

THE WEST VIRGINIA PRETRIAL ACT LEGISLATIVE INTENT

Purpose: It is the purpose of this article is to authorize the Supreme Court of Appeals of West Virginia to establish, develop and maintain a pretrial program in any county, circuit, or any combination thereof, to provide the judicial system with a comprehensive pretrial program for misdemeanors and felony offenders who may require less than regional jail custody.

The article shall be interpreted and construed so as to effectuate the following purposes:

1. To require monitoring of the pretrial release conditions, specifically designed to ensure effective protection of society and uniformity, and efficiency and economy in the delivery of pretrial services;
2. To assist West Virginia County Commissions in saving on the cost of pretrial detention;
3. To assist the State of West Virginia in addressing the jail overcrowding problem;
4. To operate under the premise that those accused of committing a crime are presumed innocent until proven guilty and are entitled to a reasonable bail and the least restrictive conditions possible, balancing their likelihood to appear in court against any present risk to public safety.

Establishment of pretrial system—To employ recommendations from the Council of State Government's Justice Center's Analyses and Policy Options to Reduce Spending on Corrections and Reinvest in Strategies to Increase Public Safety, by providing 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.

WV Supreme Court Administrative Office—The Administrative Office of the Supreme Court of Appeals of West Virginia (AO) shall have complete oversight and authority over all pretrial services. The AO shall establish guidelines, rules and policies of all pretrial programs.

Community Corrections Subcommittee— The Community Corrections Subcommittee of the Governor's Committee on Crime, Delinquency and Corrections (W.Va. Code § 62-11C-2) shall

approve standards for the development, maintenance and evaluation of West Virginia's pretrial services. Any county, circuit, or combination thereof that establishes a pretrial program intended to provide services pursuant to the article shall submit a grant proposal to the Community Corrections Subcommittee of the Governor's Committee on Crime, Delinquency and Corrections for review and approval.

Mandated pretrial services:—Any county, circuit, or combination thereof, which elects or is required to establish a pretrial program pursuant to this article shall provide pretrial services to the judicial system.

Establishment of Community Criminal Justice Boards—Any county, circuit, or combination thereof, which elects or is required to establish a pretrial program pursuant to this article shall establish a local Community Criminal Justice Board to oversee and fund sustenance of its pretrial program.

Establishment of Community Pretrial Committees— Any county, circuit, or combination thereof, which elects or is required to establish a pretrial program pursuant to this article shall establish a local Community Pretrial Committee, consisting of a prosecutor, county commissioner, sheriff, executive director of community criminal justice board, chief probation officer, and member of the defense bar where available. The committee shall meet once per week at a designated time to review and recommend monitored conditional pretrial release of offenders to the court.

Funding—

1. The State of West Virginia shall provide the Community Corrections Subcommittee of the Governor's Committee on Crime, Delinquency and Corrections up to one million dollars in funding for local pretrial programs.
2. The local Community Criminal Justice Board may assess a fee to the County Commission in the amount of \$7.00 per offender per day of monitoring on pretrial supervision.

3. The local Community Criminal Justice Board may charge an offender who is placed on monitored conditional pretrial release thirty dollars per month supervision fee.

Senate Bill No. 584

(By Senators Cann, Green, Wells, Walters,

Palumbo, Laird, Miller, Tucker, Snyder,

Kessler (Mr. President), Kirkendoll, Stollings, Cookman, Plymale and Fitzsimmons)

[Introduced March 20, 2013; referred to the Committee on the
Judiciary .]

A BILL to amend and reenact §62-11C-5 and §62-11C-7 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto a new article, designated §62-11F-1, §62-11F-2, §62-11F-3, §62-11F-4 and §62-11F-5, all relating to authorizing community corrections programs to operate pretrial release program; legislative findings; establishing guidelines; and setting fees.

Be it enacted by the Legislature of West Virginia:

That §62-11C-5 and §62-11C-7 of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that said code be amended by adding thereto a new article, designated §62-11F-1, §62-11F-2, §62-11F-3, §62-11F-4 and §62-11F-5, all to read as follows:

ARTICLE 11C. THE WEST VIRGINIA COMMUNITY CORRECTIONS ACT.

§62-11C-5. Establishment of programs.

(a) Any county or combination of counties or a county or counties and a Class I or II municipality may establish and operate community corrections programs, as provided for in this section, to be used both prior to trial as a condition of bond in circuit and magistrate court, as well as an alternative sentencing option for those offenders sentenced within the jurisdiction of the county or counties which establish and operate the program: *Provided*, That the chief judge must certify that the community corrections facility is available for use in connection with the imposition of pretrial bond conditions.

(b) Any county or combination of counties or a county or counties and a Class I or II municipality that seek to establish programs as authorized in this section shall submit plans and specifications for the programs to be established, including proposed budgets, for review and approval by the community corrections subcommittee established in section three of this article.

(c) Any county or combination of counties or a county or counties and a Class I or II municipality may establish and operate an approved community corrections program to provide alternative sanctioning options for an offender who is convicted of an offense for which he or she may be sentenced to a period of incarceration in a county or regional jail or a state correctional facility and for which probation or home incarceration may be imposed as an alternative to incarceration.

(d) Community corrections programs authorized by subsection (a) of this section may provide, but are not limited to providing, any of the following services:

- (1) Probation supervision programs;
- (2) Day fine programs;
- (3) Community service restitution programs;
- (4) Home incarceration programs;
- (5) Substance abuse treatment programs;
- (6) Sex offender containment programs;

- (7) Licensed domestic violence offender treatment programs;
- (8) Day reporting centers;
- (9) Educational or counseling programs;
- (10) Drug courts; ~~or~~
- (11) Community beautification and reclamation programs for state highways, municipal, county and state parks and recreation areas, and community gardens; and
- (12) Pretrial release programs.

(e) A county or combination of counties or a county or counties and a Class I or II municipality which establish and operate community corrections programs as provided for in this section may contract with other counties to provide community corrections services.

