The Supreme Court of Ohio

TASK FORCE TO EXAMINE THE OHIO BAIL SYSTEM

AGENDA

January 23, 2019
10:00 a.m. – 2:00 p.m.

1. Welcome & Introductions — Tasha Ruth
2. Opening Remarks — Chief Justice Maureen O'Connor
3. Purpose and Objectives of Task Force — Tasha Ruth
4. Presentation from the Pretrial Justice Institute — PJI Staff
5. Lunch
6. Group Discussion — Judge Mary Katherine Huffman
7. Next Steps: Compose List of Organizations to Invite to Provide Testimony at February Meeting — Judge Mary Katherine Huffman
8. Select Next Two Meeting Dates: — Tasha Ruth
    a. February 26 or 27
    b. March 11 or 13

THE SUPREME COURT *of* OHIO

TASK FORCE TO EXAMINE THE OHIO BAIL SYSTEM

ROSTER

Hon. Mary Katherine Huffman (Chair) Montgomery County Court of Common Pleas	**Sara Andrews, Esq.** Director Ohio Criminal Sentencing Commission
Hon. Andrew Ballard Lawrence County Court of Common Pleas	**Michael Barhorst** Sidney Mayor President, Ohio Municipal League
Vallie Bowman-English, Esq. Clerk of Court Toledo Municipal Court	**Russell Brown, Esq.** Court Administrator Cleveland Municipal Court
Gwen Callender, Esq. Chief Legal Counsel Fraternal Order of Police of Ohio, Inc.	**Daniel Dew, Esq.** Legal Fellow The Buckeye Institute
Julie Ehemann President, County Commissioners Association of Ohio Shelby County Commissioner	**Hon. Todd L. Grace** Athens County Municipal Court
Meghan Guevara Pretrial Justice Institute	**Hon. Brian F. Hagan** Rocky River Municipal Court
Tim Horsley, Esq. Cincinnati City Prosecutor	**Hon. Mark A. Hummer** Franklin County Municipal Court
James Lawrence President, Oriana House	**Charles Eddie Miller** President, Ohio Bail Agents Association
Christopher Nicastro Chief of Criminal Justice Services Ohio Department of Mental Health and Addiction Services	**Jocelyn Rosnick** Assistant Policy Director ACLU of Ohio

THE SUPREME COURT *of* OHIO

TASK FORCE TO EXAMINE THE OHIO BAIL SYSTEM

ROSTER

Hon. John J. Russo Cuyahoga County Court of Common Pleas	**Tom Sauer** President, Ohio Association of Pretrial Services Agencies Hamilton County Pretrial Services
Sheriff Larry L. Sims President, Buckeye Sherriff's Association Warren County Sheriff	**Michael Streng, Esq.** President, Ohio Association of Criminal Defense Lawyers Bridges, Jillisky, Streng, Weller & Gullifer, LLC
Judy C. Wolford, Esq. Pickaway County Prosecuting Attorney	**Timothy Young, Esq.** Office of the Ohio Public Defender

STAFF LIAISON

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To the extent required by Article I, Section 10a of the Ohio Constitution or by the Revised Code, the trial court shall, upon request, provide the alleged victim the opportunity to be heard in any public proceeding in which a right of the alleged victim is implicated, including but not limited to public proceedings involving release, plea, sentencing, or disposition.

Proposed Staff Notes (2019 Amendment)

Crim.R 37-Victim's Opportunity to be Heard

Previously reserved, this new rule was added to comply with the 2017 amendment to Article I, Section 10a of the Ohio Constitution, also known as Marsy's Law.

RULE 46. ~~Bail~~ Pretrial Release and Detention

(A) Pretrial detention. A prosecutor may file a motion seeking pretrial detention of a defendant pursuant to the standards and procedures set forth in the Revised Code.

(B) Types and amounts of bail. Any person who is entitled to release shall be released upon one or more of the following types of bail in the amount set by the court:

(1) The personal recognizance of the accused or an unsecured bail bond;

(2) A bail bond secured by the deposit of ten percent of the amount of the bond in cash. Ninety percent of the deposit shall be returned upon compliance with all conditions of the bond;

(3) A surety bond, a bond secured by real estate or securities as allowed by law, or the deposit of cash, at the option of the defendant.

Unless the court orders the defendant detained under division (A) of this rule, the court shall release the defendant on the least restrictive conditions that, in the judgment of the court, will reasonably ensure the defendant's appearance in court, the protection of the safety of any person or the community, and that the defendant will not obstruct the criminal justice process. If the court orders monetary conditions of release, the court shall impose an amount and type which are least costly to the defendant while also sufficient to reasonably ensure the defendant's future appearance in court.

~~(B)~~(C) Conditions of bail. The court may impose any of the following conditions of bail:

(1) Place the person in the custody of a designated person or organization agreeing to supervise the person;

(2) Place restrictions on the travel, association, or place of abode of the person during the period of release;

(3) Place the person under a house arrest, electronic monitoring, or work release program;

(4) Regulate or prohibit the person's contact with the victim;

(5) Regulate the person's contact with witnesses or others associated with the case upon proof of the likelihood that the person will threaten, harass, cause injury, or seek to intimidate those persons;

(6) Require ~~a person who is charged with an offense that is alcohol or drug related, and who appears to need treatment, to attend treatment while on bail~~ completion of a drug and/or alcohol assessment and compliance with treatment recommendations, for any person charged with an offense that is alcohol or drug related, or where alcohol or drug influence or addiction appears to be a contributing factor in the offense, and who appears based upon an evaluation, prior treatment history, or recent alcohol or drug use, to be in need of treatment;

(7) Require compliance with alternatives to pretrial detention, including but not limited to diversion programs, day reporting, or comparable alternatives, to ensure the person's appearance at future court proceedings;

(8) Any other constitutional condition considered reasonably necessary to ensure appearance or public safety.

~~(C)~~(D) Factors. In determining the types, amounts, and conditions of bail, the court shall consider all relevant information, including but not limited to:

(1) The nature and circumstances of the crime charged, and specifically whether the defendant used or had access to a weapon;

(2) The weight of the evidence against the defendant;

(3) The confirmation of the defendant's identity;

(4) The defendant's family ties, employment, financial resources, character, mental condition, length of residence in the community, jurisdiction of residence, record of convictions, record of appearance at court proceedings or of flight to avoid prosecution;

(5) Whether the defendant is on probation, a community control sanction, parole, post-release control, bail, or under a court protection order;

(6) An evaluation of the defendant's likelihood of appearance and risk to public safety, as determined by an objective risk-assessment tool recognized as reliable by statute or by the court, when reasonably available to the court. As soon as possible without causing unreasonable delay to the court's bail determination, this risk-assessment tool shall be employed by the court on its own initiative for any defendant not yet released on bail, either before or after the defendant's initial appearance.

~~(D)~~(E) Appearance pursuant to summons. When summons has been issued and the defendant has appeared pursuant to the summons, absent good cause, a recognizance bond shall be the preferred type of bail.

~~**(E)**~~**(F)** ~~**Amendments**~~ **Continuation of Bail.** ~~A court, at any time, may order additional or different types, amounts, or conditions of bail.~~ Unless otherwise ordered by the court pursuant to this subsection, bail shall continue until the return of a verdict or the entry of a guilty plea, and may continue thereafter pending sentence or disposition of the case on review. At any time, a court may eliminate or lessen any condition of bail that the court believes is no longer necessary to reasonably ensure the defendant's appearance in court, the protection of the safety of any person or the community, and that the defendant will not obstruct the criminal justice process.

