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Public Defender Services

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The High Cost of Pretrial Detention and How It Affects Indigent Defense

Not Yet Proven Guilty

Roughly 450,000 people are in jail pretrial on any given day in the United States. Nearly two-thirds of all people in U.S. jails do not have a bond set or cannot make the bond set for them.[1] The average annual cost to American tax payers is $14 billion and most of these unconvicted arrestees are considered low-risk for reoffending or low-risk for missing future court dates.

Despite advocacy for bond reductions, public defenders daily face the fact that their clients remain in jail, unable to make their set bonds. Matters of bond and pretrial incarceration are interwoven issues. The Joint Technology Committee of State Court Administrators, State Courts, and Court Management concluded, "[b]etter pretrial decision-making can improve individual and community well-being, alleviate jail crowding, reduce costs, and increase the overall effectiveness of the criminal justice system" (JTC Resource Bulletin).

This newsletter examines the intertwined issues of pretrial justice and bail reform, exploring what is available in West Virginia at present and what opportunities are being explored. The goal is to review where West Virginia is and where it is headed on the topic of pretrial justice so public defenders may forge a path of data collection and embark on the road forward.

"A Very, Very Progressive State"

Jail and prison overcrowding have plagued West Virginia for nearly a decade. Between 1999 and 2013, West Virginia's incarceration rate increased by 52% (among the fastest in the nation in the last 20 years). The annual jail bill to counties is steadily eight-figures based on the rate of $48.25 per inmate per day for housing in West Virginia jails.

To address these growing jail numbers, pretrial release was made a formal intervention in West Virginia in July 2009 when five pilot projects were created by law. The goal of the pretrial release pilot programs was to save money on regional jail costs while making West Virginia safer and the criminal justice process more efficient. Non-violent misdemeanor and felony offenders could be diverted immediately back to the community by the magistrate on duty rather than going to jail and awaiting bond or trial. The pilot-program counties were Mercer, Brooke, Wood, Wayne, and Greenbrier. At the bill signing, Justice Robin Jean Davis said, "We are delighted with the signing of the bill. It shows we are a very, very progressive state and a very progressive Court."

Four years later, West Virginia's Justice Reinvestment Act implemented several new initiatives, again intended to slow the rate of incarceration growth and reduce prison overcrowding. To identify which defendants are least likely to return to court or reoffend on bond, Justice Reinvestment focused on implementation

[1] Bond and bail are used interchangeably without distinction.

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of a standardized risk assessment tool for use pretrial by the Regional Jail Authority. (At the same time a separate risk assessment conducted by the probation department post-felony conviction was created, then voided in March 2017, by the Supreme Court of Appeals). Counties were also given the authority to create pretrial release programs with guidelines and oversight by the Supreme Court of Appeals based on the aforementioned pilot programs.

Justice Reinvestment and Other Past Legislation

In late 2013, the Supreme Court of Appeals (hereafter "State Supreme Court") adopted the Ohio Risk Assessment System – Pretrial Assessment Tool (ORAS) for use by the Regional Jail Authority as their [jail] pretrial risk assessment model. The ORAS is considered a validated tool to help predict (ostensibly for bond purposes) a defendant's failure to appear at court dates and risk for re-arrest on a new offense. The West Virginia Code requires completion of these risk assessments within three calendar days of arrest and states the assessments are:

> confidential and shall only be provided to the court, court personnel, the prosecuting attorney, defense counsel and the person who is the subject of the pretrial risk assessment. Upon completion of the assessment, the authority shall provide it to the magistrate and circuit clerks for delivery to the appropriate circuit judge or magistrate (§31-20-5g. Pretrial Risk Assessment.).

The stated goal of the jail pretrial risk assessment, per the Magistrate Court Services Division, was for it to function as a tool available to help inform pretrial release decision-making. Results are confidential (except for the named parties) and inadmissible as evidence in court.

