











A “New Norm” For
Pretrial Justice in the
Commonwealth of Virginia
Pretrial Risk-based Decision Making



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Summary Facts about the Pretrial Release Decision

Pretrial Services in Virginia

- There are 31 pretrial services agencies in Virginia serving 97 of the state's 134 localities.
- In FY 2012:
 - » Pretrial services agencies conducted 43,324 pretrial investigations and risk assessments;
 - » 18,919 defendants were placed on supervision;
 - » 85% of cases were closed successfully;
 - » 96.3% of defendants appeared in court as scheduled; and
 - » 96.3% of the defendants did not have their supervision revoked due to new alleged criminal activity.

Risk-Based Pretrial Decision Making

- Actuarial risk assessments have higher predictive validity than clinical or professional judgment.
- Virginia pretrial services agencies currently use an objective and research-based pretrial risk assessment, the Virginia Pretrial Risk Assessment Instrument (VPRAI), to assess risk of flight and danger to the community posed by pretrial defendants. This can reduce subjective pretrial decision making practices that are prone to demographic disparities and may produce poor results from a public safety perspective.
- The VPRAI, known nationally as the "Virginia Model," was the first research-based statewide pretrial risk assessment in the country.
- The VPRAI has been validated for use by all Virginia pretrial services agencies.
- The VPRAI examines eight risk factors that are weighted to create a risk score, and defendants are assigned to one of five risk levels ranging from low to high.
- The risk levels represent the likelihood of pretrial failure including failing to appear in court and danger to the community pending trial.
- Research shows that over-supervising low risk defendants or adding conditions to their bond can increase failure rates.
- Defendants who are detained, even for short periods of time, are more likely to lose stability in the areas of employment, residence, and pro-social connections with family and community.
- Requiring low risk defendants to spend as little as two days in jail disrupts their stability factors in a way that increases the likelihood they will fail to appear and commit new criminal offenses while on release.
- Requiring low risk defendants to spend as little as two days in jail can increase the likelihood of long-term recidivism.
- Virginia pretrial services agencies are piloting evidence-based supervision strategies intended to improve outcomes during the pretrial stage.



The Public Supports Risk-Based Pretrial Decision Making

- Recent public opinion surveys have shown support for:
 - » Evidence-based practices in our criminal justice system;
 - » Using pretrial risk as the main factor in determining release and not using a defendant's ability to pay as a main factor in determining release;
 - » Releasing defendants on the least restrictive conditions;
 - » Using pretrial risk assessment to protect community safety; and
 - » Using risk-based screening tools instead of cash bail bonds to determine whether defendants should be released from jail before trial.

The "New Norm"

- Shift in practice from a presumption of a secured bond to a presumption favoring release on the least restrictive terms and conditions based on the defendant's risk factors.
- Presume that a low to below average risk non-violent defendant should be released on personal recognizance or an unsecured bond unless the judge finds, in his or her discretion, that the defendant is a flight risk or danger to others.
- Presume that average to above average risk defendants should be released to pretrial supervision with an unsecured bond and with appropriate conditions to assure future court appearance and to reduce the likelihood of new criminal activity during the pretrial stage.
- Secured bonds should only be used if non-financial options are inadequate to assure a defendant's appearance and should not be used to address public safety.
- The presumption in favor of releasing a defendant will not apply when the defendant meets the criteria for "rebuttable presumption" described in §19.2-120 (B).
- Arraignments will reflect the ABA concept of a "meaningful" first appearance, including participation from the Commonwealth's Attorney, indigent defense counsel, and pretrial services.
- The pretrial release/detention decision should be based on the pretrial risk assessment and other facts or evidence provided.
- It is critical to have pretrial services in all localities in Virginia.
- Expand the capacity of indigent defense so that attorney can be available at arraignment to represent indigent defendants during arraignment proceedings.
- Amend § 19.2-123 (A) to strike the requirement for a secured bond.
- Amend § 19.2-120 (B) to incorporate right to due process in a similar way as provided in federal legislation regarding "preventive detention."
- Amend § 19.2-120 to require the presumption of release on the least restrictive terms and conditions of bail for cases not meeting the criteria in subsection B.



Introduction

The purpose of this paper is to address unnecessary detention of defendants at the pretrial stage of the justice system. In Virginia, too many lower risk defendants remain in jail for lengthy periods of time due to their inability to post a secured bond. Often, bond amounts that hold defendants in jail are relatively small – \$5,000 or less. Inability to pay a bond should not keep lower risk defendants in jail.

There are 31 pretrial services agencies in Virginia, serving 97 of the of the state’s 134 localities. Every pretrial services agency uses a research-based and validated pretrial risk assessment, known as the Virginia Pretrial Risk Assessment Instrument (VPRAI). The VPRAI measures the defendant’s risk of failure to appear in court and risk of being rearrested during the pretrial release period. Pretrial services agencies in Virginia share the results of the VPRAI with the judge, Commonwealth’s Attorney and defense attorney to reconsider the defendant’s bail at arraignment. This provides the opportunity for the court to make risk-based decisions, limiting the potential for excessive bail and lower risk defendants languishing in jail. National public opinion surveys show overwhelming support for pretrial justice reform that is risk-based. Emphasizing pretrial risk-based strategies and expanding the existing pretrial services framework can be effective in reducing unnecessary detention during the pretrial stage of the justice process.

Jail crowding is very costly to taxpayers. Jail crowding also makes it difficult to provide critical programming within the jail to reduce reoffending when the offender is released to the community. Freeing up jail beds allows for creative reentry programming that may improve long-term reintegration outcomes for individuals returning to communities from local jails. Better utilization of pretrial services to assist the courts in making risk-based pretrial release or detention decisions early on could significantly reduce jail populations while preserving public safety and the integrity of the judicial process.

Implementing risk-based pretrial decision making involves more than expanding pretrial services. While many of the necessary elements are in place, significant work remains. Enhancing Virginia’s risk-based pretrial decision making capacity involves taking a systems approach. Improving early decision making and the way justice stakeholders use the information provided by pretrial services is critical to reducing unnecessary detention. This paper explores potential opportunities to use legal and evidence-based solutions to reduce unnecessary pretrial detention.



Pretrial Services in the Commonwealth of Virginia

Pretrial services were first formally created in Virginia in 1989, pursuant to authorizing language in the Appropriations Act. In 1995, pretrial services were authorized by statute with the passage of the Pretrial Services Act (§19.2-152.2 *Code of Virginia*). Pretrial services agencies provide information and investigative services to judicial officers (judges and magistrates) to help them decide whether persons charged with certain offenses and awaiting trial need to be held in jail or can be released to their communities. In the latter case, the agencies provide supervision and services to defendants if ordered by judicial officers. There are currently 31 pretrial services agencies in Virginia serving 97 of 134 localities.