(f) For purposes of this section, the phrase "may be sentenced to a period of incarceration" means that the statute defining the offense provides for a period of incarceration as a possible penalty.

(g) No provision of this article may be construed to allow a person participating in or under the supervision of a community corrections program to earn "good time" or any other reduction in sentence.

§62-11C-7. Supervision or participation fee.

(a) A circuit judge, magistrate, municipal court judge or community criminal justice board may require the payment of a supervision or participation fee from any person required to be supervised by or participate in a community corrections program. The circuit judge, magistrate, municipal court judge or community criminal justice board shall consider the person's ability to pay in determining the imposition and amount of the fee.

(b) All fees ordered by the circuit court, magistrate court, municipal court or community criminal justice board pursuant to this section are to be paid to the community criminal justice board, who shall remit the fees monthly to the treasurer of the county designated as the fiscal agent for the board pursuant to section six of this article.

(c) A circuit judge, magistrate or community criminal justice board may require the payment of a supervision or participation fee of \$7 per offender per day of "pretrial" supervision from the county commission wherein said offender is charged pursuant to a pretrial release program established pursuant to section five, article eleven-c, chapter sixty-two of this code.

(d) A circuit judge, magistrate or community criminal justice board may also require payment of a supervision or participation fee or \$30 per month from an offender for "pretrial" supervision pursuant to a pretrial release program established pursuant to section five, article seven, chapter sixty-two and section seven, article eleven-c, chapter sixty-two of this code.

ARTICLE 11F. PRETRIAL RELEASE PROGRAMS.

§62-11F-1. Applicability.

This article applies to adult defendants who have been charged with either a misdemeanor or felony and, are incarcerated in a regional jail prior to an adjudication of guilt or innocence.

§62-11F-2. Establishment of Pretrial Release Programs.

(a) It is the purpose of Pretrial Release Programs to employ recommendations from the Council of State Government's Justice Center's Analyses and Policy Options to Reduce Spending on Corrections and Reinvest in Strategies to Increase Public Safety, by providing 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.

(b) Any county, circuit, or combination thereof, which elects or is required to establish a pretrial program pursuant to this article shall establish a local Community Pretrial Committee which consists of a prosecutor; county commissioner; sheriff; executive director of the community corrections program; chief probation officer; and a member of the defense bar where available. The committee shall meet, at a minimum, once per week to review and recommend pretrial release of offenders to the Court.

(c) Pretrial Release Programs shall be funded by appropriations made to the Supreme Court of

Appeals for such purpose..

§62-11F-3. Pretrial Release Program Guidelines.

(a) The Supreme Court of Appeals of West Virginia shall have complete oversight and authority over all pretrial services.

(b) The Supreme Court of Appeals of West Virginia shall establish recommended guidelines for pretrial programs to use when ordering pretrial release for defendants whose pretrial risk assessment indicate that they are an appropriate candidate for pretrial release.

(c) The Community Corrections Subcommittee of the Governor's Committee on Crime, Delinquency and Corrections, pursuant to section two, article eleven c, chapter sixty-two, shall approve policy and funding for the development, maintenance and evaluation of pretrial release programs. Any county, circuit or combination thereof that establishes a pretrial program intended to provide pretrial release services shall submit a grant proposal to the Community Corrections Subcommittee of the Governor's Committee on Crime, Delinquency and Corrections for review and approval.

§62-11F-4. Pretrial Release Assessment.

The Supreme Court of Appeals of West Virginia may adopt a standardized pretrial risk assessment for use by Pretrial Release Programs to aid in making pretrial decisions under article one-c of this chapter.

§62-11F-5 Role of Pretrial Release Programs

(a) Any county, circuit or combination thereof, which elects or is required to establish a pretrial program shall collect and present the necessary information, present risk assessment, and make release recommendations to the Court.

(b) Pretrial services shall also monitor, supervise, and assist defendants released prior to trial and review the status and release eligibility of detained defendants for the court on an ongoing basis.

(c) Pretrial Release Programs shall:

(1) Present accurate information to the court relating to the risk defendants may pose in failing to appear in court or of threatening the safety of the community or any other person and, consistent with court policy, develop release recommendations responding to risk;

(2) Develop and provide appropriate and effective supervision for all persons released pending adjudication who are assigned supervision as a condition of release;

(3) Monitor compliance of released defendants with the requirements of assigned release conditions;

(4) Promptly inform the court of all apparent violations of pretrial release conditions or arrests of persons released pending trial, including those directly supervised by pretrial services as well as those released under other forms of conditional release, and recommended appropriate modifications of release conditions;

(5) Coordinate the services of other agencies, individuals or organizations that may serve as custodians for released defendants, and advise the court as to their appropriateness, availability, reliability and capacity relating to pretrial release conditions;

(6) Review the status of detained defendants on ongoing basis for any changes in eligibility for release options and facilitate their release as soon as feasible and appropriate;

(7) Develop and operate an accurate information management system to support prompt identification, information collections and presentation, risk assessment, release conditions selection, compliance monitoring and detention review functions essential to an effective pretrial release program; and

(8) Remind persons released before trial of their court dates to attempt to facilitate their court appearance.

NOTE: The purpose of this bill is authorize pretrial release programs to evaluate and supervise

persons on pretrial release as part of a community corrections program.

§62-11F-1, §62-11F-2, §62-11F-3, §62-11F-4 and §62-11F-5 are new; therefore, strike-throughs and underscoring have been omitted.

Strike throughs indicate language that would be stricken from present code, and underscoring indicates new language that would be added.