Three years after implementation of these pretrial risk assessments the FY2016 Annual Report on the Justice Reinvestment Initiative (S.B. 371) included the following statement on the function of the pretrial risk assessment:

> Pre-Trial-- In West Virginia, individuals can be held in a county or regional jail, a day report center or a home prior to trial. Currently, an eight-question risk assessment (ORAS) is conducted at a regional jail for all individuals, with the exception of the federally held inmates. The brief questionnaire was established to determine flight risk and was implemented in all regional jails beginning October 2013, in coordination with the Supreme Court. While ORAS is a useful tool for aiding decisions on which defendants are more or less at-risk to fail to appear in court, it is not adequate for guiding intensive treatment considerations for offenders at post-conviction. (p. 10)

While the above statement reflects the ORAS is conducted "for all individuals," it is at present unclear if the risk assessment is actually being used in pretrial determinations of bond or to determine a defendant's ability to be released pre-trial.

One year after implementation of the pretrial risk assessment, Senate Bill 307 (2014 legislative session) specifically addressed pretrial release programs (Chapter 62, Article 11F) stating "the purpose of pretrial release programs [is] to…[provide] for uniform statewide risk assessment and monitoring of those released prior to trial, facilitating a statewide response to the problem of overcrowded regional jails and costs to county commissions."

The State Supreme Court has complete oversight and authority over all pretrial services and has the role of establishing recommended guidelines for pretrial programs to use when ordering pretrial release for defendants. Implementation of the ORAS gained added emphasis under 2014's Senate Bill 307, seemingly with the goal of releasing low-risk individuals pre-trial to save money and reduce jail crowding.

Pretrial release programs are a targeted money saving effort, but it is hard to know how pervasive pretrial release programs are overall in West Virginia because the pilot programs were not continued by law and operations of pretrial release programs are not as formalized as drug courts.

All for Naught?

In the fall of 2016, a University of Charleston intern to Public Defender Services

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contacted three Regional Jail Authority Administrators at South Central, Western, and North Central Regional Jails. The objective was to hear what perspectives the jail administrators had on the pretrial risk assessment and any impact the risk assessments have had on their population statistics.

Each administrator reported their jail complies with the pretrial risk assessment, but each indicated the assessment does not impact bond or it is unclear to them what role it plays in bond. These jail administrators state their staff complete the assessments and send them on to the magistrate personnel, yet the jail inmate population is rising. Specifically, these three administrators see no correlation between completion of the pretrial risk assessment and bond reductions.

Anecdotal interviews of public defender offices support the lack of a correlation between bond reductions and the pretrial risk assessment. In fact, not all public defender offices receive copies of the pretrial risk assessment as the Code directs.

Despite years of strategic efforts, policy change, and changes in law to address jail and prison overcrowding, incarceration counts are higher today than in the years before Justice Reinvestment was passed. Even though specific measures to address and reduce pretrial detention in regional jails have been implemented, West Virginia's incarceration numbers nearly doubled from 5,500 inmates in 2000 to 10,270 inmates in 2016 (official DOC numbers show different inmate counts, but still show a nearly-doubled population in this same time period).

The [Worsening] State of Pretrial Justice

The law is clear that conditions of pretrial release must address public safety and a defendant's return to court while also weighing pretrial liberty. Yet the sheer number of people in jail pretrial cannot be representative of those posing a danger to society or a flight risk (especially given the present rate of violent crime is nearly half what it was during its peak in the 1990s). The natural conclusion is that people are in jail pretrial because they either do not have a bond set in their case or, more likely, because they cannot afford their bond.

There is evidence that pretrial detention can actually make offenders more likely to cycle back into the criminal justice system. Based on a 2013 study, even short periods in jail, pretrial, for low-and-moderate risk defendants can contribute to future criminal activity, increase the likelihood of an incarceration sentence, and increase the average length of the incarceration sentence. "Research has demonstrated that detained defendants receive more severe sentences, are offered less attractive plea bargains and are more likely to become 'reentry' clients because of their pretrial detention – regardless of charge or criminal history."

