KEY FEATURES OF HOLISTIC PRETRIAL JUSTICE STATUTES AND COURT RULES

IN 2015, the Pretrial Justice Institute (PJI) launched its 3DaysCount™ Campaign. The campaign is a nationwide initiative to: (1) reduce unnecessary arrests that destabilize families and communities; (2) replace discriminatory cash bail with practical, risk-based decision making; and (3) restrict detention, through due process, to the small number of defendants who pose an unmanageable threat to public safety or flight. One of the goals of the campaign is to assure that state statutes and court rules are written to best support these outcomes.

Unfortunately, rather than being supportive, many of our current bail laws hinder efforts to achieve these outcomes. Many were written decades ago, before the American Bar Association studied the bail process and issued standards for pretrial release,[1] before research debunked the belief that requiring defendants to post money as a pre-condition to release is needed as an incentive to get defendants to court,[2] before the capacity existed to deploy and utilize empirically-based pretrial risk assessment tools,[3] before research demonstrated that even very short stays in jail for low and moderate risk defendants greatly increases pretrial failure and

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recidivism rates,[4] and that detaining low- and moderate-risk defendants throughout the pretrial period significantly increases their likelihood of receiving harsher sentences,[5] and before numerous key national stakeholder associations stepped forward calling for massive reforms of the bail system.[6]

As a result, many existing statutes and court rules sanction, encourage, and sometimes even require the use of practices that are now known to be unsafe, unfair, and ineffective. For example, many call for the use of bond schedules as a tool for determining who is released and who remains in jail pending trial. These tools, which simply assign a dollar amount to the charge, allow dangerous defendants who have access to money to buy their way out of jail, while low-risk defendants without financial means must remain in jail. Other laws specifically allow judges to set secured financial bonds to address concerns regarding public safety, despite the fact that such bonds are designed only to address concerns about appearance, and, in most states, no mechanisms exist to forfeit a bond if the defendant engages in criminal activity that endangers the public while on pretrial release. Also, since many statutes and court rules were written at a time when financial conditions were the predominant form of release, "bail" is often defined as an amount of money.[7]

The purpose of this document is to present the key features of statutes and court rules that would support each of the desired outcomes for the 3DaysCount campaign: reduced arrests; replacing cash bonds with risk-based decision making; and restricting detention, through due process, only to those with unmanageable risks.

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This document provides examples of language from existing statutes and court rules that address these features. The examples should not be viewed as the only way, or even the best way, to address the specific feature. Rather, they are presented to show how lawmakers in other states have attempted to incorporate these features into their laws. Statements from the Standards of the American Bar Association (ABA) about how these features should be addressed accompany the examples.

REDUCING ARRESTS

EACH year, there are about 11 million arrests in this country, most of them for non-violent misdemeanors. The 3DaysCount campaign recognizes that for these 11 million arrestees, our criminal justice system operates as a complex maze, with too many entry points and too few exits. The first outcome targeted by the campaign is to reduce the number of entry points. There are several ways to do this.

The first is simply to reduce the number of persons who become formally involved with the criminal justice system. Law enforcement officers have a great deal of discretion in deciding whether to initiate criminal charges, often guided by departmental policies. Many departments seek to deflect certain individuals, including from among those who suffer from mental illnesses and those who present chronic public disorder challenges, to appropriate placements outside of the criminal justice system. Such placements typically do not require any statutory authority.

But when the criminal justice system is going to be invoked, there are at least two entry points that do not require an individual to be taken into custody. One involves an expanded use of the summons, which is a legal document issued by a judicial officer summoning a person to appear in court on a specific date to answer for a criminal charge. The other involves expanded use of the citation, which is a document issued by law enforcement agencies directing a person to appear in court on a specific date.

Summonses in Lieu of Arrest Warrants

THE ABA Pretrial Release Standards state that judicial officers "should be given statutory authority to issue a summons rather than an arrest warrant in all cases in which a complaint, information, or indictment is filed or returned against a person not already in custody. Judicial officers should liberally utilize

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this authority unless a warrant is necessary to prevent flight, to ensure the safety of the defendant, any other person or the community, to prevent commission of future crimes or to subject a defendant to the jurisdiction of the court when the defendant's whereabouts are unknown."[9] The Standards go on to call for the mandatory issuance of a summons for minor offenses, which the ABA defines as lower-level misdemeanors.[10]

Citations in Lieu of Custodial Arrests

THE ABA Pretrial Release Standards also call for the use of citations in lieu of custodial arrests. "It 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."[11]

At least two states have statutory provisions directing law enforcement to use citation releases to the maximum extent possible.

KENTUCKY: Except for a defendant who is charged with assault, a sex or weapons offense, or DUI, or who presents a danger to him or herself, or who refuses to follow the peace officer's reasonable instructions, *"a peace officer shall issue a citation instead of making an arrest for a misdemeanor committed in his or her presence, if there is reasonable grounds to believe that the person being cited will appear to answer the charge."* Ky. Rev. Stat. Ann. § 431.015 (1)(a).

TENNESSEE: The statute calls for the use of citations in misdemeanor cases *"in which: (1) the public will not be endangered by the continued freedom of the suspected misdemeanant; (2) the law enforcement officer has reasonable proof of the identity of the suspected misdemeanant; and (3) there is no reason to believe the suspected misdemeanant will not appear as required by law."* Tenn. Code. Ann. § 40-7-118(m).

