federal regulatory agency or Georgia representatives in Congress that court approved electronic notices, texts and email, (including by court contracted private vendors) for court appearances and jury service be exempted by the federal agency from opt-in requirement and financial penalties in a manner similar to medical appointments. Compare 47 CFR 64.1200(a)(2) ... “other than a call made with the prior express written consent of the called party or the prior express consent of the called party when the call is made by or on behalf of a tax-exempt nonprofit organization, or a call that delivers a “health care” message made by, or on behalf of, a ‘covered entity’ or its ‘business associate,’”[emphasis added]. Courts

CJRC Commentary: This motion passed unanimously, and it was noted that this recommendation would come down to Georgia’s congressional delegation.

Status: At this time, the issue has not been taken up by Georgia’s congressional delegation. Possible alternatives include an “opt in” on the new misdemeanor citation form in which a defendant provides their cell phone number and agrees to receive text messages from the court or to gather such information at booking after an arrest.

⁶³Jefferson County, *Colorado Court Date Notification Program: FTA Pilot Project Summary* (2005).

⁶⁴Matt O’Keefe, *Court Appearance Notification System: 2007 Analysis Highlights* (2007). See also: Michael N. Herian and Brian H. Bernstein, *Reducing Failure to Appear in Nebraska: A Field Study*, THE NEBRASKA LAWYER (2010); and Wendy White, *Court Hearing Call Notification Project*, Coconino County Criminal Justice Coordinating Council (2006).

⁶⁵The Pickens County program was not a formal study with tests of statistical significance. Compared to the preceding three-month period, however, when confined to cases where the information was obtained upon release from jail, FTAs dropped to 20% of the prior rate. When expanded to field citations where dependent upon officers obtaining and notating the cell phone numbers, the FTAs was reduced by half.

Best Practices

Recommendation: Update Uniform Superior Court Rules on pretrial release to allow for additional options to be utilized at the discretion of local courts.

Discussion: The Uniform Superior Court Rules provide guidance to local courts on a variety of topics, including the use of pretrial release. In order to provide additional assistance to local courts, these rules should be updated to reflect current best practices in the field while giving local courts the authority to develop programs that model those best practices.

In lieu of cash bail, courts may employ a wide variety of alternatives – pretrial diversion, risk assessment, supervised release, non-monetary bonds and more. Rule changes may be necessary to provide structure to such local programs. Herein lie opportunities to require any pre-trial programs to also note possible substance abuse and/or mental health to screen for possible referral to local accountability court programs. Alternately, bail schedules could vary in other ways based on the length of incarceration. For example, certain provisions could kick in automatically after 24 hours.

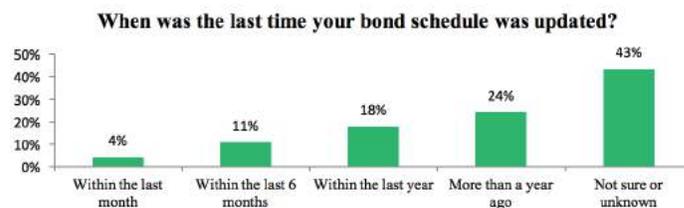
CJRC Commentary: This recommendation passed unanimously.

Status: This request will be forwarded to the Uniform Rules Committee of the Council of Superior Court Judges for further review and discussion.

Recommendation: Establish a statewide repository of bond schedules

Discussion: In an effort to be transparent and to minimize wide variation of bail amounts throughout the state, a central repository of bond schedules should be developed. The committee suggests revising uniform rules to require filing a copy of all bond schedules from around the state with the Supreme Court.

A survey was conducted on judges in the state that showed a wide variation in the use and currency of bond schedules.



CJRC Commentary: This recommendation passed unanimously with the suggestion that the Judicial Council take this matter up for further review.

Status: The Judicial Council should consider requesting that the Supreme Court issue an order requiring the filing of all such bond schedules with the Supreme Court. Such schedules could then be made available to those further reviewing this issue.

