NLADA | American Council of Chief Defenders

Policy Statement on Fair and Effective Pretrial Justice Practices

June 4, 2011

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."

- Chief Justice Rehnquist, *United States v. Salerno*, 481 U.S. 739, 755 (1986).

The American Council of Chief Defenders is a national community of public defense leaders dedicated to securing a fair justice system and ensuring high quality legal representation for people facing loss of life, freedom, or family. The Mission of the American Council of Chief Defenders is to provide tools, strategies, mutual support, training, and information to chief defenders; to speak as a national voice for public defense; to promote best practices in the leadership, management, and administration of justice; and to support development and reform of public defense systems.

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Executive Summary

Pretrial release practices throughout the country frequently result in the unjust, unnecessary, expensive, and prolonged detention of many individuals prior to trial.

Our legal traditions urge us to reserve pretrial detention for only the most carefully limited circumstances, and all available evidence reflects the importance of doing so.

Pretrial detention has harsh consequences, including the loss of jobs, homes, and family ties.

Research has revealed that all other factors being equal, individuals who are detained prior to trial experience more severe ultimate outcomes. Just as importantly, the heavy reliance by many jurisdictions upon monetary bond as a pretrial release condition disproportionately affects the poor and minorities.

Given our evidence-based ability to accurately identify risk, communities can lower their jail costs while ensuring that only those who pose significant risks of flight or danger are detained.

This American Council of Chief Defenders Policy Statement calls for a new commitment by all criminal justice stakeholders to ensure fair and appropriate pretrial release decision-making, and outlines key action steps for each pretrial actor. In particular, this statement calls upon defenders to advance the following initiatives:

- **Examine Pretrial Release Practices Within Their Own Jurisdictions to Identify Key Areas of Improvement**. While jurisdictions may share common issues, each has its own unique set of practices and traditions. Where unnecessary or unjust pretrial detention is occurring, defenders ought to identify the particular practices leading to those outcomes.
- **Identify and Implement National Standards and Best Practices.** Several national organizations have developed national standards on pretrial practices, and these provide excellent guidelines for defenders in developing strategies to improve pretrial outcomes. Defenders should become familiar with these standards and strive to implement them in daily practice.
- **Develop Collaborative Efforts Among All Criminal Justice Stakeholders to Improve Pretrial Practices.** Improvements are only feasible where open dialogue is occurring between all pertinent criminal justice leaders. Defenders can lead the effort to develop a collaborative approach to rectifying identified detrimental pretrial practices. This effort ought to include local and state policy-makers, who determine how resources are allocated.
- **Develop Effective Pretrial Litigation Strategies.** Defenders ought to be equipped with effective and efficient litigation strategies, grounded in local practice and law, to challenge pretrial-release decisions that result in unnecessary detention.

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In January 2010, National Public Radio's Laura Sullivan wrote a series on bail in the United States that included the following story:

Leslie Chew spent his childhood working long days next to his father on the oil rigs of southern Texas. No school meant he never learned to read or write. Now in his early 40s, he's a handyman, often finding a place to sleep in the back of his old station wagon. But he got by — until one night in December 2008 when the station wagon got cold, and he changed the course of his life. "Well, I stole some blankets to try to stay warm," he says quietly. "I walked in and got them and turned around and walked right back out of the store. [The security guard] said, 'Excuse me, sir, come here. Are you planning to pay for these?' I said, 'No, sir. I don't have no money.' That's when he arrested me right then." When I first spoke to Chew last summer, he'd been inside the Lubbock County jail since the night he was arrested: 185 days, more than six months. Chew is like one of more than a half-million inmates sitting in America's jails — not because they're dangerous or a threat to society or because a judge thinks they will run. It's not even because they are guilty; they haven't been tried yet. They are here because they can't make bail — sometimes as little as $50. Some will wait behind bars for as long as a year before their cases make it to court. And it will cost taxpayers $9 billion this year to house them. On this day that I met him, Chew's bail is $3,500. He would need to leave that much as a cash deposit with the court to leave jail. Or he could pay a bail bondsman a $350 nonrefundable fee to do it for him. If he had either amount, he could stand up and walk out the door right now. But he doesn't. The money, says Chew, "is like a million dollars to me."[1]

Leslie Chew's unfortunate story is far from unusual. Pretrial release practices throughout the country frequently result in the unnecessary, expensive, and unjust detention of many low-risk individuals prior to trial. Yet, these same pretrial release practices often unintentionally facilitate the release of high-risk individuals who happen to have access to resources. Many jurisdictions have no way of accurately assessing risk.

Informed, reasonable, and constitutional pretrial release decision-making among all relevant criminal justice stakeholders is imperative to a just and effective criminal justice system. Therefore, a new commitment by defenders, prosecutors, judges, pretrial release officers, and policymakers is needed to ensure fair and appropriate pretrial release decision-making for persons accused of a crime.

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[1] Laura Sullivan, *Bail Burden Keeps Jail Stuffed With Inmates*, NATIONAL PUBLIC RADIO, Jan. 21 2010, http://www.npr.org/templates/story/story.php?storyId=122725771.