The Pretrial Services Act was enacted to provide more effective protection of society by establishing pretrial services agencies to assist judicial officers in discharging their duties related to determining pretrial release and detention. The Act states that “such agencies are intended to provide better information and services for use by judicial officers in determining the risk to public safety and the assurance of appearance of persons.” Those charged with offenses punishable by death are ineligible.

The duties and responsibilities of pretrial services agencies are detailed in §19.2-152.4:3 of the *Code*. In order to assist judicial officers in discharging their duties related to determining release or detention for pretrial defendants, pretrial services officers are required to provide the following primary services:

1. Investigate and interview defendants arrested on state and local warrants and who are detained in jails located in jurisdictions served by the agency while awaiting a hearing before any court that is considering or reconsidering pretrial release, at initial appearance, advisement or arraignment, or at other subsequent hearings;
2. Present a pretrial investigation report with recommendations to assist courts in discharging their duties related to granting or reconsidering pretrial release; and
3. Supervise and assist all defendants residing within the jurisdictions served and placed on pretrial supervision by any judicial officer within the jurisdictions to ensure compliance with the terms and conditions of pretrial release.¹

In FY 2012², pretrial services agencies conducted 43,324 pretrial investigations and 18,919 defendants were placed on supervision. In that year, over 17,739 supervision cases were closed, 85% of them successfully and 15% unsuccessfully due to failure to appear (4%), new arrest (4%), technical violations (6%), and other (1%). As a result, in FY 2012 defendants released to supervision by Virginia pretrial services agencies had a 96.3% court appearance rate. In addition, 96.3% of the defendants did not have their supervision revoked due to new alleged criminal activity.

¹ See *Virginia Code* § 19.2-152.4:3 - Duties and responsibilities of local pretrial services officers for the complete list of required services. (<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+19.2-152.4C3>)

² Data reported from the 2012 Comprehensive Community Corrections Act and Pretrial Services Act Report published by the Virginia Department of Criminal Justice Services (www.dcjs.virginia.gov/corrections/pretrial/annualReportFY2012.pdf)



Risk-Based Pretrial Decision Making

Nationally, the movement to reform criminal justice practices and policies in a way that improves outcomes has extended to the pretrial justice system and the pretrial services field. Evidence-based reform has gained recent support from legislators across the country as they attempt to better utilize scarce state and local resources, while improving public safety. An example of this kind of reform occurred in the Commonwealth of Kentucky. During the 2011 General Assembly, the Kentucky legislature passed House Bill 463, which was intended to reduce the increasing financial burden of housing Kentucky's inmates while continuing to ensure public safety.³ Key provisions of the bill included:

- Formally defined the “Pretrial Risk Assessment” as an objective, research based, validated assessment tool that measures a defendant’s risk of flight and anticipated criminal conduct while on pretrial release pending adjudication;
- Requires that supervision and intervention programs for pretrial defendants implement evidence-based practices (EBP);
- Requires a defendant determined by the pretrial risk assessment to be low risk be released on recognizance (ROR) or with an unsecured bond (USB), unless the judge finds in his or her discretion that the defendant is a flight risk or danger to others;
- Requires a defendant determined by the pretrial risk assessment to be a moderate risk be released either ROR or USB with the court to consider additional supervision, such as referral to Pretrial Services’ Monitored Conditional Release (MCR) program, GPS tracking, etc. unless the judge finds the defendant is a flight risk and/or a danger to others.

After the first year of the passage and implementation of Kentucky’s bail reform, major outcomes improved. Release rates increased, as did court appearance and public safety rates. Kentucky’s experience is showing promising results: incarceration rates for the awaiting trial population can be safely reduced by applying legal and evidence-based practices.

Legal and Evidence-Based Practices in Virginia

The Commonwealth of Virginia is also leading the nation in the movement to better utilize scarce resources while improving pretrial outcomes by implementing pretrial risk assessment and developing risk-based recommendations and supervision practices.

Virginia Pretrial Risk Assessment Instrument (VPRAI)

Given the ability to use evidence 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. Actuarial pretrial risk assessments are used to assist judicial officers with making bail decisions. Research has demonstrated that actuarial risk assessments have higher predictive validity than clinical or professional judgment.⁴ Subjective pretrial decision making practices are prone to demographic disparities and may produce poor results from a public safety perspective.

Virginia pretrial services agencies currently use an objective and research-based risk assessment to assess risk of flight and danger to the community posed by pretrial defendants. The Virginia Pretrial Risk Assessment Instrument (VPRAI), known nationally as the “Virginia Model,” was the first research-based statewide pretrial risk assessment in the country. It has been validated for use by all Virginia pretrial services agencies.

³ Kentucky Administrative Office of the Courts, *Report on Impact of House Bill 463: Outcomes, Challenges and Recommendations*, June 2012 (<http://pretrial.org/Docs/Documents/Kentucky%20Pre%20Post%20HB%20463%20First%20Year%20Pretrial%20Report.pdf>)

⁴ Kristin Bechtel, Christopher T. Lowenkamp, and Holsinger, A., “Identifying the Predictors of Pretrial Failure: A Meta-Analysis,” *Federal Probation*, Vol. 75 No. 2 (2011). (www.uscourts.gov/uscourts/FederalCourts/PPS/Fedprob/2011-09/identifying.html)



With the enactment of the Pretrial Services Act, the Department of Criminal Justice Services (DCJS) was required to develop risk assessment and other instruments for pretrial services agencies to use in assisting judicial officers in determining release or detention for pretrial defendants.⁵ The process used to develop the Virginia Model is detailed in the 2003 publication *Assessing Risk among Pretrial Defendants in Virginia: The Virginia Pretrial Risk Assessment Instrument*.⁶ The research-based pretrial risk assessment was implemented by all Virginia pretrial services agencies using a phased in approach between July 2003 and December 2004.

By January 2005, all pretrial services agencies in Virginia were using the risk assessment to identify the likelihood of failure to appear in court and the danger to the community posed by defendants pending trial. After two years of state-wide use, a validation study was completed. The primary purpose of the study was to confirm predictive validity – in this case that the assessment was able to predict future failure to appear for court and danger to the community defendants awaiting trial. Although the assessment was research-based, it was important to confirm its validity and ensure that circumstances that can change over time (e.g. crime patterns, law enforcement practices, drug usage, population demographics) had not affected its accuracy. Using data from all Virginia pretrial services agencies, the study confirmed that the assessment as originally developed accurately classified defendants according to their likelihood of pretrial failure (failure to appear and danger to the community). Based on the study results, minor revisions to the assessment were made and a revised assessment finalized. The revised assessment was implemented during the first half of 2009 and is currently in use. Detailed information about the validation study and the revised validated VPRAI can be found in the 2009 publication *Pretrial Risk Assessment in Virginia: The Virginia Pretrial Risk Assessment*.⁷

The revised and validated VPRAI consists of eight risk factors: (1) current charge, (2) pending charges, (3) criminal history, (4) failure to appear, (5) violent convictions, (6) length at residence, (7) employment/primary caregiver, and (8) history of drug abuse. The eight factors are weighted to create a risk score and defendants are assigned to one of five risk levels ranging from low to high. The risk levels represent the likelihood the defendant will fail to appear and/or pose a danger to the community while awaiting trial.