Recommendation: Institute a system of data collection and reporting to the Judicial Council to determine the effectiveness of the pretrial detention practices.

Discussion: With misdemeanor prosecutions largely funded on a local level in 159 counties, widespread use of risk assessment, even as a voluntary input used by judges, cannot be widespread without automation of the process and access to data. Manually creating a risk assessment score from raw GCIC reports is very labor intensive. Data gathered from around the state should be used to better inform policymakers and judges on the use of bail and pretrial detention. Data collection should include:

- Failure to Appear rates for misdemeanor defendants awaiting arraignment
- Number/rate of misdemeanor bond forfeitures (i.e., for FTAs)

- Recidivism rates for misdemeanant defendants awaiting disposition
- Local jail data analysis of misdemeanant defendants in jail who cannot make bond (how long and the bond amounts)
- Criminal database reforms should consider how data elements may need to be used in automated programs calculating risk assessment scores.

CJRC Commentary: This recommendation passed unanimously.

Status: A Judicial Council committee or group would be needed to carry out this recommendation.

Recommendation: Develop a bench card for judges that outlines alternatives to monetary bail.

Discussion: This bench card should describe the alternatives to cash bail including, but not limited to: allowing the posting of one’s driver license as collateral, posting of surety bonds (cash, property, etc.), own recognizance bonds, electronic monitoring, and pretrial release and supervision. The Criminal Justice Reform Council and the Judicial Council of Georgia have developed several bench cards for judges noting key changes in the law and best practices on a variety of topics. For example, after previous reforms on misdemeanor probation and felony sentencing, a bench card was produced and well received. Such a bench card would be beneficial to note these reforms and the numerous bail reforms and alternatives to monetary bonds.

CJRC Commentary: This recommendation passed unanimously.

Status: A Judicial Council committee or group would be needed to carry out this recommendation to develop and disseminate a bench card.

Recommendation: Encourage the use of best practices for pretrial release.

Discussion: Best practices for pretrial release and supervision programs include:

- Use of evidence-based supervision practices
- Use of validated pre-trial risk assessment
- Notice to defendant of court date at release
- Follow-up notice of court dates (phone, text, letter, etc.)
- Use of plain language in notices when possible
- Sharing of data/information on programs
- Establishment of training and protocols
- Tracking of key benchmarks
- Expedited review of initial bond/financial decision
- Earlier access to indigent defense

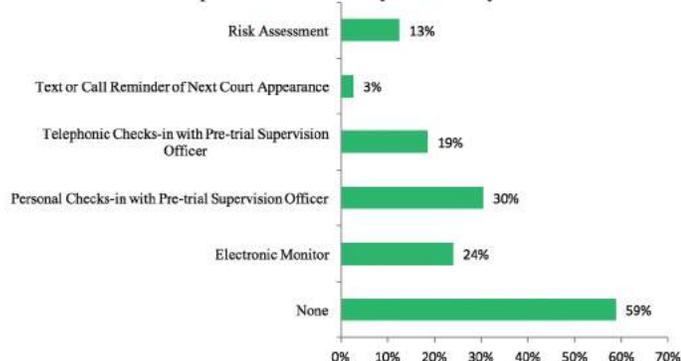
Another best practice is for the trial court to make a timely examination of the bail court’s initial evidentiary financial review of the appropriate constraints on monetary bonds. For instance, if the case was expected to be tried in the superior court, the superior court might wish to designate a particular magistrate to conduct a second financial review with appointed counsel available.

In the survey of judges in the state, most indicated that tools and resources were not readily available pretrial.

If you handle first appearances, what resources are available to you at the first appearance? (check all that apply)



What pre-trial services do you routinely offer?



Recommendation: Promote judicial education on any adopted reforms and national research on pretrial incarceration effects.