The Tennessee statute goes on to include a statement from the legislature explaining why it thinks it is important that law enforcement use citation releases to the maximum extent possible: *"The general assembly finds that the issuance of a citation in lieu of arrest of the suspected misdemeanant will result in cost savings and increased public safety by allowing the use of jail space for dangerous individuals and/or felons and by keeping officers on patrol. Accordingly, the general assembly encourages all law enforcement agencies to so utilize misdemeanor citations and to encourage their personnel to use those citations when reasonable and according to law."* Tenn. Code Ann. § 40-7-118(m).

In 2016, the State of Alaska modified its statute on citation, expanding the offenses that are eligible for citation to Class C felonies.

ALASKA: *"When a peace officer stops or contacts a person for the commission of a class C felony offense, a misdemeanor, or the violation of a municipal ordinance, the officer may, in the officer's discretion, issue a citation to the person instead of taking the person before a judge or magistrate."* Alaska Stat. § 12.25.180 (a).

REPLACING CASH BAIL WITH RISK-BASED DECISION-MAKING

OVER 60 percent of jail inmates in the U.S. are awaiting adjudication of the charges against them.[12] A very large percentage of these inmates are in jail on financial bonds. And many of these defendants pose little risk to public safety or flight. As a result, the second outcome sought by 3DaysCount is to replace the current money-based bail system with one that is based on risk. This section sets forth the legal language that can help bring about that transformation.

Replacing Cash Bail

THE goals of the bail or pretrial release decision are to maximize appropriate pretrial release, maximize public safety, and maximize court appearance.[13] Achieving all three of these goals simultaneously is a major challenge facing key stakeholders and policymakers. When our bail laws reflect what is known about approaching this challenge—that a focus on maximizing one goal does not have to occur at the expense of neglecting the other goals—there can be simultaneous progress on all three goals. And that realization leads to one conclusion: it is time to replace financial bond conditions as an option available to the court.

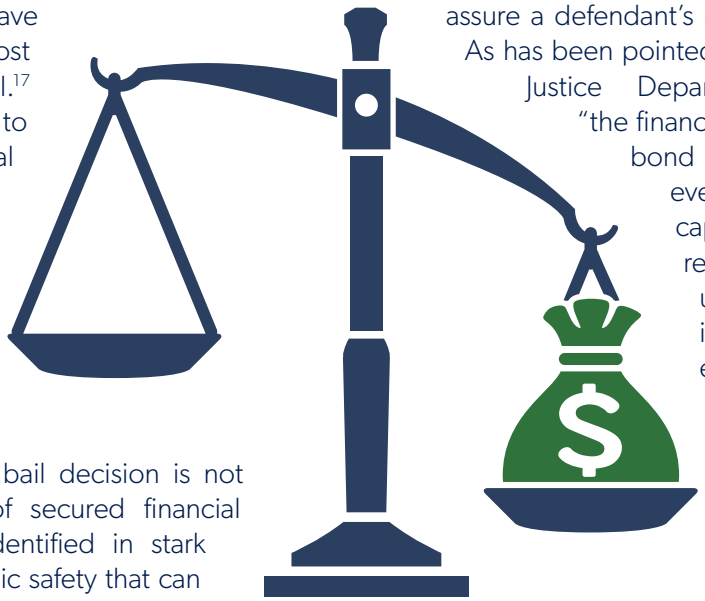
The ABA Pretrial Release Standards have called for the extremely limited use of financial bonds. According to the Standards, secured financial bonds "should be imposed only when no other less restrictive condition of release will reasonably ensure the defendant's appearance in court." Further, "[f]inancial conditions of release should not be set to prevent future criminal conduct during the pretrial period or to protect the safety of the community or any person." Moreover, "[t]he judicial officer should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay."[14]

The goals of the bail or pretrial release decision are to maximize appropriate pretrial release, maximize public safety, and maximize court appearance.

Despite this call for the extremely limited use of secured financial conditions, such conditions are used extensively in most jurisdictions.[15] **THE 3DAYSCOUNT CAMPAIGN CALLS FOR THE REPLACEMENT OF ALL FINANCIAL BONDS WITH A SYSTEM INFUSED WITH RISK ASSESSMENT**.

There are at least two powerful reasons for doing so. First, not only are secured conditions designed to address only one of the three goals of the bail decision—court appearance—they create obstacles to the achievement of the other two. The history of bail shows that secured financial conditions were designed to create an incentive for defendants to appear in court through the threat of forfeiture for failure to appear.[16] To that extent, they would, in theory, help assure the goal of maximized appearance. But what about the other two goals?

The goal of the bail decision to effectuate release of the defendant pending trial is clearly impacted by the use of secured financial conditions. Only those defendants who pay the bond or the bondsman's fees are released. National data on felony defendants show that only about half of those who have a secured financial condition post it and are released pending trial.[17] Pretrial detention for inability to pay falls most heavily on racial minorities. Studies have consistently shown that African American defendants have higher bond amounts and are detained on bonds at higher rates than white defendants.[18]



The public safety goal of the bail decision is not advanced through the use of secured financial conditions. A recent study identified in stark form the consequences to public safety that can result from a defendant sitting in jail beyond just one day, such as when a defendant or his or her family are trying to gather the money to pay a secured bond. This detention had the unintended effect of increasing the likelihood of arrest on new criminal activity.[19] The same study also found that low- and moderate-risk defendants who remained detained pretrial recidivated at much higher rates at 12 and 24-month intervals than low- and moderate-risk defendants who were released during the pretrial period.[20]

Moreover, secured financial conditions may not even be most effective at achieving the goal of maximizing court appearance. Recent research shows that, when controlling for defendants' pretrial risk levels, requiring defendants to post a secured financial condition prior to pretrial release does not improve court appearance rates compared to defendants who were released with an unsecured financial condition on the back end.[21]