A Pew Charitable Trust study also found that incarceration reduces earnings of the previously incarcerated by 40 percent compared with those who have never been incarcerated. Therefore, unnecessary pretrial detention can do more harm than good for some offenders while weakening the communities to which they return (when considering lower earning potential and recidivism rates).

Beginning in 1968, the American Bar Association created standards for pretrial release and has steadily updated these over the last four decades. The Standards make clear that the decision to detain or release a defendant is an in jail/out of jail, bail/no bail decision. Their fundamental belief is that pretrial release is best served by the reduction in the use of money bail.

While the ABA has been consistent in promoting their Standards and the reduction in the use of money bail, they have not formally measured their progress towards implementation. The Pretrial Justice Institute (hereafter PJI) did review the states' operations and in November 2017 released their pretrial justice "report card" that evaluated how states are doing regarding pretrial justice reforms. The publication, "The State of Pretrial Justice in America," issued "report cards" for each state after analyzing: the rate of unconvicted people in local jails; percentage of people living in a jurisdiction that uses evidence-based pretrial assessment to inform pretrial decisions; and percent of a state's population living in a jurisdiction that has functionally eliminated money bail. Scores ranged from an A to an F, and only New Jersey earned an A (New Jersey also was the only state to have eliminated the use of money

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bail). There were eight Bs, ten Cs, thirteen Ds, and seventeen Fs. West Virginia earned an F.

West Virginia earned an F grade from PJI in part based on a score of zero for not using a validated pretrial risk assessment and 0% of people living in a county where a pretrial risk assessment is used. The question is how West Virginia could score a zero knowing that West Virginia adopted a version of the ORAS for pretrial risk assessment and the Code states that pretrial risk assessments are to be administered within three calendar days of arrest. The results of the PJI report suggest the ORAS is not being used in pretrial decision making in a uniformly measurable way and that the pretrial risk assessment is not extensively used.

As the only state to earn an A on the PJI report, New Jersey is gaining a lot of attention for its quick success and positive outcomes from pretrial justice reform. New Jersey began making changes in 2014 when it passed legislation that mandated the creation of pretrial services agencies statewide to conduct pretrial risk assessments and make release recommendations to the court. New Jersey judges must state on the record why money bail is necessary. New Jersey voters approved a constitutional amendment that allowed the court to detain persons pretrial rather than release before trial if risk warranted this (because high-risk offenders who could post bail would be released, while low-risk offenders who could not afford bail stayed in). The quick turnaround on pretrial detention changes in New Jersey has produced a 15% drop in citizens in jail awaiting trial in the first six months of implementation of the law. Public safety was improved and overall crime rates dropped statewide during the first nine months of 2017.

Pretrial Risk Assessments and Pretrial Release Agencies

With the positive outcomes in New Jersey and so many options available to make pretrial operations more just, it may seem unclear why some tools and strategies work and others do not. Based solely on longevity in trying to tackle this issue and incorporate pretrial risk assessments, Kentucky should provide clarity. Yet despite their mandate for pretrial risk assessments, not all Kentucky judges trust the science behind the assessments and rely instead on their "gut instincts." Fayette County (KY) Judge Julie Goodman said, "I do think [the pretrial risk assessment is] a good tool. But it is nothing other than a tool."

In the end, pretrial assessment tools may be available for use and implementation, but it is the judges who make the determinations and maintain judicial discretion. In fact, this tension between statistical analysis and judicial experience is not unusual and is one of the problems that prevents full implementation of pretrial justice reform.

In the United States, the use of pretrial risk assessments began gaining traction more than a decade ago as a strategy to determine who is most at risk to the community and who is least likely to return for future court dates. Those studying pretrial risk assessments at the time found that "for the poor, bail means jail," and pretrial risk assessments were a mechanism to even the playing field that money bail had imbalanced. Good pretrial risk assessments are intended to simply look at statistical standards of risk to the community (harm and/or recidivism) and flight risk, while controlling for gender and race.

