

IN PURSUIT OF LEGAL AND EVIDENCE-BASED PRETRIAL RELEASE RECOMMENDATIONS AND SUPERVISION



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Virginia Pretrial Services Agencies



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In Pursuit of Legal and Evidence-Based Pretrial Release Recommendations and Supervision

VIRGINIA PRETRIAL SERVICES AGENCIES

INTRODUCTION

Pretrial services agencies in Virginia are actively engaged in implementing Pretrial Services Legal and Evidence-Based Practices (LEBP).¹ Pretrial services LEBP are interventions and practices that are consistent with the legal and constitutional rights afforded to accused persons awaiting trial and methods research have proven to be effective in reducing unnecessary detention while assuring court appearance and the safety of the community during the pretrial stage. A component of this larger LEBP initiative involves the development and implementation of research-based guidelines for use by pretrial services agencies that are (1) risk-based, (2) consistent with legal and evidence-based practices, and (3) provide guidance for pretrial release recommendations and differential pretrial supervision.

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. Pretrial release recommendations are currently subjective and although pretrial staff consider the results of the risk assessment, there is no objective and consistent guidance for making pretrial release recommendations. In addition, many of Virginia’s pretrial services agencies require the same frequency and types of contacts for all defendants during pretrial supervision while some have identified their own levels of supervision with varying frequencies and types of contacts. In both cases there is no objective and consistent policy for providing differential pretrial supervision based on the risk of pretrial failure.

The Virginia Department of Criminal Justice Services, in collaboration with the Virginia Community Criminal Justice Association, formed an LEBP Advisor Committee and partnered with Luminosity, Inc. to develop guidelines that utilize the VPRAI to guide pretrial release recommendations and differential pretrial supervision. The criteria for the guidelines include the need to be compliant with the law, based on available research, and consistent with the concept of pretrial justice.²

Pretrial Justice

The honoring of the presumption of innocence, the right to bail that is not excessive, and all other legal and constitutional rights afforded to accused persons awaiting trial while balancing these individual rights with the need to protect the community, maintain the integrity of the judicial process, and assure court appearance

¹ 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.

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

To ensure the guidelines criteria were met, as well as consistency with LEBP, the research project included five primary components.

1. Research Pretrial Legal Questions – Conduct a review of Virginia state statutes, case law, and other legal resources to explore potential legal challenges to specified pretrial release conditions and pretrial practices.
 - a. Explore legal challenges to the following pretrial release conditions –
 - i. ‘Blanket’ pretrial release condition (a term used to describe one or more condition imposed upon defendants – usually as a group – without regard to individualized risk factors)
 - ii. Drug testing
 - iii. Alcoholics anonymous/twelve-step meetings
 - iv. Treatment and assessment (e.g. mental health or substance abuse)
 - b. Explore legal challenges to imposing pretrial supervision fees on defendants and the delegation of judicial authority
2. Examine Existing National Pretrial Specific Research – Conduct a comprehensive review of existing pretrial specific research in the areas listed below.
 - a. Conditions and interventions (i.e., court date notification, drug testing, electronic monitoring, and pretrial supervision) and their effectiveness in reducing unnecessary detention while assuring court appearance and the safety of the community during the pretrial stage
 - b. Effectiveness of types of pretrial release (personal recognizance, unsecured bail, and secured bail)
3. Identify Research-Based and Validated Pretrial Risk Assessments with Corresponding Guidelines for Pretrial Release Recommendations and Differential Pretrial Supervision
4. Conduct Virginia Pretrial Services Research – Use Virginia pretrial services data contained in the Pretrial and Community Corrections Case Management System (PTCC) to explore the relationships listed below while controlling for risk.
 - a. Pretrial release conditions and pretrial failure
 - b. Pretrial supervision and pretrial failure
 - c. Pretrial release types and pretrial failure
5. Develop Guidelines that Utilize the VPRAI to Guide Release Recommendations and Differential Pretrial Supervision – Rely on the findings to the pretrial legal questions, existing national pretrial specific research, and results of the Virginia pretrial services specific research to inform the development of the guidelines.

This report contains background information about Virginia pretrial services agencies and the VPRAI, as well as an overview of the results of the research related to the pretrial legal questions, existing national pretrial specific research, research-based and validated pretrial risk assessments with corresponding guidelines, and the Virginia pretrial services specific research. The report concludes with the presentation of the risk-based guidelines developed to guide pretrial release recommendations and differential pretrial supervision.

BACKGROUND

Virginia Pretrial Services Agencies

Pretrial services agencies were first created in Virginia in 1989 and were later authorized by statute in 1995 with the passage of the Pretrial Services Act.³ There are currently 30 pretrial services agencies serving 82 of Virginia's 134 cities and counties. All Virginia pretrial services agencies operate under the authority of the Pretrial Services Act and are funded in whole or part by the Virginia Department of Criminal Justice Services (DCJS). DCJS administers general appropriation funds designated for the purpose of supporting the Pretrial Services Act as discretionary grants to local units of government.

The Pretrial Services Act was enacted into law with the purpose of providing 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 ... other than an offense punishable by death, who are pending trial or hearing."

The duties and responsibilities of pretrial services agencies are detailed in Virginia Code § 19.2-152.4:3 - Duties and responsibilities of local pretrial services officers. 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.⁴

In FY 2009, pretrial services agencies conducted 50,254 pretrial investigations and 17,903 defendants were placed on supervision. In that same year, over 18,000 supervision cases were closed; 86% were closed successfully and 14% unsuccessfully due to failure to appear (3.9%), new arrest (3.3%), and technical violations (6.8%). As a result, in FY 2009 defendants released with a condition of supervision to Virginia pretrial services agencies experienced a 96.1% court appearance rate. In addition, 96.7% of the defendants did not have their supervision revoked due to new alleged criminal activity.

³ Article 5 (§19.2-152.2 et seq.) of Chapter 9 of Title 19.2.

⁴ See Virginia Code § 19.2-152.4:3 - *Duties and responsibilities of local pretrial services officers* for the complete list of required services.

Virginia Model Pretrial Risk Assessment

With the enactment of the Pretrial Services Act, the Department of Criminal Justice Services was required to develop risk assessment and other instruments to be used by pretrial services agencies in assisting judicial officers in discharging their duties related to determining release and detention for pretrial defendants.⁵ The Virginia Pretrial Risk Assessment Instrument (VPRAI), also known as the Virginia Model, was the first research-based statewide pretrial risk assessment in the country.

The process 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 a defendant pending trial. After two years of statewide use, a validation study was completed. The primary purpose of the validation 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 pending trial for defendants in Virginia. Although the assessment was research-based, it remained desirable to confirm the predictive validity and ensure that circumstances that can change over time (e.g. crime patterns, law enforcement practices, drug usage, population demographics) had not impacted the accuracy of the assessment. 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 including measures of the following: (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 of pretrial failure including failing to appear in court and danger to the community pending trial.

There is no objective and consistent guidance for making pretrial release recommendations nor is there an objective and consistent policy for providing differential pretrial supervision based on the risk assessment. For this reason, the goal of the current study was to develop VPRAI-based guidelines to guide pretrial release recommendations and differential pretrial supervision.

⁵ See Virginia Code § 19.2-152.3 - Department of Criminal Justice Services to prescribe standards; biennial plan.

⁶ Marie VanNostrand, *Assessing Risk Among Pretrial Defendants in Virginia: The Virginia Pretrial Risk Assessment Instrument*, Richmond, VA: Department of Criminal Justice Services, 2003.

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.

PRETRIAL LEGAL QUESTIONS

Pretrial Services LEBP require that pretrial interventions and practices are consistent with the legal and constitutional rights afforded to accused persons awaiting trial. The term LEBP is intended to reinforce the uniqueness of the field of pretrial services and ensure that criminal justice professionals remain mindful that pretrial services practices are often driven by law and when driven by research, they must be consistent with the rights afforded to defendants awaiting trial. For this reason, the first step in the process of guideline development was to conduct a review of Virginia state statutes, case law, and other legal resources to explore potential legal challenges to specified pretrial release conditions and pretrial practices. The findings of the legal review related to specified pretrial release conditions and pretrial practices are provided below.

‘Blanket’ Pretrial Release Condition

‘Blanket’ pretrial release condition is a term used to describe one or more conditions imposed upon defendants – usually as a group – without regard to individualized risk assessment. Constitutional issues arise when blanket pretrial release conditions are imposed upon a group of defendants without an individualized assessment of a particular defendant’s risk factors. A court might impose blanket pretrial release conditions under a number of circumstances: perhaps a State or Federal statute authorizes it or perhaps it occurs simply as a matter of local practice. An example would be a requirement that all defendants submit to pretrial release conditions such as drug testing or curfew.

When considering a court’s limitations on setting pretrial release conditions, we look first to the court’s general authority to set pretrial release. The setting of pretrial release involves potential infringements on the liberty of people presumed to be innocent; therefore, the government’s power to impose pretrial release conditions is limited by the constitution. “In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” United States v. Salerno, 481 U.S. 739, 754 (1987). For example, the Eighth Amendment’s Excessive Bail Clause and the Fifth Amendment’s Due Process Clause both require that in those cases in which bail is to be set, it must be set according to a ‘fair process’ and it must not be ‘excessive’ in relation to the governmental goals of assuring the appearance of the defendant to stand trial and the safety of the community. See e.g. United States v. Crowell, No. 06-CR-291E(F), 2006 WL 3541736 (W.D.N.Y.Dec.7, 2006) (citing United States v. Montalvo-Murillo, 495 U.S. 711, 714 [1990]).

The parameters for setting pretrial release conditions have had occasion to come under a great deal of scrutiny in recent years since the passage of new federal pretrial release legislation. Under the Adam Walsh Act Amendments which modify the Bail Reform Act of 1984, 18 U.S.C. § 3141 *et seq.*, the legislature mandated that all defendants of a particular group (those charged with crimes involving minor victims) *shall* be subjected to certain pretrial release conditions such as electronic monitoring and curfew, regardless of their individualized pretrial release risk factors. See 18 U.S.C. § 3142(c)(1). No judicial determination of a particular defendant’s circumstances is required under the Act prior to the imposition of the mandatory pretrial release conditions. For purposes of our discussion, they meet the definition of ‘blanket pretrial release conditions.’

The majority⁸ of federal court cases reviewing this question have ruled that section 216 - Improvements to the Bail Reform Act - of the Adam Walsh Act unconstitutional under the Eighth Amendment Excessive Bail Clause or the Due Process Clause of the Fifth Amendment or both.⁹ Because the constitutional bar against blanket pretrial release conditions is not limited to the Adam Walsh Act but would apply to any state or federal court decision imposing blanket pretrial release conditions, a full understanding of the court's rationale is instructive.

The Due Process Clause of the Fifth Amendment guarantees that "no person shall ... be deprived of life, liberty, or property, without due process of law." This clause has been interpreted to provide what we refer to as "procedural due process" which "insures that any government action that deprives a person of life, liberty, or property is implemented in a fair manner." See United States v. Smedley, 611 F.Supp.2d 971, 975 (E.D. Mo. 2009). Procedural due process is the "opportunity to be heard at a meaningful time and in a meaningful manner." Id. So, for example, the right to procedural due process guarantees that an accused has the right to have a trial, to present evidence, and to cross-examine witnesses. The question raised under the Adam Walsh Act cases was whether the Due Process Clause also required that prior to the imposition of pretrial release conditions, a judicial determination be made that such pretrial release conditions are, in fact, necessary.

Courts have held that there is no formula for exactly what processes are due to a defendant at a particular stage of the criminal process. Rather, courts employ a three pronged analysis that considers:

1. the private interest that will be affected by the official action;
2. the risk of an erroneous deprivation of that interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
3. the government's interest, including the burdens that any additional or substitute procedural requirements would entail. Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

Courts that have found that the mandatory pretrial release conditions contained in the Improvements to the Bail Reform Act section of the Adam Walsh Act violate the Due Process Clause have applied the three pronged analysis as follows:¹⁰ (i) They have concluded that when considering pretrial release, 'the private interest that will be affected by the official action' is an individual's liberty. Although not the *most* significant private interest,¹¹ an individual's liberty is

⁸ Only two courts to date that have had the question before them have declined to find the Adam Walsh Act unconstitutional: United States v. Cossey, ---- F.Supp.2d ----, 2009 WL 2232222 (D.Mont. July 27, 2009) and United States v. Gardner, 523 F.Supp.2d 1025 (N.D.Cal. 2007).

⁹ At least one court also ruled the Adam Walsh Act Amendments were unconstitutional on the basis of the separation of powers clause of the United States Constitution. See, e.g., Crowell, *supra*.

¹⁰ For cases in which courts have found the blanket bail conditions of the Adam Walsh Act unconstitutional under the Fifth Amendment Due Process Clause, see United States v. Polouizzi, 697 F.Supp.2d 381 (E.D.N.Y. 2010); United States v. Smedley, 611 F.Supp.2d 971 (E.D. Mo., 2009); United States v. Merritt, 612 F.Supp.2d 1074 (D.Neb., 2009); United States v. Rueb, 2009 WL 764552 (D.Neb. Mar.20, 2009); United States v. Arzberger, 592 F.Supp.2d 590 (S.D.N.Y.2008); United States v. Kennedy, 593 F.Supp.2d 1221 (W.D.Wash.2008); United States v. Torres, 566 F.Supp.2d 591 (W.D.Tex.2008); United States v. Vujnovich, No. 07-20126-01 CM DJW, 2007 WL 4125901 (D.Kan.Nov.20, 2007); United States v. Crowell, No. 06-CR-291E(F), 2006 WL 3541736 (W.D.N.Y.Dec.7, 2006).

¹¹ Consider, for example, the private interest implicated by the death penalty.

still a very well protected interest. (ii) They have also concluded that the risk that a defendant's liberty may be deprived erroneously is substantial. They reach this conclusion because under the Improvements to the Bail Reform Act section of the Adam Walsh Act there is no individualized judicial determination that particular pretrial release conditions are necessary to reasonably assure appearance in court or protection of the public. Since the only Constitutional bases to detain an individual pretrial are if they pose a risk of flight or are a danger to the community, a statute that permits an individual to be detained absent these characteristics would be at high risk of erroneously depriving an individual of their liberty. (iii) Finally, the courts have concluded that the State's interest in avoiding such an individualized determination is minimal. Unlike some additional procedural safeguards that might be expensive or time-consuming, the burden to the State here is small because the necessary judicial determination could be easily made as part of the already existing pretrial release hearing.

Thus, the conclusion of those courts finding the Improvements to the Bail Reform Act section of the Adam Walsh Act unconstitutional under the Due Process Clause was that defendants are entitled to an individual judicial determination that each pretrial release condition ordered is necessary in a particular defendant's case to reasonably assure appearance in court or protection of the public. Presumably, the application of this entitlement imposes upon the State a duty to affirmatively establish that a necessity exists for each pretrial release condition and entitles the defendant the opportunity to challenge the alleged necessity.

Another basis under which the Improvements to the Bail Reform Act section of the Adam Walsh Act has been challenged is the Eighth Amendment of the United States Constitution.¹² The relevant constitutional text simply says, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The general framework to be used when deciding whether bail is 'excessive' is laid out in the decisions of *Stack v. Boyle*, 342 U.S. 1 (1951) (dealing with risk of flight) and *United States v. Salerno*, *supra* (dealing with danger to the community). These cases instruct us to look to the relationship between the proposed pretrial release conditions and the government interests of assuring the defendant's appearance at trial and the safety of the community. Bail that is more stringent than that which would be 'reasonably calculated' to fulfill those purposes is 'excessive' under the Eighth Amendment. *See Crowell*, *supra* at 5.

Courts that have found the mandatory pretrial release conditions of the Improvements to the Bail Reform Act section of the Adam Walsh Act unconstitutional under the Eighth Amendment have reasoned:

"[T]he imposition of such conditions [as curfew and electronic monitoring] on all defendants charged with certain crimes, regardless of the personal characteristics of each defendant and circumstances of the offense, without any consideration of factors demonstrating that those same legitimate objectives cannot be achieved with less onerous release conditions,

¹² For cases in which courts have found the blanket bail conditions of the Adam Walsh Act unconstitutional under the Eighth Amendment Excessive Bail Clause, *see United States v. Polouizzi*, 697 F.Supp.2d 381 (E.D.N.Y. 2010); *United States v. Kennedy*, 593 F.Supp.2d 1221 (W.D.Wash.2008); *United States v. Torres*, 566 F.Supp.2d 591 (W.D.Tex.2008); *United States v. Vujnovich*, No. 07-20126-01 CM DJW, 2007 WL 4125901 (D.Kan.Nov.20, 2007); *United States v. Crowell*, No. 06-CR-291E(F), 2006 WL 3541736 (W.D.N.Y.Dec.7, 2006).

will subject a defendant, for whom such conditions are, in the court's judgment, unnecessary, to excessive bail in violation of the Eighth Amendment.” Crowell, *supra* at 7.

This quickly evolving body of case law has dramatic implications on the traditional assumptions made by courts and parties when setting or advocating for pretrial release conditions. These cases are not limited to the conditions contained within the Improvements to the Bail Reform Act section of the Adam Walsh Act or just to federal actors; rather, the requirements of the Eighth Amendment and the Due Process Clause apply to *any and all* pretrial release conditions imposed in a blanket fashion, including universal drug testing, curfew and even, as the following discussion describes in more detail, the prohibition against possession of a firearm.