1. A Fair and Effective System of Pretrial Release is Both a Constitutional Imperative and Good Public Policy

A. Pretrial Release is Essential to Ensuring a Legal System Where Liberty is the Norm

Our foundational value of liberty requires the law to presume that every person charged with a crime is innocent until the person's charges are resolved through a fair criminal justice process. "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction…. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[2] A fundamental measure of our society is how carefully we guard and implement this presumption. Our communities and commitment to a free and just society are diminished when the pretrial liberty of individuals is treated callously or unjustly denied.

Nationally, current pretrial release practices commonly result in the unnecessary detention of large numbers of individuals, particularly non-violent and low-risk individuals, despite the presumption of release to which those who have not been convicted are constitutionally and statutorily entitled.[3] This is particularly regrettable since evidence-based methods of identifying risk exist. Statistics from the past five years have consistently revealed that America's jails are populated primarily with individuals awaiting adjudication of their charges.[4]

Just as important, these individuals very frequently cannot obtain release simply because they are unable to meet the financial conditions of release set by the court.[5] Additionally, all too often these individuals are without counsel at their first appearance and have no advocate to assist them in securing reasonable and fair pretrial release.[6] It is unacceptable that thousands upon thousands of persons charged with a crime remain incarcerated simply because they cannot make their bail, or because they did not have counsel present at bail to advocate for reasonable release conditions.

The historical arch for bail is towards reform dedicated to ensure that the core liberty values of our society are protected and sustained.[7] As chief defenders whose staff represent indigent criminal clients across our nation, we call upon ourselves and our defender staff, prosecutors,

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[2] *Stack v. Boyle*, 342 U.S. 1, 4 (1951); *but see Bell v. Wolfish*, 441 U.S. 520, 533 (1979).

[3] Thomas H. Cohen & Tracey Kyckelhahn, Bureau of Justice Statistics Bulletin, *Felony Defendants in Large Urban Counties, 2006* (May 2010)(hereafter "BJS Bulletin").

[4] "At midyear 2009, about 6 in 10 unconvicted offenders in jail were awaiting court action on a current charge, a trend unchanged since 2005. Similarly, the unconvicted male (54.8%) and female (7.4%) population has remained relatively stable during that time period." Todd D. Minton, *Jail Inmates at Midyear 2009 – Statistical Tables*, Bureau of Justice Statistics Statistical Tables (2010).

[5] *Id.* at 8.

[6] Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel*, 1998 U. Ill. L. Rev. 1(1998); *See also* Douglas L. Colbert, *Connecting Theory and Reality: Teaching Gideon and Indigent Defendants' Non-Right to Counsel at Bail*, 4 Ohio State Journal of Criminal Law 167 (2006);

[7] Timothy R. Schnacke, Michael R. Jones, &Claire M. B. Brooker, *The History of Bail and Pretrial Release*, Pretrial Justice Institute (2010).

judges, pretrial release officers, and policymakers to continue reform of pretrial release practices with a new commitment in our nation to ensure that pretrial release is indeed the norm.

B. Our Legal Traditions Support Pretrial Release

The Eighth Amendment to the United States Constitution clearly states "Excessive bail shall not be required…." Bail is "basic to our system of law … and the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment."[8] Excessive bail is constitutionally prohibited because historically, bail was used as a mechanism to assure that people appeared for adjudication of their charges, while still facilitating their release. Courts often simply relied upon the promise of the client to return, or the promise of a family member or neighbor to assist in assuring the individual's return or stand in for the person should he or she fail to appear.[9] As the Supreme Court noted in one of the landmark cases addressing the Eighth Amendment right to bail, "[t]he right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty."[10] The proscription against excessive bail prevented abuses of bail as a release mechanism, and this system safeguarded individual liberties and the presumption of innocence while protecting the integrity of the justice system. More recently, the Supreme Court has emphasized the intrinsic value of pretrial freedom, stating that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[11]

However, the Supreme Court and many state legislatures have also embraced as a purpose of bail the protection of the community, victims, and witnesses. In *United States v. Salerno*, the Court held that "[t]here is no doubt that preventing danger to the community is a legitimate regulatory goal." [12] In *Salerno*, the Court held that the government may deny pretrial release to individuals in select and limited circumstances, provided that detention is attended by all appropriate and necessary due process.[13]

The American Bar Association has also recognized the significant purposes served by bail in the criminal justice system. The ABA Criminal Justice Standards on Pretrial Release state as follows:

> 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 judge or judicial officer decides whether to release a defendant on personal recognizance or unsecured appearance bond, release a defendant on a

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[8] *Schilb v. Kuebel,* 404 U.S. 357, 484 (1971).
[9] *See* Schnacke, et al., *supra* note 7.
[10] *Stack,*342 U.S. at 4.
[11] *United States v. Salerno,* 481 U.S. 739, 755 (1987).
[12] *Salerno*, 481 U.S. at 747; *See, e.g.,* Idaho Code § 19-2902 (2010); 15 M.R.S. § 1002 (2010).
[13] *See id.*, generally.