WV REGIONAL JAIL AUTHORITY
JAIL COSTS BY COUNTY - FISCAL YEARS 2010 - 2012

County	FY 2012	FY 2011	FY 2010	% Change FY 10 - FY 12
Barbour County	\$258,786	\$212,378	\$156,513	65%
Berkeley County	\$3,226,900	\$2,849,575	\$2,593,790	24%
Boone County	\$925,199	\$891,039	\$797,335	16%
Braxton County	\$383,910	\$380,892	\$243,628	58%
Brooke County	\$274,061	\$356,533	\$340,005	(19%)
Cabell County	\$3,528,533	\$2,891,504	\$2,736,760	29%
Calhoun County	\$97,112	\$153,915	\$118,750	(18%)
Clay County	\$373,125	\$390,777	\$368,125	1%
Doddridge County	\$163,773	\$181,341	\$106,068	54%
Fayette County	\$871,129	\$808,030	\$878,274	(1%)
Gilmer County	\$190,466	\$167,048	\$113,905	67%
Grant County	\$456,182	\$322,910	\$331,360	38%
Greenbrier County	\$579,354	\$560,102	\$601,873	(4%)
Hampshire County	\$525,527	\$495,125	\$480,985	9%
Hancock County	\$514,645	\$487,902	\$453,815	13%
Hardy County	\$421,974	\$390,986	\$396,340	6%
Harrison County	\$1,756,800	\$1,749,773	\$1,430,746	23%
Jackson County	\$775,871	\$669,829	\$573,515	35%
Jefferson County	\$1,170,858	\$1,037,892	\$1,113,496	5%
Kanawha County	\$4,440,410	\$4,389,912	\$4,041,500	10%
Lewis County	\$300,364	\$249,600	\$306,993	(2%)
Lincoln County	\$535,678	\$404,845	\$356,108	50%
Logan County	\$1,047,394	\$1,006,444	\$789,830	33%
Marion County	\$1,578,387	\$1,236,453	\$1,216,191	30%
Marshall County	\$605,364	\$611,214	\$546,180	11%
Mason County	\$726,486	\$489,025	\$569,668	28%
McDowell County	\$682,712	\$1,068,183	\$1,061,863	(36%)
Mercer County	\$1,574,190	\$1,346,587	\$1,443,525	9%
Mineral County	\$865,078	\$746,644	\$651,843	33%
Mingo County	\$999,473	\$994,429	\$1,452,123	(31%)
Monongalia County	\$1,505,285	\$1,470,100	\$1,222,033	23%
Monroe County	\$189,637	\$184,171	\$141,313	34%
Morgan County	\$487,707	\$531,358	\$414,200	18%

WV REGIONAL JAIL AUTHORITY
JAIL COSTS BY COUNTY - FISCAL YEARS 2010 - 2012

County	FY 2012	FY 2011	FY 2010	% Change FY 10 - FY 12
Nicholas County	\$913,536	\$782,801	\$884,213	3%
Ohio County	\$837,554	\$767,038	\$828,068	1%
Pendleton County	\$93,842	\$121,951	\$91,865	2%
Pleasants County	\$111,118	\$103,163	\$79,990	39%
Pocahontas County	\$294,313	\$267,717	\$274,075	7%
Preston County	\$402,405	\$382,250	\$367,745	9%
Putnam County	\$1,333,314	\$1,153,046	\$1,010,800	32%
Raleigh County	\$2,315,170	\$2,372,998	\$2,077,935	11%
Randolph County	\$503,909	\$554,217	\$686,898	(27%)
Ritchie County	\$175,046	\$128,783	\$118,275	48%
Roane County	\$379,762	\$403,348	\$437,048	(13%)
Summers County	\$258,152	\$244,244	\$201,305	28%
Taylor County	\$182,951	\$252,784	\$216,268	(15%)
Tucker County	\$56,167	\$57,875	\$56,193	(0%)
Tyler County	\$145,326	\$185,635	\$136,515	6%
Upshur County	\$465,357	\$522,111	\$554,135	(16%)
Wayne County	\$905,923	\$682,029	\$809,543	12%
Webster County	\$563,884	\$348,793	\$501,933	12%
Wetzel County	\$334,622	\$319,006	\$203,015	65%
Wirt County	\$80,569	\$54,802	\$84,788	(5%)
Wood County	\$2,089,079	\$1,855,770	\$1,658,558	26%
Wyoming County	\$1,022,458	\$922,954	\$731,738	40%
Grand Totals	\$45,496,824	\$42,209,831	\$40,059,545	14%

Per Diem Rate	\$48.80	\$48.80	\$47.50	3%
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Rate Growth - 3%

Volume Growth - 11%



BROOKE COUNTY SHERIFF'S OFFICE
300 COURT HOUSE SQUARE
WELLSBURG, WV 26070
VOICE: (304) 737-3660
FAX: (304) 737-3046

January 10, 2013

James Lee
Probation Office
840 Charles Street
Wellsburg, WV 26070

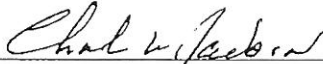
Sir:

Per your request I have compiled the actual expenditures made by Brooke County for housing prisoners at the Northern Regional Jail. Below are listed the amounts, and fiscal years, of the expenditures.

Fiscal Year	Total Expenditure for Housing of Prisoners (Misdemeanor Sentencing and Pre-Trial Incarcerations)
2006-2007	\$483,694.00
2007-2008	\$410,149.00
2008-2009	\$527,532.00
2009-2010	\$327,386.00
2010-2011	\$370,652.00
2011-2012	\$278,745.00
2012-2013 (First Half) July 1, 2012-December 31, 2012	\$126,538.00

If you need further assistance, please do not hesitate to contact my office.

