

**Materials for Pretrial Subgroup meeting
Oct. 15, 2015**

Agenda / Objectives

- 9:00 – 9:05 Introduction
- 9:05 – 10:35 Citation vs. arrest
- 9:35 – 10:45 Pretrial release decision-making framework
- 10:45 – 11:15 Pre-hearing release / detention decisions for petitions to revoke probation and parole
- 11:15 – 11:45 Penalties for failure to appear and violations of release conditions
- 11:45 – 12:00 Public comment

***** Discussion draft – not for distribution *****

Citation vs. arrest

Current practice:

- Officer discretion to issue a citation for misdemeanors unless crime involving violence, domestic violence, harm to person or property, or danger to self or others.

Relevant research principle:

- Pretrial detention longer than 24 hours can lead to worse outcomes.¹

Areas of general consensus:

- There should be a presumption of citation rather than arrest for some offenses.
- The list of exceptions (making arrest mandatory) should be narrower.

Questions to decide:

- For which offense types should citation be presumptive?
- For which offense types should citation be discretionary?
- For which offense types should arrest be mandatory?

¹ Lowenkamp, VanNostrand & Holsinger (2013), *The Hidden Cost of Pretrial Detention*.

Policy reform options

Narrow exceptions: Eliminate exception requiring arrest for “harm to property”.

Presumptive citation:

- **Version 1:** There is a presumption that the officer will issue a citation rather than arrest for all **nonviolent misdemeanors**. The presumption can be overcome with a finding that the person presents a danger to themselves or others.
 - Estimated to save 48 beds²

- **Version 2:** There is a presumption of citation rather than arrest for all **nonviolent misdemeanors and nonviolent Class C felonies**. The presumption can be overcome with a finding that the person presents a danger to themselves or others.
 - Estimated to save 80 beds

- **Version 3:** There is a presumption of citation rather than arrest for all **nonviolent misdemeanors and nonviolent Class C felonies**. The presumption can be overcome with a finding that the person presents a danger to themselves or others. The exceptions list would be altered to give officers discretion to issue citations for **violent Class B misdemeanors**.
 - Estimated to save 80 beds

² Estimated policy impacts provide the number of beds that will no longer be needed by this group by July 1, 2025. All estimated impacts are a reduction for future bed need. Bed impacts are NOT cumulative across version options. These bed impacts are preliminary and will change as the policies and underlying assumptions become more defined.

Pretrial release decision-making framework

Current practice:

- Defendants have a Constitutional right to be released on bail.
- There's a presumption of release on personal recognizance or unsecured bond.
- Conditions of release are authorized, including money bond; and are applied at the judge's discretion.
- Presumption of detention for unclassified and Class A felonies, sexual felonies, felony DUI and refusal to submit to chemical testing, and person crimes / DV with certain criminal history.

Relevant research principles:

- Pretrial risks can be predicted.³
- Release conditions should be tied to risk level.⁴
- Pretrial detention longer than 24 hours can lead to worse outcomes.⁵
- Unsecured money bond is as effective at achieving court appearance and public safety as secured money bond.⁶

Areas of general consensus:

- Pretrial risk assessment would be a helpful tool.
- Release conditions should be tied to risk level.
- Lower-risk defendants shouldn't be detained just because they can't pay.
- Higher-risk defendants with serious charges shouldn't be released just because they *can* pay.
- Creating a pretrial services division will lead to more releases and likely cost less than detention.
- The presumption of release on recognizance should result in most defendants being released (roughly 80%).

Questions to decide:

- Which defendants should never be detained pretrial?
- Which defendants should courts have discretion to detain or release pretrial?
- How should the court's discretion be guided?

³ Mamalian (2011), *State of the Science of Pretrial Risk Assessment*.

⁴ VanNostrand (2009), *Pretrial Risk Assessment in the Federal Court*.

⁵ Lowenkamp, VanNostrand & Holsinger (2013), *The Hidden Cost of Pretrial Detention*.

⁶ Jones (2013), *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option*.

Example pretrial release decision-making grid

| | Nonviolent misdemeanor | Nonviolent felony | Violent misdemeanor | Violent felony |
|----------------------|--|--|--|--|
| Low-risk | Detention not an option 100% ROR Minimal conditions | ROR recommended Supervision level 1 | ROR recommended Supervision level 2 | ROR sometimes recommended Supervision level 3 |
| Moderate-risk | Detention not an option 100% ROR Minimal conditions | ROR recommended Supervision level 1 | ROR sometimes recommended Supervision level 3 | ROR not recommended |
| High-risk | Detention not an option 100% ROR Supervision level 1 | ROR recommended Supervision level 2 | ROR not recommended | ROR not recommended |

Definitions:

- **ROR**
 - Release on personal recognizance or unsecured bond with appropriate release conditions / supervision level
 - Release conditions (including financial conditions) shall not result in detention
- **“Detention not an option”**
 - Judicial officer must release the defendant at first appearance with appropriate release conditions
- **“ROR recommended”**
 - Pretrial officer will recommend ROR and appropriate release conditions / supervision
 - Judicial officer has discretion to follow or not follow the recommendation
- **“ROR sometimes recommended”**
 - Pretrial officer may recommend ROR based on the individual case
 - Judicial officer has discretion to follow or not follow the recommendation
- **“ROR not recommended”**
 - Pretrial officer will not recommend ROR
 - Judge has discretion to release the defendant, set secure financial bond, or detain the defendant without bail