~~**(F)**~~**(G) Information need not be admissible.** Information stated in or offered in connection with any order entered pursuant to this rule need not conform to the rules pertaining to the admissibility of evidence in a court of law. Statements or admissions of the defendant made at a bail proceeding or in the course of compliance with a condition of bail shall not be received as substantive evidence in the trial of the case.

~~**(G)**~~**(H) Bond schedule.**

(1) In order to expedite the prompt release of a defendant prior to initial appearance, ~~Each~~ each court shall establish a bail bond schedule covering all misdemeanors including traffic offenses, either specifically, by type, by potential penalty, or by some other reasonable method of classification. The court also may include requirements for release in consideration of divisions ~~(B)~~ (C) and ~~(C)(5)~~ (D)(5) of this rule. The sole purpose of a bail schedule is to allow for the consideration of release prior to the defendant's initial appearance.

(2) A bond schedule shall not be considered as "relevant information" under division (D) of this rule.

(3) When a person fails to post a bond established by a bail bond schedule, a judicial officer shall conduct a bail hearing no later than the second court day after that person has been arrested.

(4) Each municipal or county court shall, by rule, establish a method whereby a person may make bail by use of a credit card. No credit card transaction shall be permitted when a service charge is made against the court or clerk unless allowed by law.

(5) Each court shall review its bail bond schedule bi-annually by January 31 of each even numbered year, to ensure an appropriate bail bond schedule that does not result in the unnecessary detention of defendants due to inability to pay.

~~**(H) Continuation of bonds.** Unless otherwise ordered by the court pursuant to division (E) of this rule, or if application is made by the surety for discharge, the same bond shall continue until the return of a verdict or the acceptance of a guilty plea. In the discretion of the court, the same bond may also continue pending sentence or disposition of the case on review. Any provision of a bond or similar instrument that is contrary to this rule is void.~~

(I) Failure to appear; breach of conditions. Any person who fails to appear before any court as required is subject to the punishment provided by the law, and any bail given for the person's release may be forfeited. If there is a breach of condition of bail, the court may amend the bail.

(J) Justification of sureties. Every surety, except a corporate surety licensed as provided by law, shall justify by affidavit, and may be required to describe in the affidavit, the property that the surety proposes as security and the encumbrances on it, the number and amount of other bonds and undertakings for bail entered into by the surety and remaining undischarged, and all of the surety's other liabilities. The surety shall provide other evidence of financial responsibility as the court or clerk may require. No bail bond shall be approved unless the surety or sureties appear, in the opinion of the court or clerk, to be financially responsible in at least the amount of the bond. No licensed attorney at law shall be a surety.

OHIO RULES OF EVIDENCE

RULE 615. Separation and Exclusion of Witnesses.

(A) Except as provided in division (B) of this rule, at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. An order directing the "exclusion" or "separation" of witnesses or the like, in general terms without specification of other or additional limitations, is effective only to require the exclusion of witnesses from the hearing during the testimony of other witnesses.

(B) This rule does not authorize exclusion of any of the following persons from the hearing:

(1) a party who is a natural person;

(2) an officer or employee of a party that is not a natural person designated as its representative by its attorney;

(3) a person whose presence is shown by a party to be essential to the presentation of the party's cause;

(4) in a criminal proceeding, a victim of the charged offense to the extent that the victim's presence is authorized by the Ohio Constitution or by statute enacted by the General Assembly. As used in this rule, "victim" has the same meaning as in the provisions of the Ohio Constitution providing rights for victims of crimes.

[Existing language unaffected by the amendments is omitted to conserve space]

OHIO
CRIMINAL SENTENCING COMMISSION

Ad Hoc Committee on Bail and Pretrial Services

Final Report & Recommendations
June 2017

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I. Executive Summary

The system of bail was intended to ensure a defendant would appear in court and, eventually, ensure public safety by keeping those defendants who pose a substantial risk of committing crimes while awaiting trial in jail. The reality, however, is that those with money, notwithstanding their danger to the community, can purchase their freedom, while poor defendants remain in jail pending trial. Research shows that even short stays in jail before trial lead to an increased likelihood of missing school, job loss, family issues, increased desperation, and thus, an increased likelihood to reoffend.[1]

In 1968, the American Bar Association released criminal justice standards related to pretrial release and over the past several years many states have undertaken reviews of their pretrial systems and adopted various reforms. No less than 20 states have begun implementing reforms such as risk assessments for release determinations, citation in lieu of detention, and elimination of bond schedules *(Appendix A)*. In addition, there has been a rise in litigation arguing that pretrial detention violates the Due Process and Equal Protection Clauses of the United States Constitution. For example, in *Walker v. City of Calhoun*, pretrial detainees challenged the City of Calhoun's bail system, which mandated payment of a fixed amount without consideration of other factors, including risk of flight, risk of dangerousness, and financial resources.[2] The trial court invoked U.S. Supreme Court decisions[3], finding that the principle of those cases was especially applicable "where the individual being detained is a pretrial detainee who has not yet been found guilty of a crime."[4] The court found that the system violated the Equal Protection Clause since "incarceration of an individual because of the individual's inability to pay a fine or fee is impermissible."[5] The issue is currently under consideration by the Eleventh Circuit Court of Appeals, where the Justice Department has filed a brief in support of striking down the city's bail scheme.[6]

Nationally, pretrial services and bail have come under scrutiny in the past decade. The Conference of State Court Administrators (COSCA) issued a paper in 2013 supporting the ongoing work of the United States Department of Justice and the Pretrial Justice Institute to reform pretrial services.[7] The Conference of Chief Justices and the Conference of State Court Administrators has established a National Task Force on Fines, Fees and Bail Practices to address the ongoing impact these financial sanctions have on the economically disadvantaged in the United States.[8] Finally, the United States Department of Justice has funded bail reform initiatives

[1] Pretrial Justice Institution, www.pretrial.org/the-problem/, December 1, 2016.
[2] *Walker v. City of Calhoun, Georgia*, 2016 WL 361612, N.D. Georgia, January 28, 2016.
[3] *Griffin v. Illinois*, 351 U.S. 12 (1956); *Bearden v. Georgia*, 461 U.S. 660 (1983).
[4] *Walker*, *supra* at 11.
[5] *Id.*, citing *Tate v. Short*, 401 U.S. 395 (1971).
[6] Walker v. City of Calhoun, Georgia, 11 Cir. CA, No. 16-10521-HH.
[7] Arthur W. Peppin, "2012-2013 Policy Paper Evidence-Based Pretrial Release", COSCA http://cosca.ncsc.org/~/media/microsites/files/cosca/policy%20papers/evidence%20based%20pre-trial%20release%20-final.ashx
[8] "Top national state court leadership associations launch National Task Force on Fines, Fees and Bail Practices", National Center for State Courts, February 3, 2016, http://www.ncsc.org/Newsroom/News-Releases/2016/Task-Force-on-Fines-Fees-and-Bail-Practices.aspx?utm_source=iContact&utm_medium=email&utm_campaign=Communications&utm_content=0216+COSCA+Bulletin

and provided data to states and, in its consent decree with the city of Ferguson, ended the use of secured money bonds.[9]

The Council of State Governments Justice Center found that, in Pennsylvania, less than half of those with monetary bail succeed in posting it, even for misdemeanors.[10] A recent decision in the Southern District of Texas stated "under federal and state law, secured money bail may serve to detain indigent misdemeanor arrestees only in the narrowest of cases, and only when, in those cases, due process safeguards the rights of the indigent accused."[11] The Connecticut Criminal Sentencing Commission issued a report and recommendations in February 2017 that recommended many reforms similar to those contained in this report.[12]

Recent events fuel the debate over the reform of bail and pretrial services. In New Jersey recent reports show increased criticism of bail reform implemented at the beginning of 2017. New Jersey virtually eliminated the use of cash bail and, under the new law, only detains those who pose the highest risk for flight or reoffending. Police and victims have begun to criticize the new law as resulting in a "revolving door" of defendants.[13] Suggestions have been made that tragedies, like those in Kirkersville, Ohio, where a gunman killed the police chief and two nursing-home employees, would become more frequent under bail reform.[14] But New Jersey's reforms went further than those recommended here, limiting judicial discretion in release and detain decisions,[15] and the gunman in Kirkersville was out of prison on judicial release post-conviction, not pretrial.