> condition or combination of conditions, temporarily detain a defendant, or detain a defendant according to procedures outlined in these Standards….[14]

As reflected by the foregoing and countless legislative and judicial actions, the pretrial-release process is supposed to carefully safeguard pretrial liberties while incorporating community safety concerns and assuring the presence of the person in court. "The decision to release or detain a defendant pending trial requires the consideration of pretrial justice – the honoring of the presumption of innocence, the right to bail that is not excessive, and all other legal and constitutional rights afforded to accused persons awaiting trial while balancing these individual rights with the need to protect the community, maintain the integrity of the judicial process, and assure court appearance."[15]

C. Pretrial Release is Favored by the Law and Has Significant Benefits Beyond the Protection of Liberty

In addition to infringing upon liberty interests, pretrial detention generates a number of collateral consequences, such as the loss of job, home, family, and community ties. It is clear that the law favors release for these very reasons. "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…"[16]

Pretrial release also has significant practical benefits to the client and communities. Honoring the constitutional mandate of pretrial release where safe and fair substantially shrinks jail populations, reducing their impact on county and state budgets. Although courts may not restrict individual liberties to serve financial considerations, in fact jurisdictions that employ pretrial detention in only carefully limited circumstances experience significant reductions in costs to local jails and county budgets. For example, the average daily cost of housing an individual in jail is $57.30, which jails save every time an individual is released, rather than detained.[17]

Providing counsel to individuals at bail hearings also significantly contributes to reduction of jail populations. Studies have shown that when individuals had counsel present to advocate for fair and reasonable release conditions, commensurate with the client's individual circumstances, people are two and a half times more likely to be released on recognizance or to receive affordable bail.[18] The jail population was accordingly reduced by nearly 50%.[19]

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[14] STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE § 10-1.1 (2007).

[15] *Pretrial Risk Assessment in Federal Court – For the Purposes of Expanding the Use of Alternatives to Detention*, US DOJ (2009), at 22.

[16] STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE § 10-1.1(2007).

[17] *Jail Population Management: Elected County Officials' Guide to Pretrial Services* (National Association of Counties, The Pretrial Justice Institute, The Bureau of Justice Assistance) Sept. 2009, at 9.

[18] Douglas L. Colbert, Ray Paternoster, and Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 Cardozo L. Rev. 1719, 1722-1723 (2002).

[19] *Id.*

Given our evidence-based ability to accurately identify risk, communities can lower their jail costs while ensuring that only those who pose significant risks of flight or danger are detained.

Clients who are released prior to trial also have greater ability to meet with defense counsel in order to provide information and to assist in the preparation of their defense, including locating witnesses, remaining employed, providing for their families, obtaining treatment, and otherwise demonstrating good citizenship in the community. Pretrial release also provides them with an opportunity to demonstrate good behavior, which can positively influence sentencing decisions.

On the other hand, clients in custody may be subject to pressure to agree to inappropriate guilty pleas. For example, in New York, a comprehensive study of pretrial detention and case outcomes found that pretrial detention not only increased the likelihood of conviction, it also lessened the likelihood that the individual would be offered the opportunity to plead to a less severe charge.[20]

Notably, clients on release receive better ultimate outcomes. Studies have shown repeatedly that, holding all other factors constant, individuals who are detained prior to trial suffer from greater conviction rates and more severe sentencing than those who are released prior to trial.[21]

Pretrial release ultimately works toward ensuring that our criminal justice system remains truly adversarial, fair, and balanced.

D. Fair and Safe Pretrial Release Practices Produce Outcomes that are Consistent with the Presumption of Innocence

Evidence-based studies uniformly demonstrate that persons on pretrial release are treated less harshly than similarly situated persons who are detained. Released clients receive less severe sentences, are offered more attractive plea bargains, and are less likely to become repeat clients for no other reason than their pretrial release. Pretrial detention is the most significant factor contributing to a harsher outcome.[22]

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[20] Mary T. Phillips, Ph.D., *Pretrial Detention and Case Outcomes, Part 2: Felony Cases*, Final Report, New York City Criminal justice Agency, Inc. (2008), at 58 (hereinafter "CJA Final Report").

[21] *See* Mary T. Phillips, Ph.D., *Bail, Detention, and Nonfelony case Outcomes*, Research Brief Series no. 14, New York City Criminal Justice Agency, Inc. (2007)(hereinafter CJA Research Brief No. 14).

[22] *See* John S. Goldkamp, *Two Classes of the Accused: A Study of Bail and Detention in American Justice* (1979); Malcom M. Feeley, *The Process is the Punishment: Handling Cases In A Lower Criminal Court* (1992); Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees,* 26 Cardozo L. Rev. 1947 (2005). *See also, e.g.,* Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. Pa. L. Rev.1031, 1048-1049 (1954); Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. Rev. 641 (1964); Stevens H. Clarke and Susan T. Kurtz, *The Importance of Interim Decisions to Felony Trial Court Dispositions*, 74 J. Crim. L. & Criminology (1983); Michael R. Gottfredson & Donald M. Gottfredson, *Decision Making in Criminal Justice: Toward a Rational Exercise of Discretion* (New York: Plenum Press, 1988).