Respectfully,



Sheriff Charles W. Jackson

CWJ

**BROOKE COUNTY INCARCERATED INMATES FOR 2012
SAMPLE**

January 30, 2012 – 17

February 27, 2012 – 12

March 26, 2012 – 15

April 30, 2012 – 20

May 29, 2012 – 18

June 11, 2012 – 14

July 16, 2012 – 11

August 13, 2012 – 14

September 4, 2012 – 20

October 1, 2012 – 21

November 18, 2012 – 12

December 16, 2012 – 13

*Total days of incarceration for sampling – 187

*Average daily incarceration inmates for sampling period – 15.58 inmates daily

Approved

CONFERENCE OF CHIEF JUSTICES

Resolution 3

Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial Release

WHEREAS, pretrial judicial decisions about release or detention of defendants before disposition of criminal charges have a significant, and sometimes determinative, impact on thousands of defendants every day; and

WHEREAS, pretrial release decisions add great financial stress to publicly funded jails holding defendants who are unable to meet financial conditions of release; and

WHEREAS, many of those incarcerated pretrial do not present a substantial risk of failure to appear or a threat to public safety, but do lack the financial means to be released; and

WHEREAS, evidence-based assessment of the risk that a defendant will fail to appear or will endanger others, if released, can increase successful pretrial release without imposing unnecessary financial conditions that many defendants are unable to meet; and

WHEREAS, defendants who are detained can suffer job loss, home loss, and disintegrated social relationships, and, according to the Bureau of Justice Assistance, "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;" and

WHEREAS, imposing conditions on a defendant that are appropriate for that individual following a valid pretrial assessment substantially reduces pretrial detention without impairing the judicial process or threatening public safety; and

WHEREAS, in 2012 the Conference of State Court Administrators (COSCA) adopted a Policy Paper on Evidence-Based Pretrial Release, which concludes with the following recommendations to state court leaders:

- Analyze state law and work with law enforcement agencies and criminal justice partners to propose revisions that are necessary to support risk-based release decisions of those arrested and ensure that non-financial release alternatives are utilized and that financial release options are available without the requirement for a surety;

- Collaborate with experts and professionals in pretrial justice at the national and state levels;
- Take the message to additional groups and support dialogue on the issue;
- Promote the use of data including determining what state and local data exist that would demonstrate the growing problem of jail expense represented by the pretrial population, and that show the risk factors presented by that population may justify broader pretrial release; and
- Reduce reliance on bail schedules in favor of evidence-based assessment of pretrial risk of flight and threat to public safety.

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices commends and endorses the Policy Paper on Evidence-Based Pretrial Release and joins with Conference of State Court Administrators to urge that court leaders promote, collaborate, and accomplish the adoption of evidence-based assessment of risk in setting pretrial release conditions and advocate for the presumptive use of non-financial release conditions to the greatest degree consistent with evidence-based assessment of flight risk and threat to public safety and to victims of crimes.

Proposed by the CCJ/ COSCA Criminal Justice Committee at the Conference of Chief Justices 2013 Midyear Meeting on January 30, 2013.

2012-2013 Policy Paper Evidence-Based Pretrial Release

Final Paper



Author

Arthur W. Pepin, Director
New Mexico Administrative Office of the Courts

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Table of Contents

Glossary of Terms.....	1
I. Introduction	2
II. The Law.....	2
III. The Consequences of Pretrial Release versus Incarceration.....	4
IV. Evidence-Based Risk Assessment: The Lesson of <i>Moneyball</i> and the Challenge of Adopting New Practices.....	5
V. The Way Forward	10

Glossary of Terms

Bail – Bail refers to a deposit or pledge to the court of money or property in order to obtain the release from jail of a person accused of a crime. It is understood that when the person returns to court for adjudication of the case, the bail will be returned in exchange. If the person fails to appear, the deposit or pledge is forfeited. There is no inherent federal Constitutional right to bail; a statutory right was first created in the 1960s.

Bond – A term that is used synonymously with the term “bail” and “bail bond.” (*See above*).

Citation release – a form of nonfinancial pretrial release in which the defendant is issued a written citation, usually at the time of arrest, and signs the citation pledging to appear in court when required.

Commercial bail agent/bondsman – a third party business or person who acts as a surety on behalf of a person accused of a crime by pledging money or property to guarantee the appearance of the accused in court when required.

Compensated surety – a bond for which a defendant pays a fee to a commercial bail agent, which is nonrefundable.

Conditional release – a form of nonfinancial pretrial release in which the defendant agrees to comply with specific kinds of supervision (e.g., drug testing, regular in-person reporting) in exchange for release from jail).

Deposit bond - a bond that requires a defendant to post a deposit with the court (usually 10% of the bail amount), which is typically refunded upon disposition of the case.

Full cash bond – a bond deposited with the court, the amount of which is 100% of the bail amount. The bond can be paid by anyone, including the defendant.

Pretrial - The term “pretrial” is used throughout this paper to refer to a period of time in the life of a criminal case before it is disposed. The term is a longstanding convention in the justice field, even though the vast majority of criminal cases are ultimately disposed through plea agreement and not trial.

Property bond – a bond that requires the defendant to pledge the title of real property valued at least as high as the full bail amount.

Release on recognizance – a form of nonfinancial pretrial release in which the defendant signs a written agreement to appear in court when required and is released from jail.

Surety – a person who is liable for paying another's debt or obligation.

Surety bond – a bond that requires the defendant to pay a fee (usually 10% of the bail amount) plus collateral if required, to a commercial bail agent, who assumes responsibility for the full bail amount should the defendant fail to appear. If the defendant does appear, the fee is retained by the commercial bail agent.

I. Introduction

Pretrial judicial decisions about release or detention of defendants before disposition of criminal charges have a significant, and sometimes determinative, impact on thousands of defendants every day while also adding great financial stress to publicly funded jails holding defendants who are unable to meet financial conditions of release. Many of those incarcerated pretrial do not present a substantial risk of failure to appear or a threat to public safety, but do lack the financial means to be released.¹ Conversely, some with financial means are released despite a risk of flight or threat to public safety, as when a bond schedule permits release upon payment of a pre-set amount without any individual determination by a judge of a defendant's flight risk or danger to the community. Finally, there are individuals who, although presumed innocent, warrant pretrial detention because of the risks of flight and threat to public safety if released.

Evidence-based assessment of the risk a defendant will fail to appear or will endanger others if released can increase successful pretrial release without financial conditions that many defendants are unable to meet. Imposing conditions on a defendant that are appropriate for that individual following a valid pretrial assessment substantially reduces pretrial detention without impairing the judicial process or threatening public safety. The Conference of State Court Administrators advocates that court leaders promote,

collaborate toward, and accomplish the adoption of evidence-based assessment of risk in setting pretrial release conditions. COSCA further advocates the presumptive use of non-financial release conditions to the greatest degree consistent with evidence-based assessment of flight risk and threat to public safety and to victims of crimes.