The second reason the 3DaysCount campaign calls for the replacement of financial bonds relates to the irrationality inherent in attempting to set a specific dollar amount that would best assure a defendant's appearance in court. As has been pointed out in a recent U.S. Justice Department publication, "the financial condition of a bail bond is typically arbitrary; even when judges are capable of expressing reasons for a particular amount, there is often no rational explanation for why a second amount, either lower or higher, might not arguably serve the same purposes."[22]

Even though the secured financial condition option is still available under the law in the District of Columbia, bonds with these conditions have not been used in that jurisdiction since the early 1990s. What precipitated that change was an amendment to the D.C. bail law that included the following language:

DISTRICT OF COLUMBIA: *"A judicial officer may not impose a financial condition…to assure the safety of any other person or the community, but may impose such a financial condition to reasonably assure the defendant's presence at all court proceedings* ***that does not result in the preventive detention of the person****, ……"* (Emphasis added). D.C. Code § 2, 23-1321(c)(3):

Judges in the District of Columbia have interpreted the last clause of this provision to mean that they cannot set a financial condition that results in a defendant being in jail due to inability to meet the bond. This, along with research and experience showing that financial conditions are unnecessary to achieve the underlying goals of the release process, has led to the disuse of financial conditions in the District of Columbia.

Indeed, this jurisdiction shows that a justice system that does not include secured financial bonds can very successfully and simultaneously meet all three goals of the bail decision. Over 85 percent of all defendants are released pending adjudication—all without financial conditions. Eighty-eight percent of these defendants make all their court appearances, and 89 percent complete the pretrial period without an arrest for new criminal activity, with less than one percent being charged with a violent crime.[23]

This language essentially eliminates both unintentional detention, which, unfortunately, has been somewhat tolerated in American history, and also intentional detention, by making sure that judges use lawfully enacted pretrial detention processes, rather than money, to detain defendants who pose unmanageable risks for flight or to public safety.[24] A decision to add language mandating that money not detain will necessarily force jurisdictions to assess their current detention provisions to make sure they can accommodate a risk and detention system based on less or no money.

Risk-Based Bail Decision Making

MANY existing bail statutes and court rules present a list of factors that the judge must consider in making the bail decision. These typically involve several factors that relate to the defendant's community ties, such as length of time in the jurisdiction, residence status, presence of family in the area, and employment status. Many risk assessment studies done in the past several years have shown that these factors are not always the best predictors of conduct while on pretrial release. As a result, instead of listing specific factors that the court must consider—factors that may later be shown to be irrelevant to risk—at least two states that use empirically derived risk assessment tools have enacted legislation directing the courts to consider the results of the risk assessment tool in making the bail decision.

KENTUCKY: *"When a court considers pretrial release and bail for an arrested defendant, the court shall consider whether the defendant constitutes a flight risk, is unlikely to appear for trial, or is likely to be a danger to the public if released. In making this determination, the court shall consider the pretrial risk assessment…"* Ky, Rev. Stat. Ann. § 431.066 (2). Another part of the statute defines a pretrial risk

assessment as *"an objective, research-based, validated assessment tool that measures a defendant's risk of flight and risk of anticipated criminal conduct while on pretrial release pending adjudication."* Ky, Rev. Stat. Ann. § 446.010 (35).

COLORADO: *"In determining the type of bond and conditions of release, if practicable and available in the jurisdiction, the court shall use an empirically developed risk assessment instrument designed to improve pretrial release decisions by providing to the court information that classifies a person in custody based on predicted level of risk and pretrial failure."* Colo. Rev. Stat § 16-4-103 (3) (b) (2013).

In 2016, the State of Alaska passed a law establishing a pretrial services program for the state, with the responsibility of using an empirically derived risk assessment tool.

ALASKA: The statewide pretrial services program must use *"a risk assessment instrument that is objective, standardized, and based on analysis of empirical data and risk factors relevant to pretrial failure, that evaluates the likelihood of failure to appear in court and the likelihood of rearrest during the pretrial period, and that is validated on the state's pretrial population."* Alaska Stat. § 33.07.020 (5).

Risk-based decision making must incorporate several key concepts that naturally flow from following the law and the research in the pretrial phase of a criminal case: a recognition for presumption for release on recognizance; that presumption must be overcome to impose conditions of release; those release conditions must be the least restrictive necessary to provide reasonable assurance of safety and appearance; conditions should be supervised using evidence-based practices, and violations of conditions must be addressed.

The Presumption for Release

THE ABA Pretrial Release Standards state that "[i]t should be presumed that defendants are entitled to release on personal recognizance on condition that they attend all required court proceedings and they do not commit any criminal offense. This presumption must be rebutted by evidence that there is substantial risk of nonappearance or need for additional conditions…"[25]

The new Alaska statute sets forth the presumptions for release on recognizance or unsecured bonds based on a combination of identified risk levels and charge, with the standard of "clear and convincing evidence" needed to overcome those presumptions. Alaska Stat. § 12.30.011. For example, a person charged with a Class C felony, with limited specified exceptions (i.e., sex offenses), who scores as low-risk on the empirically derived risk assessment tool "shall be released on the person's own recognizance or upon execution of an unsecured appearance bond or unsecured performance bond;…" Alaska Stat. § 12.30.011 (c) (1).

Below are three more examples of existing statutes that incorporate this presumption for release.

FEDERAL: *"The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond … unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person in the community."* 18 U.S. Code § 3142 (b).

NEBRASKA: *"Any bailable defendant shall be ordered released from custody pending judgment on his or her personal recognizance unless the judge determines in the exercise of his or her discretion that such a release will not reasonably assure the appearance of the defendant as required or that such release could jeopardize the safety and maintenance of evidence or the safety of victims, witnesses, or other persons in the community."* Neb. Rev. Stat. Ann. § 29-901.