One of the strongest predictors of sentence length is bail amount. According to a study done in New York on pretrial detention and case outcomes, the odds of being convicted were significantly greater for individuals who were detained for over a week, even after accounting for the effects of charge type and severity, borough of prosecution, and other relevant factors.[23] The adverse effect of detention on outcomes in felony cases is pronounced.

> Defendants who are detained were more likely to be convicted, less likely to have their charges reduced, and more likely to be sentenced to jail or prison, than their counterparts who were not detained. Incarcerative sentences were also likely to be longer for detained defendants. These effects were stronger for felony cases than were found previously for nonfelony cases…. Although no statistical study can prove causality, the findings of this research are fully consistent with the argument that something about detention itself leads to harsher outcomes.[24]

All of this information indicates that pretrial detention, which should only be used in carefully limited circumstances, does indeed have a nefarious effect on the ability of criminal justice systems to produce fair outcomes and undermines the presumption of innocence.

E. National Pretrial Release Data Reveals Sobering Discrepancies Between the Law and Reality, Thus Reflecting the Need for Reform

For the past 22 years, the Bureau of Justice Statistics has supported the State Court Processing Statistics Project (SCPS), which produces statistics detailing how state courts in the 75 most populous counties throughout the nation process and release felony defendants prior to trial. It is the only felony case processing statistics program in the country that collects any information on pretrial release processes and outcomes, although it lacks in certain details. Although there is no similar data collection series for misdemeanor cases, which constitute the preponderance of case filings in this country, the SCPS project has revealed some significant information that highlights the challenges before us:

- The number of people who actually obtain pretrial release is decreasing. "From 1990 to 2002 the percentage of felony defendants released prior to case disposition remained fairly consistent, ranging from 62% to 64%. After 2002, there was a slight decline to 58% of defendants released before case disposition."[25]
- The number of people released on recognizance is markedly decreasing.[26] "From 1990 through 1994, release on recognizance (ROR) accounted for 42% of releases, compared

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[23] *See* Mary T. Phillips, Ph.D., *Bail, Detention, and Felony Case Outcomes*, Research Brief Series No. 18, NY City Criminal Justice Agency, Inc. (2008), at 4-7 (hereinafter CJA Research Brief No. 18). CJA Research Brief No. 14, at 7.

[24] CJA Research Brief No. 18, at 4-7. "The small, but real, negative impact of detention on case outcomes, especially on the likelihood that the defendant will be convicted, provides a further rationale for the suggestion that judges explore alternative bail-setting options to help defendants gain their freedom more quickly, if release on recognizance is not appropriate." *Id.* at 7.

[25] *BJS Bulletin*, at 2.

[26] *Id.* at 2.

to 24% released on surety bond. From 2002 through 2006, surety bonds were used for 42% of releases, compared to 26% for ROR."[27]

- The number of defendants who obtain release through surety bonds is substantially increasing. From 2002 to 2006, "[t]he most common type of release was surety bond (42% of released defendants), which involves the services of a commercial bail bond agent. In 2006, an estimated 6% of felony defendants released through surety bond also had conditions attached to that release, including pretrial monitoring."[28]
- Those people who did not obtain release had substantially higher bail amounts than did those persons who obtained release. "Bail was set at $10,000 for more than half of defendants who had bail set. The overall median bail amount set for defendants charged with a violent offense was about twice that amount ($22,000). Defendants detained until disposition of their cases had a median bail amount set at $25,000 compared to defendants who were released on bail, for whom bail was set at a median of $5,000."[29]

Just as important, typical pretrial release practices are likely to have a disproportionately negative effect on poor individuals because these practices rely heavily on financial release conditions, as indicated in the SCPS data. Therefore, individuals who have access to resources are far more likely to obtain pretrial release.

> Reform advocates have targeted cash bail as the source of unequal treatment of defendants at bail. They have claimed that the cash-based charge-governed system institutionalizes economic discrimination against the poor. According to this reform perspective, the treatment of defendants has been unequal because some can afford their freedom and some cannot. Critics of such bail practices do not believe a person's ability to afford cash bail, a reflection of economic background, is related to determining the likelihood that he or she will fail to attend court. Unfortunately, because of the economic basis of cash-based pretrial release, at least in most urban settings, racial bias is also a result. African Americans and other minorities, who disproportionately are numbered among the poorest of the poor, also disproportionately fill the jails as pretrial detainees.[30]

As indicated above, current pretrial release practices also result in significant racial and ethnic disparities. A recent study in Baltimore, Maryland, found that 91% of jail inmates were pretrial detainees and that African Americans comprised 89% of the jail population.[31] Another study, which analyzed the SCPS data collected between 1999 and 2000 for racial and ethnic disparities in criminal processing, came to several disturbing conclusions. The study revealed that racial disparities were notable in courts' decisions to deny bail and for defendants charged with

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[27] *Id.*
[28] *Id.*
[29] *Id*. at 6.
[30] John S. Goldkamp, *Bail*, Encyclopedia of Crime and Justice (2002), http://www.encyclopedia.com/topic/bail.aspx
[31] Natassia Walsh, Justice Policy Inst., *Baltimore Behind Bars: How to Reduce the Jail Population, Save Money, and Improve Public Safety* 15 (2010).

violent crimes, and ethnic disparities were most prominent in court decisions to grant or deny nonfinancial release and for people charged with drug crimes.[32]

All these studies reflect that, despite the mandates of our Constitution, pretrial practices throughout the country do not in fact ensure that pretrial liberty is the norm or that all are treated equally under the law. Better pretrial release practices must be adopted by all criminal justice stakeholders to rectify these realities.