Until two years ago, it was probably taken for granted that a court was within its authority to impose blanket prohibitions against the possession of firearms as a condition of pretrial release. See United States v. Arzberger, *supra* at 601. Then in 2008, the United States Supreme Court decided the case of District of Columbia v. Heller, 128 S.Ct. 2783 (2008), which held that the Second Amendment establishes a protectable liberty interest in a citizen's right to bear arms. The impact of the Heller decision was to create a heightened standard of scrutiny upon our right to possess firearms than that which had previously existed. After the Heller decision was decided, a lower court considered how the Heller decision impacted the Adam Walsh Act. The Act also mandates that judges prohibit firearms possession of certain defendants without an individualized determination of their risk to the community. The Court concluded that:

“... the Adam Walsh Amendments violate due process by requiring that, as a condition of release on bail, an accused person be required to surrender his Second Amendment right to possess a firearm without giving that person an opportunity to contest whether such a condition is reasonably necessary in his case to secure the safety of the community.” United States v. Arzberger, *supra* at 603.

Although these cases involve challenges to a federal statute, because they were decided under the United States Constitution, they are controlling on state court decisions or bail statutes.¹³ Given the federal courts' reasoning under the Adam Walsh Act line of cases, it is likely that blanket pretrial release conditions that are imposed upon a group of defendants without an individualized judicial determination that they further the state's interest in assuring the defendant's presence at trial or the safety of the community will be found to violate procedural due process or the prohibition against excessive bail or both.

Virginia's bail statute does not appear to impose blanket pretrial release conditions.¹⁴ This fact notwithstanding, if a judge, individually or as a matter of local practice, were to impose blanket pretrial release conditions, such conditions would still be vulnerable to Constitutional challenge. In fact, because the judicial acts were not made pursuant to statute, the acts would be subject to even greater scrutiny.

¹³ While the Virginia Constitution may indeed be more protective of individual rights than the United States Constitution, it may not be less protective.

¹⁴ Although the bail statute does not impose blanket conditions, it does require that defendants charged with a felony may only be released upon a secure bond, regardless of their danger to the community or risk of flight. Va. Code Ann. § 19.2-123(A). In light of the Adam Walsh line of cases, it is interesting to consider whether such a mandate would be vulnerable to a constitutional challenge.

Drug Testing Release Condition

Drug testing as a condition of pretrial release may be analyzed in several different ways. If the testing is imposed upon defendants as a blanket condition without benefit of an individualized judicial determination, then the analysis of the Bail Reform Act section of the Adam Walsh Act line of cases will apply. Because of a case decided by the Ninth Circuit, a question has arisen whether even testing that is ordered pursuant to an individualized judicial determination may be constitutionally suspect as a violation of the Fourth Amendment's prohibition against unreasonable searches.

In United States v. Scott, 450 F.3d 863 (2006), the 9th Circuit addressed the question of whether the state could search a pretrial defendant without the presence of probable cause, even though the defendant had consented to the search. The search at issue was the urine testing of the defendant pursuant to his conditions of pretrial supervision, and to which he had consented.

The Fourth Amendment of the United States Constitution provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...” It is generally recognized that a drug test is a search within the meaning of the Fourth Amendment. Under the Fourth Amendment, the government's searches of citizens must be deemed “reasonable.” The most common scenario in which a search is deemed reasonable is when it is supported by probable cause. There are, however, several exceptions to the probable cause requirement, including the doctrine of “special needs.”

Under the special needs exception, although a search may be premised upon less than probable cause, this exception is a “closely guarded” exception. Ferguson v. City of Charleston, 523 U.S. 67, 77 (2001). The Supreme Court employs a balancing test in which it weighs the intrusion on the individual's interest in privacy against the “special needs” of the state action at issue. Id., at 78. So, for example, the Supreme Court found drug testing of railway employees involved in train accidents permissible under the special needs doctrine. Id. at 77 (citing Skinner v. Railway Labor Executives' Assn., 489 U.S. 602 [1989]). The Supreme Court has refused to apply the special needs doctrine in cases in which the primary justification for the action is a “general interest in law enforcement.” Id. (reversing lower court's order permitting drug testing of obstetric patients' blood without their permission).

Since there is no dispute that in the case of Mr. Scott the urine test was not premised upon probable cause, the State argued that it was justified by the ‘special needs’ of preventing pretrial crime and assuring court appearance. The Court summarily rejected the argument that the search was justified by the need to prevent pretrial crime, restating the principle that special needs may not be justified by a general interest in law enforcement.

The Court ultimately rejected the second basis as well, reasoning that to satisfy the special need of assuring court appearance, the government must demonstrate a pattern of “drug use leading to non-appearance” in court, or point to an individualized determination that the defendant's drug use was likely to lead to his non-appearance. See Scott, *supra* at 872.

The rationale of the Scott case has not been followed outside of the 9th Circuit since it was decided; therefore its application may be of limited value until it is adopted by a broader range

of courts.^{15 16} In fact, a subsequent case, also decided by the Ninth Circuit, analyzed the question of whether mandatory DNA testing of pretrial detainees was a violation of the Fourth Amendment. See *United States v. Pool*, 09-10303 (9th Cir. September 14, 2010). Using a different analysis than that of the *Scott* opinion, the Court concluded that such DNA testing was not unconstitutional. *Id.* Although dealing with a pretrial defendant's consent to DNA testing rather than drug testing, the reasoning of the *Pool* decision may be found persuasive by other courts. This is certainly an area of the law that bears watching in the next few years.

In Virginia, the *Scott* decision notwithstanding, courts have the statutory authority to order drug or alcohol testing as a condition of pretrial release. Va. Code Ann. § 19.2-123(A)(3a)(vii). Once the Court has made such an order, there also is statutory authority for a pretrial services agency to conduct the testing.¹⁷ Va. Code Ann. §§ 19.2-123(B); 19.2-152.4:3. Absent a court order, however, there does not appear to be statutory authority for pretrial services agencies to conduct drug or alcohol testing.

Treatment and Assessment Release Condition

There are several potential issues implicated when a court imposes treatment, for example mental health or substance abuse treatment, as a condition of bail. First, the assessment and treatment process often requires the defendant to make incriminatory statements while a criminal action is still pending. This places defendants in the untenable position of having to choose between self-incrimination and non-compliance with pretrial release conditions, a consequence of which may well result in incarceration pending trial. Second, court-mandated treatment pretrial could be considered by some to be 'punishment,' which is impermissible for a defendant who is still presumed innocent. Third, because most bail statutes do not specifically authorize the pretrial release condition of pretrial treatment; the question of whether the court has statutory authority to impose the condition may be at issue.

There is little case law on the question of whether court-imposed treatment pretrial is permissible and the courts that have decided the issue have been split in their conclusions.

In New York, there has been a good deal of litigation in which courts have permitted court-ordered treatment at a variety of behavioral modifications programs. In *Halikipoulos v. Dillon*, 139 F.Supp.2d 312 (E.D.N.Y. 2001), a defendant charged with shoplifting challenged a state court pretrial release condition ordering her to complete a shoplifters prevention course. She argued that the program was impermissible punishment before a finding of guilt.

The Court acknowledged that imposing punishment on a pretrial defendant is prohibited by the Due Process Clause of the United States Constitution. *Id.* at 316 (citing *Bell v. Wolfish*, 441 U.S. 520, 536 [1979]). The Court went on to conclude, however, that if the purpose of a pretrial

¹⁵ See footnote 10, *supra*.

¹⁶ For more commentary on the *Scott* decision, see Andrew J. Smith, *Unconstitutional Conditional Release: A Pyrrhic Victory for Arrestees' Privacy Rights Under United States v. Scott*, 48 Wm. & Mary L. Rev. 2365 (2007); Melissa Weiss, *Interpreting Searches of Pretrial Releasees Through the Lens of the Fourth Amendment Special Needs Exception*, 35 Hofstra 363 (2006); Melanie D. Wilson, *The Price of Pretrial Release: Can We Afford to Keep Our Fourth Amendment Rights?*, 92 Iowa L. Rev. 159 (2006).

¹⁷ Pretrial services agencies are also permitted to conduct a drug or alcohol test to be used at a bail hearing for the purpose of determining conditions of release. Va. Code Ann. § 19.2-123(B).

release condition is “regulatory” rather than punishment, the condition is permissible. The opinion goes on to explain how New York state courts have used similar reasoning to permit pretrial release conditions ordering various types of behavior modification, including enrollment in an alcohol treatment program, treatment with a psychotherapist, and domestic violence prevention classes. *Id.* (citations omitted).

The Court did place importance on the fact that the program at issue did not require the defendant to “admit guilt, apologize to the victim, or otherwise compromise or disregard a defendant’s claim of innocence.” *Id.* at 317. Presumably, therefore, even under the New York Courts’ rationale, a treatment program that does not have similar protections toward the defendant’s claim of innocence would be suspect.

In contrast to New York, several other Courts have held that court-ordered treatment pretrial is not permissible. In *Butler v. Kato*, 154 P.3d 259 (Wash.App. 2007), the defendant, charged with Driving Under the Influence, challenged conditions of pretrial release that ordered him to attend three Alcoholics Anonymous meetings a week and to attend a substance abuse assessment and comply with recommendations. The Court concluded that requiring the defendant to undergo a substance abuse assessment implicated the defendant’s right to be free from self-incrimination under the State and Federal Constitutions.¹⁸ See also *US v. Antelope*, 395 F.3d 1128 (9th Cir. 2005) (holding that a condition of probation that required probationer to reveal past sexual offenses in a sex offender treatment program violated his right to be free from self-incrimination).

In *Sexson v. Merton*, 631 P.2d 1367, 1372 (Or.1981), the Oregon Supreme Court used a statutory rationale to find the lower’s court order of treatment impermissible. In that case, the Court focused on the language of the bail statute, which authorized the imposition of pretrial release conditions that served the purpose of assuring the defendant’s attendance at trial and preventing pretrial crime. The Court concluded that where the defendant had an alcohol problem, the pretrial release conditions ordering the defendant to not use alcohol and report to a pretrial services officer were closely related to permissible bail objectives. The Court went on to conclude, however, that the condition requiring the defendant to involuntarily participate in all programs recommended at his local county mental health center was “too tenuously related” to the statutory purpose of assuring the defendant’s appearance at trial. Absent a “significant relationship” between the pretrial release condition and a permissible statutory bail objective, the Court concluded that that the lower court exceeded its statutory authority to order the condition.¹⁹

The *Sexson* Court is not alone in concluding that courts must be literal in construing the limits of their statutory authority to set pretrial release conditions, especially as it relates to pretrial treatment. In *Commonwealth v. Dodge*, 705 N.E.2d 612, 615 (Mass.1999), the Massachusetts Supreme Judicial Court concluded that a lower court exceeded its authority to impose pretrial release conditions because the conditions ordered were not specifically authorized by the bail statute. In that case, the lower court ordered the defendant, charged with Driving While Under

¹⁸ Although not applicable in a state other than Washington, it is interesting to note that the Court’s decision was also predicated on the Right to Autonomy and the Right to Confidentiality protected by the Washington Constitution.

¹⁹ The defendant also argued that his constitutional rights against self-incrimination would be violated by court-ordered treatment, but the court declined to reach this argument because it could decide the case on different grounds.

the influence, to undergo drug and alcohol screening and to participate in outpatient counseling as recommended. Although there existed certain sections in the bail statute that permitted the court to order conditions of pretrial release, none of these provisions applied to the defendant. Instead, the general section of the bail statute which did apply to the defendant, made no such provision for the court to order conditions of bail. As such, the impermissible conditions of bail were vacated.

Although not decided on this basis, in *Butler v. Kato*, *supra* at 525, before finding the pretrial release condition of substance abuse treatment impermissible, the Court commented with concern that the pretrial release condition ordered was not listed in the bail statute as an authorized condition but was instead listed in another statutory section as a post-trial punishment.

This review of decided cases suggests that courts imposing bail conditions that require the defendant to undergo behavioral treatment or assessment may be subject to scrutiny on two fronts: first, courts that impose bail conditions not specifically authorized in the governing bail statute risk a challenge that they lack the authority to impose such conditions. Second, even when authorized by statute, courts imposing mandatory treatment pretrial risk challenge on any of the constitutional bases previously discussed (i.e.: violation of right against self-incrimination or violation of presumption of innocence and right to be free from punishment pretrial).²⁰

Under the first prong of the analysis, Virginia judges are statutorily authorized to order pretrial release conditions requiring the defendant to “maintain employment,” “commence an educational program,” “comply with a specified curfew,” “refrain from excessive use of alcohol, or use of any illegal drug or any controlled substance not prescribed by a health care provider,” and “submit to testing for drugs and alcohol.” Va. Code Ann. § 19.2-123(A)(3a). Court-ordered treatment is not specifically mentioned in that list, although the argument could be made that if a court justified its decision that treatment was “reasonably necessary to assure appearance as required, and to assure his good behavior pending trial,” it might be statutorily permissible. Va. Code Ann. § 19.2-123(A)(4).

However, review of the subsequent bail provision undermines this argument. Virginia Code Annotated Section 19.2-123(B) describes in detail the court’s authority to order drug testing. For example, this provision states that test results may only be considered by the court in setting conditions of release, not in making the pretrial release determination. In fact, the court is not even permitted access to test results prior to making its pretrial release determination.

The provision goes on to describe the permissible sanctions for a positive test result. It provides only that an accused that tests positive may “be ordered to refrain from use of alcohol or illegal drugs and may be required to be tested on a periodic basis until final disposition of his case to ensure his compliance with the order.” The section goes on to say that sanctions for a violation of a condition of release of testing “may include imposition of more stringent conditions of release, contempt of court proceedings, or revocation of release.” Noticeably absent from the language of this section is any explicit mention of treatment. The fact that a statutory section that so

²⁰ In assessing the persuasive value of some of these decisions, it is perhaps appropriate to caution that matters decided by courts based in the 9th Judicial Circuit (i.e.: California, Montana, Oregon, and Washington) are not always representative of courts in other areas of the country.

extensively discusses drug and alcohol testing and sanctions does not authorize the court to impose treatment may be a sign that the legislature did not intend to grant the court such authority. Indeed, this is even more in question given Virginia's precedent of strict statutory construction.²¹

At least one legislature appears unconcerned, however. In Vermont, the legislature passed a statute two years ago that mandates drug treatment prior to conviction. Vt. Stat. Ann. tit. 13, § 7554 (2009). Although not yet tested, members of the Vermont defense bar are openly critical that the statute is unconstitutional. Moreover, as we have seen with the Adam Walsh Act, the fact that a statute authorizes a particular judicial act does not insulate the act from constitutional attack.

But having the statutory authority is only the first step of the analysis. Court-imposed treatment pretrial in Virginia may be vulnerable to constitutional attack on any of the three primary bases described above. As such, until this issue is addressed in Virginia, caution should be taken if treatment is ordered as a condition of pretrial release. Guidance from the cases documented above would suggest that (1) if treatment is ordered, the defendant is not required to admit guilt, apologize to the victim, or otherwise compromise or disregard a defendant's claim of innocence (self-incriminate); and (2) a pretrial release condition is "regulatory" rather than punishment, and that it is related to a risk posed by the defendant of failing to appear for court or danger to the community pending trial. This is sure to be an issue that sees more litigation in the upcoming years.

Alcoholics Anonymous/Twelve-Step Meetings Release Condition

An incidental issue to the question of imposing substance abuse treatment during the pretrial stage is the question of the appropriateness of ordering treatment that includes a religious component, as Alcoholics Anonymous (AA) admittedly does. In the case of *Inouye v. Kemna*, 504 F.3d 705 (2007) the 9th Circuit held that compelling a defendant to attend AA meetings violates the Establishment Clause of the First Amendment, which precludes the government from coercing citizens to participate in religion.

While this one court decision is not binding on most courts, its reasoning provides persuasive authority on the issue.²² The discussion from the prior section on the statutory authority in Virginia to impose pretrial treatment may also be applicable to the imposition of AA/12-Step Meeting attendance.

Pretrial Supervision Fees

Although there is little case law that directly addresses this question, several court decisions help inform the discussion. The first line of cases arises out of challenges to state bail-fee statutes that impose an administrative bail bond fee above and beyond the amount of bail set by the court. The challenges to bail bond fees were made under the Eighth Amendment Excessive Bail Clause,

²¹ See, e.g., *Grigg v. Commonwealth*, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982)("When a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way").

²² See, however, footnote 10, *supra*.

the Equal Protection Clause, and the Due Process Clause, and although they were all unsuccessful, a review of the court's analysis is instructive.

Applying an Eighth Amendment analysis, the Seventh Circuit addressed a challenge to a bail bond fee by application of the standard articulated in Stack v. Boyle, *supra*, and United States v. Salerno, *supra*. The Court reasoned that bail should not be set at an amount higher than reasonably necessary to fulfill the State's interest in assuring the defendant's presence at trial and the safety of the community. The excessiveness of the amount or conditions of bail was determined by comparing the bail condition sought against the government's interest in seeking the condition. Payton v. County of Carroll, 473 F.3d 845, 848 (2007). Noting that the bail bond fees at issue were minimal (\$10 to \$22) and that the government's interest in receiving compensation for an administrative function that serves as a convenience to defendants (namely posting bond with a sheriff rather than waiting until business hours to post with a county clerk) was legitimate, the Court rejected the challenge to the fees.²³

The United States Supreme Court had occasion to reject an Equal Protection claim under a similar bail bond fee statute. In Schilb v. Keubel, 404 U.S. 357 (1971), a defendant filed suit against county officials for acting under a bail statute which distinguished between those defendants who could post the full amount of their bail and defendants who elected instead to post a bail bond and deposit of cash equal to only ten per cent of bail or \$25, whichever was greater. The latter class of defendants was subject to a "bail bond cost" of one percent of the total bail amount. The appellant claimed that the imposition of the 'bail bond cost' violated the equal protection clause because it had a disproportionate effect on people with lower incomes by charging them an additional cost.