II. The Law

The Supreme Court of the United States has said, "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."² The right to bail has been a part of American history in varying degrees from the beginning -- 1641 in Massachusetts and 1682 in Pennsylvania. Other state constitutions adopted the Pennsylvania provision as a model.³ Nine states and Guam follow the pattern of the United States Constitution by prohibiting "excessive bail" without explicitly guaranteeing the right to bail.⁴ Forty state constitutions, as well as the Puerto Rico Constitution and the District of Columbia Bill of Rights, expressly prohibit excessive bail.⁵ One state, Maine, had a constitutional provision prior to 1838 that expressly provided the right to bail, but by amendment that year the Maine Constitution now only prohibits bail in capital cases, without otherwise addressing the matter.⁶ However, the Maine Supreme Judicial Court held that the current language continues the guarantee of the right to bail that was express prior to 1838.⁷ The Federal

Judiciary Act of 1789 provided for the absolute right to bail in non-capital cases. The Eighth Amendment prohibition on excessive bail was adopted in 1791 as part of the Bill of Rights.⁸

Freedom before conviction permits unhampered preparation of a defense and prevents infliction of punishment before conviction. Without the right to bail, the presumption of innocence would lose its meaning.⁹ The purpose of bail is to ensure the accused will stand trial and submit to sentencing if found guilty.¹⁰ Another legitimate purpose is reasonably to assure the safety of the community and of crime victims.¹¹

Twelve states, the District of Columbia, and the federal government have enacted a statutory presumption that defendants charged with bailable offenses should be released on personal recognizance or unsecured bond unless a judicial officer makes an individual determination that the defendant poses a risk that requires more restrictive conditions or detention.¹² Six other states have adopted this presumption by court rule.¹³ However, it is common in many states to have bail schedules, adopted statewide or locally, that establish a pre-set amount of money that must be deposited at the jail in order for a defendant to obtain immediate release, without any individual assessment of risk of flight or danger to the community. In a 2009 nationwide survey of the 150 largest counties, among the 112 counties that responded, 64 percent reported using bond schedules.¹⁴

Despite the common use of bond schedules (also commonly termed “bail schedules”), they seem to contradict the notion that pretrial release conditions should reflect an assessment of an individual defendant’s risk of failure to appear and threat to public safety. Two state high courts have rejected the practice of imposing non-discretionary bail amounts based solely on the charge, as in a bail schedule. The Hawai’i Supreme Court found an abuse of discretion for a trial court to apply a bail schedule promulgated by the senior judge that ignored risk factors specific to the defendant.¹⁵ The Oklahoma Court of Criminal Appeals overturned a statutory mandate for a particular bail amount attached to a specific crime: “[The statute] sets bail at a predetermined, nondiscretionary amount and disallows oral recognizance bonds under any circumstances. We find the statute is unconstitutional because it violates the due process rights of citizens of this State to an individualized determination to bail.”¹⁶

In the United States in the twenty-first century, it is common to require the posting of a financial bond as the means to obtain pretrial release, often through procuring the services of a commercial bond company, or bail bondsman. Bonding companies typically require a non-refundable premium payment from the defendant, usually 10 percent of the bail set by the court. Many companies also require collateral sufficient to cover the full bond amount.¹⁷ In 2007 the DOJ Bureau of Justice Statistics reported that an estimated 14,000 bail agents nationwide secured the release of more than 2 million defendants annually.¹⁸ The United

States and the Philippines are the only countries that permit the widespread practice of commercial bail bonds.¹⁹ In countries other than these two, “[b]ail that is compensated in whole or in part is seen as perverting the course of justice.”²⁰

III. The Consequences of Pretrial Release versus Incarceration

From the perspective of the defendant, who is presumed innocent, pretrial release mitigates the collateral consequences of spending weeks or months awaiting trial or a plea agreement. Jail time can result in job loss, home loss, and disintegrated social relationships, which in turn increase the likelihood of re-offending upon release.²¹

In 2010 the United States had the world’s highest total number of pretrial detainees (approximately 476,000) and the fourth-highest rate of pretrial detention (158 per 100,000).²² A study of felony defendants in America’s 75 largest urban counties showed that in 1990, release on recognizance accounted for 42% of releases, compared to 25% released on surety bond. By 2006, the proportions had been reversed: surety bonds were used for 43% of releases, compared to 25% for release on recognizance.²³ Taking into account all types of financial bail (surety bond, deposit bail, unsecured bond, and full cash bond), it is clear that the majority of pretrial release requires posting of financial bail.

The same study of felony defendants showed that 42% were detained until disposition of their case.²⁴ Pretrial

incarceration imposes significant costs on taxpayer-funded jails, primarily at the local government level. In 2010, “taxpayers spent \$9 billion on pre-trial detainees.”²⁵ The increased practice of requiring financial bonds has contributed to increased jail populations, which has produced an extraordinary increase in costs to counties and municipalities from housing pretrial detainees. The most recent national data indicates that 61% of jail inmates are in an un-convicted status, up from just over half in 1996.²⁶

In addition to the financial costs from increased pretrial detention, the cost in unequal access to justice also appears to be high. The movement to financial bonds as a requirement for pretrial release, often requiring a surety bond from a commercial bond seller, makes economic status a significant factor in determining whether a defendant is released pending trial, instead of such factors as risk of flight and threat to public safety. A study of all nonfelony cases in New York City in 2008 found that for cases in which bail was set at less than \$1,000 (19,617 cases), in 87% of those cases defendants were unable to post bail at arraignment and spent an average of 15.7 days in pretrial detention, even though 71.1% of these defendants were charged with nonviolent, non-weapons-related crimes.²⁷ In short, “for the poor, bail means jail.”²⁸ The impact of financial release conditions on minority defendants reflects disparate rates of poverty among different ethnic groups. A study that sampled felony cases in 40 of the 75 largest counties nationwide found that, between 1990 and