2. National Standards for Criminal Justice Agencies Emphasize the Importance of Evidence- and Risk-Based Release Decision-Making

Bail decisions are often made arbitrarily and quickly and on little information other than previous criminal history and current charges. Many jurisdictions utilize bond schedules that assign a dollar amount to an offense type, irrespective of the specific characteristics and risks associated with the particular individual charged. Objective research-based tools have been and continue to be developed that impartially assess a person's likelihood to flee or pose a threat to the community and provide this information to judges, prosecutors, and defenders. With the availability of such tools, defenders are better able to advocate for release according to evidence-based risk assessments, prosecutors are able to identify discrete risks actually posed by individuals and request release conditions tailored to address those risks, and judges are better equipped to assign more rational conditions of release or detention. National standards require pretrial release decision-making by each relevant criminal justice stakeholder that relies upon objective determinations of risk, considerations of fairness and efficacy, and the law.

A. National Standards for Public Defenders

The national norm for pretrial release advocacy by public defenders requires practical advocacy using particularized facts and relevant law. Standards set forth by the National Legal Aid and Defender Association require public defenders to present judicial officers with the facts and legal criteria that support release, and where release is not obtained, to pursue modification of the conditions of release.[33]

Counsel is crucial for bail determinations. The Supreme Court has stated that "[c]ounsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail."[34] The Supreme Court has also recognized that arraignment, where a person's liberty is at stake and prosecutorial forces are arrayed against him or her, is a crucial stage of litigation triggering the individual's Sixth Amendment right to counsel.[35]

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[32] Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 Just. Q. 170 (2005).
[33] PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION § 2.3 (Nat'l Legal Aid and Defender Ass'n 1994).
[34] *Coleman v. Alabama*, 399 U.S. 1, 9 (1970).
[35] *See Rothgery v. Gillespie*, 554 U.S. 191 (2008).

While in many jurisdictions, public defenders are not at bail hearings, empirical evidence has demonstrated that representation of clients at bail hearings produces measurable benefits and also that "representation is crucial to the outcome of a pretrial release hearing."[36]

A study done in Baltimore, Maryland, showed that low-risk, non-violent indigent persons who were provided with lawyers at bail:

- Were two and a half times more likely to be released on recognizance;
- Were four and a half times more likely to have their bail amount significantly reduced;
- Served less time in jail (the median reduction in jail time was from nine days to two days);
- Had minimally longer bail hearings.[37]

Defenders at bail not only help their clients receive more favorable and fairer release conditions, clients also feel more satisfied with their outcomes and feel treated more fairly when they have counsel present at bail.[38]

There are practical litigation tools to help defenders meet this standard without significantly increasing their workload. For example, the North Carolina Defender Manual provides public defenders with an interview checklist for the bond hearing that details information that should be collected and that may be helpful in advocating for fair and just pretrial release for their clients.[39]

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[36] Colbert, *supra* note 18, at 1720.
[37] *Id.* at 1722-1723.
[38] *Id.* at 1759-60.
[39] *See* Alyson Grine & John Rubin, *Interview Checklist for Bond Hearing, in* NORTH CAROLINA DEFENDER MANUAL, VOLUME 1, PRETRIAL (NC Indigent Defense Manual Series, 2009) ("The following information may be useful both for preparing for a bond hearing and for locating the client later:

1. Identifying Information (name, aliases, social security #, citizenship, date and place of birth)
2. Length of residence (in North Carolina and _____County)
3. Family ties in North Carolina (spouse, children, other relatives and dependents) and the names of neighbors, friends, and others who can verify information about the client (with work and home telephone numbers for each)
4. Present address, length of residence at that address, telephone number, and names and relationship to client of people living there
5. Prior addresses and length of residence at each
6. Present employment status, length of employment and job responsibilities, telephone number of employers, and job prospects if unemployed
7. Prior employment information
8. Education
9. Current and past military service
10. Health information (medical or mental health problems, alcohol or drug problems, and past or present treatment providers or programs)
11. Probation, post-release supervision, or parole status, including names and telephone numbers of previous attorney and probation officer
12. Other pending charges and name of attorney (if any), conditions of release, and other pertinent information
13. Prior convictions, prior release status in other cases, and whether there have been any past failures to appear
14. Financial resources for bond (client or willing relatives, friends, others). What bond could client make, if any?