Humans are not statistics, obviously, so there is always an outlier that calls these risk assessments into question and disrupts the implementation process. In Kentucky, the outlier took the form of persons who had escaped from custody yet were still scored at a low-to-moderate level of risk. In California (which uses the same pretrial risk assessment as Kentucky), the outlier came in the form of a repeat offender who should have scored high, but human error miscalculated the number of prior jail days and the result was a preventable murder while the defendant was on bond for another, unrelated charge.

The risk assessment used in Kentucky and California (and many other locations) is the Laura and John Arnold Foundation Public Safety Assessment. This computer-generated assessment has risen to the top among other similarly focused assessments, in part because the funding behind the tool has allowed for comprehensive comparisons of offenders for increased validity and more accurate determinations.

An accurate, validated, evidence-based risk assessment is not the sole solution to costly pretrial detention. The judiciary must receive information and education about the use, effectiveness, and

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background of these risk assessments and how evidence-based assessments differ from other versions.

Additionally, some pretrial risk assessments are costly and staffing for pretrial services adds another layer of cost. There must be an entity trained to conduct the pretrial risk assessments such as pretrial programs or release agencies who can then monitor defendants to measure their compliance with pretrial release conditions. In New Jersey, the addition of pretrial release agencies was in the millions of dollars.

Seeking Solutions Statistically

The Pretrial Justice Institute (PJI) describes as its core purpose "to advance safe, fair, and effective juvenile and adult pretrial justice practices and policies that honor and protect all people." One way they do this is through research and evaluation of pretrial incarceration numbers across the country to determine the circumstances that reduce pretrial incarceration without sacrificing community safety or court compliance.

PJI ranked defendants and placed them into categories based on their likelihood to succeed on pretrial monitoring and court follow-up. PJI measured outcomes for defendants where pretrial risk and supervision were in place and money bail was eliminated. Defendants with low risk scores (only needing a reminder of their court date) were over 90% likely to show up to court and stay out of trouble on bond. Those needing some monitoring in addition to a reminder for court had a 75% chance of showing up for court and staying out of trouble. Those requiring the most support (including mandatory in-person visits and/or electronic monitoring) resulted in approximately half of the defendants successfully appearing at court and staying out of trouble on bond. (A link to PJI's matrix of pretrial release conditions by risk level follows at the end of this newsletter in the Resources section).

The point that PJI and several states make is one not lost on public defenders: payment of money does not guarantee adherence to bond conditions and a return to court. Money is simply a barrier to release from jail. Instead, meaningful assessment of risk and imposition of a corresponding structure is a more effective strategy.

Legislative Progress in West Virginia

A hefty bill passed this legislative session, House Bill 4338, and was signed by Governor Justice; it goes into effect July 1, 2018. The short summary is the Bill reorganized and reconfigured powers and compensation related to the Division of Corrections – soon to become the Division of Corrections and Rehabilitation. The way this could impact pretrial justice is through housing and a specific, stated goal for release from incarceration. On page 14 of the enrolled version of the Bill (lines 6-13), the Bill states,

> It is the intent of the Legislature…That persons held in pretrial detention, and committed to jails and correctional institutions of the state for whom release is available for crimes, be afforded appropriate treatment to reestablish their ability to live peaceably, consistent with the protection of the community; That persons committed to jails and correctional institutions of the state be released at the earliest possible date, consistent with public safety.

The concepts of treatment and release at the "earliest possible date" are not outlined more explicitly in this Bill but are worthy objectives if the opportunities for timely and quality treatment and expedited release are readily available to our clients. No changes were recommended for the pretrial risk assessment tool. (The Bill is worth reading due to the organizational changes, changes in inmate fees, and the housing, movement, and transfer of inmates – that will take effect July 1; not all issues are directly related to pretrial inmates but do impact adults and juveniles under incarceration supervision).