VERMONT: Except for any person held without bail pursuant to the state's detention provision, *"[t]he person shall be ordered released on personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer unless the judicial officer determines that such a release will not reasonably assure the appearance of the person as required."* Vt. State Ann. tit. 13, § 7554 (a).

A court rule in Michigan sets a clear presumption for release on recognizance or unsecured bonds for all defendants who are not held without bond under that state's detention provisions.

MICHIGAN: *"If the defendant is not ordered held in custody pursuant to (detention provisions), the court must order the pretrial release of the defendant on personal recognizance, or on an unsecured appearance bond, subject to the conditions that the defendant will appear as required, will not leave the state without permission of the court, and will not commit any crime while released, unless the court determines that such release will not reasonably ensure the appearance of the defendant as required, or that such release will present a danger to the public."* Mich. Ct. R. 6.106 (C).

Least Restrictive Conditions

IF the presumption for release on recognizance is overcome by the demonstrated need for conditions, all conditions must be related to the risks posed and be the least restrictive necessary to provide reasonable assurance of safety and appearance. The ABA Pretrial Release Standards explain the rationale for this. "This Standard's presumption that defendants should be released under the least restrictive conditions necessary to provide reasonable assurance they will not flee or present a danger is tied closely to the presumption favoring release generally.… The presumption constitutes a policy judgment that restrictions on a defendant's freedom before trial should be limited to situations where restrictions are clearly needed, and should be tailored to the circumstances of the individual case."[26]

Taking this position further, Timothy Schnacke posits that "the principle of least restrictive conditions transcends the Standards and flows from even more basic understandings of criminal justice, which begins with presumptions of innocence and freedom, and which correctly imposes increasing burdens on the government to incrementally restrict one's liberty."[27]

The Federal bail statute provides a good example of wording to convey the requirement for setting the least restrictive conditions.

FEDERAL: If the judicial officer determines that release on recognizance or unsecured bond is not sufficient, "such judicial officer shall order the pretrial release of the person…subject to the least restrictive condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community,…" 18 U.S. Code § 3142 (c)(1)).

According to the ABA, if the court finds that release on recognizance or unsecured bond is not sufficient, the non-financial conditions of release that may be imposed include: releasing the defendant to the supervision of a pretrial services agency, or require the defendant to report on a regular basis to such agency; releasing the defendant into the custody or care of some other qualified organization or person responsible for supervising the defendant and assisting the defendant in making all court appearances; imposing reasonable restrictions on the activities, movements, associations, and residences of the defendant, including curfew, or stay-away orders; prohibiting the defendant from possessing any dangerous weapons; prohibiting the defendant from engaging in certain described activities, or using intoxicating liquors or certain drugs; requiring the defendant to be released on electronic monitoring, be evaluated for substance abuse treatment, undergo regular drug testing, be screened for eligibility for drug court or other drug treatment program, undergo mental health or physical health screening for treatment, participate in appropriate treatment or supervision programs, be placed under house arrest or subject to other release options or conditions as may be necessary reasonably to ensure attendance in court, prevent risk of crime and protect the community or any person during the pretrial period; or "impos[ing] any other reasonable restriction designed to ensure the defendant's appearance, to protect the safety of the community or any person, and to prevent intimidation of witnesses or interference with the orderly administration of justice."[28] According to the ABA Standards, financial conditions should be imposed "only when no other less restrictive conditions of release will reasonably ensure appearance in court."[29]

The Court Rules of Washington State address separately the conditioning of pretrial release when considering appearance and safety risks.

WASHINGTON: "If the court determines that the accused is not likely to appear if released on personal recognizance, the court shall impose the least restrictive…. conditions that will reasonably assure that the accused will be present for later hearings…," including that the defendant be supervised by an individual or organization, and that the defendant abide by restrictions on travel and place of abode. Wash. CrR 3.2 (b). The rules go on to state that "[u]pon a showing that there exists a substantial danger that the accused will commit a violent crime or that the

accused will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice," the court may impose such conditions as: requiring that the defendant avoid all contact with specific individuals or classes of individuals; prohibiting the defendant from going to certain geographical areas or premises; prohibiting the defendant from possessing dangerous weapons or consuming alcohol or illegal drugs; and requiring that the defendant remain under the supervision of a court agency. Wash. CrR 3.2 (d).

Domestic violence cases present significant challenges for those stakeholders involved in the bail decision-making process, given the vulnerability that victims can face after a domestic violence arrest. At least one state has included in its bail statute the list of additional conditions that the court may impose on defendants charged with domestic violence.

KENTUCKY: For defendants charged with domestic violence offenses, the court may impose the following conditions: "(a) an order enjoining the person from threatening to commit or committing acts of domestic violence or abuse against the alleged victim or other family or household member; (b) an order prohibiting the person from harassing, annoying, telephoning, contacting, or otherwise communicating with the alleged victim, either directly or indirectly; (c) an order directing the person to vacate or stay away from the home of the alleged victim and to stay away from any other location where the victim is likely to be; (d) an order prohibiting the person from using or possessing a firearm or other weapon specified by the court; (e) an order prohibiting the person from possession or consumption of alcohol or controlled substances; (f) any other order required to protect the safety of the alleged victim and to ensure the appearance of the person in court; or (g) any combination of the orders set out in paragraphs (a) to (f) of this subsection." Ky. Rev. Stat. Ann., § 431.064(2).

Supervision of Bail Conditions

THE Commonwealth of Kentucky recently enacted a provision requiring that supervision of pretrial defendants be based upon evidence-based practices.