B. National Standards for Pretrial Services Agencies

Pretrial services agencies fulfill a crucial function in assuring that where appropriate, pretrial liberty remains the norm in this country. These agencies interview and investigate individuals upon arrest. The agencies are required to present objective pretrial release recommendations to court officers according to evidence-based risk assessments of each defendant. The pretrial services agency has critical responsibilities to "assemble reliable and objective information relevant to the court's determination concerning pretrial release or detention, drawing upon information obtained through the interview of the defendant and other information obtained through its investigation. It should prepare a written report that organizes the information, presents an assessment of risks posed by the defendant and recommends ways of responding to the risks through use of appropriate conditions of release. The assessment and recommendations should be based on an explicit, objective, and consistent policy for evaluating risks and identifying appropriate release options. The information gathered in the pretrial services investigation should be demonstrably related to the purposes of the pretrial release decision and should include factors shown to be related to the risk of nonappearance or of threat to the safety of any person or the community and to selection of appropriate release conditions."[40]

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15. Relatives, friends, or others who might agree to custody release
16. Client's priorities with regard to pretrial release conditions (keep job, care for children, continue medical treatment, get substance abuse treatment, etc.)Too often unethical workloads impair a defender's ability to meet this national standard of practice at the pretrial release stage, but simple steps may be taken to streamline the process and reduce the amount of work required to provide meaningful and effective representation.")

[40] STANDARDS ON PRETRIAL RELEASE §3.4 (Nat'l Association of Pretrial Services Agencies 2004) which further states:

> (a) The report may include information on factors such as: (i) the defendant's age, physical and mental condition, family ties, employment status and history, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; (ii) whether at the time of the current offense or arrest, the defendant was on probation, parole, or other release pending trial, sentencing, appeal, or completion of sentence for an offense; (iii) availability of persons who could verify information and who agree to assist the defendant in attending court at the proper time; (iv) other information relevant to successful supervision in the community; (v) facts justifying a concern that the defendant will violate the law if released without restrictions; (vi) the nature and circumstances of the offense when relevant to determining release conditions; and (vii) whether there are specific factors that may make the defendant an appropriate subject for conditional release and supervision options, including participation in available medical, drug, mental health or other treatment, diversion or alternative adjudication release options. (b) The presentation of the pretrial services information and the recommendations made to the judicial officer should link assessments of the risk of flight and of public safety to appropriate release options designed to respond to the specific risk and supervision needs identified. The identification of release options and the recommendations made by pretrial services for the consideration of the judicial officer should be based on detailed agency or program policies developed in consultation with the judiciary. Suggested release options or conditions should be supported by objective, consistently applied criteria set forth in these policies, and should be the least restrictive conditions necessary to assure the defendant's appearance for scheduled court events and protect the safety of the community and individual persons.

The national standards for the role and responsibilities for pretrial services agencies are detailed by the American Bar Association and the National Association of Pretrial Services Agencies. According to the American Bar Association, the role of the pretrial services agencies states: "Every jurisdiction should establish a pretrial services agency or program to collect and present the necessary information, present risk assessments, and, consistent with court policy, make release recommendations required by the judicial officer in making release decisions, including the defendant's eligibility for diversion, treatment or other alternative adjudication programs, such as drug or other treatment courts. Pretrial services agencies should also monitor, supervise, and assist defendants released prior to trial, and to review the status and release eligibility of detained defendants for the court on an ongoing basis." [41]

> The results of the pretrial services investigation, including information relevant to alternative release options, conditional release treatment and supervision programs, or eligibility for pretrial detention, should be presented to relevant first appearance participants before the hearing so that appropriate actions may be taken in a timely fashion.

[41] STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE § 10-1.10 (2007). This standard further states:

> The pretrial services agency should: (a) conduct pre-first appearance inquiries; (b) present accurate information to the judicial officer relating to the risk defendants may pose of failing to appear in court or of threatening the safety of the community or any other person and, consistent with court policy, develop release recommendations responding to risk; (c) develop and provide appropriate and effective supervision for all persons released pending adjudication who are assigned supervision as a condition of release; (d) develop clear policy for operating or contracting for the operation of appropriate facilities for the custody, care or supervision of persons released and manage a range of release options, including but not limited to, residential half-way houses, addict and alcoholic treatment centers, and counseling services, sufficient to respond to the risks and problems associated with released defendants in coordination with existing court, corrections and community resources; (e) monitor the compliance of released defendants with the requirements of assigned release conditions and develop relationships with alternative programs such as drug and domestic violence courts or mental health support systems; (f) promptly inform the court of all apparent violations of pretrial release conditions or arrests of persons released pending trial, including those directly supervised by pretrial services as well as those released under other forms of conditional release, and recommend appropriate modifications of release conditions according to approved court policy. The pretrial services agency should avoid supervising defendants who are government informants, when activities of these defendants may place them in conflict with conditions of release or compromise the safety and integrity of the pretrial services professional; (g) supervise and coordinate the services of other agencies, individuals or organizations that serve as custodians for released defendants, and advise the court as to their appropriateness, availability, reliability and capacity according to approved court policy relating to pretrial release conditions; (h) review the status of detained defendants on an ongoing basis for any changes in eligibility for release options and facilitate their release as soon as feasible and appropriate; (i) develop and operate an accurate information management system to support prompt identification, information collection and presentation, risk assessment, release conditions selection, compliance monitoring and detention review functions essential to an effective pretrial services agency; (j) assist persons released prior to trial in securing any necessary employment, medical, drug, mental or other health treatment, legal or other needed social services that would increase the chances of successful compliance with conditions of pretrial release; (k) remind persons released before trial of their court dates and assist them in attending court; and
> (l) have the means to assist persons who cannot communicate in written or spoken English.