The United States Supreme Court dismissed the appellant's complaint, reasoning that the distinctions contained within the statute's bail structure did not implicate a fundamental right or a suspect class and that there was a "rational basis" for imposing an administrative fee in situations in which additional administrative duties were required. The benefit to defendants of posting cash deposits instead of the full amount of bail results in administrative costs borne by the government. It is reasonable to pass along to the defendants benefitting from the policy. See also Broussard v. Parish of Orleans, 318 F.3d 644 (2003) (challenge to bail bondsmen fees rejected – administrative costs associated with bail are permissible); Payton, *supra* (extending the Shilb decision to even those cases in which the bail bond fee must be paid *prior* to the defendant's release from jail).

In Payton, the courts responded to a Procedural Due Process challenge under the United States Constitution by applying the three pronged standard articulated in Matthews v. Eldridge, *supra*.²⁴ The Court concluded that (i) the bail bond fees could theoretically implicate a defendant's liberty

²³ Incidentally, the Payton Court indicated in dicta that the Eighth Amendment is only triggered when the fee at issue is required prior to a defendant's release from jail. It noted that the practice of releasing the defendant and seeking to collect the fee after the defendant's release rendered the fee not akin to "bail" and outside the Eighth Amendment altogether. See Payton, *supra*, at 850.

²⁴ "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Matthews, *supra*, at 335.

interest if, for example, a defendant was unable to post bail solely because of the bail bond fee; (ii) because there were alternative procedures allowing a defendant to post bail in other ways, the risk of a defendant being erroneously detained solely because of an inability to pay the bail bond fee was slight; and (iii) the sheriffs had a legitimate interest in trying to recoup the costs of administering the bail system. *Payton, supra*, at 851-852.

Although admittedly, pretrial supervision fees are distinct (and often more significant) than bail bond fees, the court's analysis would likely be similar; namely, are the burdens to the defendant associated with pretrial supervision fees reasonably necessary to further the government interests of assuring the defendant's appearance at trial and the safety of the community. The court would also likely consider whether there are less onerous alternatives that could meet the governmental objective.

Under such an analysis, while there would theoretically be a point at which fees that are required to satisfy court imposed pretrial release conditions could become excessive, pretrial supervision fees that are justified by the government as necessary administrative costs may be acceptable. Pretrial supervision fees that are exorbitant; however, would certainly be vulnerable to challenge under an excessiveness argument, especially if the defendant could establish that less onerous (and expensive) pretrial release conditions could meet the state's interest in assuring the defendant's presence at trial and the safety of the community.

A difficult situation arises when a defendant's inability to pay pretrial supervision fees puts him or her at risk for being incarcerated or prevents the defendant from being released on supervision in the first place.

Although there is no case law directly on this point, a United States Supreme Court case illustrates a useful principle to this discussion. In *Bearden v. Georgia*, 461 U.S. 660 (1983), the United States Supreme Court held that a sentencing court could not revoke defendant's probation for failure to pay a fine absent a showing that he was somehow responsible for the failure and that alternative forms of punishment would be inadequate to meet the State's interest in punishment and deterrence. The court reasoned that if probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment. Only if the alternative measures are not adequate to meet the state's interests in punishment and deterrence may the court imprison the probationer. *Id.* at 671-672.

Applying this analysis to the pretrial setting in which a defendant is still presumed innocent would presumably result in an even more protective stance with respect to a defendant's inability to pay supervision fees. It is likely that if incarceration or continued incarceration were to result from a defendant's inability to pay supervision fees, a court would at least be amenable to having a hearing at which a defendant may establish a bona fide inability to pay and to argue for less financially onerous conditions.

Delegation of Judicial Authority

The delegation of judicial authority in this case relates to a court which delegates its authority to set or modify pretrial release conditions to a pretrial services or similar agency. Generally, the

authority of courts is statutorily delineated by the legislature, within constitutional limits. 20 Am. Jur 2d. Courts § 7 (2009). Unless statutorily permitted, a judge may not delegate its judicial authority or the performance of judicial acts to another, even with the consent of the parties. 46 Am. Jur 2d. Judges § 22 (2009). The authority to set bail is exclusively judicial, except insofar as there may be a statutory authorization granting the rights to others. 8A Am. Jur. 2d Bail and Recognizance § 8 (2009). So for example, a judicial administrative order permitting clerks of court to sign orders of release for county prisoners was found unenforceable in light of the existence of a statute that required a judge's signature. Id.

In the case of People v. Rickman, 178 P.3d 1202 (Co. 2008), the court applied these general principles in deciding the authority of a pretrial services agency to set pretrial release conditions. In Rickman, the trial court set a cash bail amount upon the defendant and ordered him to Pretrial Supervision upon posting bail but did not order any further conditions of pretrial release. During his initial meeting with his pretrial services representative, the defendant signed a form that was entitled "Conditions of Bond" and that had been approved by the county court judges for use by pretrial services. The pretrial services representative checked off numerous conditions, including that the defendant not use a firearm or commit a felony while on bail. The form describing conditions was never signed by a judge or otherwise incorporated in the court's bail order.

The defendant was later charged with violating the conditions of pretrial release that he not possess a firearm or commit a felony while on bail. As part of that case, he challenged the two release conditions on the basis that the pretrial services agent did not have the authority to impose conditions of release; the Colorado Supreme Court agreed.

Applying the general standard articulated above, the court looked to Colorado statutes in determining the judge's authority to delegate to the pretrial services agency and the pretrial services agency's authority to set pretrial release conditions. The court determined that the judge was statutorily authorized to order that the defendant submit to the supervision of some "qualified person or organization." The "qualified person or organization," in this case the pretrial services agency, was then authorized to supervise the defendant according to a number of statutorily delineated supervision methods (telephone contact, office visits, GPS monitoring, etc.). Nowhere in the statutory scheme, however, was the judge permitted to delegate its authority to set the actual conditions of pretrial release to a pretrial services agency.

The court stated:

"Absent statutory authorization, a court may not delegate its authority to set bond conditions. Taking bail and setting the amount of bail are incident to the court's power to hear and determine cases. [citation omitted]. Necessarily, the discretion to set conditions of a bail bond is also a part of the court's judicial function. See [the Colorado bail statute] ("*The judge may impose such additional conditions upon the conduct of the defendant as will, in the judge's opinion, render it more likely that the defendant will fulfill the other bail bond conditions.*") (emphasis added). Therefore, just as a court may not delegate its power to set bail, it may not hand over its authority to determine the conditions of the bail bond." Id. at 1207.

Although only one case, this decision has wide reaching implications for jurisdictions in which courts are delegating the authority to pretrial services agencies to set or modify conditions of pretrial release. Unless specifically authorized by statute, the setting or modifying of conditions of pretrial release by pretrial services agencies is vulnerable to attack.

Neither the Virginia bail statute nor the Pretrial Services Act authorizes the court to delegate to a pretrial services agency the authority to set conditions of release. There is one reference in the Pretrial Services Act to the pretrial services agency setting “conditions of pretrial supervision,” Va. Code Ann. § 19.2-152.4:1, but for several reasons, it is not likely that this language was intended to be a grant of authority to pretrial services agencies to set release conditions.

First, that discrete phrase is the only such reference in the bail statute or the Pretrial Services Act and it is found within a section describing pretrial services officers’ authority to seek a *capias*. We can assume in a strict constructionist state such as Virginia, that if the legislature intended to do something as consequential as granting an agency the authority to set release conditions, it would have made its intent more evident by including the relevant language in a section detailing the duties and responsibilities of pretrial services agencies. See, e.g., Va. Code Ann. § 19.2-152.4:3 (entitled “Duties and responsibilities of local pretrial services officers”).

Second, close inspection of the surrounding language provides further information about its intended meaning. The surrounding language describes how a pretrial services officer may seek a *capias* on an individual “for failure to comply with any conditions of release imposed by a judicial officer, [or] for failure to comply with the conditions of pretrial supervision.” The different language used to describe the acts of judicial officers (setting “conditions of release”) as compared to pretrial services officers (setting “conditions of pretrial supervision”) suggest that the two acts are, in fact, dissimilar. It is more likely that the legislature was referring here to those conditions of supervision that must be set such as the dates, times, and/or rules for reporting for supervision contact.

For these reasons, if pretrial release conditions are being set in Virginia by pretrial services agencies, these conditions may be subject to challenge as being an impermissible delegation of the court’s authority to set conditions of release.

EXISTING NATIONAL PRETRIAL SPECIFIC RESEARCH

In addition to being consistent with the legal and constitutional rights afforded to accused persons awaiting trial, legal and evidence-based practices for pretrial services are interventions and practices that research have proven to be effective in reducing unnecessary detention while assuring court appearance and the safety of the community during the pretrial stage. LEBP is a relatively new and emerging field and admittedly lacks the research that identifies the practices and interventions that meet the criteria of LEBP. For this reason, the second step in the process of guideline development was to conduct a comprehensive review of existing pretrial specific research in the areas of (1) pretrial release conditions and interventions (i.e., court date notification, drug testing, electronic monitoring, and pretrial supervision), (2) pretrial release types (own recognizance, unsecured bail, and secured bail), and their effectiveness in reducing unnecessary detention while assuring court appearance and the safety of the community during the pretrial stage.

Pretrial Release Conditions and Interventions

A wide net was cast in an effort to identify as much relevant research that would benefit guideline development. A variety of digital subscription databases, such as Academic OneFile, EBSCOhost, HeinOnline, LexisNexis, and ProQuest, were used to search and locate relevant studies published in academic journals and periodicals. Other online libraries, such as, the National Institute of Corrections,²⁵ National Criminal Justice Reference Service,²⁶ Inter-university Consortium for Political and Social Research,²⁷ and the Pretrial Justice Institute²⁸ were also consulted.

The literature review resulted in more than 200 peer-reviewed articles and policy related reports, all of which were filtered for relevancy and examined for use in guiding the discussion of the effectiveness of pretrial release conditions and interventions. The information contained in this section was determined to be the most relevant regarding the effectiveness of pretrial release conditions and interventions including court date notification, drug testing, electronic monitoring, and pretrial supervision (see Appendix for a complete list of relevant research utilized in this section).

Court Date Notification

The problem of failure to appear (FTA) in this country can be extraordinarily costly, both in terms of the financial cost to local justice systems and the integrity of the judicial process. Each court date missed has a ripple effect throughout the justice system leading to inefficient use of time and resources that are often already overtaxed. Missed court appearances frequently result in arrest warrants which require justice system resources for processing and serving. Defendants arrested on warrants for FTA often spend more time in local jails when compared to other jail admissions. Missed court appearances impact victims and witnesses that share a stake in the court hearings.

²⁵ National Institute of Corrections Library, found at <http://nicic.gov/Features/Library>.

²⁶ Nation Criminal Justice Reference Service Library, found at <http://www.ncjrs.gov>.

²⁷ Inter-university Consortium for Political and Social Research, found at <http://www.icpsr.umich.edu/icpsrweb/ICPSR/> and <http://www.icpsr.umich.edu/NACJD/>.

²⁸ Pretrial Justice Institute, found at <http://www.pretrial.org>.

Reminding defendants of their court appearances – court date notification – is a pretrial release intervention designed to reduce failure to appear and associated costs.

The research review identified six studies that shed light on the potential effectiveness of court date notification. Although there are many other court date notification programs in operation across the country, this report focuses on existing research and evaluation studies that have been made available for public access including those conducted in the state of Nebraska, Multnomah County, Oregon; Flagstaff, Arizona; Jefferson County, Colorado; King County, Washington; and New York City, New York. A description of the research and a summary of findings are provided for each study.

NEBRASKA²⁹

Through a grant from the National Institute of Justice, researchers with the University of Nebraska Public Policy Center tested the effectiveness of a pilot court reminder program in 14 of Nebraska's County Courts. The sample size for this study included 7,865 misdemeanor defendants that were mailed notification letters from March 2009 through May 2010. The study measured the effectiveness of three different types of court date reminder postcards at reducing FTA rates and measured whether the court date reminders differentially impacted defendants when considering racial category. The first sample group included a simple reminder condition. This group received a postcard with the time and place of the scheduled hearing. The second sample included a reminder-sanctions condition. Defendants in this group were mailed a postcard that included the simple reminder message as well as a description of a range of penalties for failing to appear in court. The third sample group was sent a reminder-procedural condition. Defendants in this group were sent postcards that included the simple reminder and sanction message as well as additional procedural information. A control group served as the baseline sample.

Overall, the study showed that mailing reminder notifications to misdemeanor defendants reduced FTA rates. The FTA rate for the baseline group of this study was 12.6% while the FTA rate for those receiving any postcard was 9.7%. The most effective notification results were found in the reminder-sanctions condition sample group which had an FTA rate of 8.3%. This reminder type was also the most effective at reducing the FTA rate for all three major racial categories, and was especially effective for Whites and Hispanics. The sample group that was sent the reminder-procedural condition had an FTA rate of 9.8% and appeared to have a strong effect for Whites and Blacks, but not Hispanics. The reminder type that was least effective at reducing FTA rates was the simple reminder condition with an FTA rate of 10.9% (not statistically significant).

MULTNOMAH COUNTY, OR³⁰

In May 2005, Multnomah County, Oregon implemented a pilot program to determine if the FTA rate could be reduced through the utilization of an automated court date notification system. The automated telephone software system – Court Appearance Notification System (CANS) – began placing notification calls on May 31, 2005. During the first six months of notification calls, the

²⁹ Mitchel N. Herian, and Brian H. Bornstein, "Reducing Failure to Appear in Nebraska: A Field Study," *The Nebraska Lawyer*, 13, no. 8 (September 2010): 11.

³⁰ Matt Nice, *Court Appearance Notification System: Process and Outcome Evaluation*, A Report for the Local Public Safety Coordinating Council and the CANS Oversight Committee, 2006.

CANS system placed notification calls for 2,391 felony and non-felony case-events (hearings), representing about 21% of all eligible case events. Multnomah County completed a program evaluation in 2006 using a limited quasi-experimental design which examined both the process and outcomes of the program. Three statistically relevant randomly selected groups were used; treatment call success (call placed and either a person answered or a message was left on an answering service [n=204]), treatment call missed group (call placed but no one answered and no message was left on an answering service [n=158]), and non-treatment comparison group (no call made [n=184]).

The evaluation, using a random sample of cases from the first six months of program implementation, showed that notifying defendants of their upcoming court dates using an automated phone call system reduced failing to appear rates. The treatment call success group experienced a 16% failure to appear rate compared to 28% for the non-treatment comparison group. In addition, the treatment call missed group experienced a 23% failure to appear rate; 5% less than the comparison group. The study did acknowledge, however, that defendants with a contact phone number may have greater stability than those without a contact phone number – potentially influencing the study results.

COCONINO COUNTY, AZ³¹

In Coconino County, failures to appear or otherwise comply with court orders account for 22.9% of the total local jail population. In addition, defendants jailed due to misdemeanor failure to obey a court order had an average length of stay of 7.7 days compared with 4.1 days for misdemeanor DUI cases and 5.2 days for violent misdemeanor cases against a victim. The Criminal Justice Coordinating Counsel in Flagstaff, Arizona implemented a pilot project in an attempt to reduce the FTA rate for cite and release misdemeanor cases at first appearance. Cite and release cases are cases where defendants are issued citations and released without being admitted to the jail. A volunteer from the Flagstaff Police Department called defendants to remind them of their upcoming scheduled court appearance. Data was collected between January and April 2006 and a sample identified from 489 misdemeanor citations. From that sample a control group (244 citation cases where no contact was made) and a study sample (calls made for 245 citation cases) were used to conduct this study.

The study concluded that calling defendants with cite and release misdemeanor cases to remind them of their initial court appearance improved appearance rates. The control group's FTA rate was 25.4%, while the study group's FTA rate was nearly half (12.9%). All types of phone contacts resulted in lower FTA rates while speaking directly to the defendant showed the largest reduction in FTA. The FTA rates were as follows: 5.9% when the caller spoke directly to the defendant, 15% when a message was left with another person and 21% when a message was left on an answering service.

³¹ Wendy F. White, *Court Hearing Call Notification Project, Coconino County, AZ: Criminal Coordinating Council and Flagstaff Justice Court, 2006.*

JEFFERSON COUNTY, CO³²

The Court Date Notification Program in Jefferson County focused on the problem of failure to appear in the Duty Division of the Jefferson County Court. That particular division is staffed on a rotating basis by the seven county court judges in Jefferson County. Each day, that division hears an average of seventy-seven unrepresented traffic and misdemeanor cases summonsed into court by a number of municipal, county, and state ticketing agencies.

The Court Date Notification Program started with a target population of defendants who had “No Proof of Insurance” (NPOI) as one of their charges. This was done for several reasons. First, files containing this charge account for over half of the cases seen in Duty Division each day. Second, defendants facing an NPOI charge typically have other charges associated with the same stop. Third, fines for these charges are typically high; reducing FTAs for these cases might ultimately lead to increased revenue to the State. Fourth, defendants facing NPOI charges frequently ask for continuances to bring in the required documentation, causing additional strain on the court’s workload.

Between April and September 2006, the Court Date Notification Program attempted to contact nearly 5,600 defendants who had NPOI as one of their charges. The program successfully contacted approximately 3,500 defendants (spoke to defendant, a third party, or left a message on an answering service). The study concluded that calling defendants who had NPOI as one of their charges to remind them of their court appearance reduced failure to appear rates. The 3,500 defendants who were successfully contacted experienced an FTA rate of 11%; a reduction of 52% (from 23% to 11%) when compared to baseline data. When looking at notification types, direct phone contact with the defendant had the largest impact, followed by leaving a message on an answering service and leaving a message with a third party.

KING COUNTY, WA³³

In 1998, a study was conducted which examined misdemeanor case processing in King County.³⁴ One recommendation contained in the study involved implementing a court date reminder program to reduce the high incidence of FTA by providing timely and effective notification of scheduled hearings. As a result of the study and related recommendation, the Reminder Project was initiated and modeled after what is commonly used in the medical field – a reminder phone call. The Reminder Project began in 1998 to serve the jurisdictions that make up King County District Court. Volunteers were used to call defendants to remind them of their upcoming scheduled court appearance.