KENTUCKY: "(1) As used in this section, 'evidence-based practices' means intervention programs and supervision policies, procedures, programs, and practices that scientific research demonstrates reduce instances of a defendant's failure to appear in court and criminal activity among defendants when implemented competently. (2) In order to increase the effectiveness of supervision and intervention programs funded by the state and provided to defendants, the Supreme Court shall require that a vendor or contractor providing supervision and intervention programs for adult criminal defendants use evidence-based practices." Ky. Rev. Stat. Ann., § 27A.097.

Addressing Violations of Bail Conditions

ACCORDING to the ABA, a person who violates any condition of pretrial release—whether it be a failure to appear in court, arrest for new criminal activity while on pretrial release, or a technical violation—"should be subject to modification of release conditions, revocation of release, or an order of detention, or prosecution

on available criminal charges."[30] While many violations can be addressed by modifying or revoking release in the instant case, some states allow for additional penalties in certain circumstances.

FAILURE TO APPEAR, DISTRICT OF COLUMBIA: A person who fails to appear on a felony charge is subject to a fine and imprisonment of not less than one year and not more than five years. A person who fails to appear on a misdemeanor charge is subject to a fine and imprisonment of not less than 90 days and not more than 180 days. D.C. Code, § 23-1327.

ARREST FOR NEW CRIMINAL ACTIVITY OR TECHNICAL VIOLATIONS, DISTRICT OF COLUMBIA: A defendant who violates conditions of release is subject to revocation of the bond and detention without bond. However, *"[n]o order of revocation and detention shall be entered unless, after a hearing, the judicial officer (A) finds that there is: (i) probable cause to believe that a person has committed a federal, state or local crime while on pretrial release, or (ii) clear and convincing evidence that the person has violated any other condition of his release; and (B) finds that: (i) …there is no condition or combination of conditions of release which will reasonably assure that the person will not flee or pose a danger to any other person or the community; or (ii) the person is unlikely to abide by any condition or conditions of release."* D.C. Code, § 23-1329.

This language mirrors very closely the ABA Standards, which state: "The judicial officer may enter an order of revocation and detention if, after notice and a hearing, the judicial officer finds that there is: (i) probable cause to believe that the person has committed a new crime while on release or **(ii) clear and convincing evidence that the person has violated any other conditions of release, and (iii) clear and convincing evidence…that there are no conditions or combination of conditions that the defendant is likely to abide by that would reasonably ensure the defendant's appearance in court and protect the safety of the community or any person."**[31] (Emphasis added).

RESTRICTING DETENTION

SINCE 1990, the number of unconvicted persons in U.S. jails has increased by 126 percent, accounting for 77 percent of the total increase in jail populations.[32] If 100 percent of that growth were comprised of the highest-risk, most dangerous of people, this would not be more than a space or capacity conversation. But what we know is that the vast majority could be handled—should be handled—in the community pending trial.

For the reasons set forth in the previous section, only the highest-risk and highest-charged individuals should be in jail pending adjudication. Jurisdictions can ensure that jails are used for this purpose by integrating the results of empirically derived risk assessment into judicial decision-making.

The third outcome sought by 3DaysCount recognizes that some defendants pose substantial risks to public safety and court appearance, and need to be held without opportunity for release. It also recognizes the obligation that exists to assure that decisions to detain a defendant are made following all due process requirements, that would include a judicial finding of clear and convincing evidence that no conditions of release could provide reasonable assurance of safety or appearance. Detention should have a substantial hurdle to be jumped, and also be immediately appealable.

Constitutional Allowance for Detention

BEFORE addressing statutes and court rules relating to detention without bail, it is necessary to acknowledge that certain actions or decisions can be either required or prohibited by a state's constitution. This is particularly relevant to this discussion in relation to a constitutional "right to bail."

The legal framework outlined here envisions that the judicial officer will be making a decision that results in either the immediate release of the defendant, on the least restrictive

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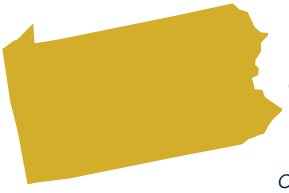
means necessary to provide reasonable assurance of safety and appearance, or in the defendant's deliberate detention without bond. While the authority to release defendants pretrial exists in all jurisdictions, currently about 20 states have broad "right to bail" provisions in their constitutions that preclude the use of detention without bond, except in extremely limited situations.[33] To implement all of the features presented here, those states would likely need to amend their constitutions to allow for a broader use of detention.

Even in many states where the constitution currently allows for detention, the constitutional language requires a charge-based detention decision. That is, a defendant can be detained if charged with certain offenses. But to assure that only defendants with unmanageable risks are detained without bond, that language should provide for a consideration of risk in making the decision to detain. At least two states have constitutional provisions that do this.

The Florida Constitution makes clear that all defendants, except those charged with capital or life offenses, are "entitled" to release, unless there are no conditions that could provide reasonable assurance of safety or appearance. The last sentence of this provision can be read to allow for a risk-based detention decision.

FLORIDA: *"Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions.* ***If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.*** *"* (Emphasis added.) Fla. Const. § 14.

The Pennsylvania Constitution also identifies all but capital and life offenses as bailable, except for when no conditions of release would suffice.



PENNSYLVANIA: *"All prisoners shall be bailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment* ***or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of a person and the community when the proof is evident or presumption great;*** *and the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it."* Pa. Const. art. 1, § 14.