Risk-Based Pretrial Recommendations and Supervision

In FY 2010, DCJS, in collaboration with the Virginia Community Criminal Justice Association (VCCJA), received a grant from the Bureau of Justice Assistance for a project to evaluate strategies to more fully utilize the VPRAI, including ways to help guide how defendants are supervised in the community. The purpose of the project was to promote risk-based decision making during the pretrial stage and to implement risk-based supervision strategies to improve outcomes—appearance and public safety rates—using the VPRAI. This was to be accomplished by designing research-based guidelines to be used with the VPRAI to assist pretrial services staff with recommendations and to improve the outcomes of defendants placed on pretrial supervision. The project examined pretrial legal questions, existing national pretrial specific research, existing guidelines for pretrial release recommendations and differential supervision, and Virginia pretrial services research. This provided the foundation for developing a guideline for pretrial recommendations and the structure for differential pretrial supervision. A summary of the project is in the publication, *In Pursuit of Legal and Evidence-Based Pretrial Release Recommendations*,⁸ which can be found on the DCJS website.

⁵ See *Virginia Code* § 19.2-152.3 – Department of Criminal Justice Services to prescribe standards; biennial plan. (<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+19.2-152.3>)

⁶ Marie VanNostrand, *Assessing Risk Among Pretrial Defendants in Virginia: The Virginia Pretrial Risk Assessment Instrument*, Richmond, VA: Department of Criminal Justice Services, 2003. (www.dcj.virginia.gov/corrections/riskAssessment/assessingRisk2003.pdf)

⁷ Marie VanNostrand, and Kenneth J. Rose, *Pretrial Risk Assessment in Virginia: The Virginia Pretrial Risk Assessment Instrument*, Richmond, VA: Department of Criminal Justice Services, 2009. (www.dcj.virginia.gov/corrections/riskAssessment/assessingRisk.pdf)

⁸ Marie VanNostrand, Kenneth J. Rose, & Weibrecht, K., *In Pursuit of Legal and Evidence-Based Pretrial Release Recommendations and Supervision*, Richmond, VA: Department of Criminal Justice Services, 2010. (www.dcj.virginia.gov/corrections/documents/VirginialEBPResearchProjectReportMarch2011.pdf)



Beginning in FY2013, with the continued assistance from the Bureau of Justice Assistance and additional funding from the Arnold Foundation, DCJS began implementing the pretrial recommendation guidelines and differential supervision strategies. The implementation process included a rigorous research design that includes dividing the pretrial agencies in Virginia into four groups: a control group and three different experimental implementation groups. The project also included modifications to the statewide pretrial database and case management system to integrate risk assessment data with release recommendations and supervision levels, and provide data for a process and outcome evaluation. Data collection is currently underway and is expected to be completed by Spring 2014. Based on the results of the research, a statewide implementation plan will be developed to improve risk-based pretrial recommendations and supervision in all pretrial agencies in the Commonwealth.

The Public Supports Risk-Based Pretrial Decision Making

Gauging the public support for changes in justice practices is an important consideration. Recent surveys have shown that the public does in fact support evidence-based practices in our criminal justice system. As it relates to bail reform, three surveys released in 2012 show the public's support of risk-based pretrial decision making. A 2012 survey of Republican voters in Florida⁹ showed that 91% agreed that risk should be the main factor in determining release and 69% said that a defendant's ability to pay should not be a main factor in determining release. A 2012 survey of residents of Mecklenburg, North Carolina¹⁰ showed that 76% support the policy of judges releasing defendants on the least restrictive conditions. Lake Research Partners¹¹ conducted a national survey on the topic of pretrial justice reform and found more than three in four voters believe that pretrial risk assessment would be effective at protecting community safety. A majority of the electorate strongly supports using risk-based screening tools instead of cash bail bonds to determine whether defendants should be released from jail before trial. Only nine percent oppose this reform.

What these survey findings suggest is that the public recognizes shortcomings in pretrial justice and favors an evidence-based approach to addressing those shortcomings.

Jail Crowding

Jail crowding is very costly to taxpayers. Data from the Bureau of Justice Statistics show that between 1982 and 2006, county expenditures on criminal justice grew from \$21 billion to \$109 billion and that county expenditures on jails rose 500 percent during that time.¹² Jail crowding also makes it difficult to provide critical programming in jails to reduce reoffending once offenders are released. Freeing up jail beds allows for creative jail reentry programming that may improve long-term reintegration outcomes for individuals returning to their communities.

The primary purpose of local and regional jails in Virginia is to house inmates awaiting transfer to the Department of Corrections, sentenced felons, sentenced misdemeanants and defendants awaiting trial. According to data presented to the Offender Population Forecasting Liaison Work Group,¹³ in 2013, 67.9% of the local jail population consisted of either felons sentenced to 12 months or less, sentenced misdemeanants or persons awaiting trial. This local-responsible jail population had been decreasing since September 2006, but started to increase again in December 2010 despite a drop in monthly average commitments. In part, this may be attributed to an increase in the Average Length of Stay (ALOS). The ALOS for the unsentenced, awaiting trial population has shown the largest increase among local jail population categories. One possible explanation for the increase in ALOS may be related to the requirement to post a secured bond.

⁹ Florida Tax Watch, Center for Smart Justice Poll Results, (January 2012) (www.floridatxwatch.org/resources/pdf/SmartJusticePoll11912.pdf)

¹⁰ MarketWise, *Charlotte-Mecklenburg 2012 Criminal Justice System Survey Presentation of Results*, Charlotte, NC (<http://charmeck.org/mecklenburg-county/countymanagersoffice/criminaljusticeservices/documents/criminal%20justice%20survey%20results%202012.pdf>)

¹¹ National Association of Counties, *Communicating the Need for Pretrial Justice Reform*, (2012) www.naco.org/programs/csd/Documents/Criminal%20Justice/2012.10.04%20PDF%20Webinar%20Powerpoint.pdf

¹² Bureau of Justice Statistics' Justice Expenditures and Employment Extract series.

¹³ *Offender Population Forecasting: Criminal Justice Trends in Virginia*, Presentation to the Offender Population Forecasting Policy Advisory Committee, August 1, 2013



The Virginia Community Criminal Justice Association presented results of a study of pretrial screenings occurring in October 2011, in an effort to better understand the release decisions and outcomes for pretrial defendants. DCJS continued the methodology of the 2011 October Study in 2012. Using the Pretrial and Community Corrections (PTCC) case management system, in conjunction with the Virginia Compensation Board's Local Inmate Data System (LIDS), DCJS studied the outcomes of pretrial screenings completed in October 2012.

As with the 2011 report, this 2012 October Study reviews the jail status (released vs. detained in jail) of investigated defendants seven days after their initial appearance. The bond type, secured bond amounts, and risk levels identified using the Virginia Pretrial Risk Assessment Instrument (VPRAI) are examined for each group (Released/Detained).