In looking at bail reform, eliminating money bail is a natural consideration and several measures were considered this past legislative session. House Bill 4160 seemed to have the most direct approach to linking money bail, pretrial release, and incarceration costs, though it died in Committee. House Bill 4173 also died in Committee but focused on the use of *evidence-based* (emphasis mine) pretrial risk assessments and the authority of magistrates to set bail contrary to the pretrial risk assessment with an order supporting written findings of fact and law.

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House bill 4511 was also introduced during the past legislative session and seemed to make it the farthest on the bail reform front. H.B. 4511 proposed magistrates set PR bonds in misdemeanor cases except in certain charges involving drugs, weapons, violence, minors, or serious traffic accidents, and also floated the idea of a bail schedule. While H.B. 4511 passed the House, the Senate Judiciary Committee initially eliminated the bail schedule before voting to turn the bill into a study resolution which allows for a broader review of bail reform with research and input.

The study resolution tasks the Joint Committee on the Judiciary to study the modification of criminal proceedings pertaining to bail requirements (including allowances of magistrates to release misdemeanants on PR bonds) and the potential creation of a sentencing commission. There is indication presently that some legislators remain interested in bail reform, but a future legislative session and outcomes of the Joint Committee's study resolution will have to determine what steps are taken.

Final Words on Reform

West Virginia started the process of pretrial justice reform in 2009 and added to these efforts in 2013 with Justice Reinvestment and other measures. Yet the number of pretrial inmates in regional jails is still high and West Virginia's overall incarceration rate is high. The pretrial risk assessment is not widely known or used in bond determinations, and pretrial release programs are limited and much less formalized than the 2009 pilot projects envisioned.

By comparison, New Jersey mounted an impressive but expensive solution to the pretrial justice/bail reform problem by implementing pretrial risk assessments and formalized pretrial release programs. They also eliminated money bail. New Jersey's investment was costly, but the benefits will ultimately convert into cost savings in the form of reduced jail days, increased employment of offenders, and decreased repeat criminal justice contact.

Nearly a decade ago West Virginia had a similar vision to reduce overcrowding through pretrial justice initiatives and laid much of the groundwork in law. West Virginia is now considering additional bail reform options through a study resolution by the Joint Committee on the Judiciary. The information that will likely be presented to the Joint Committee will be anecdotal in nature and based on what is perceivable or available for presentation. Hard data and links between risk and release, money bail and reoffending, is not widely kept or available in West Virginia.

West Virginia has a Unified Judicial Application database where magistrate clerks enter data on criminal charges, bonds, and jail admission and release dates. The 2016 University of Charleston intern to PDS found that not all records entered into the Unified Judicial Application are complete, therefore jail release dates or bond types may not be listed in every case. One strategy available to West Virginia's public defenders is to undertake in-house data collection on defendants incarcerated pretrial. The risk of missing data is still possible if public defenders maintain their own pretrial data, but public defenders may see trends emerge related to types of crime or bond amounts set and this may shape advocacy at bond hearings and moving forward.

Many of West Virginia's public defenders are independently mounting efforts to highlight the costs of detaining poor defendants pretrial by including this information in bond reduction motions that cite the daily costs to taxpayers for keeping poor, low-risk defendants in jail rather than returning them to the community. Public defender files offer an internal snapshot of information on charges, bail types and amounts, average number of pretrial jail days, and statistics on returning for court dates (versus capiases).

With data, continued measures to highlight risk and cost are essential to understanding pretrial justice issues lest the legislature rely on anecdotal information that does not accurately depict the plight of our clients or our communities. Public defenders know that if safe, reliable, and low-risk defendants are released pretrial, the county does not have an inflated jail bill and pretrial defendants may be able to restore a portion of their lives while awaiting resolution of their criminal case.

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Resources:

- For a rallying cry on bail reform, watch Robin Steinberg's April 2018 TED Talk. Steinberg is a public defender and the CEO of The Bail Project.
- PJI's matrix of pretrial release conditions by risk level found on page 4, Figure 1 of "What Pretrial Systems Look Like Without Money Bail."
- Chart (below) from Vera Institute, https://bit.ly/2M1Imcu