It is important that state constitutions allow—as these two examples do—for risk-based detention decision making. As Timothy Schnacke, who has studied and written extensively on state bail laws, has noted: "[s]tate constitutional provisions providing (and denying) a right to bail without fully incorporating or balancing risk-based elements are significant in that they naturally hinder the legislature's ability to fully implement risk-based pretrial release statutes because those statutes might conflict with the constitution." Schnacke recommends that state constitutional provisions on release and detention minimally contain one clause declaring a right to release and another clause declaring an exception to that right, albeit with strong constitutional language designed to ensure that legislatures or courts (through court rule) do not erode the fundamental right to release.[34]

States that have no constitutional language conferring a right to bail, as is the case in the U.S. Constitution, do not require any changes to the constitution to authorize the legislature to enact detention provisions.[35]

Statutory or Court Rule Language for Detention

THE ABA Standards state that judicial officers should have the authority to order the temporary detention of defendants who, while on pretrial release in another case or on probation or parole, are arrested on a new charge—provided that the judicial officer finds probable cause in the new offense.[36] Here is the wording from the District of Columbia's temporary detention provision.

DISTRICT OF COLUMBIA: *"(a) The judicial officer shall order the detention of a person charged with an offense for a period of not more than 5 days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the government to notify the appropriate court, probation, or parole official, or local or state law enforcement official, if the judicial officer determines that the person charged with an offense: (1) was at the time the offense was committed, on: (A) release pending trial for a felony or misdemeanor under local, state, or federal law; (B) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under local, state, or federal law; or (C) probation, parole, or supervised release for an offense under local, state or federal law; and (2) may flee or pose a danger to any other person or the community or, when a hearing (to consider violations of conditions of release) is requested, is likely to violate a condition of release. If the official fails or declines to take the person into custody during the 5-day period described in this subsection, the person shall be treated in accordance with other provisions of law governing release pending trial."* DC Code, § 23-1322 (a).

The ABA Standards also call for the use of detention without bond pending trial in limited circumstances—when the defendant is charged with a crime of violence or a dangerous crime, or when the defendant is charged with a "serious" crime while on pretrial release, probation or parole for a serious crime involving violence—and only after a hearing where a judicial officer finds, by clear and convincing evidence, that there are no conditions or combination of conditions that can reasonably assure the safety of the pubic and court appearance. At the hearing, according to the ABA, the defendant should be present and represented by counsel, able to testify and present witnesses on his or her behalf, and confront and cross-examine prosecution witnesses.[37] In addition, "[e]very jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice. These accelerated time limitations should be shorter than current speedy trial time limitations applicable to defendants on pretrial release."[38]

At least one state has incorporated many of these elements into its court rules, based on the detention authority granted in the state's constitution.

MICHIGAN: *"The court may deny pretrial release to (a) a defendant charged with (i) murder or treason, or (ii) committing a violent felony and [A] at the time of the commission of the violent felony, the defendant was on probation, parole, or released pending trial for another violent felony, or [B] during the 15 years preceding the commission of the violent felony, the defendant had been convicted of 2 or more violent felonies under the laws of this state or substantially similar laws of the United States or another state arising out of*

separate incident; if the court finds that proof of the defendant's guilt is evident or the presumption great (b) a defendant charged with criminal sexual conduct in the first degree, armed robbery, or kidnapping with the intent to extort money or other valuable thing thereby, if the court finds proof of the defendant's guilt is evident or the presumption great, unless the court finds by clear and convincing evidence that the defendant is not likely to flee or present a danger to any other person….(3) If the court determines…that the defendant may not be released, the court must order the defendant held in custody for a period not to exceed 90 days after the date of the order, excluding delays attributable to the defense, within which trial must begin or the court must immediately schedule a hearing and set the amount of bail." Mich. Ct. R. 6.106 (B).

The District of Columbia has these elements in its detention statute.

DISTRICT OF COLUMBIA:

"The judicial officer shall hold a hearing to determine whether any condition or combination of conditions…will reasonably assure the appearance of the person as required and the safety of any other person and the community, upon oral motion of the attorney for the government, in a case that involves: (A) a crime of violence, or a dangerous crime,…;(B) (obstruction of justice); (C) a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate a prospective witness or juror; or (D) a serious risk that the person will flee. If, after a hearing …, the judicial officer finds by clear and convincing evidence that no condition or combination of conditions will reasonably assure the appearance of the person as required, and the safety of any other person and the community, the judicial officer shall order that the person be detained before trial. Sec. 23-1322 (b). The case of a person detained pursuant to subsection (b) of this section shall be placed on an expedited calendar and, consistent with the sound administration of justice, the person shall be indicted before the expiration of 90 days, and shall have trial of the case commence before the expiration on 100 days." D.C. Code, § 23-1322 (h).

Many existing detention statutes include rebuttable presumptions—if the defendant is charged with certain offenses, it is presumed that there are no conditions or combination of conditions that can reasonably assure public safety or court appearance. The defendant then has to initiate the rebuttal of this presumption. Because (1) the ABA Standards state that the burden should be on the prosecution to establish by clear and convincing evidence that no conditions or combination of conditions can provide reasonable assurance of safety and appearance before detention can be ordered, (2) current presumptions—for example, those used in the federal system—are based on charge or other assumptions about risk that do not always hold up to the actual research on risk; and (3) such presumptions tend to lead to overuse of detention, examples of existing rebuttable presumption provisions are not included here.

A word of caution is in order regarding the ABA Standards on detention and the examples of detention statutes presented here. These standards and statutes were written before the advent of empirically derived pretrial risk assessment tools in many jurisdictions. These tools have shown that charge level alone is not a good indicator of risk, and that multiple factors, considered together and weighed according to research findings, can successfully sort defendants into risk categories. As a result, it is time for a "second generation" of detention standards and statutes that include risk, as determined through the use of an empirically derived pretrial risk assessment tool, to help judicial officers determine whether any conditions or combination of conditions can provide reasonable assurance of safety and appearance.