In an effort to test the effectiveness of the Reminder Project, a study was conducted which assessed the impact of the program on FTA rates for misdemeanor cases. Pre-program data (October 1997 to September 1998) was used for baseline comparison purposes. Post-program

³² Jefferson County Criminal Justice Planning Unit, *Jefferson County Court Notification Program Six Month Program Summary*, Jefferson County, CO, 2006.

³³ Tricia L. Crozier, *The Court Hearing Reminder Project: “If you call them, they will come,”* King County, WA: Institute for Court Management Court Executive Development Program, 2000.

³⁴ Christopher Murray, Nayak Polissar, and Merlyn Bell, *The Misdemeanor Study: Misdemeanors and Misdemeanor Defendants in King County, Washington*, Seattle, WA 1988.

implementation data was used to measure changes in FTA rates (October 1998 to December 1999).

The study concluded that calling defendants who had misdemeanor cases pending in King County District Court reduced failure to appear rates. The FTA reduction varied from locality to locality and ranged from a low of 1.33% to a high of 22% reduction in FTA. The author acknowledges that the study was a simple examination of the Reminder Project and the potential impact on failure to appear. A more rigorous research study was recommended.

NEW YORK CITY, NY³⁵

New York City has a long history of utilizing court date notification as a tool to minimize FTA. Research and evaluation regarding the effectiveness of their court date notification program has been examined periodically since the 1970's. The last such study conducted in 1991 by the New York City Criminal Justice Agency (CJA) examined FTA results obtained for Desk Appearance Tickets (DAT), which are written summons requiring arrestees to appear for arraignment in Criminal Court on misdemeanor or lesser offenses.

Defendants issued a DAT were mailed notification letters instructing them to call CJA staff to confirm that they would attend their upcoming scheduled court appearance. Defendants who did not respond to the letter were called by CJA staff in an attempt to notify them of the upcoming court appearance. The sample used to examine FTA rates included all scheduled appearances for this population between February 4 and March 27, 1991. The period for data collection used for analysis was separated into two groups, Time 1 and Time 2. Time 1 consisted of court dates scheduled between February 4, 1991 and March 1, 1991 and Time 2 between March 4, 1991 and March 27, 1991.

The study concluded that notifying defendants who were issued a DAT reduced failure to appear rates. During Time 1, defendants who were successfully notified of their court date had an FTA rate of 13.8% compared to 21.7% for defendants who were not successfully notified. Time 2 results were similar – defendants who were successfully notified had a 15.3% FTA rate compared to 23.0% for defendants who were not successfully notified. In addition, FTA rates were lower when telephone contact was made with defendants when compared to defendants who were sent the letter but not reached by phone. Further, examination of both Time 1 and Time 2 data revealed that phone contact directly with the defendant had a greater impact on FTA rates when compared to phone contact with someone other than the defendant.

It should be noted that not all the studies conducted by the New York City Criminal Justice Agency came to the same conclusions.³⁶ In fact, in a twenty-one month study that examined data for defendants both bailed and released on recognizance (ROR) from January 1986 to September 1987 found that there was no significant increase or decrease in overall FTA rates as a result of

³⁵ Martin Rouse, and Mary Eckert, *Arrestment-Date Notification and Arrestment Appearance of Defendants Released on Desk Appearance Tickets: A Summary of Preliminary Findings*. New York, NY: New York City Criminal Justice Agency, 1992; Mary Eckert, and Martin Rouse, *The 1991 Court-Date Notification Study: A Preliminary Report on CJA Notification Procedures and Their Impact on Criminal Court Failure-to-Appear Rates, February 4, 1991 Through March 27, 1991*, New York, NY: New York City Criminal Justice Agency, 1991.

³⁶ M. Gewirtz, and M. Schiff, *Evaluation of Court-Date Notification for Defendants Released on Bail*, New York, NY: New York City Criminal Justice Agency, 1988.

the notification program. Further analysis did; however, find that notifications appeared to have interrupted a trend of rising FTA rates among the bailed defendant population and that the notification program appeared to be more effective at reducing FTA rates among defendants CJA recommended be released on own recognizance.

SUMMARY

The evaluations and studies reviewed above were conducted in six different states over nearly 30 years. All the studies examined the effectiveness of court date notification programs. The target populations among the studies varied and ranged from defendants issued a citation/summons for minor offenses to those charged with felony offenses. Different approaches of notifying defendants were utilized and included (1) “live” callers such as volunteers or paid staff to call defendants to remind them of upcoming court dates, (2) an automated calling system, (3) notification letters or post cards, and (4) a combination of notification letters and phone calls. All of the studies concluded that court date notifications in some form are effective in reducing failures to appear in court.

Drug Testing

Many pretrial services agencies throughout the country provide drug testing to monitor a defendant’s drug use as a condition of pretrial release. This pretrial release condition has been utilized for decades and according to the 2009 Survey of Pretrial Programs,³⁷ the number of pretrial services agencies offering drug testing as a pretrial release condition has grown from 75% in 2001 to 90% in 2009.

The research related to the effectiveness of drug testing in reducing pretrial failure, in large measure, comes from the implementation of drug testing programs in the late 1980s and early 1990s. Beginning in 1984, the D.C. Pretrial Services Agency (PSA) implemented the first drug testing program in the country. The program was designed to identify high-risk drug-involved defendants through pre-release drug testing so that pretrial release conditions could be ordered to address their drug behavior and to deter pretrial failure through drug test monitoring and treatment services.³⁸

The drug testing program model developed by D.C. PSA expanded throughout the nation in the late 1980s and early 1990s. Through funding provided by the Bureau of Justice Assistance, pretrial drug testing demonstration projects were implemented in other jurisdictions in an effort to predict the likelihood of pretrial failure among drug involved defendants and to use the pretrial release condition of drug testing as a tool to deter pretrial failure. Jurisdictions that implemented the drug testing program model included, but were not limited to, the following: Multnomah County, Oregon; Pima and Maricopa Counties, Arizona; Prince George’s County, Maryland; and Milwaukee, Wisconsin.

The research related to the potential impact of drug testing as a condition of pretrial release focuses on research evaluation studies conducted in the late 1980s and early 1990s. All studies relate either to the D.C. PSA drug testing program or the Bureau of Justice Assistance

³⁷ See Pretrial Justice Institute, 2009 Survey of Pretrial Programs, Washington, DC: Pretrial Justice Institute, 47.

³⁸ See Christy A. Visher, “Pretrial Drug Testing: Panacea or Pandora’s Box,” *The ANNALS of the American Academy of Political and Social Science*, 521 (1992):113-118.

demonstration projects conducted in Multnomah County, OR; Pima and Maricopa Counties, Arizona; Prince George's County, Maryland; and Milwaukee, Wisconsin.

WASHINGTON, D.C.³⁹

In 1989 a study was conducted which examined the effectiveness of the drug testing program that was implemented by the D.C. PSA in 1984. The data examined arrestees from June 1984 to January 1985 who were drug tested pre-trial, tested positive for drug use, and were subsequently released pending trial. This study used an experimental design by randomly assigning approximately 2,000 released defendants to one of three groups: periodic drug testing, referral to drug treatment, or a control group.

The primary finding of the study was that the rate of pretrial failure did not vary significantly based on the random assignment to one of three groups: periodic drug testing, referral to treatment, or the control group. The study also examined the periodic drug testing group in more detail. The researchers found that the periodic drug testing group separated itself into two sub-groups, "successful participants" and "non-participants." Successful participants essentially appeared as required for drug testing and non-participants dropped out of the program by not showing for scheduled drug testing. When comparing these two groups, rearrest rates for the successful participants were significantly lower than that of the non-participants. The researchers suggested that participation in the drug testing program provided a "signal" that the defendant exhibited low-risk behavioral characteristics that would be associated with pretrial failure while those who were non-compliant and failed to participate in drug testing signaled higher-risk behavior.

MILWAUKEE, WI AND PRINCE GEORGE'S COUNTY, MD

In 1988 and 1989, Milwaukee, Wisconsin and Prince George's County, Maryland implemented drug testing programs for pretrial defendants and served as demonstration projects for the Bureau of Justice Assistance. The programs were premised on the idea that information about drug use among pretrial defendants derived from pre-bail drug testing would be a predictor of pretrial failure during pretrial release; and that drug testing would serve as an effective supervisory tool for minimizing drug use, failure-to-appear, and crime among drug-involved defendants granted conditional pretrial release.

One study of the demonstration projects examined the impact of pretrial drug monitoring during pretrial release on pretrial failure (failure to appear and rearrest). The sample data used from Prince George's County included cases from August 1988 through February 1989 and Milwaukee County from March through December 1989 that were assigned either to experimental or control groups. The control group did not participate in drug monitoring and the experimental group was drug tested regularly. The sample for the experimental and control groups used in Prince George's County included 298 cases in each group. Milwaukee County used a sample of 389 in the experimental group, with 348 in the control group. This study concluded that drug testing

³⁹ Mary A. Toborg, John P. Bellasai, Anthony M.J. Yezer, and Robert P. Trost, *Assessment of Pretrial Urine Testing in the District of Columbia*, Washington, DC: U.S. Department of Justice, 1989.

defendants during the pretrial stage as a condition of pretrial release did not reduce pretrial failure when compared to similar defendant's who were not drug tested.⁴⁰

A second study of the demonstration projects examined the deterrent effect of drug testing when combined with a system of sanctions designed to enforce defendant compliance with the conditions of pretrial release. Examples of sanctions tested in Prince George's County for violations of the drug testing program include (1) increased frequency of testing, (2) require the defendant to attend a correction program that describes treatment options and referrals, (3) notification to the court and order the defendant to treatment program, (4) request show-cause hearing to recommend brief incarceration and reassigned to drug monitoring, and (5) request show-cause to recommend brief incarceration and reassigned to drug monitoring with electronic monitoring for nonworking hours. In Milwaukee, the sanctions tested included (1) counseling by program staff, (2) increased drug testing, (3) return to court for show-cause hearing, and (4) request for bench warrant. Defendants were assigned to either a control or experimental group and the impact of drug test monitoring combined with a system of sanctioning was tested. This study concluded that participation in drug testing alone had no deterrent impact on pretrial failure; however, given the problems experienced in implementing sanction schemes, the researchers could not draw firm conclusions about the impact of sanctions combined with drug test monitoring.⁴¹

PIMA AND MARICOPA COUNTIES, AZ⁴²

Pima County and Maricopa County, Arizona, also implemented drug testing programs for pretrial defendants and served as demonstration projects for the Bureau of Justice Assistance. A study was conducted which examined the effectiveness of pretrial drug testing to predict pretrial failure and the effectiveness of pretrial drug test monitoring as a method to reduce pretrial failure.

Using experimental data from Pima County and Maricopa County, Arizona, the researchers tested the impact of drug test monitoring on a defendant's drug use and chances of pretrial failure while released pending trial. The study used an experimental design in both sites with data collected from May through October, 1988. Defendants were randomly assigned to either a drug test (monitoring) group or control (defendants released without drug test monitoring) group.

In each site, two phases of research were conducted. In the first phase, a sample of defendants was tested for drug use and followed in the community. The second phase involved an experiment in which some defendants were assigned randomly to either ordinary release

⁴⁰ See John S. Goldkamp, Peter R. Jones, Doris Weiland, and Michael R. Gottfredson, *Measuring the Impact of Drug Testing at the Pretrial Release Stage: Experimental Findings from Prince George's County and Milwaukee County*, Philadelphia, PA: Crime and Justice Institute, 1990; John S. Goldkamp, and Peter R. Jones, "Pretrial Drug Testing Experiments in Milwaukee and Prince George's County: The Context of Implementation," *Journal of Research in Crime and Delinquency*, 29, no. 4 (1992): 430.

⁴¹ Peter R. Jones, and John S. Goldkamp, "Implementing Pretrial Drug Testing Programs in Two Experimental Sites: Some Deterrence and Jail Bed Implications," *The Prison Journal* 73, no. 2 (1993): 199.

⁴² See Michael R. Gottfredson, Chester L. Britt, and John S. Goldkamp, *Evaluation of Arizona Pretrial Services Drug Testing Programs: Final Report to the National Institute of Justice*, Washington, DC: U.S. Department of Justice, National Institute of Justice, 1990; Chester L. Britt, Michael R. Gottfredson, and John S. Goldkamp, "Drug Testing and Pretrial Misconduct: An Experiment on the Specific Deterrent Effect of Drug Monitoring Defendants on Pretrial Release," *Journal of Crime and Delinquency* 29, no. 1 (1992):62.

conditions or periodic drug testing with sanctions for noncompliance. The sanctions for noncompliance in Pima County began with a verbal warning, written warning, and then a referral to a substance abuse center. On completion of the substance abuse program evaluation, release conditions were modified in accordance with the treatment plan; sanctions were suspended for up to 30 days while the defendant was in treatment. If the defendant tested positively subsequent to the treatment, a petition to review the release conditions was filed. Unexcused failures to provide specimens also resulted in sanctions. In Maricopa County, testing positively and unexcused failures to appear for testing were treated as noncompliance. The continuum of sanctions included a verbal warning, followed by a written warning, and a petition to the court to revoke the defendant's release.

This study concluded that monitoring drug use by drug testing defendants as a condition of pretrial release had neither a substantively or statistically significant effect at reducing pretrial failure (failure to appear and rearrest). The only statistically significant finding was in Maricopa County where defendants assigned to the drug testing (monitoring) group experienced a statistically significant increase in pretrial failure to appear and rearrest. This finding was contrary to the expectations of the research.

MULTNOMAH COUNTY, OR⁴³

The Detection and Monitoring of Drug-Using Arrestees (DMDA) Program in Multnomah County, Oregon, was developed to serve as a demonstration project sponsored by the Bureau of Justice Assistance. The DMDA sought to incorporate drug use information in the pretrial process by providing the arraignment court with information on defendant drug use and by providing a program of drug test monitoring as a condition of supervised pretrial release.

The program provided drug testing and monitoring at the time pretrial release conditions were set and during pretrial services supervision as a condition of release. The goals of the program were to reduce the incidence of failure to appear for scheduled court appearances and to minimize rearrest for new crimes while on release.

An evaluation of the program was conducted that focused on defendants released to the custody and supervision of the Pretrial Release Supervision Program pending trial. An experimental research design was implemented to assess the impact of drug monitoring on pretrial failure to appear and rearrest. The data used for analysis included 396 monitored and 154 control group defendants. Control group defendants were placed under the same pretrial supervision as monitored defendants, but were not tested for drug use. The study concluded that drug test monitoring did not reduce failure to appear or rearrest rates for monitored defendants when compared to non-monitored defendants. Drug use information resulting from the monitoring was used by pretrial services staff to make referrals to treatment programs, yet monitored and control group defendants were referred to treatment at equal rates. The authors note that the monitoring program itself suffered from chronically high rates of defendant noncompliance. It was reported that less than half (42%) of defendants placed on monitoring reported for testing four or more times.

⁴³ Stefan Kapsch, and Louis Sweeny, *Multnomah County DMDA Project: Evaluation Final Report*, Washington, DC: Bureau of Justice Assistance, 1990.

SUMMARY

Most of the research regarding pretrial drug testing was spurred by the drug testing program started in the District of Columbia and later replicated and evaluated through funding provided by the Bureau of Justice Assistance. The primary body of research for pretrial drug testing comes as a result of the implementation and program evaluations completed in Washington, D.C.; Milwaukee, Wisconsin; Prince George's County, Maryland; Multnomah, Oregon; and Pima and Maricopa Counties, Arizona, over a ten year period from the mid 1980s through the early 1990s. The research conducted used experimental designs to test the effectiveness of drug test monitoring as a tool to deter or reduce pretrial failure. In some of the studies drug testing in combination with the use of sanctions was also evaluated. None of the studies reviewed found empirical evidence that could be used to demonstrate that when drug testing is applied to defendants as a condition of pretrial release it is effective at deterring or reducing pretrial failure, even when a system of sanctions is imposed.

Electronic Monitoring

Jail crowding is a challenge faced at one time or another by most localities in the United States. With the advent of Electronic Monitoring (EM), many in the criminal justice system saw opportunities to reduce jail crowding by electronically monitoring defendants and offenders in lieu of incarceration. Consistent with the concept of reducing unnecessary detention while assuring court appearance and community safety, EM has been used as an alternative to detention for pretrial defendants for over 20 years. EM in various forms has been used to provide surveillance of pretrial defendants and to monitor compliance with certain conditions of pretrial release. Although much of the EM research focuses on the application of EM for post conviction populations (offenders), there is a body of research that examines the efficacy of EM applied in pretrial settings. Below is a summary of research that examined the use of electronic monitoring to reduce unnecessary detention while assuring court appearance and community safety for defendants released pretrial.

MESA COUNTY, AZ⁴⁴

Mesa County, Arizona began a pretrial release pilot program on August 11, 2008. The pilot project was intended to evaluate the use of electronic monitoring, by means of Global Positioning System (GPS), and its impact on reducing unnecessary detention and failure to appear for misdemeanor defendants. Following implementation, a study was conducted to assess the effectiveness of the pilot program. Data used for this study was collected between August 11 and December 31, 2008 and included 151 defendants who were in custody, met program criteria, and were subsequently released to the pretrial release pilot program on personal recognizance with a condition of EM. In addition to EM, defendants were provided a reminder call the day prior to the scheduled court appearance.

It was reported that the average failure to appear rate for misdemeanor defendants in the Mesa Municipal Court was 29%; although it is unknown when and how this rate was determined. The FTA rate of 29% was used as a baseline for this study. The study concluded that release with EM and a reminder call the day prior to the scheduled court appearance significantly reduced failure

⁴⁴ Albert J. Lemke, *Evaluation of the Pretrial Release Pilot Program in the Mesa Municipal Court, Mesa, AZ: Court Executive Development Program, 2009.*

to appear. Defendants released on personal recognizance with a condition of EM, including a court reminder call, had an FTA rate of 5% compared to the court average FTA rate of 29%. In addition, during the pilot study period, defendants released on personal recognizance increased, resulting in a reduction in the average length of stay in jail for pretrial defendants. The author acknowledged that it was unclear if the reduction in failure to appear was due to the reminder call, the EM and desire to have the GPS device removed, or a combination of the two.