In Ohio, bail reform and pretrial services have been the subject of review in various individual jurisdictions. In Cuyahoga County, Administrative Judge John Russo formed a committee to review that county's bail system, examine local policies and procedures among jurisdictions within the county, and consider the costs of the system.[16] Lucas County is one of 20 jurisdictions to participate in the MacArthur Foundation Safety + Justice Challenge network intended to support "a network of competitively selected local jurisdictions committed to finding ways to safely reduce jail incarceration."[17] The local goal is to safely reduce jail population and address racial and ethnic disparities in the criminal justice system. Lucas County has implemented an administrative release program, which allows judges to administratively release inmates according to the risk they pose as determined by the Ohio Risk Assessment System Community Supervision Tool, to reduce the local jail population. Lucas County has also

[9] Attorney General Loretta E. Lynch, Remarks at the Eight Annual Judge Thomas A. Flannery Lecture, November 15, 2016, https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-eighth-annual-judge-thomas-flannery .
[10] "Justice Center Analysis of AOPC data", Council of State Governments Justice Center, 2017, p.6.
[11] *ODonnell v. Harris Cty., Texas*, Case 4:16-cv-01414, p. 6, April 28, 2017.
[12] Connecticut Sentencing Commission, "Report to the Governor and the General Assembly on Pretrial Release and Detention in Connecticut", February 2017. http://www.ct.gov/ctsc/lib/ctsc/Pretrial_Release_and_Detention_in_CT_2.6.2017.pdf
[13] Wallace, Sarah. "Nobody's Afraid to Commit Crimes: Cops, Victims Blast Overhaul of NJ Bail System". NBC New York, May 30, 2017. http://www.nbcnewyork.com/news/local/Bail-Reform-New-Jersey-Criminals-Streets-Law-Jail-Investigation-422965474.html
[14] Dayton Daily News, "Kirkersville murders: Judge who granted killer's early release admits 'mistakes'". May 16, 2017. http://www.daytondailynews.com/news/local/kirkersville-murders-judge-who-granted-killer-early-release-admits-mistakes/VHn7a13sjfSIwZ0nj9ijkK/
[15] Rice, Josie Duffy. "New Jersey passes new bail reform law, changing lives of poor defendants". Daily Kos. January 3, 2017. http://www.dailykos.com/story/2017/1/3/1616714/-New-Jersey-passes-new-bail-reform-law-changing-lives-of-poor-defendants
[16] "Impact 2016:Justice for All", cleveland.com, http://www.cleveland.com/metro/index.ssf/2016/05/cuyahoga_county_chief_judge_jo.html#incart_river_index_topics
[17] MacArthur Foundation, Safety + Justice Challenge, January 5, 2017, http://www.safetyandjusticechallenge.org/about-the-challenge/

implemented use of a risk assessment tool developed by the Laura and John Arnold Foundation ("Arnold tool") to provide public safety assessments to determine risk of failure to appear and new criminal activity. Stark County and the Cleveland Municipal Court are also beginning use of the Arnold tool. Summit County has developed an in-house risk assessment tool for pretrial determinations.

The Ohio Criminal Sentencing Commission, in an effort to ensure that Ohio is holding people for the right reasons prior to trial, formed an Ad Hoc Committee on Bail and Pretrial Services to determine the current situation in Ohio and to make recommendations that will maximize appropriate placement for defendants, protect the presumption of innocence, maximize appearance at court hearings, and maximize public safety. One of the primary purposes of pursuing reform of bail practices and pretrial services is to ensure that those that pose the greatest risk to public safety and failure to appear are detained while awaiting trial while maximizing release of pretrial detainees to effectively utilize jail resources. According to a study conducted by the Department of Rehabilitation and Correction (DRC), 35.4% of people in local jails are awaiting trial – meaning they have not been convicted of a crime.[18] They are either being held without bail or cannot afford bail. In most cases it is the latter.

The Ad Hoc Committee was comprised of commission members and others with a vested interest in the bail and pretrial services system. Judges, prosecutors, defense counsel, clerks, court administrators, law enforcement, jails, and bondsmen were all represented on the Ad Hoc Committee so that all sides of the issues could be considered in making recommendations. The Commission secured technical assistance from the National Institute of Corrections for assistance in defining the problem and identifying national trends and successful solutions. The National Institute of Corrections (NIC) is an agency within the U.S. Department of Justice, Federal Bureau of Prisons which provides training, technical assistance, information services, and policy/program development assistance to federal, state, and local corrections agencies while also providing leadership to influence correctional policies, practices, and operations nationwide. At the request of the Commission, the Institute agreed to provide technical expertise on pretrial service reform. Lori Eville, correctional program specialist at NIC and Tim Schnacke,[19] executive director of the Center for Legal and Evidence-Based Practices, made several visits to Ohio to discuss national trends, the experience of other jurisdictions undertaking pretrial and bail reform, and to offer their experiences and expertise.

The full Ad Hoc Committee met five times over the course of 11 months and formed work groups to tackle the various issues identified by members as priorities for discussion. The first task undertaken by the majority of work groups was to design and disseminate surveys to determine the current state of pretrial services in Ohio. Surveys were sent to clerks, jail administrators, prosecutors, and judges *(Appendix B)*. After analyzing the current state of pretrial services in Ohio, including presentations from Ohio counties currently undergoing reform efforts, and a review of

[18] Brian D. Martin, Brian R. Kowalski, & Sharon M. Schnelle, *Findings and Recommendations from a Statewide Outcome Evaluation of Ohio Jails*, (June 2012), available at http://www.drc.ohio.gov/web/ohiojailevaluation.pdf at 41.

[19] Tim Schnacke is author of two papers on pretrial services and bail reform that were instrumental in educating Ad Hoc committee members. "Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform", NIC, September 2014 and "Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial", NIC, September 2014 provided needed background and foundational information for the committee.

national trends, work groups met and developed recommendations to present to the full Ad Hoc Committee, which then considered each recommendation and voted on whether it should be included in the recommendations to the Ohio Criminal Sentencing Commission. After initial release of draft recommendations the Commission opened a public comment period soliciting comments from criminal justice partners, stakeholders, and the general public. The comment period resulted in only four submitted comments. Two comments previously submitted by the bail bond industry were included and also considered *(Appendix E)*. A survey was sent to Ad Hoc Committee members to determine which, if any, of the public comment suggestions would be incorporated into the report prior to final approval by the Commission. Public comments are discussed throughout the report in appropriate sections.

The Ad Hoc Committee stresses that these recommendations should not be read or considered independently. Implementation of each recommendation is necessary to create a fair and effective bail system with robust pretrial services.[20] At the conclusion of the report, suggested language is provided for revisions to Crim.R. 4, Crim.R. 5, and Crim.R. 46 *(Appendix C)*. The Ad Hoc Committee did not fully discuss this proposed language, but wanted to provide the Supreme Court of Ohio a starting point from which to develop rule amendments in line with their recommendations.