These agencies also provide supervision and assistance where necessary and appropriate to those on release on a variety of matters, including employment, medical, drug, and mental or other health treatments. Pretrial services agencies can help individuals increase their chances of successful compliance with conditions of pretrial release and remind released individuals of their court dates and assist them in attending court. Practical pretrial risk assessment instruments that are in use, that have been studied, and that have been validated can be very effective tools for promoting alternatives to pretrial detention.[42]

Pretrial services agencies should vigorously identify and use noncash-based alternatives to incarceration that rely on validated risk assessments in order to eliminate financial discrimination against the poor and minorities.

C. National Standards for Prosecutors

As the voice for the state, prosecutors are enormously influential in determining the conditions of release imposed upon each defendant. Their bail recommendations frequently give the court parameters within which to decide release conditions and should be made upon careful review of all appropriate and pertinent factors. The National District Attorneys Association Standards place a responsibility on the prosecutor to request bail conditions that are designed to facilitate release, rather than detention, where appropriate and possible.[43] These standards also require prosecutors to gather significant and pertinent information about each defendant to inform their bail recommendations. Some of this information includes the defendant's employment status and history, financial condition, ability to raise funds and the source of those funds, length of residence in the community and family ties, and criminal record, among others.[44] Prosecutors are to evaluate the specific risks of flight and danger posed by each defendant after considering all the appropriate information and request bail conditions that are tailored to address identified risks.[45] These standards also impose a continuing obligation on prosecutors to modify the bail status or conditions of a defendant if they learn of new information rendering the initial bail request inappropriate, and require prosecutors to voluntarily request "periodic reports on detained defendants to determine if continued detention under the current conditions is appropriate."[46]

D. National Standards for Judicial Officers

Judicial officers arguably play the most important role in the pretrial release decision. Their release decisions are determinative and should be informed by all factors. The American Bar

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[42] See, *e.g.*, Marie Van Nostrand, Ph.D & Geena Keebler, U.S. Dep't of Justice, *Pretrial Risk Assessment in Federal Court* (2009); James Austin, Roger Ocker, &Avi Bhati, The JFA Inst.,*Kentucky Pretrial Risk Assessment Instrument Validation*(2010).

[43] STANDARDS ON PRETRIAL RELEASE § 4-4.4 (Nat'l Dist. Attorneys Ass'n 2010).

[44] *Id.* at § 4-4.2.

[45] *Id.* at §§ 4-4.1,2.

[46] *Id.* at §§ 4-4.3,5.

Association directs its Pretrial Release Standards to the responsibilities of the judicial officer.[47] The Standards recognize that detention prior to trial is oppressive and harsh, and detention should be limited to circumstances only when necessary and when due process is provided to the individual.[48] Judicial officers are to assign the least restrictive conditions necessary to assure appearance or provide for community safety, including encouraging citations rather than arrests by police officers and utilization of diversion programs and other alternative adjudication options.[49] Judicial officers are also advised to use release on financial conditions only when no other conditions will ensure appearance, and when financial conditions are to be used, bail should be set at the lowest level necessary to ensure the individual's appearance and with regard to a person's financial ability to post bond. Finally, the Standards admonish judicial officers against using financial conditions to address concerns for public safety.[50]

3. Action is Needed to Implement a Fair and Effective System of Pretrial Release

There should be more informed, effective, and constitutional pretrial release decision-making among all relevant criminal justice stakeholders. Common sense action will bring about these improvements.

Public defenders can and ought to take the following steps:

- Dedicate sufficient resources to the bail hearing and/or first appearance, where pretrial release terms are set
- Obtain and use crucial risk assessment information for making relevant and persuasive arguments regarding appropriate release conditions for their clients
- Ensure they are equipped with the necessary tools, strategies, mutual support, and training to meet their pretrial-release advocacy responsibilities
- Collaborate on publications and media efforts to raise awareness regarding the importance and benefits of pretrial release and to promote best practices for public defenders in the pretrial stage
- Educate and train defenders on the value and function of pretrial service programs within their local justice systems
- Advocate for the use of alternatives to detention when appropriate, such as diversion programs, drug and mental health treatment programs, or other community programs, so as to allocate criminal justice resources judiciously and prevent unnecessary detention
- Work collaboratively with judges, prosecutors, and pretrial service agencies to develop cooperative, productive, and sustainable pretrial-release practices, in conformance with national standards
- Be prepared to challenge or appeal unfavorable or erroneous pretrial release decisions or practices through available legal channels

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[47] STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE § 10-1(2007).
[48] *Id.* at § 10-1.1.
[49] *Id.* at§§ 10-1.1,4,6
[50] *Id.* at §10-1.4.