LAKE COUNTY, IL⁴⁵

The Pretrial Services Unit of Lake County, Illinois began operating in October 1983 in response to local county jail crowding. The Pretrial Services Unit initially focused on providing pretrial investigation reports to the Court to assist with the pretrial release decision. The Pretrial Bond Supervision (PTBS) component began a few years later, providing pretrial supervision to defendants released on personal recognizance with a condition of supervision. In addition to standard pretrial services supervision (court date reminders and random periodic home visits), EM was provided when ordered by the Court as a condition of pretrial release.

To examine the effectiveness of utilizing electronic monitoring, failure rates (new arrest, FTA, or technical violations) were compared between program participants who were released on personal recognizance with standard pretrial services supervision with and without EM as a condition of release. Case closure data from 1986 through 1988 was used for analysis. The sample included 219 defendants electronically monitored and 334 defendants non-electronically monitored.

Defendants under pretrial supervision who were released with the condition of electronic monitoring had comparable failure to appear rates (7.3% vs. 6.9%) and new arrest rates (3.7% vs. 4.8%) when compared to defendants released without the EM condition. The overall failure rate was higher, however, due to a higher technical violation rate (7.8% vs. 1.1%) for defendants released with the electronic monitoring condition.

It was noted that cases placed on supervision with EM were believed to be a higher-risk when compared to defendants placed without EM, yet an objective risk assessment was not applied to either population. The authors suggested that having EM as a condition of supervision offered a viable alternative to detention, thereby reducing unnecessary detention and alleviating jail crowding.

FEDERAL PRETRIAL⁴⁶

There are 94 federal judicial districts in the U.S. District Court system. All 94 Districts have a pretrial services agency. In 1989, 17 of the 94 federal pretrial services agencies offered electronic monitoring as a condition of pretrial release. The effectiveness of electronically monitoring federal defendants on pretrial release was explored by the Administrative Office of the U.S. Courts – Office of Probation and Pretrial Services (OPPS). Pretrial services supervision outcomes (FTA and rearrest) were examined using all cases closed nationally in 1989

⁴⁵ Keith Coopridge, and Judith Kerby, "Practical Application of Electronic Monitoring at the Pretrial Stage," *Federal Probation*, 54, No. 1, (1990): 28.

⁴⁶ Timothy P. Cadigan, "Electronic Monitoring in Federal Pretrial Release," *Federal Probation*, 55, No. 1, (1991): 26.

(n=22,725). In the 17 Districts that offered EM, 7,234 cases were closed that year including 168 that were released with an EM condition.

When comparing supervision outcomes, defendants released with electronic monitoring had a higher FTA rate (5.4%) when compared to the 17 districts that offered EM (3.0%) and all cases closed nationally (2.8%). Similar results were found for felony rearrest – electronic monitoring cases had higher rearrest rates (3.6%) compared to the 17 districts that offered EM (1.9%) and all cases closed nationally (2.1%). The author of this study concluded that effectiveness of electronic monitoring at reducing failure to appear and rearrest, in this case, could not be established empirically based on the available data. A primary observation was that defendants released with a condition of electronic monitoring were a higher risk of pretrial failure. Eighty-four percent of the defendants released with electronic monitoring were released after the initial appearance. The implication of this finding is that these defendants presented a risk of flight or danger to the community that could not be addressed early on in the process. Although not conclusive, the study suggested that utilizing EM with high-risk defendants with only modest increases in FTA and rearrest rates may allow for the release of defendants as an alternative to detention who would otherwise have been detained.

MARION COUNTY, IN⁴⁷

Faced with jail crowding in the late 1980s, Marion County began to implement alternatives to detention. One solution was the utilization of electronic monitoring as a condition of release for pretrial defendants. In July, 1988, the Marion County Community Corrections Agency began providing electronic monitoring services to pretrial defendants. The goal of the program was to reduce jail crowding, while assuring court appearance and public safety. Subsequently, a research study sponsored by the National Institute of Justice, and conducted by the University of Indiana, was conducted to assess the efficacy of electronic monitoring in the pretrial setting. The study was a non-experimental evaluation of the Marion County pretrial electronic monitoring program and examined data that was collected from July, 1988 through July, 1989 and included 224 cases. Cases on pretrial electronic monitoring were restricted to nonviolent cases only, including the exclusion of defendants with criminal histories with patterns of prior violence. To avoid net-widening, consideration for release with the condition of electronic monitoring occurred only after five (5) days from the time of admission to jail.

An actual FTA rate was not reported, however, it was noted that 3% of the defendants supervised on EM failed to appear and remained at large as absconders at the conclusion of the study period. In addition, 1.3% of the defendants placed on EM were rearrested while on pretrial release. The authors acknowledged that the impact of EM could not be assessed due to a lack of comparison data and that the selection criteria may also have had an impact on the results.

SUMMARY

Electronic monitoring as a condition of pretrial release grew out of the need to address the problem of jail crowding. EM, in various forms, is used as an alternative to detention with the

⁴⁷ Michael G. Maxfield, and Terry L. Baumer, *Final report: Evaluation of Pretrial Home Detention with Electronic Monitoring*, Bloomington, IN: Indiana University, School of Public and Environmental Affairs, 1991.

goal of reducing unnecessary detention while assuring court appearance and community safety for defendants released pretrial. The research conducted surrounding EM as a condition of pretrial release resulted in similar conclusions; utilizing EM as a condition of pretrial release does not reduce failure to appear or rearrest. What is noted in several studies; however, is that EM was believed to be ordered for more high-risk defendants – defendants who may not otherwise have been released if not for the availability of this alternative to detention. As a result, it was hypothesized that providing EM as a condition of pretrial release has the potential to reduce unnecessary detention for higher-risk defendants while maintaining court appearance and community safety (as evidenced by comparable or marginally higher FTA and rearrest rates). Research is needed to test this hypothesis.

Pretrial Supervision with Alternatives to Detention

All U.S. District Courts in the federal court system are served by pretrial services agencies. The Pretrial Services Act of 1982 authorized the implementation of pretrial services nationwide with a primary purpose of reducing unnecessary pretrial detention. Consistent with the concept of pretrial justice and U.S. Code Title 18, Part II, Chapter 207, § 3142 Release or Detention of a Defendant Pending Trial, the Administrative Office of the United States Courts provides the Federal Judiciary with funding to support alternatives to pretrial detention. Alternatives to pretrial detention include, but are not limited to, third-party custodian, substance abuse testing, substance abuse treatment, location monitoring, halfway house, community housing or shelter, mental health treatment, sex offender treatment, and computer monitoring. Pretrial services agencies can recommend any of these alternatives to detention as conditions of pretrial release and judicial officers can set one or more of the alternatives to detention as conditions of release in lieu of secured detention.

Utilization of alternatives to detention as conditions of pretrial release should be consistent with the evidence-based practice “risk principle.” As it relates to the post-conviction field, research has demonstrated that evidence-based interventions directed towards offenders with a moderate to high-risk of committing new crimes will result in better outcomes for both offenders and the community. Conversely, treatment resources targeted to low-risk offenders produce little, if any, positive effect.⁴⁸

Recent research conducted specifically for pretrial defendants supports the applicability of this principle to the pretrial services field. The Pretrial Risk Assessment Study for the Federal Court⁴⁹ employed data provided by the Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services (OPPS) that described all persons charged with criminal offenses in the federal courts between October 1, 2001 and September 30, 2007 who were processed by the federal pretrial services system (N=565,178). All federal districts with the exception of the District of

⁴⁸ The PEW Center on the States, "Putting Public Safety First: 13 Strategies for Successful Supervision and Reentry," Public Policy Brief, No. 7 December 2008, http://www.pewcenteronthestates.org/report_detail.aspx?id=46538, (accesses on November 19, 2010).

⁴⁹ Marie VanNostrand, and Gena Keebler, *Pretrial Risk Assessment in the Federal Court, For the Purpose of Expanding the Use of Alternatives to Detention*, Washington, D.C.: report prepared for the U.S. Department of Justice, Office of the Federal Detention Trustee, 2009.

Columbia were represented in the study.⁵⁰ In addition to identifying the predictors of pretrial failure (risk factors), the study examined the use of alternatives to pretrial detention while considering risk. The relevant findings are provided below.

1. Release conditions that include alternatives to pretrial detention generally decrease the likelihood of success pending trial for lower-risk defendants and should be required sparingly (excluding mental health treatment which, when appropriate, is beneficial regardless of risk).
2. Alternatives to pretrial detention are most appropriate for moderate and higher-risk defendants as it allows for pretrial release while either increasing or not decreasing pretrial success. Alternatives to pretrial detention should be imposed for this population when a defendant presents a specific risk of pretrial failure that can be addressed by a specific alternative.
3. Defendants identified as moderate and higher-risk are the most suited for pretrial release – both programmatically and economically – with conditions of alternatives to pretrial detention. The pretrial release of these defendants can be maximized by minimizing the likelihood of pretrial failure through participation in alternatives to detention.

The study concluded that utilizing alternatives to detention as conditions of pretrial release for the appropriate defendant population can reduce unnecessary detention while assuring court appearance and community safety.

Pretrial Supervision

Pretrial services agencies provide monitoring and supervision of defendants released with court ordered pretrial release conditions. Pretrial release conditions are intended to address a defendant's risk of flight and danger to community while on release pending trial. Pretrial supervision is primarily intended to facilitate, support, and monitor defendant's compliance with pretrial release conditions; thereby advancing the goal of assuring court appearance and community safety during the pretrial stage.

The primary mechanisms used by pretrial services agencies to monitor and supervise pretrial release conditions include face-to-face contacts, home contacts, telephone contacts, collateral contacts, court date reminders, and criminal history checks. There is no standard for what constitutes pretrial supervision as it relates to frequencies and types of defendant contacts, and as a result, practices vary substantially. A review of supervision strategies in numerous pretrial services agencies nationally revealed disparate practices for what constitutes pretrial supervision. The frequency and types of contacts ranged from monthly phone contacts with an automated calling system to daily in-person reporting by defendants. Some agencies utilize face-to-face contacts while others do not. The same is true for home contacts, collateral contacts, court date reminders, and criminal history checks – some agencies provide them and others do not. Even when the mechanism to provide supervision is used, the nature and frequency of the contact

⁵⁰ The District of Columbia operates a pretrial services agency that services to both the Superior Court and the District Court. This agency operates independent of the federal system and no data are reported to the Administrative Office of the U.S. Courts.

varies. Interestingly, all programs referred to the services provided as pretrial supervision, including the agency that required only once a month phone contact with an automated calling system as well as the agency that required daily in-person reporting. Similarly, some pretrial agencies require the same frequencies and types of contacts and provide the same supervision to all defendants regardless of current charges or risk posed. Some agencies utilize a differential pretrial supervision strategy – requiring different frequencies and types of contacts based on current charges and risk posed (levels of supervision).

With the lack of standardization as to what is ‘pretrial supervision’ and the wide variation of supervision requirements and practices, little is known about the supervision practices that are most effective for pretrial defendants in assuring court appearance and community safety pending trial. There is a dearth of research and evaluation related to effective supervision strategies and differential pretrial supervision when considering the current charges, risk of flight, and danger to the community. An overview of two research studies that begin to explore the effectiveness of different supervision strategies is provided below.

MIAMI, FL; MILWAUKEE, WI; AND PORTLAND, OR⁵¹

In March 1980, the National Institute of Justice (NIJ) launched a national test design of the Supervised Pretrial Release (SPR) concept. As part of its research and development mandate, NIJ required an experimental design with randomization to test a number of innovative approaches for supervising defendants released pretrial. The field test required that key program elements of supervised pretrial release be uniformly implemented and evaluated at three sites. The three selected sites included: Dade County, Florida; Milwaukee County, Wisconsin; and Multnomah County, Oregon. Among other things, the study examined the impact of different types of supervised release conditions on failure to appear and pretrial crime rates.

A total of 3,232 felony defendants were interviewed as candidates for SPR at the three sites. Approximately 52% of those interviewed actually entered the experimental SPR study. The study examined the level of supervision and services provided by testing two levels of supervision. Defendants were randomly assigned to two test groups. The *supervision only group* was to receive (1) one phone contact plus two face-to-face contacts per week during the first 30 days of release, and (2) one phone contact per week after the initial 30-day period. For the *supervision plus services group*, the minimum requirements included; (1) one phone contact and one face-to-face contact per week during the first 30 days, and (2) appropriate participation in a designated service. The authors acknowledge that despite efforts to maintain common standards of supervision and services for all three jurisdictions, each site established unique styles of providing supervision and services to their defendants and one site provided levels of supervision and services generally below the test design standards.

The study concluded that court appearance rates and rearrest rates were essentially equivalent for the supervision only and supervision plus services test groups. The most rigorous component of the SPR test design evaluated the effects of supervision alone versus supervision with services. Analysis consistently showed that the delivery of social services had no systematic impact on

⁵¹ James Austin, Barry Krisberg, and Paul Litsky, "The Effectiveness of Supervised Pretrial Release," *Crime & Delinquency*, 31 (1985): 519.

failure to appear or pretrial crime rates. The authors noted that this was not intended to imply that services should never be afforded defendants in obvious need, but that these services should be selectively reserved for a carefully screened minority of defendants requiring crisis-level intervention.

PHILADELPHIA, PA⁵²

Philadelphia conducted a multi-staged experimental study intended to identify successful pretrial supervision strategies. The study included four sequenced field experiments that tested different elements of pretrial supervision. The second experiment is most relevant to the current discussion, specifically; it examined the impact of varying frequencies and types of contacts.

Philadelphia utilizes Pretrial Release Guidelines, essentially a matrix that considers the risk of pretrial failure and the seriousness of the charge and identifies a recommended release type with or without pretrial supervision. A portion of the defendants are identified as being in need of release on own recognizance with special conditions. These defendants are further broken down into two types: type I (medium-risk) and type II (higher-risk). The experimental study was conducted on this population, those identified by the Pretrial Release Guidelines as appropriate for release on own recognizance with special conditions, both type I and II defendants.

The supervision experiment was carried out in the Philadelphia courts between August 1, 1996 and November 26, 1996. During that period, 845 defendants assigned type I and II supervision as a result of new charges appeared at the Pretrial Services Division, attended orientation, and then were randomly assigned to levels of supervision. This design permitted comparison of different levels of supervision within and across defendant type. Type I defendants (medium-risk) were randomly assigned to two types of supervision, similar to levels of supervision. Both groups, A and B supervision, included a pretrial services orientation and phone reporting through an automated phone system once per week. Unlike group A, group B defendants also received a personal phone call from the Warrant Unit pretrial services staff the night before each court date.

Type II defendants (higher-risk) were also randomly assigned to two types of supervision. Both groups, A and B supervision, included a pretrial services orientation and phone reporting through an automated phone system twice per week. Group B defendants were also required to meet in person with their case managers three days before every court date. When a defendant failed to attend the pretrial services meeting, the Warrant Unit was notified and a warrant investigator made a visit to the defendant's residence. The investigator instructed the defendant to attend the pretrial services meeting and reminded the defendant of the upcoming court date.

The final assignment at the completion of the study period showed 175 type IA, 194 type IB, 252 type IIA, and 224 type IIB defendants. The study employed a 4-month (16-week) follow-up period to chart rates of failure to appear and rearrest among study defendants. The experimental results showed that the failure to appear and rearrest rates for type I defendants assigned to groups A and B did not vary significantly. It did show, however, type I defendants released with either A or B conditions had substantially lower failure to appear and rearrest

⁵² John S. Goldkamp, and Michael D. White, "Restoring Accountability in Pretrial Release: The Philadelphia Pretrial Release Supervision Experiments," *Journal of Experimental Criminology*, 2 (2006): 143.

rates when compared to baseline data. Similarly, failure to appear and rearrest rates for type II defendants assigned to groups A and B did not vary significantly. Type II defendants also exhibited much lower failure-to-appear rates than those produced among comparable baseline defendants in the earlier study, and rearrests that were slightly lower (or no higher) than among the baseline samples.

The authors concluded that, on the surface, these findings appear to suggest that gradations in restrictiveness of conditions of supervision in the experiment did not translate into commensurate differences in rates of failure to appear or rearrest. They did suggest, however, that the general content of supervision provided to defendants of both types produced rates of rearrest (for type I at least) and FTA (both types) substantially lower than those shown in the comparable baseline data. These findings suggest that, across the board, some supervision produces better effects on defendant performance during release than no supervision (no-conditions).

SUMMARY

Pretrial supervision is primarily intended to facilitate, support, and monitor defendant's compliance with pretrial release conditions; thereby advancing the goal of assuring court appearance and community safety during the pretrial stage. There is a lack of standardization as to what is 'pretrial supervision' and supervision requirements and practices vary widely. The two research studies reviewed above suggest that variations in frequencies and types of contacts may not impact failure to appear or rearrest rates. The most recent study conducted in this area, however, does suggest that supervision generally provided to defendants results in substantially lower rates of failure to appear and rearrest when compared to defendants released without supervision. It must be acknowledged that research in this area is very limited and substantially more research is needed.