Recommendations to reform and create a system of pretrial justice that maximizes appearance, release and appropriate placement, preserves public safety, protects the presumption of innocence, and achieves efficiencies and consistency in Ohio's pretrial system while decreasing the reliance on monetary bail as the primary release mechanism include:

1. **Establish a risk-based pretrial system, using an empirically based assessment tool, with a presumption of nonfinancial release and statutory preventative detention.** Setting monetary bail based only upon the level of offense, as most bond schedules do, negates the ability of the court to differentiate bail decisions based upon a defendant's risk for failure to appear or the risk to public safety. At a minimum, defendants detained in accordance with the bond schedule should have a bond review hearing within a reasonable time. Bond schedules should be eliminated. However, if they are utilized, the schedule should be based upon a defendant's risk for failure to appear or risk to public safety and should be consistent and uniform among counties and courts within counties.

[20] The recommendations should be implemented in any situation where bond is set. For example, in child support civil contempt motions bond is often set in the amount of the arrears to guarantee appearance. These amounts can be very high and are not based upon the defendant's risk for failure to appear.

2. **Implement a performance management (data collection) system to ensure a fair, effective and fiscally efficient process**. As in other areas of Ohio's criminal justice system, data regarding pretrial decisions, agencies, and outcomes is rarely collected. A dedicated, concerted effort to increase data collection and analysis for all facets of the bail and pretrial system in Ohio includes each jurisdiction mandated to collect appearance rates, safety rates, and concurrence rates (how often a judge accepts a pretrial service agency recommendation), development of a method to track the number of hearings on bond and information about violations that occur while defendants are out on bond, and information regarding the effectiveness/success of diversion programs.

3. **Maximize release through alternatives to pretrial detention that ensure appearance at court hearings while enhancing public safety.** Diversion options, such as prosecutorial diversion programs and day reporting, should be offered in every jurisdiction with eligibility criteria that takes into account pretrial assessments.

4. **Mandate the presence of counsel for the defendant at the initial appearance.** The practice is a hallmark of an effective pretrial system and importantly, the United States Supreme Court has found that a criminal defendant's initial appearance before a magistrate or judge, where the defendant learns the charge against him and his or her liberty is subject to restriction, marks the initiation of adversarial judicial proceedings.[21] This triggers the attachment of the Sixth Amendment right to counsel.[22]

5. **Require education and training of court personnel, including judges, clerks of court, prosecutors, defense counsel, and others with a vested interest in the pretrial process.** Without training and education, the individuals operating within the system will remain reluctant to embrace risk assessment and alternatives to monetary bail.

6. **Continued monitoring and reporting on pretrial services and bail in Ohio.** With the implementation of robust data collection and the onset of new practices under the recommendations in this report, the Ohio General Assembly should task the Ohio Criminal Sentencing Commission with periodic reporting on pretrial practices and operations to ensure continued progress.

[21] Rothergy v. Gillespie County, 554 U.S. 191, 213 (2008).
[22] Rothergy v. Gillespie County, 554 U.S. 191, 213 (2008).

II. Ad Hoc Committee Members*

Commission and Advisory Committee Members

Judge Ken Spanagel – Parma Municipal Court, Commission Member *(Co-Chair)*
Paul Dobson – Prosecutor, Wood County, Commission Member *(Co-Chair)*
Lara Baker-Morrish – Chief, Columbus City Attorney's Office
Judge Fritz Hany – Ottawa County Municipal Court
Chrystal Alexander – Victim Services, Department of Rehabilitation and Correction
Judge Nick Selvaggio – Champaign County Court of Common Pleas
Senator Cecil Thomas – Ohio Senate
Kari Bloom - Office of the Ohio Public Defender
James Lawrence – Oriana House

Additional Members

Judge Ronald Adrine – Cleveland Municipal Court
Judge Beth Cappelli – Fairborn Municipal Court
Julie Doepke – Hamilton County Adult Probation
Diana Feitl – Oriana House
Stephanie Hardman – Clerk, Mount Vernon Municipal Court
Sheriff Michael Heldman – Hancock County
Ryan Kidwell – Deputy, Hancock County Sheriff's Office
Michael Kochera – Court Administrator, Canton Municipal Court
John Leutz – County Commissioners Association of Ohio
Branden Meyer – Clerk, Fairfield County Court of Common Pleas
Charles Miller – President, Ohio Bail Agents Association
Marta Mudri – Ohio Judicial Conference
Michele Mumford – Clerk, Shelby County Court of Common Pleas
Dan Peterca – Ohio Association of Pretrial Service Agencies
Dave Phillips – Prosecutor, Union County
Judge Cynthia Rice – Eleventh District Court of Appeals
Tom Sauer – Hamilton County Pretrial Intervention Services
Susan Sweeney – Court Administrator, Summit County Court of Common Pleas
Penny Underwood – Clerk, Champaign County Court of Common Pleas
Josh Williams – Ohio Judicial Conference
Brenda Willis – Ohio Association of Pretrial Service Agencies

Sara Andrews – Director, Ohio Criminal Sentencing Commission
Jo Ellen Cline – Criminal Justice Counsel, Ohio Criminal Sentencing Commission
Lori Eville – Correctional Program Specialist, National Institute of Corrections
Tim Schnacke – Director, Center for Legal and Evidence-Based Practices

III. Background

A. History[23]

Bail, in its earliest form, was a personal surety system where an individual would vouch for the accused and agree to oversee the accused until trial. When colonists settled the New World, they brought their bail traditions with them. "Bail" equaled release with unsecured bonds and no profit or indemnification. But as society changed over time, reform of pretrial practices resulted in significant changes. Americans initially put even more emphasis on release and freedom, but in the 1920s, with crime on the rise and jails becoming crowded, alternatives were needed to the traditional system to reduce the unnecessary detention of bailable defendants. This resulted in the rise of secured money bonds and the commercial bail industry. Later, in the 1960s, another reform movement resulted in the consideration of public safety as a valid purpose to limit pretrial release. Currently, the national trend toward risk assessment of pretrial defendants to determine release responds to notions that secured money bonds allow release of high-risk defendants and detention of low-risk defendants based solely upon financial means.

B. Basics of Bail

"When a person is arrested, the court must determine whether the person will be unconditionally released pending trial, released subject to a condition or combination of conditions, or held in jail during the pretrial process."[24] In making its determination the court must consider if there is a significant risk that the defendant will not appear at future hearings or if the defendant will commit a serious crime during the pretrial period. Many pretrial detainees are low-risk individuals who are highly unlikely to commit another crime while awaiting trial and are very likely to return to court. Other pretrial detainees pose a moderate risk to reoffend or not return, which can generally be managed through effective monitoring and supervision. And, finally, there are pretrial detainees who pose a significant risk of committing new crimes or skipping court who should be detained pretrial. "Effectively balancing the presumption of innocence, the assignment of the least restrictive intervention for defendants, and the need to ensure community safety while minimizing defendant pretrial misconduct is the challenge afforded pretrial justice. Whether this balance is reached and how pretrial justice is administered has significant ramifications for both the defendant and the community. For the community at-large, the pretrial decision affects how limited jail space is allocated and how the risks of non-appearance and pretrial crime by released defendants are managed. The pretrial decision also affects defendants' abilities to assert their innocence, negotiate a disposition, and mitigate the severity of a sentence."[25] In some cases the court may find that the defendant cannot be released, or is non-bailable, and therefore, subject to pretrial detention. In the vast majority of cases, however, the court will determine that the defendant can be released pretrial, i.e., "bailable." The court has a variety of options in releasing the defendant pretrial including releasing the person on their own recognizance or a conditional release, which entails putting specific conditions on

[23] Tim Schnacke, "Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform". National Institute of Corrections, September 2014, p. 19-37.
[24] "Moving Beyond Money: A Primer on Bail Reform", Criminal Justice Policy Program, Harvard University, October 2016, p. 5.
[25] Cynthia A. Mamalian, Ph.D., "State of the Science of Pretrial Risk Assessment". Pretrial Justice Institute, March 2011.

their release, including a secured or unsecured bond. Secured bail requires payment of money upfront to be released, while unsecured bail permits release without payment and only requires payment if the defendant does not comply with release conditions. Some courts allow the defendant to pay a percentage of the full bond amount to secure release. If the defendant lacks adequate funds or resources to pay the unsecured bond amount, a bail bond agent, or surety, can make the payment for the defendant.