The data show that over half of the defendants (53%) were still in jail seven days after their pretrial screenings. This includes defendants identified as being below average or low risk by the VPRAI. The average secured bond amounts for those still in jail was generally (though not always) higher than for those released, suggesting the size of the bond may be related to an individual's release.

Of those investigated in October 2012, 47% (n=1,668) were released after seven days, 42% (n=1,477) were held without bond, and 11% (n=381) were still in custody due to an inability to meet the requirements of a secured bond (Appendix B, Figure 1).

Of those still held without bond seven days after screening (1,477), 29% were identified as having a risk level of Average or less by the VPRAI (Appendix B, Figure 2).

Of those given a secured bond (381 cases) but remaining in jail after seven days, 43% were identified as having a risk level of Average or less by the VPRAI (Appendix B, Figure 3), and 92% were held on bonds of \$5,000.00 or less (Appendix B, Figure 4).

For defendants released within seven days of their screening, the most serious committing offenses were usually non-violent/non-drug misdemeanors (33%), or non-violent/non-drug felonies (24%). For defendants still held without bond seven days after screening, the most serious committing offenses were usually non-violent/non-drug felonies (36%), or violent felonies (28%). For defendants given a secured bond but remaining in jail after seven days, the most serious committing offenses were usually non-violent/non-drug felonies (41%), or non-violent/non-drug misdemeanors (34%), (Appendix B, Figure 5).

Better utilization of pretrial services to assist the courts in making risk-based pretrial release or detention decisions early on could have a significant impact on ALOS for the defendants awaiting trial.



Nature of First Appearance/Arraignment

The American Bar Association's Standards on Pretrial Release describe a "meaningful first appearance."¹⁴ At arraignment, each case should receive individual treatment, and decisions should be based on the particular facts of the case and information relevant to the purpose of the pretrial release decision. Participation from the judge, representation from the Commonwealth, legal counsel for the defendant and pretrial services are needed at a "meaningful first appearance." The pretrial investigation provides the foundation for judges to make informed risk-based decisions.¹⁵ Pretrial services in Virginia are designed to provide objective information to judges at arraignment that evaluates defendant risk and appropriate release options. The pretrial investigation gathers information related to the risk of flight, threat to the safety of any person or the community and identifies appropriate release conditions that may include pretrial supervision.

Current practice in Virginia does not meet these standards. In many localities the court does not reconsider the defendant's bond status despite authorization provided by the *Code of Virginia*¹⁶ to address bond and conditions when the court believes that the amount of bond is inadequate or excessive. In these localities, the pretrial investigation report is not considered and the defendant's bond set by the magistrate is usually continued. In many localities, neither a prosecutor nor counsel for the defendant is available at the time arraignment begins, making it difficult for the court to reconsider bond. As a result, the defendant remains in jail until a formal bond hearing can be scheduled days and sometimes weeks later.

When defendants don't have access to counsel at arraignment, there may be legal and constitutional violations and unnecessary pretrial detention of low to moderate risk defendants who could be safely released. Dangerous defendants with financial resources buy their freedom while low risk defendants languish in jail simply because they do not have the financial resources to secure their release.

Preserving the Legal and Constitutional Rights Afforded to Defendants

Pretrial Justice means honoring the presumption of innocence and the accused person's right to bail that is not excessive, as well as all the other legal and constitutional rights afforded to accused persons awaiting trial, while balancing these with the need to protect the community, maintain the integrity of the judicial process, and assure court appearance.¹⁷ The pretrial release decision thus is a reflection of pretrial justice.

Achieving the necessary balance is often difficult, and sometimes perceived as politically unpopular. Although laws, policy and practice are well intended, there are unintended consequences. A justice system that is out of balance produces outcomes that are not desirable. "Honoring the constitutional mandate of pretrial release where safe and fair substantially shrinks jail populations, reducing their impact on county and state budgets."¹⁸

To assure pretrial justice, close attention should be paid to the fundamental legal and constitutional rights afforded defendants during the pretrial stage. These can be found in the Constitution of Virginia, the *Code of Virginia*, the United States Constitution, and case law. The express six¹⁹ critical principles that should serve as the framework during the pretrial stage:

1. Presumption of innocence;
2. Right to counsel;

¹⁴ See ABA Standards for Criminal Justice (Third Edition) Pretrial Release, Standard 10-4.1: 10-4.2

¹⁵ See National Association of Pretrial Services Agencies Standards on Pretrial Release (Third Edition), Standard 2.1 and 2.2 (<http://napsa.org/publications/2004napsastandards.pdf>)

¹⁶ See § 19.2-130. Bail in subsequent proceeding arising out of initial arrest. (<http://leg1.state.va.us/cgi-bin/legpp504.exe?2000+cod+19.2-130>)

¹⁷ Marie VanNostrand, and Gena Keebler, "Our Journey Toward Pretrial Justice," Federal Probation, 71, No. 2, (September 2007): 20.

¹⁸ NLADA, American Council of Chief Defenders, *Policy Statement on Fair and Effective Pretrial Justice Practices*, June 2011 (www.nlada.net/sites/default/files/na_accdprialstmt_06042011.pdf)

¹⁹ Marie VanNostrand, *Legal and Evidence-based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services*, Washington, D.C.: National Institute of Corrections and Crime and Justice Institute, 2007. (www.dcjs.virginia.gov/corrections/documents/legalAndEvidence.pdf)



3. Right against self-incrimination;
4. Right to due process of law;
5. Right to equal protection under the law; and
6. Right to bail that is not excessive.

Presumption of Innocence

The presumption of innocence is a fundamental legal principle in our justice system. Simply being charged with a criminal offense is not evidence of guilt. A person charged with a criminal offense is presumed innocent and the burden of proving guilt beyond a reasonable doubt rests with the State.²⁰ To preserve this fundamental right, it is critical to examine all relevant risk factors presented by each individual defendant and not give too much weight to the instant offense. Although the nature of the offense and weight of the evidence are considerations a judicial officer must consider,²¹ there are other considerations required by the Code to establish the actual risk of the defendant. Pretrial investigation reports provide the court with relevant facts as they relate to the likelihood that a defendant will fail to appear or be a danger to the community. The face value of the charge alone is not a good predictor of failure to appear or danger to the community. Instead, local criminal justice systems should promote policy and practice that support individualized bail decisions based on factors that evidence has shown to be strongly related to assuring court appearance and protecting the safety of the community.