Pretrial Release Types

The pretrial release decision, to release or detain a defendant pending trial and the setting of terms and conditions of release, is a monumental task which carries enormous consequences not only for the pretrial defendant but also for the safety of the community, the integrity of the judicial process, and the utilization of our often overtaxed criminal justice resources. Pretrial release, as it stands today in most states and in the federal government, serves to provide assurance that the defendant will appear for court and not be a danger to the community pending trial. Terms and conditions of pretrial release set at an amount higher, or conditions more restrictive than necessary to serve those purposes, is considered excessive.⁵³ There is a legal presumption of release on the least restrictive terms and conditions,⁵⁴ with an emphasis on non-financial terms, unless the Court determines that no conditions or combination of conditions will reasonably assure the appearance of the person in court and the safety of any other person and the community.⁵⁵ In the U.S. Supreme Court case *United States v. Salerno* (1987), the Court noted

⁵³ *Ibid.*, 1.

⁵⁴ Title 18, United States Code, Section 3142(c)(1)(B).

⁵⁵ Title 18, United States Code, Section 3142(e) contains three categories of criminal offenses that give rise to a rebuttable presumption that "no condition or combination of conditions" will (1) "reasonably assure" the safety of any other person and the community if the defendant is released; or (2) "reasonably assure" the appearance of the defendant as required and "reasonably assure" the safety of any other person and the community if the defendant is released.

that “In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”⁵⁶

Judicial officers are tasked with identifying the least restrictive terms and conditions of release that will (1) not result in unnecessary detention and (2) reasonably assure a defendant will appear for court and not present a danger to the community during the pretrial stage. There are three primary terms of bail to secure release pending trial:

1. Release on Own Recognizance (ROR) – A defendant can be required to provide a promise to appear in court, signed or unsigned, to secure his/her release pending trial. A defendant is said to be released on his or her own recognizance, also known as Personal Recognizance (PR).
2. Unsecured Bail – A defendant can be required to sign a bond stating that they promise to appear in court and agree that if they fail to appear, they will pay the Court an agreed upon bail bond amount. An unsecured bail does not require money be offered up front; payment is required only if the defendant fails to appear in court.
3. Secured Bail – A defendant can be required to pay the Court a designated amount of money or post security in the amount of the bail in order to secure release pending trial. Security can be in the form of cash or property and may be posted by the defendant or by someone on his/her behalf, e.g., a relative or a private surety (not all states allow private sureties to post security on behalf of defendants).

The pretrial release decision, in this case setting the term of release, is a reflection of pretrial justice; it is the primary attempt to balance the rights afforded to accused persons awaiting trial with the need to protect the community, maintain the integrity of the judicial process, and assure court appearance.

The federal court system reports types and conditions of release in their Judicial Business of the United States Courts Annual Report of the Director.⁵⁷ The most recent report (2009) reports that of the over 70,000 cases activated in the U.S. District Court (excluding immigration cases), 46.8% were released pending trial while the remaining 53.2% were detained pending trial. Of the defendants released, 74% were released on unsecured bail. The remaining defendants were released on secured bail, with 17.2% securing release by cash or property and 8.7% by a private surety. Of all defendants released, regardless of the term of bail, 88.4% were released with the condition of pretrial supervision.⁵⁸ Pretrial failure rates have been historically very low in the federal court system. When examining defendants processed by pretrial services between FY 2001 and FY 2007 – defendants released pending trial had a 93% success rate (failure to appear 3.5% and new arrest 3.5%). These rates remained relatively constant across the years.⁵⁹ Information related to pretrial failure for certain release types when controlling for the risk of pretrial failure has not been reported.

⁵⁶ *United States v. Salerno*, 481 U.S. 739 at 755 (1987).

⁵⁷ Publications dating back to 1997 and available online at <http://www.uscourts.gov/Statistics/JudicialBusiness.aspx>.

⁵⁸ See Administrative Office of the United States Courts, *2009 Annual Report of the Director: Judicial Business of the United States Courts*, Washington, D.C.: U.S. Government Printing Office, 2010: H Tables 300-329.

⁵⁹ *Ibid.*, 31.

Nearly all state court research conducted on a national level in an attempt to identify the most effective term of release (release on own recognizance, unsecured bail, secured bail), has been completed using the State Court Processing Statistics (SCPS) data.⁶⁰ Formerly known as the National Pretrial Reporting Program (NPRP), the State Court Processing Statistics (SCPS) project serves as the primary data collection program for examining felony case processing in state courts. Since 1988, the Bureau of Justice Statistics (BJS) has supported the collection of case processing data that comes from 40 of the 75 most populous counties in the nation. Data included in SCPS are collected through a variety of agencies including courts, pretrial offices, local jails, and state criminal history data files.⁶¹

SCPS uses a two stage stratified sampling strategy. Stage one – 40 of the nation’s 75 most populous counties are selected to participate in the study. Stage two – counties provide data for defendants brought into court on a felony charge on randomly selected business days in May. Felony defendants are tracked from May of every even numbered year until May 31st of the following year. Data elements collected through SCPS include: current arrest charges (number, type); demographic characteristics (gender, race/ethnicity, age); criminal history (prior arrests, prior convictions, prior FTAs); pretrial release (type of release, bail amounts); pretrial misconduct (failure to appear, re-arrest); adjudication outcomes (method of conviction, conviction offense); and sentencing outcomes (type and length of prison, jail, or probation sentence).

The 2006 SCPS data revealed that an estimated 58% of felony defendants in the 75 most populous counties were released before final disposition of their cases. Overall, 70% of felony defendants had a secured bail set; 25% were granted non-secured release (release on own recognizance or unsecured bail) and 5% were ordered held without bail.⁶²

The term of pretrial release set must be the least restrictive (with an emphasis on non-financial terms) reasonably necessary to assure court appearance and community safety. The primary way to determine if a term is least restrictive and reasonably necessary is to assess the risk of pretrial failure posed by each defendant and to set terms and condition of release intended to minimize risk. A comprehensive examination of SCPS data reveals that many predictors of pretrial failure (risk factors) e.g. community ties, residence and employment stability, and history of substance abuse, are not contained in SCPS. As a result, an assessment of risk cannot be determined using

⁶⁰ For examples of research using SCPS data, see Eric Helland, and Alexander Tabarrok, "The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping," *Journal of Law and Economics*, 47, No. 1 (April 2004): 93; David E. Krahl, *An Analysis of the Financial Impact of Surety Bonding on Aggregate and Average Detention Costs and Cost Savings in the State of Florida for 2008 by a Single Insurance Company: A Follow-up Study to Earlier Research*, University of Tampa, Department of Criminology, July 2009; Thomas H. Cohen, "Commercial Surety Bail and the Problem of Missed Court Appearances and Pretrial Detention," *3rd Annual Conference on Empirical Legal Studies Papers*, June 2, 2008; and David Levin, "Examining the Efficacy of Pretrial Release Conditions, Sanctions and Screening with the State Court Processing Statistics Dataseries," *Paper Prepared for Presentation at the Annual Meeting of the American Society of Criminology*, Atlanta, GA, November 2007.

⁶¹ Thomas H. Cohen, and Tracey Kyckelhan, "State Court Processing Statistics: Background, Current Findings, and Future Decisions," Presentation, National Association of Pretrial Services Agencies Conference, San Diego, California, September 27, 2010.

⁶² Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2006*, Washington, D.C.: U.S. Department of Justice, U.S. Government Printing Office, <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf> (accessed November 19, 2010).

SCPS data and consequently comparisons of like defendants based on risk cannot be made. Such a comparison is necessary to assess the effectiveness of terms of release.

The Bureau of Justice Statistics reached a similar conclusion with the issuance of a SCPS data advisory. The data advisory “State Court Processing Statistics Data Limitations” states that “SCPS data are insufficient to explain causal associations between the patterns reported, such as the efficacy of one form of pretrial release over another. To understand whether one form of pretrial release is more effective than others, it would be necessary to collect information relevant to the pretrial release decision and factors associated with individual misconduct.”⁶³ As a result of the review of SCPS data and the BJS data advisory, the existing research used to assess terms of release should not be considered during the development of risk-based guidelines to guide pretrial release recommendations and differential pretrial supervision.

⁶³ Bureau of Justice Statistics, *Data Advisory: State Court Processing Statistics Data Limitations*, Washington, DC: U.S. Department of Justice, March 2010, http://bjs.ojp.usdoj.gov/content/pub/pdf/scpsdl_da.pdf (accessed November 19, 2010).

EXISTING GUIDELINES FOR PRETRIAL RELEASE RECOMMENDATIONS AND DIFFERENTIAL PRETRIAL SUPERVISION

Virginia pretrial services agencies investigate and interview certain defendants and present pretrial investigation reports with recommendations to assist courts in discharging their duties related to granting or reconsidering pretrial release. As part of the pretrial investigation process, agencies use the VPRAI to assess the risk of flight and danger to the community posed by defendants. Although the agencies use the VPRAI to assess the risk of pretrial failure, pretrial release recommendations related to the terms and conditions of pretrial release are currently subjective, and there is no statewide objective and consistent guidance for making pretrial release recommendations. In addition, there is no standardized system for the provision of differential pretrial supervision that considers the risk of pretrial failure identified by the VPRAI.

In their pursuit of Legal and Evidence-Based Practices, Virginia pretrial services agencies desire to develop and implement research-based guidelines that are (1) risk-based, (2) consistent with legal and evidence-based practices, and (3) provide guidance for pretrial release recommendations and differential pretrial supervision. To inform the development of guidelines that utilize the VPRAI to guide pretrial release recommendations and differential pretrial supervision, the third step in the guideline development process was to (1) identify other agencies in the United States that use research-based and validated pretrial risk assessments with corresponding guidelines for pretrial release recommendations and differential pretrial supervision and (2) review the guidelines to assist Virginia in their guideline development process.

Similar to the approach taken to identify existing national pretrial specific research, a wide net was cast in an effort to identify agencies using research-based and validated pretrial risk assessments with corresponding guidelines that would benefit guideline development in Virginia. A variety of digital subscription databases, such as Academic OneFile, EBSCOhost, HeinOnline, LexisNexis, and ProQuest, were used to search and locate relevant studies published in academic journals and periodicals. Other online libraries, such as, the National Institute of Corrections, National Criminal Justice Reference Service, Inter-university Consortium for Political and Social Research, and the Pretrial Justice Institute were also consulted.

In addition to the research completed above, a survey was conducted in an effort to identify pretrial services agencies that use risk-based guidelines for pretrial release recommendations and differential pretrial supervision that may not have formally published or distributed their research. In September 2009, a nationwide online survey for this purpose was initiated. First, extensive research was conducted to identify pretrial services agencies currently using pretrial risk assessments. Eighty-five agencies in 28 states and the District of Columbia were identified that met this criterion; therefore, invitations were sent to these agencies requesting the completion of an online survey. Sixty-six percent of the agencies responded to the survey and most submitted supporting documents.

The results of the research and online survey were combined and used to identify pretrial services agencies that have research-based and validated pretrial risk assessments with corresponding guidelines that provide guidance for pretrial release recommendations and differential pretrial supervision. Four agencies met the criteria above and include: Hennepin County, MN; Alleghany

County, PA; and two counties with VPRAI-based guidelines – Summit County, OH and Lake County, IL. In addition, pretrial release decision guidelines based on validated risk assessments for use by judicial officers (judges and bail commissioners) were also identified in Philadelphia⁶⁴ and the State of Connecticut. Descriptions of both the pretrial release decision guidelines for use by judicial officers and pretrial release recommendation guidelines for use by pretrial services are provided below.

Pretrial Release Decision Guidelines for Judicial Officers

PHILADELPHIA, PA⁶⁵

The pretrial release decision guidelines or matrix resembles a grid formed by two principal dimensions – the seriousness of the current charge on a scale from one to ten (with ten being the most serious) and a four-level risk classification that ranks defendants according to the likelihood of flight or rearrest (with four being the highest risk). The guidelines provide recommended release options based on the combination of risk and charge seriousness and include pretrial release type (ROR bail, secured bail, held without bail) and conditions of release. The four primary recommendations include: ROR with standard conditions, release with special conditions (monitoring and supervision), secured bail with dollar amount range, and held without bail. As the combination of risk and charge seriousness increase, the pretrial release options become more restrictive until detention is recommended.

CONNECTICUT⁶⁶

The state of Connecticut has a research-based and validated risk assessment that is used by Bail Commissioners to guide pretrial release decisions. The risk assessment consists of factors related to the seriousness of the charge, prior criminal record, community ties, employment, residence, and substance abuse. Each factor has weights or points assigned (negative or positive) and the points are added for a total risk score. The lower the score the greater the risk posed by the defendant. If the total risk score is zero or above, the recommendation is for unsecured bail (written promise to appear, non-surety, or conditional release). If the total risk score is below zero, a secured bail is recommended (surety or 10% bond).

⁶⁴ In 1981, pretrial release decision guidelines – then referred to as bail guidelines – were piloted in the Philadelphia Municipal Court for use by the Court. During the 1980s, attempts to replicate the guideline approach were made in Courts in Boston, Dade County, and Maricopa County (see John S. Goldkamp, Michael R. Gottfredson, Peter R. Jones, and Doris Weiland, *Personal Liberty and Community Safety: Pretrial Release in the Criminal Court*, New York, NY: Plenum Press, 1995). For the purposes of this research, only the guidelines developed in Philadelphia will be reviewed.

⁶⁵ The Philadelphia Courts First Judicial District of Pennsylvania reported that the process for pretrial release decisions is currently under review and a revised system is anticipated. As a result, the guidelines as they were in the 1990s are presented above as described in John S. Goldkamp, and Michael D. White, "Restoring Accountability in Pretrial Release: The Philadelphia Pretrial Release Supervision Experiments," *Journal of Experimental Criminology*, 2 (2006): 150.

⁶⁶ Jennifer Hedlund, Stephen M. Cox, and Susan Wichrowski, *Validation of Connecticut's Risk Assessment for Pretrial Decision Making*, Hartford, CT: Court Support Services Division, Judicial Branch State of Connecticut, July 2003.

Pretrial Release Recommendation Guidelines for Pretrial Services

HENNEPIN COUNTY, MN⁶⁷

The Fourth Judicial District of Minnesota, serving Hennepin County, utilizes a research-based and validated pretrial risk assessment or point scale to guide pretrial release recommendations. The risk assessment consists of factors related to the seriousness of the charge, residence, employment, age, and prior criminal record. Each factor has weights or points assigned (zero or positive) and the points are added for a total risk score. The higher the score the greater the risk posed by the defendant. The total scores are divided into three (3) groups from lowest to highest risk. The pretrial release recommendation relates to risk score as follows: group one – unsecured bail (no bail required), group two – unsecured bail with conditions (conditional release), and group three – review required by judge. The Pretrial Unit has release authority granted to them by the court for defendants who score in the first two groups while defendants in the third group must be reviewed by a judge prior to release.

ALLEGHENY COUNTY, PA⁶⁸

Allegheny County Pretrial Services utilizes a research-based and validated pretrial risk assessment to guide pretrial release recommendations. The risk assessment consists of factors related to the seriousness of the charge, prior criminal history, substance abuse, age, residence, and employment. Each factor has weights or points assigned (negative or positive) and the points are added for a total risk score. The higher the score the greater the risk posed by the defendant. The total scores are divided into four (4) groups from lowest to highest risk. The recommendation regarding type of pretrial release and conditions of release are related to the risk score as follows:

1. ROR;
2. Unsecured bail with low level supervision condition;
3. Unsecured bail with medium level supervision condition; and
4. No recommendation (if secured bail is set, recommend high level supervision condition).

The levels of supervision represent a differential pretrial supervision strategy. In the case of Allegheny County, the guidelines utilize the results of the risk assessment to guide recommendations for pretrial release and differential pretrial supervision. The frequency and types of supervision contacts required for each supervision level range from the least restrictive phone contact to the most restrictive electronic monitoring.

⁶⁷ Marcy R. Podkopacz, Deborah Eckberg, and Kubits Gina, *Fourth Judicial District Pretrial Evaluation: Scale Validation Study*, Minneapolis, MN: Minnesota Judicial Branch Fourth Judicial District, October 2006.

⁶⁸ John Clark, David Levin, Timothy Murray, and D. Alan Henry, *The Transformation of Pretrial Services in Allegheny County, Pennsylvania: Development of Best Practices and Validation of Risk Assessment*, Washington, D.C.: Pretrial Justice Institute, October 2007.

VPRAI-BASED GUIDELINES (SUMMIT COUNTY, OH⁶⁹ AND LAKE COUNTY, IL⁷⁰)

In 2004, Summit County Pretrial Services adapted the Virginia Model risk assessment and implemented the Summit County Pretrial Risk Assessment Instrument (SCPRAI) which was later validated using Summit County data. The risk assessment recommendation guidelines developed by local justice system stakeholders utilize the results of the risk assessment and seriousness of the charge to guide recommendations for pretrial release and differential pretrial supervision. The guidelines have three grids: (1) non-violent charge(s) without presumption of incarceration or mandatory prison; (2) non-violent charge(s) with presumption of incarceration or mandatory prison; and (3) violent charge(s) that are not a capital offense. The three grid approach accounts for the current charge and utilizes the five (5) risk levels from low to high. Based on the grid and risk level, recommendations are made related to pretrial release type (unsecured bail [signature or third-party release] and secured bail), bail amount range, supervision levels, and special conditions. The pretrial release type and supervision level, if applicable, become more restrictive as the risk and seriousness of the charge increase.

In 2005, Lake County Pretrial Services also adapted the Virginia Model risk assessment and implemented the Lake County Pretrial Risk Assessment Instrument (LCPRAI) which was later validated using Lake County data. Lake County primarily supervises defendants released by the Court with pretrial supervision as a release condition, without the benefit of an investigation or recommendation. As a result, pretrial services conducts an investigation and risk assessment after the defendant has been released to identify the appropriate level of supervision. The LCRAI-based guidelines are referred to as case classification guidelines.

The structure of the guidelines was modeled after those in Summit County. The guidelines have three grids: (1) first degree murder, class X, or class 1 felony; (2) violent offense that is not first degree murder, a class X or class 1 felony; and (3) non-violent offense. The three grid approach accounts for the current charge and utilizes the five (5) risk levels from low to high. Based on the grid and risk level, one of three levels of supervision (minimum, medium, maximum) is recommended. All supervision levels include one phone call per week, court date reminder calls and monthly criminal history checks. The frequency of field visits and office visits vary based on supervision level.