Discussion: Efforts should be made to provide educational outreach to judges and court staff throughout the state on bail and pretrial release efforts. Due to the depth and breadth of these reforms, education of the state’s trial judges is critical. In partnership with the Institute for Continuing Judicial Education, efforts should be made to deliver educational content on bail reform and pretrial alternatives through both in-person and web-based sessions for judges and court personnel.

CJRC Commentary: This recommendation passed unanimously.

Status: A Judicial Council committee or group would be needed to carry out this recommendation to gather and disseminate efforts from around the state. A partnership with the Institute for Continuing Judicial Education (ICJE) would be appropriate.

CJRC Commentary: This recommendation passed unanimously.

Status: A Judicial Council committee or group would be needed to carry out this recommendation to gather and disseminate efforts from around the state.

Conclusions & Next Steps

Over the past decade there has been a nationwide bail reform movement focused on the harmful effects and expense of pretrial incarceration and the doubtful utility of cash bonds. Most recently, the Conference of Chief Justices called upon the federal courts, and particularly the Fifth Circuit in the *O'Donnell* case, to establish a “settled understanding of the minimum federal constitutional requirements” to protect “an unconvicted person’s right to liberty” against “infringe[ment] solely because of an inability to pay.” The Fifth Circuit responded, holding that Court policies conditioning release in misdemeanors upon financial conditions are subject to “heightened” or “intermediate scrutiny” which requires that the government show a link between financial conditions of release and appearance at trial or law-abiding behavior before trial.

Nationwide research on the operation of bail questions whether the current practices of many Georgia courts can withstand a heightened scrutiny standard: is there a reasonable fit between policies pursued by courts and these two important objectives? In particular, research in other states shows that pretrial incarceration for misdemeanors generally negatively impacts future crime, and shows there are better alternatives than cash bonds to secure appearance at trial.

All three branches of government in Georgia now face the challenge of meeting the test of heightened scrutiny. The legislature responded in this last session with the passage of SB 407. It established the principle that the financial circumstances of the defendant be considered in the setting or adjustment of bond as soon as possible. Although no outer deadline was established, based on the *O'Donnell* case, courts should assume that the review must be completed by a judicial officer within 48 hours with findings of fact justifying any financial requirements. Next, the legislature clarified the criteria in setting bail: to “not impose excessive bail and ... impose only the conditions reasonably necessary to ensure

such person attends court appearances and to protect the safety of any person or the public given the circumstances of the alleged offense and the totality of circumstances.” The concurrent jurisdiction of all courts of inquiry to set bail was clarified with respect to non-municipal court judges setting bail in municipal court ordinances. Individual evaluation of family violence cases was mandated in lieu of any use of bail schedules.

Finally, elements of the law on non-traffic citations were clarified, and a mechanism for uniformity of forms and procedure through the Judicial Council was established. Yet, at the same time, in protecting the important interest of the State in establishing identity of the defendant prior to release, a fingerprinting provision was inserted which may destroy the usefulness of citations which may require time consuming, in-custody transport of cited individuals for jail processing prior to release. In addition to reducing pretrial detention, citations have historically been utilized as “smart policing” permitting the efficient use of police manpower in enforcing low level offenses. A procedural, technological, or legislative fix is needed to allow citations to continue to serve this traditional function.

The legislature having acted, the challenge largely passes to the other two branches of government. Georgia’s response is crucially limited by the local funding of misdemeanor criminal prosecution and jailing. But there are measures, particularly in the field of data management and support, that could greatly enhance the ability of local governments to meet the challenges of heightened scrutiny without causing heavy burdens of unfunded mandates on local government. The process of serious individual case review is very labor-intensive with current data systems. Presently, where the law mandates increase penalties for repeat offenders, bond and release decisions are not infrequently made in the absence of knowledge of whether one is dealing with a

felony or a misdemeanor, for which the legal and judgmental standards are very different. Bail schedules which take in consideration no account of the defendant's prior record is a much inferior approach to setting bail amounts and conditions, yet they become the frequent necessary shortcut in the light of local budgetary constraints. A critical need to ensure smart utilization of taxes while enhancing public safety is the creation of a more complete, transparent, and easy to access state-wide judicial inquiry system such as is found in Florida today.