C. Current Law

Recommendation:

1) *Eliminate duplication between the Ohio Revised Code and the Ohio Rules of Criminal Procedure regarding the amount, conditions, and forms of bail.*

Article 1, Section 9 of the Ohio Constitution provides:

> *"All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great, and except for a person who is charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community. Where a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and conditions of bail. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.*
>
> *The General Assembly shall fix by law standards to determine whether a person who is charged with a felony where the proof is evident or the presumption great poses a substantial risk of serious physical harm to any person or to the community. Procedures for establishing the amount and conditions of bail shall be established pursuant to Article IV, Section 5(b) of the Constitution of the state of Ohio."*

Based upon this Constitution construct, the Ohio General Assembly has adopted several statutes regarding eligibility for bail,[26] and the Supreme Court of Ohio has adopted Rule 46 of the Ohio Rules of Criminal Procedure. The statutory framework and the rule are, in many ways, duplicative. Both address the form of bail and the factors to be considered in setting bail. This duplication should be addressed in light of the Modern Courts Amendment, which states that the rules of procedure adopted by the Court supersede any conflicting statutory enactment regarding procedural matters.[27] Clarity in the law will assist greatly in consistency in application.

The Supreme Court of Ohio has not explicitly defined "bail" as it appears in Article I, § 9 of the Ohio Constitution. However, the Court has used the term "bail" to refer to security for the release of an accused from jail in order to appear before the court or judge. The Supreme Court has interpreted "bail" as the physical release of an accused person from jail. However,

[26] R.C. §§ 2713.09-2713.29, 2935.15, 2937.22-2937.45, 2949.091, 2963.14
[27] Ohio Constitution, Article IV, §5(B).

most cases from the high court focus on the imposition of "excessive bail" and the financial aspects of bail.[28]

IV. Recommendations

A. Pretrial Risk Assessment

Recommendation:

1) *The General Assembly should mandate and fund the use of a validated, risk-assessment tool for pretrial release and detain decisions.*

2) *The Supreme Court of Ohio should amend Crim.R. 46 to include results of risk assessments as a factor to be considered in release and detain decisions.*

While there are many elements of an effective pretrial system, the one element that has been discussed repeatedly both in Ohio and around the country is the use of a validated risk assessment tool to assist in making release and detain recommendations or decisions.

According to the National Institute of Corrections (NIC), effective pretrial programs use validated pretrial risk assessment criteria to gauge an individual defendant's suitability for release or detention pending trial. A good risk assessment tool is empirically based—preferably using local research — to ensure that its factors are proven as the most predictive of future court appearance and re-arrest pending trial.[29] The Laura and John Arnold Foundation has developed a universal risk assessment tool which provides an objective assessment of a defendant's risk for committing a new crime, risk for committing violent crime, and risk of failing to appear.[30] Many states have begun using risk assessment to assist in pretrial decisions. Kentucky, North Carolina, Pennsylvania, Utah, Wisconsin, and Virginia all utilize some type of pretrial risk assessment.

Currently in Ohio, some jurisdictions are utilizing one tool in the Ohio Risk Assessment System (ORAS) for pretrial risk assessment and a few jurisdictions are utilizing other validated risk assessment tools.

Lucas County began utilizing the Arnold Foundation's "Public Safety Assessment" tool in January 2015 to inform release and detain decisions at first appearances. The county was under a federal court order that capped the number of jail inmates which resulted in defendants being released to adhere to the order. The "Arnold" tool provides separate indicators for risk of failure to appear and new criminal activity and utilizes common non-interview dependent factors that predict risk, which optimizes the existing human and financial resources needed to administer risk assessments. The assessment system was implemented in January 2015 and already data is

[28] *Locke v. Jenkins*, 50 Ohio St.3d 45 (1969); *Baker v. Troutman*, 50 Ohio St.3d 270 (1990); *Sylvester v. Neal*, 140 Ohio St.3d 47 (2014), *State v. Bevacqua,* 147 Ohio St. 20, (2011).
[29] "Pretrial Justice: How to Maximize Public Safety, Court Appearance and Release: Participant Guide", National Institute of Corrections, Internet Broadcast, September 8, 2016, p. 39.
[30] "Developing a National Model for Pretrial Risk Assessment". LJAF Research Summary, Arnold Foundation, November 2013.

showing a drop in the number of pretrial bookings. Prior to implementation of the risk assessment, 38.4 percent of all bookings were released due to the federal court order. After implementation of the risk assessment, only 4.3 percent of all bookings were released due to the federal court order. Cases disposed of at the first appearance have doubled since the implementation of the assessment tool. The data shows that after the first year of implementation, court appearance rates have improved, public safety rates have improved, and pretrial success rates have improved.[31]

Summit County utilizes a risk assessment tool developed in-house based upon a tool utilized in Virginia. Their tool has nine indicators and includes an interview with each defendant being screened. Recently, the Montgomery Court of Common Pleas and the Cleveland Municipal Court have also partnered with the Arnold Foundation on using the foundation's risk assessment tool.

The Ad Hoc Committee makes no recommendation on what validated risk assessment tool should be utilized. However, the committee recommends that every jurisdiction in Ohio be mandated to utilize a validated, risk-assessment tool to assist in release and detain decisions pretrial. To be clear, risk assessment tools utilized pretrial should inform the court's consideration of the release and detain decision, therefore, the assessment should be completed prior to the decision of whether to release or detain the defendant is made, and the assessment should never supplant the individual decision making of the judge. Finally, to ensure fundamental fairness in the pretrial process, the Ad Hoc Committee believes that risk assessment results should be available for review by the parties to the case.

Public comments were received from the Hamilton County Public Defender's Office and the Office of the Ohio Public Defender asking the Commission to further clarify the meaning of "validated risk assessment tool". No standard definition exists in any jurisdiction. According to the Pretrial Justice Institute, risk assessment tools are "developed by collecting and analyzing local data to determine which factors are predictive of pretrial success and to determine their appropriate weight."[32] Validation is a multi-step process that looks at local indicators and predictive weights.[33] It also was suggested that the Ohio Criminal Sentencing Commission develop a list of approved risk assessment tools. The Commission, with appropriate statutory authority, would take on this responsibility by working with university researchers and criminal justice partners to identify appropriate risk assessment instruments that could be locally validated for each jurisdiction.[34]

[31] VanNostrand, Marie, "Assessing the Impact of the Public Safety Assessment", presented by Michelle Butts, Lucas County Court of Common Pleas, September 2016.
[32] Pretrial Justice Institute, "Risk Assessment: Evidence-based pretrial decision-making" 2013. https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=512bc99f-0e9f-ce77-a2a4-ec4a27ff0c10&forceDialog=0. *See also*, Pretrial Justice Institute, "Pretrial Risk Assessment: Science Provides Guidance on Assessing Defendants", May 2015. https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=23a6016b-d4b3-cb63-f425-94f1ab78a912&forceDialog=0
[33] Id.
[34] Id.