It should be noted that in 2010, the VPRAI was adapted and implemented in Oakland County, Michigan,⁷¹ and Mecklenburg County, North Carolina.⁷² Validation studies have not yet been conducted in either locality. Modeled after Summit County and Lake County, Oakland County developed guidelines related to pretrial release recommendations and differential pretrial supervision referred to as the 'Praxis.' The Praxis, a tool that puts theoretical knowledge and research into practice, provides guidance to pretrial services relating to the appropriate

⁶⁹ Christopher T. Lowenkamp, and Kristin Bechtel, *Meeting Pretrial Objectives: A Validation of the Summit County Pretrial Risk Assessment Instrument (SCPRAI)*, Cincinnati, OH: University of Cincinnati, 2007.

⁷⁰ Keith Coopridge, "Pretrial Risk Assessment and Case Classification: A Case Study Control," *Federal Probation*, 73, No. 1 (June 2009), <http://www.uscourts.gov/uscourts/FederalCourts/PPS/Fedprob/2009-06/index.html> (accessed November 23, 2010).

⁷¹ Oakland County Community Corrections Pretrial Services, *Oakland County Pretrial Risk Assessment & Praxis Instruction Manual Version 1.2*, Waterford, MI: Oakland County, September 2010.

⁷² Mecklenburg County Pretrial Services, *Mecklenburg County Pretrial Risk Assessment & Praxis Instruction Manual*, Charlotte, NC: Mecklenburg County, June 2010.

recommendation of term and conditions of release, while considering the current charge and risk posed by the defendant, that are reasonably necessary to address the risk of pretrial failure. If pretrial supervision is appropriate, the Praxis also provides guidance for the appropriate level of supervision (frequencies and types of contacts).

The Praxis has two grids – (1) misdemeanor or non-violent felony charge and (2) violent felony charge. The two grid approach accounts for the current charge and utilizes the five (5) risk levels from low to high. Based on the grid and risk level, recommendations are made related to pretrial release type (unsecured bail [personal bond] and secured bail [full cash or 10% cash surety]), bail amount range, and supervision levels (monitoring, standard, intermediate, and intensive). All defendants receive court date reminders, however, the frequency and types of contacts and use of electronic monitoring vary by supervision level. The pretrial release type and supervision level, if applicable, become more restrictive as the risk and seriousness of the charge increase.

Mecklenburg, North Carolina, benefited from the work done in the previous counties that implemented the Virginia Model risk assessment and corresponding guidelines. Following Oakland County, Mecklenburg County developed a Virginia Model risk-based Praxis. The Praxis has three grids: (1) misdemeanor non-assaultive and traffic; (2) misdemeanor assaultive/domestic violence related; and (3) felony non-violent. It should be noted that the Praxis does not apply to violent felony charges or probation violations. The three grid approach accounts for the current charge and utilizes the five (5) risk levels from low to high. Based on the grid and risk level, recommendations are made related to pretrial release type (unsecured bail, secured bail, or release to the custody of a designated organization), bail amount range, and supervision levels (administrative, standard, and intensive). The supervision levels vary in the frequency and types of automated phone reporting, kiosk reporting, face-to-face contacts, and use of special conditions. The pretrial release type and supervision level, if applicable, become more restrictive as the risk and seriousness of the charge increase.

SUMMARY

There are several jurisdictions across the country that have research-based and validated pretrial risk assessments with corresponding guidelines that provide guidance for pretrial release recommendations and differential pretrial supervision. Some of the guidelines are pretrial release decision guidelines for use by judicial officers while other guidelines or Praxis are for use by pretrial services agencies. Pretrial services agencies are tasked with making recommendations to judicial officers that reflect the least restrictive terms and conditions of release that will (1) not result in unnecessary detention and (2) reasonably assure a defendant will appear for court and not present a danger to the community during the pretrial stage. Guidelines attempt to honor the legal and constitutional rights afforded to pretrial defendants and the purpose of release and detention, while providing an objective and consistent policy for pretrial release recommendations and differential pretrial supervision. They also attempt to minimize disparity in recommendations and supervision of similarly situated defendants. The guidelines reviewed in this section have one primary commonality. All guidelines utilize a research-based and validated risk assessment and the seriousness of the charge to guide pretrial release recommendations or decisions by providing a continuum of options (release type and conditions) from least restrictive to most restrictive. Research is needed to determine the effectiveness of guidelines in meeting their intended outcomes.

VIRGINIA PRETRIAL SERVICES RESEARCH

The final step in preparing for guideline development was to conduct Virginia pretrial services specific research to explore conditions of release, pretrial supervision, and release types, and their relationship to pretrial failure while controlling for risk. This step was to be conducted using existing available data, specifically, data contained in the Pretrial and Community Corrections Case Management System (PTCC). PTCC was developed and implemented by the DCJS. By 2002, all 30 pretrial services agencies had access to the PTCC software. Virginia pretrial services agencies operate under the authority of the Pretrial Services Act and are funded in whole or part by DCJS. As a grant funding requirement, all agencies must fully utilize the PTCC case management system.⁷³ PTCC is the primary data source for defendant records management information and case management activities. A review of PTCC was completed to identify the data available to conduct the specified research.

Pretrial and Community Corrections Case Management System

A screenshot of PTCC shows the main data collection modules (see figure 1). Data related to pretrial investigations, including risk assessment and recommendations, are contained in the Screening module. Defendant demographic and background data are contained in the Setup module. The Pretrial Placement (PT Plcmt) and Pretrial Supervision (PT Supv) modules contain data relating to the court case placed on supervision and the supervision management activity.

Figure 1. Pretrial and Community Corrections Case Management System

The screenshot displays the PTCC software interface. At the top, the window title is "Pretrial and Community Corrections Case Management System (PTCC) - [Screening - Screening]". Below the title bar is a menu bar with "File", "Edit", "Modules", "Reports", "Administration", "Window", and "Help". A navigation bar contains tabs for "Screening", "Charges", "Court Assignment", "Court Reports", "Recommendation", "Charge Update", and "Court Update". The main area shows a case record for "Name: Pretrial, Test; SSN: 999999999; DOB: 09/29/1960". The "Screening" module is active, showing "VPRAI (Step 1)" with fields for "Instrument Completion Date" and "Arrest Information" (Court Date, Charges(s), Bond Type and Amount, Court). A "Research Factors" section includes "Charge Category", "Active Community Supervision", "Number of FTA Convictions", and "Number of Violent Arrests". A "Risk Factors" section lists various criteria like "Charge Type", "Pending Charge(s)", "Criminal History", "Two or More FTAs", "Two or More Violent Convictions", "Length at Current Residence Less Than One Year", "Residence Verified", "Not Employed 2 Years/Primary Caregiver", "Employed/Caregiver Verified", and "History of Drug Abuse". A "Calculate Risk" button and a "Risk Level" field are also present. A sidebar on the left contains icons for "Screening", "Setup", "PT Plcmt", "PT Supv", "CC Plcmt", "CC Supv", and "Reports". At the bottom, there are navigation buttons: "Exit", "<< Previous", "Save", "Undo", "New", "Delete", and "Next >>". The status bar at the bottom left shows "Case No.: CA10412009092911524400" and the bottom right shows "Staff:" and "Date Edited:".

⁷³ Virginia Department of Criminal Justice Services, *Local Community-based Probation and Pretrial Services: Grant Application Guide for FY 2011-2012 Continuation Funding*, Richmond, VA: Virginia Department of Criminal Justice Services, 2010.

Data Availability and Challenges

Data related to conditions of release, pretrial supervision, release types, risk assessment, and pretrial outcomes were necessary to complete the specified analysis. Pretrial services agencies only track outcomes (success or failure) for cases placed on pretrial supervision as a condition of release. As a result, only cases referred for pretrial supervision could be used to complete the analysis. To determine the availability of needed data, all relevant data was extracted from PTCC for defendants released pending trial with a condition of pretrial supervision between January 1, 2005 and December 31, 2008. Because risk assessment results were also needed to complete the proposed research, all cases without a risk assessment were excluded. Finally, cases that remained open (outcome yet to be determined) were also excluded. The resulting dataset included 30,629 defendant cases that were released pending trial with a condition of pretrial supervision between January 1, 2005 and December 31, 2008, who had a risk assessment completed, and the case was closed as of April 1, 2010. Upon analysis of the dataset, several challenges were identified. Descriptions of data availability and challenges for conditions of release, pretrial supervision, and release types are provided below.

CONDITIONS OF RELEASE (EXCLUDING PRETRIAL SUPERVISION)

A review of the dataset described above revealed that conditions of release ordered by the Court (e.g., submit to testing for drugs and/or alcohol, no contact with victim or potential witness, maintain or seek employment, comply with curfew) are captured in the Pretrial Placement module. In addition, only 4% of all cases placed on supervision had conditions of release entered, and of those entered, many were entered in free-form text format. The lack of standardized data for analysis prevented the examination of the relationship between conditions of release and pretrial outcome when controlling for risk. It is recommended that PTCC be revised to capture conditions of release in a more standardized way, and that conditions of release are required to be entered in PTCC for all cases referred for supervision.

PRETRIAL SUPERVISION

All defendants in the dataset were referred for pretrial supervision as a condition of release; therefore, a comparison of like defendants based on risk could not be made for defendants released with and without pretrial supervision. PTCC does contain a data element for supervision level, representing a differential pretrial supervision strategy. An examination of the supervision level data revealed two major challenges: (1) more than half of the defendants did not have a supervision level entered or the agency only used one supervision level and (2) the values for supervision level varied substantially (39 different supervision level options). The data findings were consistent with the understanding of current practices of Virginia pretrial services agencies, specifically; many agencies require the same frequency and types of contacts for all defendants during pretrial supervision while some have identified their own levels of supervision with varying frequencies and types of contacts. It is recommended that a standardized differential pretrial supervision strategy be developed (levels of supervision). In addition, the values for the data element 'supervision level' should be standardized in PTCC.

RELEASE TYPES

All of the cases in the dataset were referred for pretrial supervision as a condition of release. The available release types captured in PTCC include secured bail and unsecured bail.

Therefore, data was available to explore the relationship between release type (secured or unsecured bail) and pretrial outcome, while controlling for risk, for defendants released with pretrial supervision.

Data Analysis Results

The dataset used for analysis was extracted from PTCC as detailed above. The dataset included 30,629 defendant cases that were released pending trial to one of thirty Virginia pretrial services agencies between January 1, 2005 and December 31, 2008 – (1) with a condition of pretrial supervision, (2) who had a risk assessment completed, and (3) whose case was closed as of April 1, 2010. A description of the population and the data analysis results are provided below.

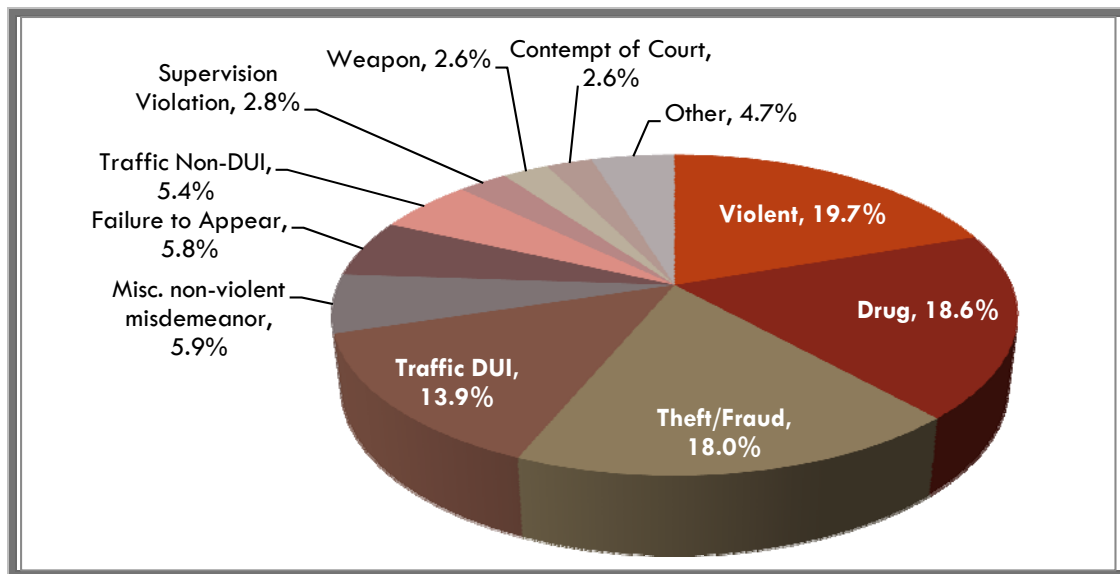
Gender, Age, Race/Ethnicity

Seventy-eight percent of the population were male while the remaining 22% were female. The average (mean) age of defendants was 32 years old. Ages ranged from 17 to 84 years old, with the most common (mode) age being 19 years old. Defendant race/ethnicity was as follows: Black 48%, White 46%, Hispanic 4.5%, and Other 1.5%.

Charge Information

A majority (55.2%) of defendants were charged with a felony while 44.8% were charged with a misdemeanor. Charges were grouped into 11 charge categories. The charge categories are as follows: Violent, Weapon, Drug, Theft/Fraud, Failure to Appear, Contempt of Court, Supervision Violation, Non-violent Misdemeanor, Traffic – Driving Under the Influence (DUI), Traffic – Non-DUI, and Other. The charge category for defendants can be found in figure 2.

Figure 2. Defendants Placed on Supervision by Charge Category



Data Source: Virginia Department of Criminal Justice Services, Pretrial and Community Corrections Case Management System (PTCC). All defendants released pending trial with a condition of pretrial supervision between 1/1/05 and 12/31/08 that had a risk assessment completed and the case was closed as of 4/1/10.

Risk Assessment

The risk assessment consists of eight (8) factors including measures of the following: (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.⁷⁴ The risk levels represent the likelihood of pretrial failure including failing to appear in court and danger to the community pending trial. Information about the risk factors and scores for the defendants released to pretrial supervision is provided below.

CURRENT CHARGE

Defendants charged with a felony offense are more likely to fail pending trial compared to defendants charged with a misdemeanor offense. A majority (55.2%) of defendants were charged with a felony while 44.8% were charged with a misdemeanor.

PENDING CHARGES

Defendants who had charges pending in court (were on pretrial release status) at the time of their arrest for crimes that allegedly occurred while on release are more likely to fail pending trial compared to defendants who did not have pending charges. Approximately one-fifth (20.3%) of defendants had charges pending in court at the time of their arrest.

CRIMINAL HISTORY

Defendants with a criminal history that includes one or more adult criminal conviction(s) are more likely to fail pending trial compared to defendants with no adult criminal convictions. Only convictions for a jailable offense constitute a criminal history, including misdemeanor and criminal traffic convictions that carry the possibility of a jail sentence. Over two-thirds (68.8%) of all defendants had at least one adult criminal conviction while nearly one-third (31.2%) had never been convicted of a jailable offense.

FAILURE TO APPEAR

Defendants that had failed to appear in court two or more times are more likely to fail pending trial compared to defendants that had failed to appear either once or never. Five percent of defendants had failed to appear two or more times.

VIOLENT CONVICTIONS

Defendants with two or more violent convictions are more likely to fail pending trial compared to defendants with one or no violent conviction. For the purposes of risk assessment, violent conviction is generally defined as any act that causes or intends to cause physical injury to another person and includes felony and misdemeanor violent convictions. Nearly one-tenth (9.3%) of defendants had two or more violent convictions while 90.7% had no or one violent conviction.

⁷⁴ See 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, for risk factor definitions, scoring, and other information about the VPRAI.

LENGTH AT RESIDENCE

Defendants that lived at their current residence for less than one year are more likely to fail pending trial compared to defendants that lived at their residence for one year or more. Thirty-nine percent of defendants lived at their current residence for less than one year or were homeless, compared to 61% of defendants that lived at their current residence for one year or more.

EMPLOYMENT/PRIMARY CAREGIVER

Defendants who had not been employed continuously at one or more jobs during the two years prior to their arrest, or who were not a primary caregiver at the time of the arrest, are more likely to fail pending trial compared to defendants who had been employed or were a primary caregiver at the time of their arrest. Approximately two-thirds (67.5%) of defendants had not been continuously employed for the two years prior to the arrest or were not a primary caregiver at the time of the arrest.

HISTORY OF DRUG ABUSE

Defendants with a history of drug abuse are more likely to fail pending trial compared to defendants without a history of drug abuse. For the purposes of risk assessment, drug abuse includes any illegal or prescription drugs and does not include alcohol. More than one-third (36.3%) of defendants were determined to have a history of drug abuse while the remaining 63.7% of the defendants were determined not to have a history of drug abuse.

RISK SCORE

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 of pretrial failure including failing to appear in court and danger to the community pending trial. There were over 30,000 defendants released with a condition of pretrial supervision between January 1, 2005 and December 31, 2008 who had a risk assessment completed and the case was closed as of April 1, 2010. The breakdown of risk levels for those defendants is shown in figure 3.

Figure 3. Defendants Placed on Supervision by Risk Level

LEVEL	FREQUENCY	PERCENT
Low	4136	13.5%
Below Average	7068	23.1%
Average	8194	26.7%
Above Average	6399	20.9%
High	4830	15.8%

Data Source: Virginia Department of Criminal Justice Services, Pretrial and Community Corrections Case Management System (PTCC). All defendants released pending trial with a condition of pretrial supervision between 1/1/05 and 12/31/08 that had a risk assessment completed and the case was closed as of 4/1/10.

Case Information

An examination of relevant and available case information was completed. Data analysis was conducted related to recommendations made to the Court by pretrial services, supervision placement by release type (unsecured or secured bail), the length of pretrial supervision, and supervision outcomes.