Policy reform options

- Adopt a pretrial risk assessment tool.
- Provide statutory guidance for release decision-making framework, tying conditions of release to charge severity and risk score. [See example grid on the previous page.]
- Determine in statute who should never be detained pretrial.
 - **Version 1:** Detention is not an option for all nonviolent misdemeanors
 - Estimated to save **294 beds**
 - **Version 2:** Detention is not an option for all nonviolent charges (misdemeanors or felonies)
 - Estimated to save **413 beds**
 - **Version 3:** Detention is not an option for all nonviolent charges and low-risk violent charges.
- Prohibit release conditions (including financial conditions) that result in detention.
 - This would require a constitutional amendment permitting courts to detain defendants without bail in certain cases (higher-risk defendants with serious charges).
 - Alternative: Reserve secure financial conditions for high-risk, serious cases.

Additional questions to decide:

- If a pretrial services office is created, what responsibilities should it take on?
 - Electronic monitoring?
 - Drug and alcohol testing?
 - Phone contact with defendants?
 - Face-to-face contact with defendants?
 - Third-party custodianship?
 - Court date reminders?
 - Diversion recommendations?
 - Victim safety planning?

Pre-hearing release / detention decision for petitions to revoke probation and parole

Current practice:

- Same statutory provisions re: bail process.
- The court / Parole Board may release on bail, but there is no right to bail if detained on:
 - A petition to revoke parole
 - A petition to revoke probation and the underlying offense is a violent felony

Relevant research:

- Pretrial detention longer than 24 hours can lead to worse outcomes.⁷

Question to decide:

- Which technical violators, if any, should be detained pre-hearing on a petition to revoke probation / parole?

⁷ Lowenkamp, VanNostrand & Holsinger (2013), *The Hidden Cost of Pretrial Detention*.

Policy reform options:

- Provide statutory guidance for release/detention pre-hearing on a PTR.

| Policy change Version 1 | Technical violation, nonviolent underlying offense | Technical violation, violent underlying offense |
|------------------------------------|---|--|
| Low-risk | ROR is recommended Pretrial supervision level 1 | ROR not recommended |
| Moderate-risk | ROR is recommended Pretrial supervision level 2 | |
| High-risk | ROR is recommended Pretrial supervision level 2 | |

| Policy change Version 2 | Technical violation, nonviolent underlying offense | Technical violation, violent underlying offense |
|------------------------------------|---|--|
| Any risk level | Pre-hearing detention not an option 100% ROR with appropriate supervision level | ROR not recommended |

| Policy change Version 3 | Technical violation, nonviolent underlying offense | Technical violation, violent underlying offense |
|------------------------------------|---|---|
| Any risk level | Pre-hearing detention not an option 100% ROR with appropriate supervision level | ROR sometimes recommended with appropriate supervision level |

Penalty for failure to appear and violation of release conditions

Current practice: [See purple section of chart on the next page]

Relevant research:

- Sanctions should be proportional to the problem behavior.⁸
- The likelihood of failure to appear can be reduced through court date reminders.⁹
- The likelihood of violations of release conditions can be reduced through pretrial services / supervision tied to risk.¹⁰

Examples from other states:

- Failure to appear can never be a felony: Michigan¹¹, Maryland¹², Utah¹³
- Failure to appear is not punishable as a new criminal charge: Illinois¹⁴, Mississippi¹⁵, Vermont¹⁶, Wyoming¹⁷

Question to decide:

- Are penalties for failure to appear and violations of release conditions out of proportion to the problem behavior? If so, how should they be altered?

⁸ Nagin & Pogarsky (2001), *Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence*.

⁹ Bechtel, Holsinger, Lowenkamp & Warren (2015), *A Meta-Analytic Review of Pretrial Research: Risk Assessment, Bond Type, and Interventions*.

¹⁰ Danner, VanNostrand & Spruance (2015), *Exploring the Effect of Risk-Based Release Recommendation and Supervision Guidelines on Pretrial Officer Recommendations, Judicial Decision-Making, and Pretrial Outcome*.

¹¹ Michigan Compiled Laws §780.62.

¹² Code of Maryland Statutes §5-212.

¹³ Utah Code § 77-7-22.

¹⁴ 725 Illinois Compiled Statutes § 5/110-3.

¹⁵ Mississippi Code § 99-5-39.

¹⁶ 13 Vermont Statutes § 7560a.

¹⁷ Wyoming Statutes § 7-3-218; Wyoming Rules of Court, Rule 46.4.

Policy reform options:

| Underlying charge | Violation behavior | Current Penalty | Policy change Version 1 (Equalize penalties) | Policy change Version 2 (Reduce all penalties) |
|-------------------|---------------------------------|-----------------|--|--|
| Felony | Failure to appear | Class C felony | Class A misd. | Class A misd. |
| | Violation of release conditions | Class A misd. | Class A misd. | Class B misd. |
| Misdemeanor | Failure to appear | Class A misd. | Class B misd. | Class B misd. |
| | Violation of release conditions | Class B misd. | Class B misd. | Infraction |