Key information in pretrial release decisions whether by formal risk assessment or qualitative judgment is prior failures to appear in court. Experience in other states such as Kentucky showed that such information is often unreliable as a guide due to varying standards for what constitutes a failure to appear – for instance a failure to pay a fee or make a non-court reporting event may, or may not, be treated as a failure to appear. From our limited inquiry, that appears to also be a problem in Georgia.

Georgia also lacks basic data on evaluating the causes of pretrial incarceration in this state and thus the effectiveness of policies involving pretrial release. Data is kept on the number of defendants in custody awaiting dispositions, but it does not break down how many defendants are in custody due to other holds for warrants including probation violations, how many due to a failure to appear or other violation of bond conditions, and how many due to inability to post secured bonds. We encourage the newly created Criminal Justice Exchange Board as well as GCIC to facilitate improvements in these areas of data management and also consider data systems with a view toward the future development of automated risk assessment tools.

Risk assessment measures have been developed which both form a valuable tool in bond decision-making and also meet the government's burden of meeting the challenge of heightened scrutiny. Such tools are valuable in evaluating measures needed to ensure court attendance, protect public safety, and smartly allocate any

resources available for pretrial monitoring. They cannot substitute for judicial discretion because they cannot incorporate significant case-specific information which might be decisive in an individual case. Today they cannot be widely applied in misdemeanor cases in Georgia because with the present criminal justice data systems, their use is quite labor intensive and beyond resources of local governments to apply in most cases. There are assessment tools, such as that developed by the Arnold Foundation, which appear to give reliable risk assessments without defendant interviews and are capable of automation with proper reforms in our criminal justice record inquiry systems. Use of such an assessment tool also requires proper local validation studies in their implementation to verify their effectiveness and lack of bias in their application which ideally would take place under Supreme Court or Judicial Council guidance and standards.

Although felony bail reform is beyond the scope of our committee, evaluating the wisdom, costs, or benefits of felony bail reform should be undertaken in the context of the reforms above and after pilot projects in a few counties in the state. Private grants are likely available to facilitate such projects. Fulton County's existing pretrial release program currently actively employs a local risk assessment tool, but its experience would be most transferable to other jurisdictions if based on a risk assessment tool similar to that of the Arnold Foundation.

Other measures to productively reduce pretrial detention are available to individual courts and entities such as the Judicial Council and the Councils of the different classes of courts. We recommend a central transparent repository of bail schedules and periodic review of local schedules. Research shows that the heaviest adverse impact of pretrial detention falls on those defendants with little or no prior record and those who cannot post the lowest secured bonds. This is hard to justify. Whatever the current system of setting secured bonds in the local court environment, serious consideration should be given to releasing the defendants with the lowest secured bonds or

unsecured bonds from the outset. Likewise, any method that allows earlier and closer examination of the defendant's record to facilitate release of those with good records and concentration of pretrial resources on those with prior offenses or failures to report is to be encouraged. Where pretrial services are available, requiring reporting to pretrial services either in person or by phone, if not overdone, may reduce non-appearances and enhance public safety more effectively than a secured bond.

Finally, a major source of pretrial detention is due to defendant's failure to appear resulting in a bench warrant for defendant's arrest. Courts mainly utilize nineteenth century methods of communication with defendants – either personal delivery, weeks or often months, ahead of the court date, or mail. Private sector actors, such as doctors and hairdressers, use cheap up-to-date methods of communication such as texting to reduce appointment nonappearance. The courts should do no less. Avoidable re-arrests and ensuing pretrial detention is a colossal waste of taxpayer resources and causes unnecessary and preventable harm to the defendant.



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