Right to Counsel

The right to counsel is established in the Sixth Amendment of the United States Constitution. Case law has also established the application of the right to counsel or assistance of counsel in criminal cases, most notably *Gideon v. Wainwright*,²² and *Argersinger v. Hamlin*.²³ Indigent defendants must be afforded counsel in any case where the threat of deprivation of liberty is at stake and at the time judicial proceedings have been initiated, which includes when the defendant is arraigned on a warrant before a judge. "A criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of the adversarial judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."²⁴ In many localities in the Commonwealth, the norm at arraignment is a hearing that includes the defendant, a judge, and the Commonwealth's Attorney. At this hearing, a pretrial investigation report may be available if it is in a jurisdiction that is served by a pretrial services agency. Defendants not represented by legal counsel at arraignment are put in the awkward situation of having to present their cases for release in adversarial hearings. The result is usually a judicial decision favoring pretrial detention or a delayed release.

Defendants who cannot afford counsel should have an attorney appointed and available for immediate reconsideration of their bond status at the time of arraignment. This would provide defendants a fair opportunity for release under the least restrictive terms and conditions at the earliest point possible and reduce the number of bond hearings scheduled due to defendants unable to post bond. 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.²⁵ The jail population accordingly was reduced by nearly 50%.²⁶

²⁰ *Coffin v. United States*, 156 U.S. 432 (1895) at 545.

²¹ See § 19.2-121. Fixing terms of bail. (<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+19.2-121>)

²² *Gideon v. Wainwright*, 372 U.S. 335, 344 – 345 (1963)

²³ *Argersinger v. Hamlin*, 407 U.S. 25 (1972)

²⁴ *Rothgery v. Gillespie*, 554 U.S. 191 (2008)

²⁵ 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)

²⁶ *Id.*



Right Against Self-incrimination

In *Miranda v. Arizona*²⁷, the United States Supreme Court clarified the self-incrimination provision of the Fifth Amendment to the U.S. Constitution. Although there are procedural safeguards during court proceedings to protect against self-incrimination, defendants arraigned without benefit of counsel may be vulnerable. They are placed at a distinct disadvantage at adversarial hearings in which courts consider the nature and circumstances of the offenses and the weight of the evidence.

Right to Due Process of Law

The Fifth and Fourteen Amendments to the U.S. Constitution provide that the government shall not take a person's life, liberty, or property without due process of law. Arraignment is a defendant's first opportunity after the magistrate's initial bail hearing to have bail reconsidered and pretrial release granted. Any restriction of liberty should be supported by evidence. It is critical that the court know what relevant facts or evidence resulted in the decision to commit the defendant to jail on a secured bond or with no bond. The magistrate checklist is intended to convey this information, but is not provided to the courts in all jurisdictions. The pretrial investigation report enables the court to reconsider a defendant's bond status at an arraignment hearing in a way that is fair and timely.

Right to Equal Protection Under the Law

The Fourteenth Amendment requires equal protection under the law. A defendant's inability to pay a bond may be a violation of the equal protection clause if other conditions were not considered in lieu of a secured bond or pretrial detention. A financial condition of bail should be imposed only when other conditions are not sufficient. Alternative methods of release, other than financial, should be considered for indigent defendants.

Right to Bail that is Not Excessive

The prohibition against excessive bail is supported in both the Constitution of Virginia and the Eighth Amendment of the United States Constitution. Chief Justice Vinson described excessive bail in his majority opinion in *Stack v. Boyle*²⁸ as being beyond what is reasonably calculated to fulfill the purpose of bail. In Virginia the purpose of bail is to assure court appearance and the safety of the public. Setting bail and conditions of bail must be individualized and done in a manner that corresponds to risk. The pretrial investigation report, risk assessment and recommendation are critical tools available to local courts to minimize instances of excessive bail. In his majority opinion in *United States v. Salerno*,²⁹ Chief Justice Rehnquist wrote: "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." Bail and conditions of bail are designed to assure court appearance and safety of the community, while facilitating release. Bail is not a tool for detaining a defendant in jail or imposing punishment before trial. Using money (secured bonds) as a tool to reduce pretrial risk does not make our communities safer. Instead, the use of targeted conditions for release based on the defendant's risk level and specific factors reduces the likelihood the defendant will reoffend during the pretrial stage.

Disruption of Defendant Stability Factors

A pretrial justice system that is out of balance by favoring detention, either through a reliance on secured bonds or by not affording timely and sufficient due process, may generate numerous collateral consequences. Among these is the destabilizing effect of pretrial incarceration. Defendants who are detained, even for short periods of time, are more likely to experience a loss of stability in the areas of employment, residence, pro-social connections with family and community in which they live. "Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic

²⁷ *Miranda v. Arizona*, 384 U.S. 436 (1966)

²⁸ *Stack v. Boyle*, 342 U.S. 1 (1951)

²⁹ *United States v. Salerno*, 481 U.S. 739 at 755 (1987)



and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support...³⁰ Recent research demonstrates the impact of disrupting the lives and stability factors of defendants, even for short periods of time. A recent study funded by the Laura and John Arnold Foundation (LJAF)³¹ found that requiring defendants to spend as little as two to three days in jail if they are low risk, disrupts their stability factors in a way that increases the likelihood they will fail to appear and commit new criminal offenses while on release. Holding low risk defendants in jail two to three days increases the likelihood of failure to appear by 22 percent and the likelihood of committing a new crime within two years by 17 percent. Additionally, the impact of pretrial detention continues beyond the pretrial stage. These failure rates increase the longer low risk defendants remain in jail. Additional findings of this study show the impact of pretrial detention on criminal case outcomes. Defendants held in jail during the entire pretrial period are four times as likely to be sentenced to jail, three times more likely to receive longer jail sentences, three times more likely to be sentenced to prison and twice as likely to receive longer prison sentences.

³⁰ ABA Standards for Criminal Justice: Pretrial Release, Standard 10-1.1

³¹ Laura and John Arnold Research Brief, October 2013. (http://arnoldfoundation.org/sites/default/files/pdf/LJAF-Pretrial-CJ-Research-brief_FNL.pdf)



Arraignment—The “New Norm”

Establishing the “new norm” in Virginia requires a shift in practice away from a presumption of secured bond and toward a presumption favoring release on the least restrictive terms and conditions based on the individual risk factors posed by the defendant. Ideally, a low to below average risk non-violent defendant should be released on personal recognizance or an unsecured bond unless the judge finds in his or her discretion that the defendant is a flight risk or danger to others. It should also be presumed that average risk to above average risk defendants should be ordered to pretrial supervision with appropriate conditions to assure future court appearance and reduce the likelihood of new criminal activity during the pretrial stage. Secured bonds should be used only if non-financial options are not sufficient to assure defendants’ appearance and should not be used to address public safety. The presumption in favor of release will not apply when the defendant meets the criteria for “rebuttable presumption” described in §19.2-120 (B).

The arraignment hearing will promote effective risk-based decision making, fairness and public safety. When a defendant is arraigned, a judge will have accurate and relevant information about the risk factors and supervisory options in order to make a better and more informed decision about detention or conditions of release. Providing judges with sound risk assessment information at arraignment will produce decisions that protect the safety of victims, witnesses, and the community.

Arraignments will reflect the ABA concept of “meaningful” first appearances to include participation from the Commonwealth’s Attorney’s office, defense counsel, and pretrial services. The foundation of the pretrial release/detention decision would be the pretrial risk assessment and other facts or evidence provided.