RECOMMENDATION BY PRETRIAL SERVICES

For the cases placed on supervision, pretrial services made a recommendation to the Court regarding release in 76% of the cases (23,206). Of the cases with a recommendation, pretrial services recommended release with a condition of pretrial supervision 54.7% of the time. The remaining 45.3% of the cases were released with a condition of pretrial supervision when supervision was not recommended by pretrial services.

RELEASE TYPE

Defendants released with a condition of pretrial services were released with two primary release types – unsecured bail and secured bail. A majority of defendants were released with unsecured bail with a condition of pretrial supervision (54.9%) while the remaining 45.1% were released with secured bail with a condition of pretrial supervision.

LENGTH OF SUPERVISION

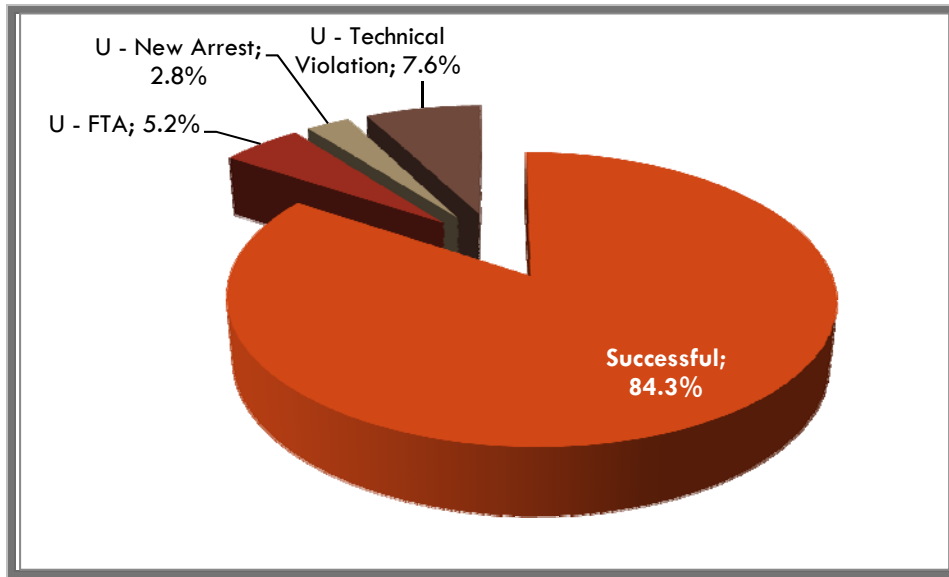
Defendants released with a condition of pretrial supervision were on supervision for an average of 105 days. The length of supervision ranged from 1 day to just over 3 years (1,122 days). The length of supervision varied depending on the charge type, specifically, defendants charged with a misdemeanor were under supervision for an average of 73 days compared to 131 days for defendants charged with a felony.

SUPERVISION OUTCOMES

Pretrial supervision cases are closed as either successful or unsuccessful. The reasons a case is closed unsuccessfully are failure to appear, new arrest, and technical violation. A case is closed unsuccessful – failure to appear when a defendant fails to appear for a scheduled court appearance pending trial and a *capias* or warrant is issued. A case is closed unsuccessful – new arrest when a defendant's supervision is revoked due to a new arrest for a crime that was allegedly committed while the defendant was released pending trial. A case is closed unsuccessful – technical violation when a defendant's supervision is revoked due to violating conditions of release (e.g., submit to testing for drugs and/or alcohol, no contact with victim or potential witness, maintain or seek employment, comply with curfew). If a defendant does not have their case closed due to failure to appear, new arrest, or technical violation as described above, the case is closed successful.

Of the 28,044 cases with a closure type of successful or unsuccessful, 84.3% were closed as successful. Cases closed unsuccessfully were due to failure to appear (5.2%), new arrest (2.8%), and technical violation (7.6%), (See figure 4).

Figure 4. Pretrial Supervision Outcomes



Data Source: Virginia Department of Criminal Justice Services, Pretrial and Community Corrections Case Management System (PTCC). All defendants released pending trial with a condition of pretrial supervision between 1/1/05 and 12/31/08 that had a risk assessment completed and the case was closed as of 4/1/10.

Predictors of Outcome When Controlling for Risk

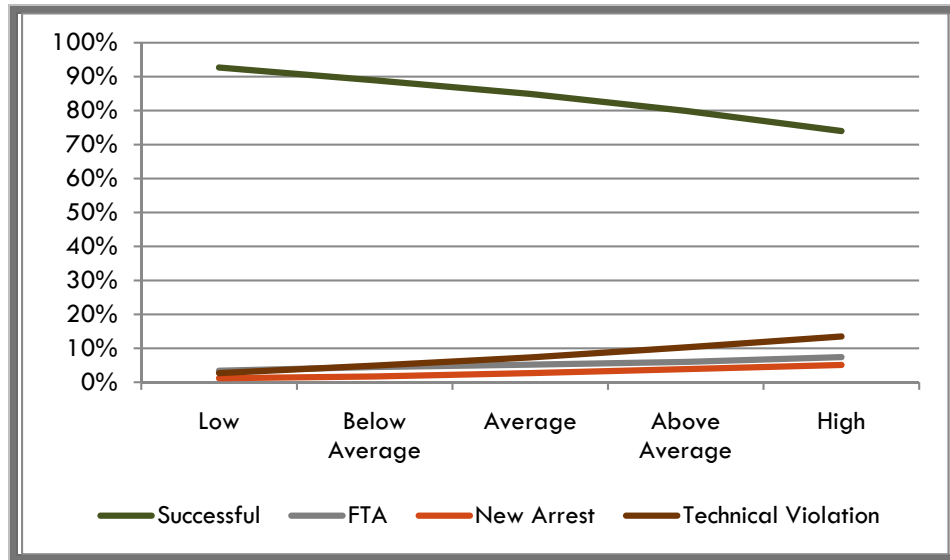
The available data allowed for the examination of, while controlling for risk, the relationship between release type and charge category with outcome. The risk level had a strong relationship with outcome as shown in figures 5 and 6. As the risk level increased, the failure rates increased.

Figure 5. Pretrial Supervision Outcomes by Risk Level Table

RISK LEVEL	SUCCESSFUL	FTA	NEW ARREST	TECHNICAL VIOLATION
Low	92.7%	3.4%	1.2%	2.7%
Below Average	88.9%	4.5%	1.7%	4.9%
Average	84.9%	5.2%	2.7%	7.3%
Above Average	79.9%	6.0%	3.9%	10.3%
High	74.0%	7.4%	5.1%	13.5%
Total	84.3%	5.2%	2.8%	7.6%

Data Source: Virginia Department of Criminal Justice Services, Pretrial and Community Corrections Case Management System (PTCC). All defendants released pending trial with a condition of pretrial supervision between 1/1/05 and 12/31/08 that had a risk assessment completed and the case was closed as of 4/1/10.

Figure 6. Pretrial Supervision Outcomes by Risk Level Graph



Data Source: Virginia Department of Criminal Justice Services, Pretrial and Community Corrections Case Management System (PTCC). All defendants released pending trial with a condition of pretrial supervision between 1/1/05 and 12/31/08 that had a risk assessment completed and the case was closed as of 4/1/10.

RELEASE TYPE

Defendants released with a condition of pretrial services were released with two primary release types – unsecured bail and secured bail. A majority of defendants were released on unsecured bail with a condition of pretrial supervision (54.9%) while the remaining 45.1% were released on secured bail with a condition of pretrial supervision. Overall, defendants released on an unsecured bail were more successful when compared to defendants released on a secured bail; 85.4% and 83%, respectively. This difference was found to be statistically significant. A closer examination of release types when controlling for risk, however, reveals no statistically significant difference in outcomes within any of the five risk levels (See figure 7). In addition, a multivariate logistic regression model revealed that, when controlling for risk level, release type (unsecured or secured bail) was not a statistically significant predictor of outcome.

Figure 7. Success Rates by Release Type and Risk Level

RISK LEVEL	UNSECURED BAIL	SECURED BAIL
	Successful	Successful
Low	92.4%	93.4%
Below Average	88.5%	89.7%
Average	85.6%	83.8%
Above Average	80.0%	79.7%
High	75.2%	73.0%
Total	85.4%	83.0%

Data Source: Virginia Department of Criminal Justice Services, Pretrial and Community Corrections Case Management System (PTCC). All defendants released pending trial with a condition of pretrial supervision between 1/1/05 and 12/31/08 that had a risk assessment completed and the case was closed as of 4/1/10.

CHARGE CATEGORY

Charges were grouped into 11 charge categories. The charge categories are as follows: Violent, Weapon, Drug, Theft/Fraud, Failure to Appear, Contempt of Court, Supervision Violation, Non-violent Misdemeanor, Traffic – Driving Under the Influence (DUI), Traffic – Non-DUI, and Other. It should be noted that the Supervision Violation charge category was determined to consist of a variety of charges that are substantially different, constitute a relatively small number of cases, and likely cannot be generalized to supervision violations as a whole. In addition, the Other charge category was determined to consist of a variety of charges and should not be generalized to all charges that do not meet the criteria for the primary categories. Similarly, charges of contempt of court represented substantially different types of contempts and should also not be generalized to all charges of contempt of court. As a result, analysis for charge category was completed using the remaining eight categories and excluded Supervision Violation, Contempt of Court and Other (See figure 8). It is interesting to note that the results are very similar to the risk assessment research conducted over the past 10 years in Virginia. Specifically, defendants charged with Traffic – DUI and Violent offenses are the most likely to be successful, defendants charged with drug and theft/fraud offenses are the least likely to be successful, and defendants charged with failure to appear are no more likely and no less likely to fail than other defendants. In addition, the findings are consistent with the risk assessment research conducted for the federal court.⁷⁵

Figure 8. Success Rates by Risk Level and Charge Category

Charge Category	RISK LEVEL					
	Low	Below Average	Average	Above Average	High	Total
Traffic - DUI	93.3%	91.2%	88.4%	85.9%	79.7%	90.4%
Violent	95.9%	92.3%	90.1%	87.9%	81.2%	90.1%
Non-violent Misdemeanor	91.4%	87.6%	86.3%	83.4%	74.4%	85.9%
Failure to Appear	91.7%	85.6%	87.1%	80.9%	80.7%	85.6%
Traffic - Non DUI	91.9%	89.7%	85.2%	79.0%	75.8%	84.9%
Weapon	91.5%	85.1%	85.0%	82.4%	63.8%	81.7%
Theft/Fraud	89.4%	85.0%	82.2%	77.5%	75.6%	80.9%
Drug	88.2%	84.8%	76.2%	71.0%	66.9%	73.7%
Total	92.7%	88.9%	84.9%	79.9%	74.0%	84.3%

Data Source: Virginia Department of Criminal Justice Services, Pretrial and Community Corrections Case Management System (PTCC). All defendants released pending trial with a condition of pretrial supervision between 1/1/05 and 12/31/08 that had a risk assessment completed and the case was closed as of 4/1/10.

⁷⁵ Ibid., 44.

Additional analysis was conducted to determine the relationship between charge category and outcome when controlling for risk. A multivariate logistic regression model revealed that, when controlling for risk level, four charge categories had a statistically significant ($p \leq .05$) relationship with outcomes. While controlling for risk level, defendants with charges in the Drug, Theft/Fraud and Weapons categories were more likely to be unsuccessful and defendants with charges in the Violent category were more likely to be successful when compared to defendants with other charges.

Summary

The dataset used for analysis included 30,629 defendant cases that were released pending trial to one of thirty Virginia pretrial services agencies between January 1, 2005 and December 31, 2008 – (1) with a condition of pretrial supervision, (2) who had a risk assessment completed, and (3) whose case was closed as of April 1, 2010.

Of the 28,044 cases with a closure type of successful or unsuccessful, 84.3% were closed as successful. Cases closed unsuccessful were due to failure to appear (5.2%), new arrest (2.8%), and technical violation (7.6%). The risk level had a strong relationship with outcome, specifically, as the risk level increased, the failure rates increased.

A lack of standardized data for analysis prevented the examination of the relationships between conditions of release and pretrial outcome and supervision levels and pretrial outcome, when controlling for risk. Data was available, however, to examine the relationships between release type and charge category and pretrial outcome when controlling for risk. When controlling for risk level, release type (unsecured or secured bail) was not a statistically significant predictor of outcome. Defendants released with an unsecured bail, even when considering risk, did as well as those released with a secured bail. While controlling for risk level, defendants with charges in the Drug, Theft/Fraud and Weapons categories were more likely to be unsuccessful and defendants with charges in the Violent category were more likely to be successful when compared to defendants with other charges.

VIRGINIA GUIDELINES FOR PRETRIAL RELEASE RECOMMENDATIONS AND DIFFERENTIAL PRETRIAL SUPERVISION

In their pursuit of legal and evidence-based pretrial release recommendations and supervision, Virginia pretrial services agencies sought to develop and implement research-based guidelines for use by pretrial services agencies that are (1) risk-based, (2) consistent with legal and evidence-based practices, and (3) provide guidance for pretrial release recommendations and differential pretrial supervision. To ensure the guidelines were compliant with the law, based on available research, and consistent with the concept of pretrial justice, a five step process was completed as follows:

1. Conduct a review of Virginia state statutes, case law, and other legal resources to explore potential legal challenges to specified pretrial release conditions and pretrial practices;
2. Conduct a comprehensive review of existing pretrial specific research related to the effectiveness of conditions and interventions and types of pretrial release;
3. Identify research-based and validated pretrial risk assessments with corresponding guidelines for pretrial release recommendations and differential pretrial supervision;
4. Use Virginia pretrial services data contained in the Pretrial and Community Corrections Case Management System (PTCC) to explore the relationships between pretrial release conditions, supervision, and release types with outcome while controlling for risk; and
5. Develop guidelines that utilize the VPRAI to guide release recommendations and differential pretrial supervision.

The results of the first four steps in the process are detailed in this report. The fifth step, guideline development, was informed by the findings to the pretrial legal questions, existing national pretrial specific research, other risk based guidelines, and the results of the Virginia pretrial services specific research.

Similar to other release recommendation and differential pretrial supervision guidelines, the LEBP Advisory Committee selected a grid style format with two primary dimensions; the risk of pretrial failure and the charge category. The risk level is based on the VPRAI and consists of five levels of risk from low to high. There are eight charge categories including the following: Violent, Weapon, Drug, Theft/Fraud, Failure to Appear, Non-Violent Misdemeanor, Traffic – DUI, and Traffic – Non-DUI.

It was determined by the Committee that the guidelines would assist pretrial service agencies in identifying defendants that would be most appropriate for release on personal recognizance without a condition of supervision and defendants appropriate for pretrial supervision regardless of release type. Acknowledging a lack of agreement on the definition of ‘pretrial supervision’, as well as a standardized differential supervision strategy, the Committee created a differential supervision structure which includes three levels of supervision.

Structure for Differential Pretrial Supervision

Level I

- ◆ Court date reminder for every court date
- ◆ Criminal history check before court date
- ◆ Face-to-face contact once a month
- ◆ Alternative contact once a month (telephone, e-mail, text, or others as approved locally)
- ◆ Special conditions compliance verification

Level II

- ◆ Court date reminder for every court date
- ◆ Criminal history check before court date
- ◆ Face-to-face contact every other week
- ◆ Alternative contact every other week (telephone, e-mail, text, or others as approved locally)
- ◆ Special conditions compliance verification

Level III

- ◆ Court date reminder for every court date
- ◆ Criminal history check before court date
- ◆ Face-to-face contact weekly
- ◆ Special condition compliance verification

In developing the three levels of supervision it was also acknowledged that there may be times when active supervision is not feasible for a particular defendant. In these cases defendants may be placed in monitoring status. Monitoring varies from all levels of supervision as there is no face-to-face contact requirement. Monitoring may be used to address extenuating circumstances and is not formally part of the differential supervision structure.

Release Recommendation and Differential Supervision Guidelines

The research-based guidelines are intended to be used by Virginia pretrial services agencies to guide pretrial release recommendations and differential pretrial supervision. Ideally, the guidelines will be implemented in a way that will include a rigorous research design that will allow for research that significantly contributes to and advances the pretrial services LEBP body of knowledge.

Risk Level/ Charge Category⁷⁶	Traffic: Non-DUI	Traffic: DUI	Non-violent Misd.	Failure to Appear	Theft/Fraud	Drug	Weapon	Violent
Low Risk								
PR – No Supervision	Yes	Yes	Yes	No	Yes	Yes	No	No
Pretrial Supervision	N/A	N/A	N/A	Yes	N/A	N/A	Yes	Yes
Supervision Level	N/A	N/A	N/A	I	N/A	N/A	I	I
Below Average Risk								
PR – No Supervision	Yes	No	Yes	No	No	No	No	No
Pretrial Supervision	N/A	Yes	N/A	Yes	Yes	Yes	Yes	Yes
Supervision Level	N/A	I	N/A	I	I	I	I	I
Average Risk								
PR – No Supervision	No	No	No	No	No	No	No	No
Pretrial Supervision	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Supervision Level	I	II	I	II	II	II	II	II
Above Average Risk								
PR – No Supervision	No	No	No	No	No	No	No	No
Pretrial Supervision	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Supervision Level	I	III	I	III	II	III	III	III
High Risk								
PR – No Supervision	No	No	No	No	No	No	No	No
Pretrial Supervision	Yes	No	Yes	Yes	Yes	No	No	No
Supervision Level	II	N/A	II	III	III	N/A	N/A	N/A

⁷⁶ The guidelines apply to cases for which the primary charge is categorized as one of the following: traffic non-DUI, traffic DUI, non-violent misdemeanor, failure to appear, theft/fraud, drug, weapon, and violent. The guidelines do not apply to other charge categories.

APPENDIX

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