1996, 27% of white defendants were held in jail throughout the pretrial period because they could not post bond, compared to 36% of African-American defendants and 44% of Hispanic defendants.²⁹

The practice of conditioning release on the ability to obtain a surety bond has so troubled the National Association of Pretrial Services Agencies (NAPSA) that, in its Third Edition of Standards on Pretrial Release (and in previous editions beginning in 1968), Standard 1.4(f) provides that “[c]onsistent with the processes provided in these Standards, compensated sureties should be abolished.” According to NAPSA, compensated sureties should be abolished because the ability to pay a bondsman is unrelated to the risk of flight or danger to the community; a surety bond system transfers the release decision from a judge to private party making unreviewable decisions on unknown factors; and the surety system unfairly discriminates against defendants who are unable to afford non-refundable fees required by the bondsman as a condition of posting the bond.³⁰ The American Bar Association also recommends that “compensated sureties should be abolished.”³¹ The Commonwealth of Kentucky and the State of Wisconsin have prohibited the use of compensated sureties.³² In addition, Illinois and Oregon do not allow release on surety bonds (but do permit deposit bail).³³

The ability of a defendant to obtain pretrial release has a significant correlation to criminal justice outcomes. Numerous research projects conducted over the past

half century have shown that defendants who are held in pretrial detention have less favorable outcomes than those who are not detained — regardless of charge or criminal history. In these studies, the less favorable outcomes include a greater tendency to plead guilty to secure release (a significant issue in misdemeanor cases), a greater likelihood of conviction, a greater likelihood of being sentenced to terms of incarceration, and a greater likelihood of receiving longer prison terms.”³⁴ Data support the common sense proposition that pretrial detention has a coercive impact on a defendant’s amenability to a plea bargain offer and inhibits a defendant’s ability to participate in preparation for a defense. In summarizing decades of research, the federal Bureau of Justice Assistance noted that “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.”³⁵

IV. Evidence-Based Risk Assessment: The Lesson of *Moneyball* and the Challenge of Adopting New Practices

Michael Lewis’s book *Moneyball* documents how Oakland A’s general manager Billy Beane used statistics and an evidence-based approach to baseball that yielded winning seasons despite severe budgetary constraints.³⁶ His approach attracted considerable antagonism in the baseball community because it deviated from long-held practices based on intuition and gut feelings, tradition, and ideology. As

persuasively set forth more recently in *Supercrunchers*, the cost of ignoring data and evidence in a broad variety of human endeavors is suboptimal decision-making.³⁷

This realization and the commensurate movement toward evidence-based practice, by now firmly ensconced in medicine and other disciplines, have finally emerged in the fields of sentencing, corrections, and pretrial release (but not without resistance, as in baseball).

In 1961, the New York City Court and the Vera Institute of Justice organized the Manhattan Bail Project, an effort to demonstrate that non-financial factors could be used to make cost-effective release decisions.³⁸ Decades later, the movement away from financial conditions and toward use of an evidence-based risk assessment in setting pretrial release conditions appears to be gathering momentum. The 2009 Survey of Pretrial Services Programs found that the majority of 112 counties responding to a survey of the 150 largest counties use a combination of objective and subjective criteria in risk assessment. Eighty-five percent of those responding counties reported having a pretrial services program to assess and screen defendants and present that information at the first court appearance.³⁹ The ongoing development of evidence-based decision-making in pretrial release decisions is demonstrated by the release in August 2011 of a monograph by the National Institute of Corrections recommending outcome and performance measures for evaluating pretrial release programs.⁴⁰ Looking forward to the type of assessments that would support evidence-

based pretrial decisions, an accumulation of empirical research strongly suggests the following points:

- Actuarial risk assessments have higher predictive validity than clinical or professional judgment alone.⁴¹
- Post-conviction risk factors (relating to recidivism) should not be applied in a pretrial setting.⁴²
- Several measures commonly gathered for pretrial were not significantly associated with pretrial failure: residency, injury to victim, weapon, and alcohol.⁴³
- The six most common validated pretrial risk factors are prior failure to appear; prior convictions; current charge a felony; being unemployed; history of drug abuse; and having a pending case.⁴⁴
- Defendants in counties that use quantitative and mixed risk assessments are less likely to fail to appear than defendants in counties that use qualitative risk assessments.⁴⁵
- Not only are subjective screening devices prone to demographic disparities, but these devices produce poor results from a public safety perspective.⁴⁶
- The statewide pretrial services program in Kentucky, begun in 1968, now uses a uniform assessment protocol that results in a failure to appear rate of only 10 percent and a re-arrest rate of only 8 percent.⁴⁷

- Pretrial programs that use quantitative and mixed quantitative-qualitative risk assessments experience lower re-arrest rates than programs that only use qualitative risk assessments.
- The number of sanctions a pretrial program can impose in response to non-compliance with supervision conditions further lowers the likelihood of a defendant's pretrial re-arrest.⁴⁸

The use of a validated pretrial risk assessment tool when making a judicial decision to release or not, and the attendant conditions on release based on that assessment, fits within a well-functioning case management regimen. While different instruments have been used with success in different jurisdictions, in general, research on pretrial assessment conducted over decades has identified these common factors as good predictors of court appearance and/or danger to the community:

- Current charges;
- Outstanding warrants at the time of arrest;
- Pending charges at the time of arrest;
- Active community supervision at the time of arrest;
- History of criminal convictions;
- History of failure to appear;
- History of violence;
- Residence stability over time;
- Employment stability;
- Community ties; and
- History of substance abuse.⁴⁹

A comprehensive guide to implementing successful evidence-based pretrial services into the pretrial release determination, with step-by-step instructions on the process from formation of a Pretrial Services Committee through program implementation, is available from the Pretrial Justice Institute.⁵⁰