Opportunities for Change

The foundation for the “new norm” exists in the Commonwealth. Many localities have pretrial services agencies and provide risk-based information to the courts at arraignment. However, to achieve pretrial justice in the Commonwealth, some reform is needed. The following recommendations may be considered to support the “new norm.”

Pretrial Services Expansion

Currently there are 31 pretrial services agencies in Virginia serving 97 of 134 localities. In the long-term, pretrial services should be expanded to all areas that are not currently served. Localities not served include: Accomack, Amelia, Amherst, Appomattox, Bath, Botetourt, Bristol, Buckingham, Buena Vista, Charlotte, Craig, Culpeper, Cumberland, Dinwiddie, Franklin, Franklin City, Goochland, Henry, Isle of Wight, Lunenburg, Martinsville, Northampton, Nottoway, Page, Patrick, Powhatan, Prince Edward, Rockbridge, Shenandoah, Southampton, Suffolk, and Warren.

In the short-term, priority should be given to the six (6) remaining localities that do not have either local probation or pretrial services (Henry, Martinsville, Patrick, Franklin, Amherst and Appomattox). Four of these localities, Amherst, Appomattox, Henry and Martinsville, are currently mandated if funds are available (§53.1-82.1 of the *Code of Virginia*) to implement local probation and pretrial services because they participate in new or expanded regional jails. Because state funding has not yet been provided for this purpose, the services have not been established.

Expand Capacity for Indigent Defense

One of the barriers to implementing a “meaningful” first appearance is the availability of defense counsel at arraignment. Providing additional attorney resources for indigent defendants is needed. Some jurisdictions nationally use a court appointed attorney or a resource provided by the Office of the Public Defender to fill the role of “attorney for the day.” This attorney would be available at arraignment to represent indigent defendants.



Amendments to the *Code of Virginia*

An amendment to § 19.2-123 (A) is needed to strike the requirement for a secured bond. Requiring a judicial officer to set a condition of bail, such as a secured bond, without having all the facts relevant to court appearance and public safety is not consistent with the risk-based model of pretrial decision making.

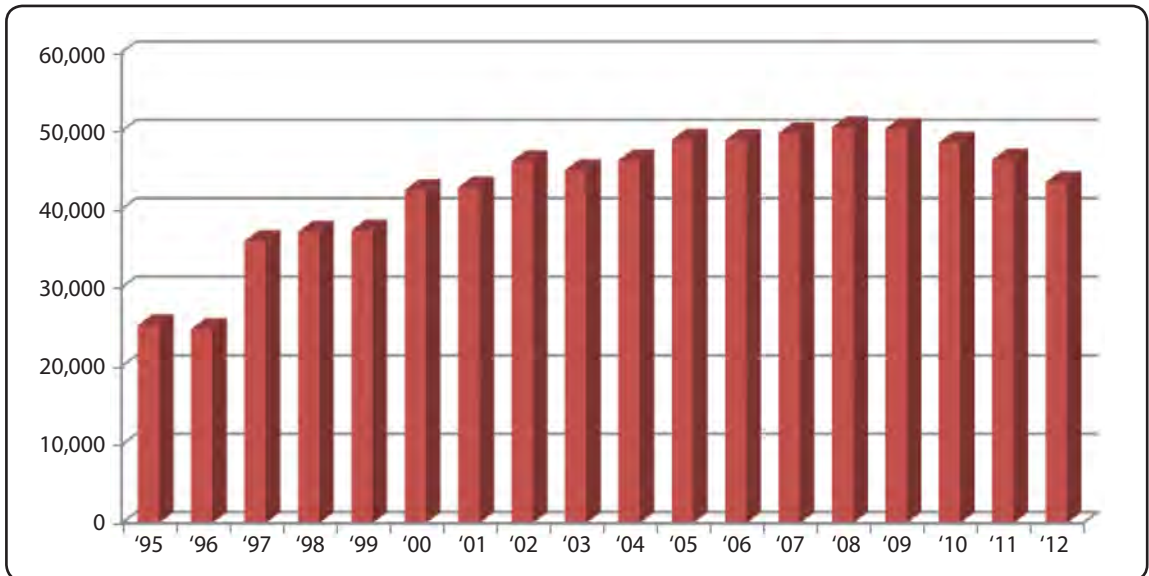
An amendment to § 19.2-120 (B) is needed to be consistent with the right to due process. This provision provides for the concept of preventive detention, which comes from federal law as a result of the 1984 Federal Bail Reform Act. That Act was upheld in *United States v. Salerno* because of its many due process provisions. The federal statute requires a formal detention hearing. The scheduling of the detention hearing is time sensitive and requires representation by defense counsel. The burden of proof shifts to the prosecution. The court must find, by clear and convincing evidence, that no condition or combination of conditions can mitigate the risk of flight and danger to the community in order to detain a defendant without bail. This ensures that detention prior to trial is the carefully limited exception.

An additional amendment to § 19.2-120 is needed to require the presumption of release on the least restrictive terms and conditions of bail for cases not meeting the criteria in subsection B. References to risk-based pretrial decisions should be included.