OTHER VITAL COMPONENTS TO HOLISTIC PRETRIAL JUSTICE LAWS

THERE are several other parts of statutes or court rules that should be examined by jurisdictions seeking to achieve the desired 3DaysCount campaign outcomes.

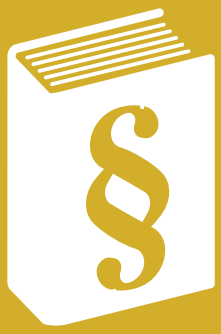
Definition of bail, statement of general principles

THE word "bail" is often used in state statutes and court rules as a synonym for a bond with secured financial conditions. Yet, historically and legally, the word has a very different definition. It has been described primarily as a security required for release, with "security" defined as "some pledge of assurance," and, secondarily, as the process of release.[39]

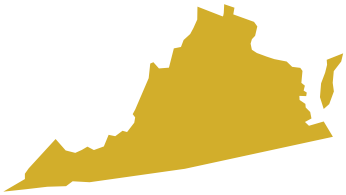
In a recent major overhaul of its bail statute, Colorado re-defined "bail" from being money, under the pre-existing statute, to be the pledge of assurance that could be accomplished with or without financial conditions.

COLORADO: *"'Bail' means a security, which may include a bond with or without monetary conditions, required by a court for the release of a person in custody set to provide reasonable assurance of public safety and court appearance."* Colo. Rev. Stat. § 16-1-104.

Bail is...a security required for release, with "security" defined as "some pledge of assurance," and, secondarily, as the process of release.



The Virginia statute carries a much more straightforward definition.



VIRGINIA: *"Bail" means the pretrial release of a person from custody upon those terms and conditions specified by order of an appropriate judicial officer."* Va. Code Ann. § 19.2-119.

A statement of general principles can help to set the tone for the statute or court rule. The ABA Pretrial Release Standards provide several, including:

- the presumption for release under the least restrictive means necessary to provide reasonable assurance of safety and appearance;
- the use of citations and summonses in lieu of arrest in appropriate cases involving minor offenses; and
- the imposition of conditions of release only when the need is demonstrated.[40]

Involvement of Defense Counsel at Initial Bail Hearing

IN the case of Rothgery v. Gillespie County, 554 U.S. 191 (2008), the U.S. Supreme Court ruled that the Sixth Amendment right to counsel attaches at the initial appearance of the defendant before a judicial officer. While the ruling only required that an attorney be appointed at that hearing—and not necessarily be present and representing the client—the involvement of defense counsel at the initial bail hearing can help assure that all the other features are meaningfully addressed. The ABA Standards for Defense Services recommends that counsel be "provided to the accused as soon as feasible and, in any event, after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs first."[41] Research has shown the important role that defense can play at the initial bail hearing. In one study, indigent defendants represented by counsel at that hearing were 2 ½ times more likely to be released without secured bonds than a similar group that was not represented.[42]

At least two states have court rules that require that indigent defendants charged with jailable offenses must be offered counsel at all hearings, beginning with the initial bail hearing.

NORTH DAKOTA: An indigent defendant charged with a jailable offense "is entitled to have counsel provided at public expense to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right." N.D. R. Crim. P. 44(a).

FLORIDA: "A person entitled to the appointment of counsel as provided herein (charged with a jailable offense) shall have counsel appointed when the person is formally charged with an offense, or as soon as feasible after custodial restraint, or at the first appearance before a committing judge, whichever occurs earliest." Fla. R. Crim. P. 3.111(a)

Data Collection and Reporting

THE 3DaysCount campaign embraces data-driven decision making. In many jurisdictions, though, providing for access to data that would allow for such decision making is seen as a luxury, rather than the necessity that it is. In fact, it is viewed as such a luxury item that no ABA Standard calls for it, and if any statutes or court rules address it, they are difficult to find. The recently revised Colorado statute provides the following language on data collection and reporting, but only as it pertains to the pretrial services programs operating in the state. The data elements listed in this provision represent the kind of information that all criminal courts should provide on a regular basis.

COLORADO: *"[E]ach pretrial services program established pursuant to this section shall provide an annual report to the judicial department no later than November 1 of each year,… The judicial department shall present an annual combined report to the house and senate judiciary committees of the house of representatives and the senate, or any successor committees, of the general assembly. The report to the judicial department must include, but is not limited to, the following information: (a) The total number of pretrial assessments performed by the program and submitted to the court; (b) The total number of closed cases by the program in which the person was released from custody and supervised by the program; (c) The total number of closed cases in which the person was released from custody, was supervised by the program, and, while under supervision, appeared for all scheduled court appearances on the case; (d) The total number of closed cases in which the person was released from custody, was supervised by the program, and was not charged with a new criminal offense that was alleged to have occurred while under supervision and that carried the possibility of a sentence to jail or imprisonment; (e) The total number of closed cases in which the person was released from custody and was supervised by the program, and the person's bond was not revoked by the court due to a violation of any other terms and conditions of supervision; and (f) Any additional information the judicial department may request."* Colo. Rev. Stat. § 16-4-106 (6).

In addition to these data elements, to better assess the impact of 3DaysCount, jurisdictions should also collect data on the following:

- number of summonses issued
- number of citations issued
- number of defendants released at the initial bail hearing on personal recognizance, and with non-financial release conditions—by risk level
- number of defendants who had a secured financial bond set—by risk level
  - number of these defendants who posted bond immediately—by risk level
  - number of these defendants who posted bond more than 1 day after the bond hearing but before the disposition of the case—by risk level and length of stay in jail
  - number of these defendants who remained in jail until disposition for not posting secured bonds—by risk level and length of stay in jail.
- number of defendants held without bond—by risk level and charge.