The Office of the Ohio Public Defender requested that any assessment tool not include an interview with the defendant of Fifth and Sixth Amendment concerns. The Ad Hoc Committee did not recommend including this as a recommendation and the current Summit County assessment tool does include an interview component. However, jurisdictions adopting a risk assessment tool should be aware of these concerns.

The Office of the Ohio Public Defender also suggested that guidance be given by the Ad Hoc Committee on completing risk assessments, including how soon after arrest they should be given to the defendant. Because results from pretrial risk assessments are meant to inform, and not replace, a court's discretionary decision making, the assessment tool should be given to the defendant prior to their initial appearance before the court when the release and detain decision is made.

Finally, the Hamilton County Public Defender's Office suggested that the Ohio Administrative Code be clarified to ensure that risk assessment tools other than ORAS be permitted. It should be noted that the Ohio Risk Assessment System is comprised of a variety of risk assessment tools, one of which is relevant to pretrial risk assessment. The Commission agrees that the Ohio Administrative Code 5120-13-01 should be amended to delete ORAS as the "single validated risk assessment tool"[35] as it pertains to pretrial risk assessment.

B. Pretrial Services

Recommendations:

1) *The General Assembly should dedicate statewide funding and support to the pretrial function through the Supreme Court of Ohio, whether through a pretrial services agency or the existing probation function. The Supreme Court of Ohio should set minimum standards for the provision of pretrial services.*

2) *The Supreme Court of Ohio should amend Crim.R. 46 to indicate that if a defendant is eligible for release under the Ohio Constitution, and the trial court determines that the defendant should be released pretrial, the trial court should first consider nonfinancial release.*

NIC has developed a list of essential elements of an effective pretrial justice agency, which is essentially a roadmap on how to create a system of pretrial justice that will maximize appearance and public safety while also maximizing release and appropriate placement.[36] The Ad Hoc Committee looked at each of these elements in making its recommendations regarding reform of pretrial practices in Ohio.

First, NIC identifies that the guiding principle of pretrial release and detain decisions must be based upon risk. "A risk-based model proceeds from the presumption that pretrial defendants should be released."[37] According to the survey conducted by the Ad Hoc Committee,

[35] OAC 5120-13-01(B)
[36] "Pretrial Justice: How to Maximize Public Safety, Court Appearance and Release: Participant Guide", National Institute of Corrections, Internet Broadcast, September 8, 2016, p. 26.
[37] "Moving Beyond Money: A Primer on Bail Reform", Criminal Justice Policy Program, Harvard University, October 2016, p. 14.

most pretrial decisions are being made based upon the nature of the current offense, the defendant's prior record, and prior failures to appear in making release decisions *(Appendix D)*. The survey results indicate that courts are currently assessing risk at some level in making release decisions. However, NIC also recommends that there be a dedicated pretrial services agency or function within an existing agency that assesses pretrial risk, makes recommendations to the court, and allows for differential supervision of pretrial defendants.

While most survey respondents report having a pretrial department or an individual who handles pretrial *supervision*, most of these departments or individuals are not engaged in bail investigations. The Ad Hoc Committee recognizes that a robust pretrial agency or department will have a significant fiscal impact on budgets. However, the Commission views this investment in pretrial services as a shift of current funding from the costs of incarceration to the costs of pretrial services. These costs should be borne by the state with funding flowing from the General Assembly to the Supreme Court of Ohio, and the Court should set standards that will act as a basis for pretrial services based upon the recommendations contained in this report. It is imperative that dedicated funding and support exist around the pretrial function to allow these entities or individuals to give objective recommendations to the court on release and detain decisions. It is important to note that the Ad Hoc Committee does not recommend that every jurisdiction establish a new agency or department for pretrial services. Pretrial services are a 'function' and can be absorbed by existing probation departments (where most pretrial supervision is occurring currently in Ohio) or court personnel with minimal (although existent) need to "staff up". Jurisdictions should be left to determine what the pretrial function/agency looks like to meet their needs based upon objective data (crime rates, jail populations, how many pretrial releasees exist, etc.).

NIC has also identified a presumption of nonfinancial release and statutory preventative detention as essential parts of an effective system. This requires states and localities to stress the least restrictive conditions to ensure appearance and public safety with non-financial release always considered as the first option. In addition, this element requires a risk-based preventative detention option that affords defendants due process when the decision to detain them pretrial is made. In Ohio, with municipal courts required to adopt a bond schedule and some courts of common pleas adopting them as well, financial release is generally the first option considered. To combat this current proclivity for requiring money to secure release, the Ad Hoc Committee recommends that Crim.R. 46 be amended to indicate that if a defendant is eligible for release under the Ohio Constitution, and the trial court determines that the defendant should be released pretrial, the trial court should first consider nonfinancial release.

Public comment from the Buckeye Institute asked that this recommendation specify that cash bail is the least preferred condition of release and that is should only be used as a last resort to ensure the defendant's appearance and public safety. While the Commission believes the recommendation is clear, it bears repeating that the Supreme Court of Ohio should amend Crim.R. 46 so that nonfinancial release is considered by the judge before considering utilizing cash bail for release.

C. Alternatives to Pretrial Detention

Recommendations:

1) *Increase awareness and use of a continuum of alternatives to detention.*

2) *Law enforcement should increase use of cite and release for low-level, non-violent offenses.*

3) *Prosecutors should screen cases before initial appearance for charging decisions, diversion suitability, and other alternative disposition options.*

4) *Prosecutors and courts should increase the availability of diversion through expanded eligibility utilizing risk assessments.*

One of the primary purposes of pursuing reform of bail practices and pretrial services is to ensure that those who pose the greatest risk to public safety and failure to appear are detained while awaiting trial while maximizing release of pretrial detainees to effectively utilize jail resources. A survey conducted by the Ad Hoc Committee showed that most jails are not differentiating their pretrial detainees from others in their data. However, of those who did have statistics, many reported a significant portion of their daily population being pretrial.

In addition to maximizing release through valid risk assessment as discussed above, there are alternatives to pretrial detention that can maximize release while ensuring appearance at court hearings and public safety. The Ad Hoc Committee believes that local jurisdictions should be made more aware of the myriad of choices for alternatives to detention for pretrial defendants and, determining which of those alternatives are most suitable for their community, should begin to utilize those alternatives more often.

One such alternative is day reporting, which is not being used widely, if at all, in Ohio for pretrial defendants. The District of Columbia has instituted a day reporting center that provides a variety of services to defendants and community members. Boone County, Indiana, offers a day reporting program that encourages defendants to work by requiring community service (if they are not employed) until work is found. Providing services and supervision will allow more low- and moderate-risk defendants to be released pretrial, maintaining or encouraging their employment, while maximizing the likelihood of appearance and safety.

Electronic monitoring is used in many jurisdictions, primarily post-conviction, and usually through courts. Increased use for pretrial defendants will promote pretrial release from detention while safeguarding the community and ensuring the defendant appears in court.

An avenue not explored in detail by the Ad Hoc Committee during its research into Ohio's system are release options utilized by law enforcement following arrest. Release on the least restrictive means starts with law enforcement, which has the option to use citations or summonses in lieu of custodial arrests for low-level, non-violent offenses. Certainly Ohio law enforcement has the option to issue a citation to a low-level, non-violent defendant where there is

no reasonable cause to suggest defendants would be a risk to themselves or the community, or miss a court date.