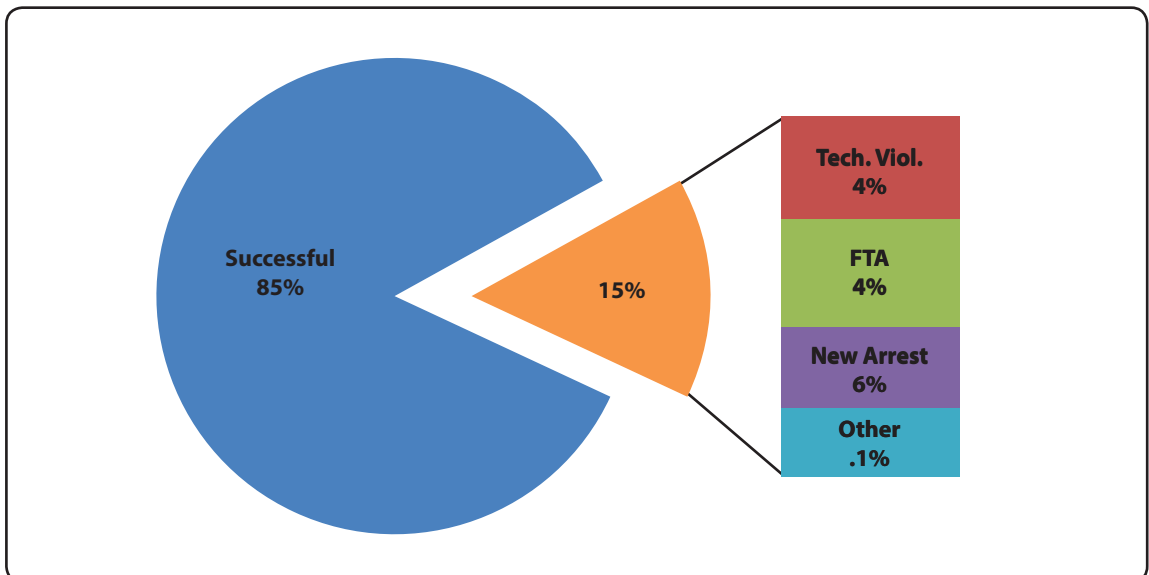


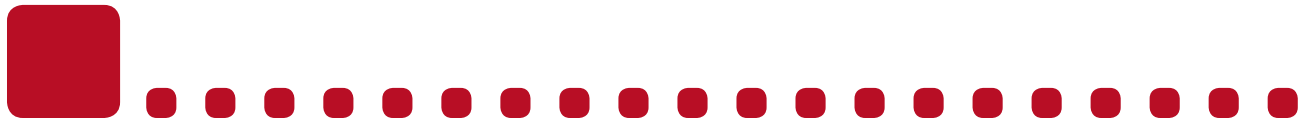
Appendix A—Pretrial Services Outcomes & Performance