Perhaps the best-known use of evidence-based risk assessment to reduce reliance on financial release conditions exists in the District of Columbia's Pretrial Services Agency (PSA).⁵¹ Paradoxically, the DC pretrial Code requires detention if no combination of conditions will reasonably assure that a defendant does not flee or pose a risk to public safety.⁵² If the prosecutor demonstrates by clear and convincing evidence that a defendant presents a serious flight risk or threat to the victim or to public safety, the defendant is detained without the option for pretrial release. However, the DC Code also provides that a judge may not impose a financial condition as a means of preventative detention.⁵³ PSA conducts a risk assessment (flight and danger) through an interview with the defendant within 24 hours of arrest that assesses points on a 38-factor instrument, assigning a defendant into a category as high risk, medium risk, and low risk.⁵⁴ In 1965, only 11% of defendants were released without a money bond, but by 2008, 80% of all defendants were released without a money bond, 15% were held without bail, and 5% were held with financial bail (none on surety bond), while at the same time 88% of released defendants made all court appearances and 88% completed pretrial release without any new arrests.⁵⁵

Another example of the impact of evidence-based pretrial risk assessment is found in the Harris County (Houston), Texas, "direct filing" system.⁵⁶ As charges are being accepted and filed, the defendant is transferred to the central jail for intake. At the jail, the pretrial screening department interviews the defendant and collects data such as family composition, employment status, housing, indigency status, education level, health problems and medications, and potential mental health issues. This process culminates in a risk classification, identifying defendants who are appropriate for release on personal recognizance bond. The process continues through appearance before a magistrate (typically within 12 hours of arrest), where defendants granted personal bond and those able to post cash or surety bonds are released from jail.⁵⁷ An estimate of net savings and revenue for Fiscal Year 2010 showed that Harris County gained \$4,420,976 in avoided detention costs and pretrial services fees collected after deducting for the costs of pretrial services.⁵⁸

Kentucky abolished commercial bail bondsmen in 1976 and implemented the statewide Pretrial Services Agency that today relies on interviews and investigations of all persons arrested on bailable offenses within 12 hours of his or her arrest. Pretrial Officers conduct a thorough criminal history check and utilize a validated risk assessment that measures flight risk and anticipated conduct to make appropriate recommendations to the court for pretrial release. Furthermore, Pretrial Services

provides supervision services for pretrial defendants, misdemeanor diversion participants and defendants in deferred prosecution programs.

In 2011 Pretrial Services processed 249,545 cases in which a full investigation was conducted on 88% of all incarcerated defendants.⁵⁹ Using a validated risk assessment tool, Pretrial Services identifies defendants as being either low, moderate, or high risk for pretrial misconduct, (i.e. failing to appear for court hearings or committing a new criminal offense while on pretrial release). Ideally, low risk defendants (those most likely to return to court and not commit a new offense) are recommended for release either on their recognizance or a non-financial bond. Statistically, about 70% of pretrial defendants are released in Kentucky; 90% of those make all future court appearances and 92% do not get re-arrested while on pretrial release.⁶⁰ When looking at release rates by risk level, the data shows that judges follow the recommendations of Pretrial Services. In 2011, judges ordered pretrial release of 81% of low risk defendants, 65% of moderate risk defendants, and 52% of high risk defendants.⁶¹

In 2011, Kentucky adopted House Bill 463, a major overhaul of the Commonwealth's criminal laws that intended to reduce the cost of housing inmates while maintaining public safety.⁶² Since adoption of HB 463, Pretrial Services data shows a 10% decrease in the number of defendants arrested and a 5% increase in the overall release rate, with a substantial increase in non-financial

releases and in releases for low and moderate risk defendants. The non-financial release rate increased from 50% to 66%, the low risk release rate increased from 76% to 85%, and the moderate risk release rate increased from 59% to 67%. In addition, pretrial jail populations have decreased by 279 defendants, while appearance and public safety rates have remained consistent.⁶³

There are other, similar examples of successful implementation of evidence-based pretrial assessments that deliver on the promise of pretrial release without financial conditions.⁶⁴

Evidence-based pretrial risk assessment in the context of skillful and collaborative case management and data sharing should be embraced as the best practice by judges, court administrators, and court leaders. Reliance on a validated, evidence-based pretrial risk assessment in setting non-financial release conditions balances the interests of courts in both protecting public safety and safeguarding individual liberty.

V. The Way Forward

"The purposes of the pretrial release decision include providing due process to those accused of crime, maintaining the integrity of the judicial process by securing defendants for trial, and protecting victims, witnesses and the community from threat, danger or interference. . . . The law favors release of defendants pending adjudication of charges. Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support."

ABA Criminal Justice Standards on Pretrial Release, Third Edition
Standard 10-1.1.

By adopting this paper, COSCA is not leading a parade, but joining in some very good and credible company. As noted in 2011 by a leading official of the United States Department of Justice, "Within the last year, a number of organizations have publicly highlighted the need to reform our often antiquated and sometimes dangerous pretrial practices and replace them with empirically supported, risk-based decision-making."⁶⁵ Not surprisingly pretrial services agencies themselves support this effort,⁶⁶ but so do a wide variety of other justice-oriented interest groups: the National Association of Counties,⁶⁷ the American Jail Association,⁶⁸ the International Association of Chiefs of Police,⁶⁹ the American Council of Chief Defenders,⁷⁰ the American Bar Association,⁷¹ the Association of Prosecuting Attorneys,⁷² and the American Association of Probation and Parole.⁷³

Following the 2011 National Symposium on Pretrial Justice hosted by the U.S. Department of Justice (DOJ), the DOJ's Office of Justice Programs collaborated with the Pretrial Justice Institute to convene in October 2011 the first meeting of the Pretrial Working Group. Information about the continuing work of the Pretrial Working Group subcommittees can be found at the Web site published by the Office of Justice Programs in association with the Pretrial Justice Institute. The stated goals of this effort are to exchange information on pretrial justice issues, develop a website to disseminate information on the work of the subcommittees, and inform evidence-based pretrial justice policy making.⁷⁴