CONCLUSION

THE three outcomes sought by the 3DaysCount campaign—reducing arrests, replacing cash bail with risk-based decision making, and restricting detention to the small number that require it—are commonsense solutions to the problems facing our pretrial justice system. Moreover, they are fully in line with the growing recognition at state, local and federal levels of the need for major reforms of our criminal justice system. While progress can be achieved without substantial statutory or court rule changes, to fully realize these outcomes in most jurisdictions will require changes in the law.

Making such changes, while challenging, is feasible. In fact, between 2012 and 2015, at least three states—Colorado, Kentucky and New Jersey—have made substantial changes to their bail laws, implementing many of the features described here. One of these states, New Jersey, was even able to change its constitution to allow for detention without bond.

PJI will work with lawmakers in the 3DaysCount states to implement changes consistent with the features described in this document.

The three outcomes sought by the 3DaysCount campaign—reducing arrests, replacing cash bail with risk-based decision making, and restricting detention to the small number that require it—are commonsense solutions...

REFERENCES

1. American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release (2007).
2. A recent study compared those who had a secured bond (meaning that they were required to post a money amount before they could be released) to those who had an unsecured bond (meaning that they did not have to post any money as a pre-condition to release), controlling for risk. The study found that, across all risk levels, there were no statistically significant differences in rates of failure to appear or new criminal activity. The only differences between the two groups was that those who had a secured bond were detained in jail at a much higher rate and spent more time in jail than those who had an unsecured bond. Michael R. Jones, Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option, Pretrial Justice Institute (2013).
3. Pretrial Risk Assessment: Science Provides Guidance on Assessing Defendants, Pretrial Justice Institute (2015).
4. Christopher Lowenkamp, Marie VanNostrand, and Alex Holsinger, The Hidden Costs of Pretrial Detention, Laura and John Arnold Foundation (2013).
5. Christopher T. Lowenkamp, Marie VanNostrand, and Alexander Holsinger, Investigating the Impact of Pretrial Detention on Sentencing Outcomes, Laura and John Arnold Foundation (2013).
6. To view resolutions or policy statements on bail reform issued such groups as the International Association of Chiefs of Police, Conference of Chief Justices, Conference of State Court Administrators, Association of Prosecuting Attorneys, American Council of Chief Defenders, and others, go to: http://www.pretrial.org/pretrial-national-coalition/.
7. Timothy R. Schnacke, Best Practices in Bond Setting: Colorado's New Bail Law, Center for Legal and Evidence-Based Practices (2013), at 29.
8. Most bail laws are promulgated in state statutes, however, in several states they are codified in court rules.
9. Supra, note 1, Std. 10-3.1, at 71
10. Id., Std. 10-3.2, at 72.
11. Id., Std. 10-2.1, at 63.
12. Todd Minton and Zhen Zeng, Jail Inmates at Midyear 2014, Bureau of Justice Statistics (2015).
13. Timothy R. Schnacke, Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform, National Institute of Corrections, (2014). See also ABA Standard 10-1.1, which articulates the balance between the three main purposes of the pretrial release decision, "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 threats, danger, or interference." Supra, note 1, Std. 10-1.1, at 36.
14. Id., 1, Std. 10-5.3, at 110-111.
15. A study of bond setting for felonies in 40 of the nation's 75 largest counties found that secured financial bonds were set in 62 percent of cases. Brian A. Reaves, Felony Defendants in Large Urban Counties, 2009 – Statistical Tables, Bureau of Justice Statistics (2013).
16. Supra, note 13, at 23-29.
17. Supra, note 15, at 17.
18. Traci 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).
19. The study found that lower and moderate risk defendants who had short stays in jail following arrest, presumably the time needed to post a monetary bond, were much more likely to be rearrested while their cases were pending than lower and moderate risk defendants who were released within one day of their arrests. Moreover, their likelihood of new criminal activity increased in step with the number of days they spent in jail before being released. Supra, note 4.
20. Id.
21. Supra, note 2.
22. Schnacke, supra, note 13, at 25.
23. The Pretrial Services Agency for the District of Columbia: A Leader in the Justice Field, 2016.
24. For a discussion of the District of Columbia's detention statute, see infra pp 18-20.
25. Supra, note 1, Std. 10-5.1, at 101-102.
26. Supra, note 1, Commentary to Std. 10-1.2, at 39-41.
27. Supra, note 7, at 39-40.
28. Supra, note 1, Std. 10-5.2, at 106-107.
29. Id., Std. 10-5.3, at 110-111.
30. Id., Std. 10-5.6(a), at 120.
31. Id., Std. 105.6(c), at 121.
32. Supra, note 12.
33. For example, in many "right to bail" states, a person charged with a capital crime, or any offense punishable by life in prison, can be held without bond.
34. Supra, note 7, at 4.
35. Of course, any legislative changes enacting detention provisions must comply with the due process requirements of both the federal and state constitutions.
36. Supra, note 1, Std. 10-5.7, at 120-121.
37. Id., Stds. 10-5.8, 9, and 10, at 124-138.
38. Id., Std. 10-5.11, at 139.
39. Supra, note 7, at 30.
40. Supra, note 1, at 10-1.
41. ABA Standards for Criminal Justice: Providing Defense Services, Std. 5-6.1.
42. Douglas L. Colbert, Ray Paternoster and Shawn Bushway, Do Attorneys Really Matter? The empirical and Legal Case for the Right of Counsel at Bail, CARDOZO LAW REVIEW, 23 (2002) at 1719-1793.