Pretrial services agencies should implement the following practices:

- Make available the objectively-obtained information on each person to every other necessary and appropriate criminal justice actor, including judges, prosecutors, and defenders
- Tailor objective release recommendations narrowly to the specific risks posed by each defendant, in conformance with appropriate national standards
- Collect and disseminate data on all pretrial-release practices in order to assess the efficacy of pretrial-release decision-making policies
- Educate and train judges, prosecutors, and defenders on their value and role in effective, fair, and safe pretrial-release practices

Prosecutors should participate in reform as follows:

- Allocate appropriate resources to the bail hearing, where pretrial release terms are set
- Obtain and use crucial risk assessment information to identify accurately the risks posed by each defendant and to seek narrowly-tailored conditions designed to address those risks
- Ensure they are equipped with the necessary tools, strategies, mutual support, and training to meet their pretrial-release advocacy responsibilities
- Educate and train prosecutors on the value and function of pretrial service programs within their local justice systems
- Proactively seek the use of alternatives to detention when appropriate, such as diversion programs, drug and mental health treatment programs, or other community programs, so as to allocate criminal justice resources effectively and prevent unnecessary and expensive detention
- Work collaboratively with judges, defenders, and pretrial service agencies to develop information-sharing and productive pretrial-release practices, in conformity with national standards

Judges should participate in reform as follows:

- Serve as leaders in their local criminal justice systems to establish effective and fair pretrial-release practices
- Employ individualized risk assessment information to identify accurately the risks posed by each defendant
- Impose narrowly-tailored release conditions designed to address those risks
- Eliminate use of bail schedules and imposition of bail based upon charge or criminal history alone
- Educate and train other judges on the value and function of pretrial service programs within their local justice systems
- Proactively employ alternatives to detention where appropriate, such as diversion programs, drug and mental health treatment programs, or other community programs, so as to allocate criminal justice resources effectively and prevent unnecessary and expensive detention

- Work collaboratively with prosecutors, defenders, and pretrial service agencies to develop information-sharing and productive pretrial release practices, in conformity with national standards

Policymakers should support reform as follows:

- Ensure that each jurisdiction has adequate resources to ensure that defense counsel is provided at every bail hearing
- Equip local justice systems with the training and resources to implement fair, cost-effective, and constitutional pretrial-release practices
- Encourage and support the development and appropriate use of effective pretrial-release alternatives, including diversion programs, drug and mental health treatment programs, and other community-based treatment programs
- Ensure jurisdictions have high-functioning pretrial release programs that equip all criminal justice actors with evidence-based risk assessments and crucial information to determine the appropriate release conditions for each defendant
- Collect and disseminate pertinent data to ascertain actual practices and the efficacy of those practices
- Assist local criminal justice actors in developing and communicating messages to local communities about the value of fair, effective, and safe pretrial-release practices

Conclusion: Advance the Constitutional Right to Pretrial Release

Freedom before conviction is a basic human right, an essential aspect of liberty. It is the responsibility of a free, open, and democratic society to ensure that the presumption of innocence is not illusory. Implementing fair and effective pretrial release practices serves to protect this presumption and is the responsibility of defenders, prosecutors, judges, pretrial release officers, and policymakers.

The tension between honoring our commitments to liberty and due process and protecting our communities need not result in unjust pretrial incarceration of thousands of individuals presumed innocent. We have the means to do better.

We chief defenders urge people of good will to unite to bring about pretrial release for those charged with a crime, especially the poor and vulnerable, people with mental illness, people with mental retardation children and adults in low-income families, people with disabilities, and immigrants.

Adopted by the American Council of Chief Defenders on June 4, 2011

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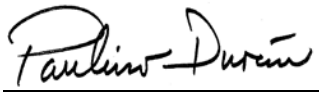
ACCD Chair

Tim Young, Ohio
ACCD Vice-Chair



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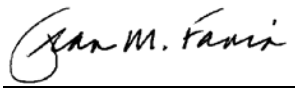

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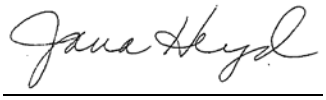

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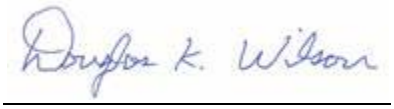
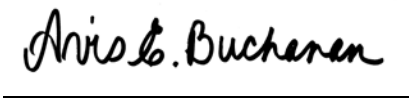


Douglas K. Wilson, Colorado
at-large

Gary Windom

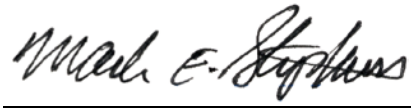
Gary Windom, California
at-large



Avis E. Buchanan, Washington D. C.
at large

Nancy Bennett

Nancy Bennett, Massachusetts
at-large



Mark Stephens, Tennessee
at-large

The American Council of Chief Defenders is a national community of public defense leaders dedicated to securing a fair justice system and ensuring high quality legal representation for people facing loss of life, freedom, or family. The Mission of the American Council of Chief Defenders is to provide tools, strategies, mutual support, training, and information to chief defenders; to speak as a national voice for public defense; to promote best practices in the leadership, management, and administration of justice; and to support development and reform of public defense systems