There are two major obstacles to reform. First, there is resistance to changing the status quo from those who are comfortable with or profit from the existing system. This resistance can be overcome by a well-

executed, evidence-based protocol, as has been demonstrated in the District of Columbia and in Kentucky. Second, courts tend to be deliberate in adopting change and to require persistent presentation of well-documented advantages to new approaches, such as evidence-based practices in the pretrial release setting. In this regard, familiarity with evidence-based decision making in drug courts, at sentencing, and in evaluating court programs should help gain acceptance for evidence-based practices in the pretrial setting. Part of this shift in practice might include elimination of or decreased reliance on bail schedules, which are in use in at least two-thirds of counties across the country.⁷⁵ State court leaders should closely follow and make a topic of discussion the efforts of the Department of Justice and its Pretrial Justice Working Group discussed above, as well as continuing efforts by the American Bar Association which is supporting transition toward evidence-based pretrial practices through its Pretrial Justice Task Force.⁷⁶

State court leaders must take several steps to leverage the emerging national consensus on this issue:

- Analyze state law and work with law enforcement agencies and criminal justice partners to propose revisions that are necessary to
 - support risk-based release decisions of those arrested;
 - ensure that non-financial release alternatives are available and that financial release options are available without the requirement for a surety.
- Collaborate with experts and professionals in pretrial justice at the national and state levels.
- Take the message to additional groups and support dialogue on the issue.
- Use data to promote the use of data; determine what state and local data exist that would demonstrate the growing problem of jail expense represented by the pretrial population, and that show the risk factors presented by that population may justify broader pretrial release.
- Reduce reliance on bail schedules in favor of evidence-based assessment of pretrial risk of flight and threat to public safety.

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- ⁵⁵ Pretrial Justice Institute (n.d.). "The D.C. Pretrial Services Agency: Lessons from Five Decades of Innovation and Growth," *Case Studies*, Vol. 2, No. 1, accessed at <http://pretrial.org/Success/Case%20Study%202%20-%20DC%20Pretrial%20Services.pdf>. Sources cited include Thomas, Jr., W.H. (1976). *Bail Reform in America*. Berkeley, CA: University of California, Berkeley, for data from 1962 through 1975; District of Columbia Pretrial Services Agency (2009). *Leading the Field: District of Columbia Pretrial Services Agency FY 2008 Annual Report*. Washington, D.C.: D.C. Pretrial Services Agency. for 2008 data.
- ⁵⁶ Mahoney, B. and Smith, W. (2005). *Pretrial Release and Detention in Harris County: Assessment and Recommendations*. Denver, CO: Justice Management Institute.
- ⁵⁷ *Id.*
- ⁵⁸ Nagy, G. (2012). "Pretrial Services, Evidence Based Policy and Practices" presentation to the Pretrial Detention in Texas: Strategies for Saving Taxpayer Money While Maintaining Public Safety meeting, Austin, Texas, March 30, 2012.
- ⁵⁹ Data provided August 2012 by Laurie Dudgeon, Director, Administrative Office of the Courts of Kentucky, directly from the Pretrial Services case management system, known as the Pretrial Release Information Management (PRIM).
- ⁶⁰ *Ibid.*
- ⁶¹ *Ibid.*
- ⁶² Kentucky legislation 11 RS HB 463/EN accessed at <http://www.lrc.ky.gov/record/11rs/hb463.htm>
- ⁶³ *Ibid.*
- ⁶⁴ *State of the Science of Pretrial Risk Assessment*, *supra*, note 42, at 30-38. See also *Rational and Transparent Bail Decision Making*, *supra* note 48 at 22-33.
- ⁶⁵ Laurie Robinson, Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice, remarks at the National Symposium on Pretrial Justice, Washington, D.C., May 31, 2011.
- ⁶⁶ National Association of Pretrial Services Agencies, *NAPSA Standards on Pretrial Release*, *supra* note 27 at p 53, Standard 3.1.
- ⁶⁷ National Association of Counties (2012), *The American County Platform and Resolutions*, Section on Justice and Public Safety, subsection on Courts, Resolution F, Pretrial Release. Accessed at <http://www.naco.org/legislation/policies/documents/american%20county%20platform%20and%20resolutions%20cover%20page%2011-12.pdf>
- ⁶⁸ American Jail Association (2010). "Resolution on Pretrial Justice," adopted October 24, 2010. Accessed at <http://www.pretrial.org/OurServices/Advocacy/AdvocacyDocuments/AJA%20Resolution%20on%20Pretrial%20Justice%202011.pdf>
- ⁶⁹ International Association of Chiefs of Police (2011). *Law Enforcement's Leadership Role in the Pretrial Release and Detention Process*. Washington, D.C.: International Association of Chiefs of Police.
- ⁷⁰ American Council of Chief Defenders (2011). *Policy Statement on Fair and Effective Pretrial Justice Practices*, Washington, D.C.: American Council of Chief Defenders. Accessed at http://nlada.net/library/document/na_accdprialstnt_06042011

⁷¹ American Bar Association (2002). *ABA Standards for Criminal Justice: Pretrial Release*, 3d ed. Standard 10-1.10. Accessed at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk.html#10-1.10.

⁷² Association of Prosecuting Attorneys (2011). *Policy Statement on Pretrial Justice*. Washington, D.C.: Association of Prosecuting Attorneys. Accessed at <http://www.apainc.org/html/APA+Pretrial+Policy+Statement.pdf>

⁷³ American Probation and Parole Association (2010). *Pretrial Supervision Resolution*. Lexington, KY.: American Probation and Parole Association. Accessed at http://www.appa-net.org/eweb/Dynamicpage.aspx?site=APPA_2&webcode=IB_Resolution&wps_key=3fa8c704-5ebc-4163-9be8-ca48a106a259

⁷⁴ Pretrial Justice Working Group Web site at <http://www.pretrial.org/symposium.html>.

⁷⁵ Carlson, L. (2010). "Bail Schedules: A Violation of Judicial Discretion?," Washington, D.C.: Pretrial Justice Institute.

⁷⁶ See the American Bar Association's *ABA Criminal Justice Section Newsletter* (Winter 2012), p.3, which provides contact information about the Pretrial Justice Task Force, organized under the auspices of the ABA Crime Prevention, Pretrial and Police Practices Committee.