Cite and release programs, which is effectively an arrest and release, enable law enforcement to release a defendant rather than requiring formal arrest and booking. Most often used in misdemeanor cases, Louisiana and Oregon permit citations for some felonies.[38] Crim.R. 4(A)(3) allows a law enforcement officer, in misdemeanor cases, to issue a summons instead of making an arrest when doing so seems reasonably calculated to ensure the defendant's appearance. Cite and release allows law enforcement to spend more time enforcing laws instead of booking defendants, and decreases the number of defendants detained in jails pretrial.

NIC also suggests that prosecutors screen criminal cases before the initial appearance for appropriate charging purposes and to allow for screening for prosecutorial diversion. As discussed further below, prosecutorial diversion programs exist in Ohio, but generally not pre-filing. Increased screening by prosecutors will encourage thinking about the defendant's suitability for diversion, intervention in lieu of conviction, or as potential candidates for specialized dockets. On the opposite side of the coin, having defense counsel engaged before initial appearance is another essential element identified for an effective system. In Ohio, according to survey respondents, defense counsel is appointed at the initial appearance of the defendant. This does not allow for counsel to represent their client during a critical stage in the case where their liberty is at issue.

Although not strictly an alternative to pretrial detention, another major practice that aids in the effective use of jail resources is diversion. The American Bar Association Criminal Justice Section Standard 10-1.5 encourages the development of diversion programs as a means to monitor defendants pretrial.[39] Diversion is widely used in Ohio both by prosecutors' offices and by courts. The program types vary by jurisdiction and include OVI diversion, license intervention, first defendant diversion, and theft diversion. Few communities are utilizing diversion pre-filing; charges are almost always filed and then the case is diverted. The National Association of Pretrial Services Agencies issued a report in 2009 based upon a national survey of pretrial diversion programs finding that over half of the respondent programs did not require any guilty plea as a condition of eligibility.[40] The Ad Hoc Committee recommends that diversion be offered in every jurisdiction with eligibility criteria that takes into account pretrial assessments that can help prosecutors and judges make diversion determinations.

Public comment from the Hamilton County Public Defender suggested the Commission stress the importance of training for attorneys and judges on detention alternatives. Training and education is a paramount addition to all the Commission's recommendations regarding bail and pretrial services. However, the importance of prosecutors, defense counsel, and judges knowing about alternatives to pretrial detention, how to access those alternatives, and when their use is

[38] Mark Perbix, "Unintended Consequences of Cite and Release Policies", Warrant and Disposition Management Project, BJA, June 2014.
[39]Criminal Justice Section Standards, American Bar Association (November 22, 2016)
http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk.html
[40]" Pretrial Diversion in the 21st Century" , National Association of Pretrial Services Agencies (2009)
https://netforumpro.com/public/temp/ClientImages/NAPSA/18262ec2-a77b-410c-ad9b-c6e8f74ddd5b.pdf

appropriate cannot be understated. Therefore, a concerted effort toward increased training, whether through the Ohio Judicial College or legal associations, is encouraged.

D. Clerks of Court

Recommendations:

1) *The General Assembly should amend the Ohio Revised Code to eliminate the use of bond schedules in Ohio.*

2) *In the alternative, if bond schedules continue to be utilized, courts should reduce reliance on bond schedules, bond review hearings should occur within 48 hours, and bond amounts should be consistent within counties. In addition, the Supreme Court should amend the Rules of Superintendence for the Courts of Ohio to require yearly review of bond schedules.*

3) *Clerks should require surety bail bond agents provide only the information required by the current Ohio Revised Code.*

In the administrative process for bonds and the payment of money bail, no entity is more important than the clerks of court. Clerks of court issue approvals for surety companies, handle bond payments (following bond schedules set by the court), and handle the administrative processing of payments. The clerks represented on the Ad Hoc Committee and surveyed by the committee feel strongly that their responsibilities in the bail process are merely implementing the will of the courts.

Under current law, municipal courts are required to adopt a bond schedule, and these bond schedules are generally available in the clerks' offices where payments are made.[41] Many Ad Hoc Committee members advocated for the complete elimination of bond schedules in Ohio. For others on the committee, however, elimination of the bond schedules seems fantastical. Therefore, although the majority of members believe that elimination of these schedules will create fundamental fairness in the criminal justice system and pretrial justice, committee members believe that, should they continue to be used or, until they are eliminated, changes in their use should be implemented. The American Bar Association Standards on Pretrial Release state that "financial conditions should be the result of an individualized decision" and "should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge."[42]

Bond schedules vary widely among jurisdictions and are a cause of consternation for both defendants and practitioners. The Ad Hoc Committee understands the usefulness of a bond schedule in processing low-level, non-violent defendants out of jail. However, setting monetary bail based only upon the level of offense, as most bond schedules do, negates the ability of the court to differentiate bail decisions based upon a defendant's risk for failure to appear or the risk to public safety. At a minimum, defendants detained in accordance with the bond schedule

[41] Crim.R.46(G)
[42] ABA Criminal Justice Section Standards 10-5-3(e).

should have a bond review hearing within 48 hours. The Ad Hoc Committee recommends bond schedules be consistent and uniform among counties and among courts within counties. In addition, the committee recommends requiring annual review of the bond schedule by the court.

Under current law, surety bail bond agents may be required by the court to register with the clerk.[43] The Ad Hoc Committee's survey found that a number of factors go into approval of sureties, and not all clerks' offices require the same information from bail bonds agents with some clerks requiring information additional to that required under the Revised Code.[44] To promote uniformity and clarity for bonding agencies, the Ad Hoc Committee recommends that clerks across Ohio only require what is required under the Ohio Revised Code: a copy of the agent's surety bail bond license; a copy of the agent's driver's license or state identification; a certified copy of the surety bail bond agent's POA from each insurer that the surety bail bond agent represents; and biennial renewal of the registration.

Public comments from the Buckeye Institute urged the Commission to recommend complete prohibition of bond schedules. The Ad Hoc Committee debated bond schedules at length during its original deliberations on recommendations. As noted above, several members of the Ad Hoc Committee promoted and advocated for a recommendation to mandate repeal of bond schedules. However, the majority of Ad Hoc Committee members expressed concerns over municipal court case processing and political realities that caused them to vote in favor of the current recommendation: Bond schedules should not be utilized, but if they are utilized, they should be based upon the defendant's risk of failure to appear or commit a crime while awaiting trial and not solely on the offense(s) charged.

E. Release Violations

Recommendations:

1) *Jurisdictions should implement a court policy and utilize a response grid or matrix to "technical violations."*

Under Ohio law, failure to appear after release is punishable as a fourth degree felony or a first degree misdemeanor.[45] In addition, Crim.R. 46 indicates that a breach of a condition of bail can result in an amendment to the bail.[46] The question the Ad Hoc Committee faced in its review is whether or not every violation of release conditions needs to go to the judge.

In probation, revocations for technical violations can be numerous and this can be the same problem in pretrial. A "technical violation" encompasses any violation of a condition that is not a re-arrest or a failure to appear. There is a continuum that must be analyzed to determine when a "technical violation" becomes something greater. Pretrial service agencies and departments should be given the opportunity to bring a defendant who has a technical pretrial

[43] R.C. 3905.87
[44] R.C. 3905.87(B)
[45] R.C. 2937.99
[46] Crim.R. 46(I)

violation into compliance. The agency or department personnel must be able use their best professional judgment within the parameters of a specific, articulated court policy to say that "this violation" is the tipping point where it is no longer technical. The agency or department must have the option to recommend a different condition of bail or to put a new plan before the judge upon a violation.