FY2012 Pretrial Investigations



FY2012 Pretrial Placement Outcomes





Appendix B—2012 October Study

Figure 1. Release/Detention Rates After Seven Days

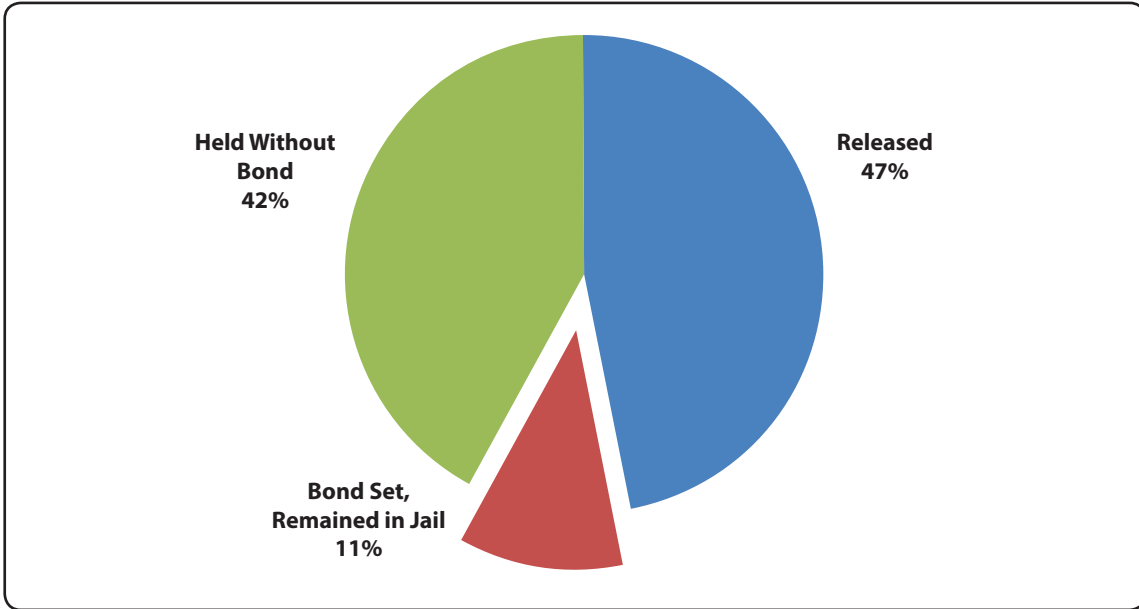


Figure 2. Held without Bond, Remained in Jail by Risk Level

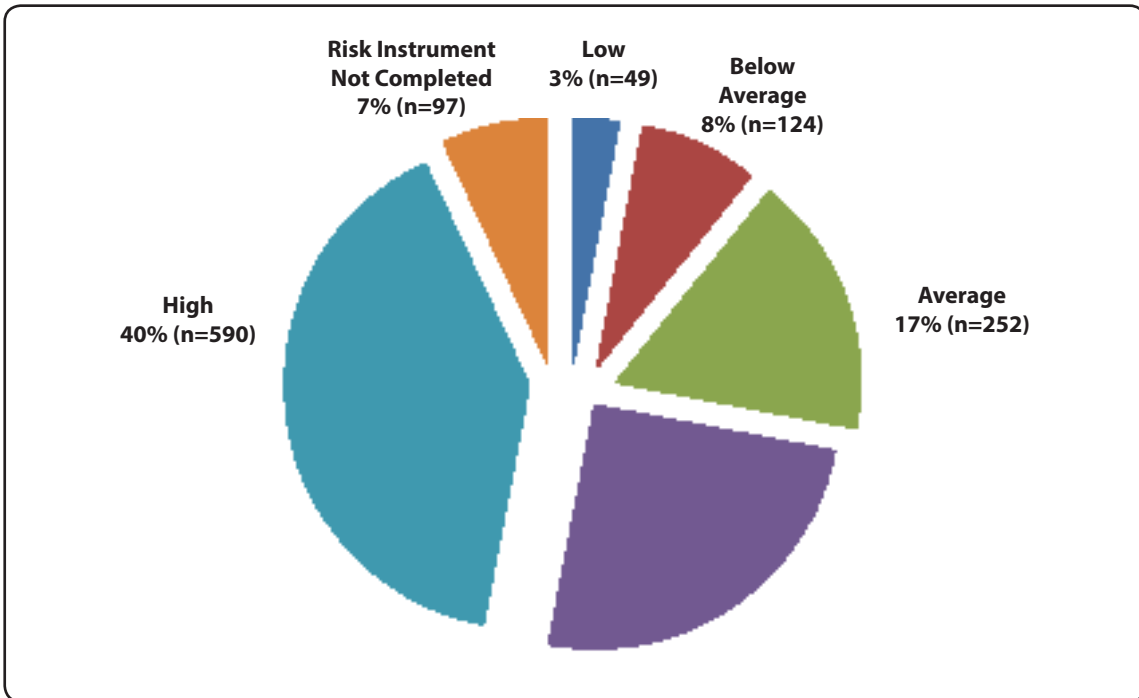




Figure 3. Bond Set, Remained in Jail by Risk Level

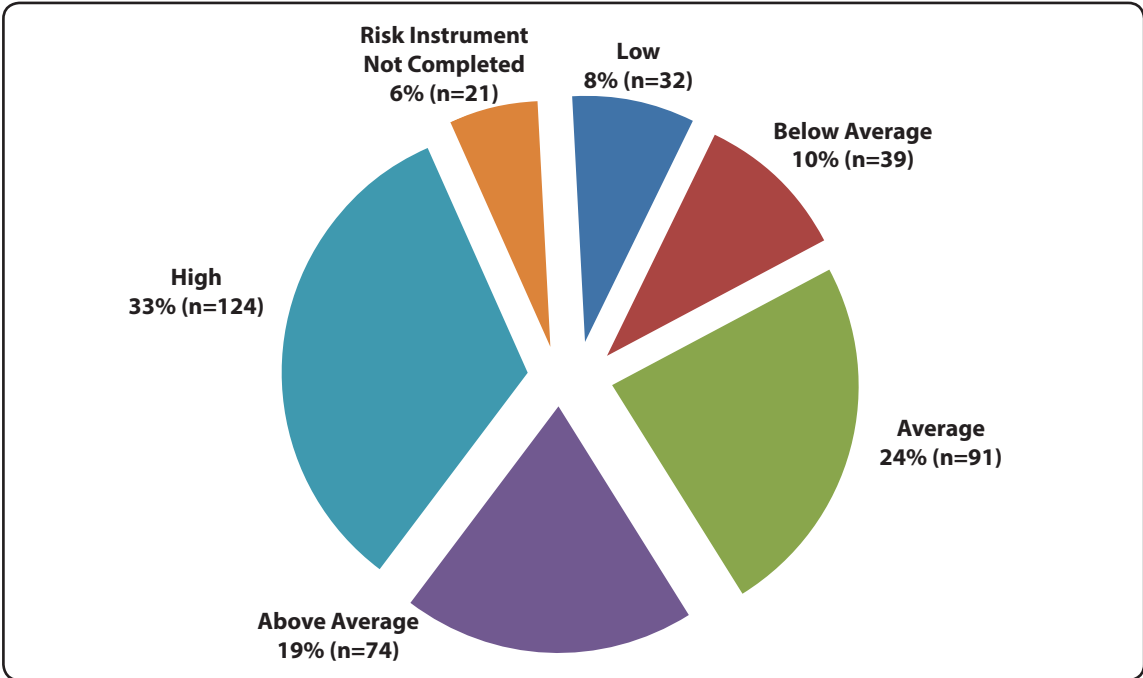


Figure 4. Bond Set, Remained in Jail by Bond Amounts

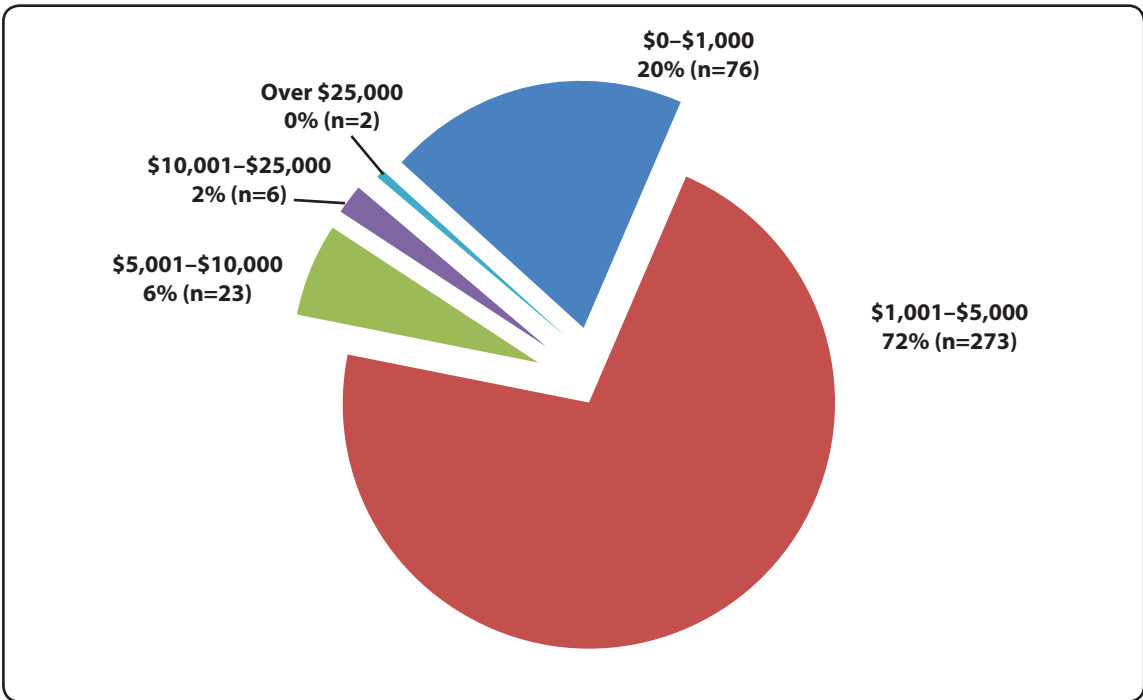
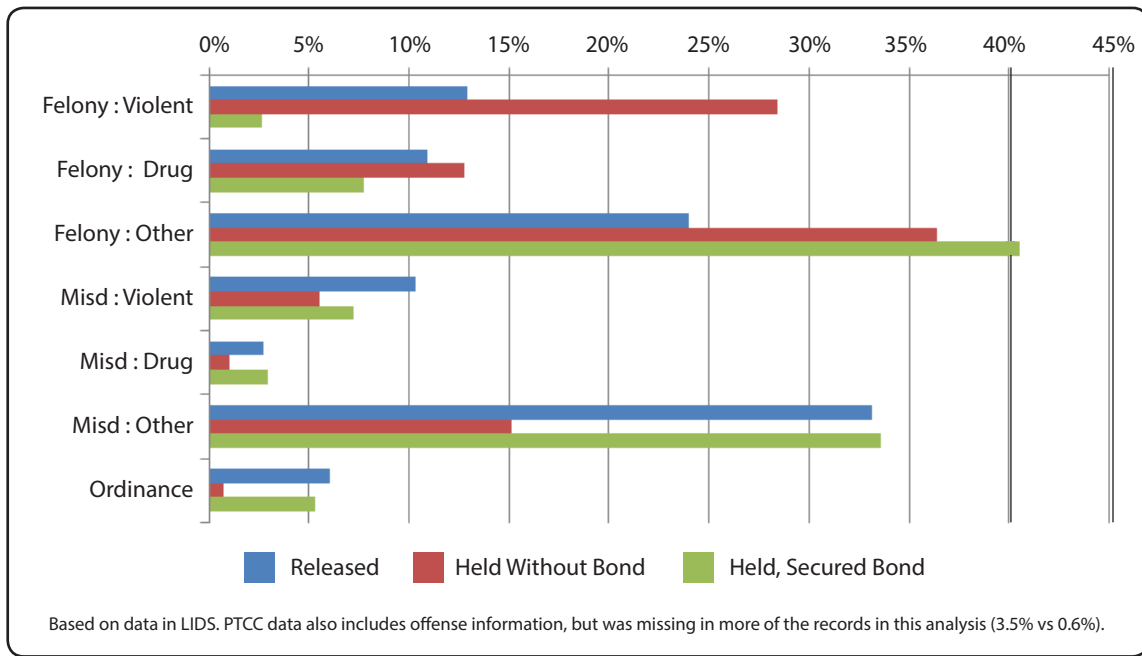




Figure 5. Release Status (7 Days) by Most Serious Committing Offense



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