The Ad Hoc Committee acknowledges that there needs to be a balancing of bail revocations resulting from technical violations and revocations based upon re-arrest or failure to appear. Clearly, in the Ad Hoc Committee's opinion, if there is a re-arrest or failure to appear, the judge should receive notice of those violations, as generally happens today. One condition the committee discussed at length was 'no contact' orders. Because the committee recognized the potential for harm to victims if such an order is violated, the Ad Hoc Committee believes that a violation of a no contact order is never a "technical" violation.

In some jurisdictions a response grid or matrix has been developed for violations.[47] Approved by the court, a matrix makes it possible for responses to violations to be responsive to the defendant's situation and ensures the response is swift and impactful. The Ad Hoc Committee encourages jurisdictions to consider adoption of a response grid for violations and to consider graduated responses based upon the nature of the violation.

F. Victims

Recommendations:

1) *Ensure the alleged victim is notified of arraignment decisions as required by the Ohio Revised Code.*

2) *The General Assembly should amend Revised Code Chapter 2930. to ensure alleged victims are informed on how to contact any pretrial supervisory authority.*

An important constituency in the pretrial structure is the alleged victims of the crimes committed by the defendant. The Ad Hoc Committee believes that it is imperative that alleged victims be aware of release and detain decisions. Most states, including Ohio, have laws that specifically address alleged victims' interests related to pretrial release. [48] Forty-one states mandate notification of the pretrial release hearing and 19 of those states allow the alleged victims to participate in some manner.[49] In Ohio, alleged victims get notice of pretrial hearings and can appear if the alleged offense is an offense of violence and the alleged victim is eligible for a protection order. Notification generally is handled by the prosecutor's office and the Ad Hoc committee recognizes the need to ensure that notification about what happened at arraignment is necessary and, most importantly, if a "stay away order" has been issued. Alleged victims also

[47] Milwaukee County Behavior Response Guidelines (April 2014); Mesa (Co.) County Pretrial Services Response to Violations Guide; Ramsey (Mn.) County; Los Angles (Ca.) County.
[48] R.C. 2930.05(A)
[49] Amber Widgery, "Victims' Pretrial Release Rights and Protections", National Center for State Courts, May 12, 2015, http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-victims-rights-and-protections.aspx.

need to be given information on how to contact any pretrial supervisory authority if necessary.

G. Prosecutors

Recommendations:

1) *A representative of the prosecutor's office should be required to appear on behalf of the state at every initial appearance.*

Under current Ohio law, a representative of the state is not required to appear at a defendant's initial appearance and, in some jurisdictions, the prosecuting attorney or their representative does not appear. This is especially true in jurisdictions where the prosecutor is "part time." The Ad Hoc Committee believes that the presence of a representative of the state at the initial hearing where pretrial release and detain decisions are made is as important as the presence of defense counsel (discussed below). The presence of the state at the initial hearing can aid in the early resolution of cases and can ensure that charges are correct and appropriate, any release conditions are commensurate with the offense charged.[50]

H. Counsel for Defendant

Recommendations:

1) *When a defendant is in custody or taken into custody, counsel should be provided at bail hearings unless the defendant knowingly and voluntarily waives counsel.*

2) *If a defendant is in custody or taken into custody and qualified pursuant to R.C. 120.05, counsel for the case should be appointed prior to the conclusion of the arraignment proceeding.*

As discussed earlier in this report, NIC has identified the presence of counsel for the defendant at the initial appearance as a hallmark of an effective pretrial system. When defendants are at risk of losing their freedom when at risk of being detained, counsel should be present. The U.S. Supreme Court has found that the criminal defendant's initial appearance before a magistrate or judge, where the defendant learns the charge against him or her and his or her liberty is subject to restriction, marks the initiation of adversarial judicial proceedings.[51] This triggers the attachment of the Sixth Amendment right to counsel and is not dependent upon whether a prosecutor is aware of, or involved in, the initial proceeding.[52] Three states require counsel to be present at a defendant's pretrial release decision.[53]

While the Ad Hoc Committee recognizes that many jurisdictions have counsel present at the initial hearing, the Constitutional right to counsel is so vital to the process that we would be

[50] National District Attorneys Association, "National Prosecution Standards, Third Edition", Standards 4-5.1 and 4-5.2, 2009, http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf.
[51] *Rothergy v. Gillespie County*, 554 U.S. 191, 213 (2008).
[52] *Rothergy v. Gillespie County*, 554 U.S. 191, 194 (2008).
[53] Maryland, Connecticut, and New York. Sara Sapia, "Access to Counsel at Pretrial Release Proceedings" National Center for State Courts Pretrial Justice Center for Courts, November 2016.

remiss if we did not acknowledge that there are defendants who do not have any representation during bail determinations. An attorney must be provided at the initial bail hearing regardless whether the defendant has the ability to hire a private attorney or not. Indigent defendants must have an attorney appointed, but those defendants, not financially eligible for a public defender for their case, who may hire a private attorney, can still have the public defender or appointed counsel for the bail hearing, unless the defendant knowingly and voluntarily waives counsel.

Counsel for the case should be appointed prior to the conclusion of the arraignment proceeding. Most jurisdictions adhere to this practice, which promotes future appearances. The more information defendants have the more likely they are to return to court. Providing an attorney's name in the entry that defendants take with them will encourage them to contact their counsel, making it more likely they will return for future hearings. In addition, if the defendant has representation at arraignment, counsel assigned to the case will be better able to determine what factors were considered in the setting of bail, which is beneficial if that counsel is seeking an amendment to the bail amount.

Public comment from the Office of the Ohio Public Defender asked that this recommendation be reworded to stress that the defendant has a right to counsel at the initial hearing. Language in the body of recommendation was revised from the initial draft to indicate that counsel "must" be appointed. The same public comment suggested that a recommendation be included to allow an arrested person to knowingly, intelligently, and voluntarily waive their bond hearing. This suggestion received support by a majority of the Ad Hoc Committee members who responded. However, it was a very close vote (9 in favor, 7 opposed), so instead of a recommendation, the suggestion is noted here for policy makers in the General Assembly to consider as part of a package of reforms in bail and pretrial services.

I. Bondsmen

Recommendations:

1) *Continue to utilize bail bond surety agents, viewing them as another tool in the arsenal.*

2) *Continue utilizing bail bond surety agents in pretrial monitoring and supervision for their clients.*

The Ad Hoc Committee included bail bond surety agents in its membership because they currently exist as a major force in the pretrial system in Ohio. Both the Ohio Bail Bondsmen Association and the American Bail Coalition addressed the Ad Hoc Committee during its deliberations. According to the American Bail Coalition, there are approximately 600 licensed bail agents in Ohio.[54] Despite the recommendations above to decrease the usage of monetary bail and rely instead upon risk assessment, it is unlikely that monetary bail will be wholly replaced. The Ad Hoc Committee envisions a system in Ohio where the first instinct courts have regarding defendants pretrial is to release them on their own recognizance. But the Ad Hoc Committee

[54] Jeff Clayton, National Policy Director, American Bail Coalition, "Presentation to the Ad Hoc Committee on Bail and Pretrial Services of the Ohio Criminal Sentencing Committee", July 22, 2016.

recognizes that there are situations where monetary bail may be the best way to ensure a defendant's appearance or protect public safety. For this reason, bondsmen need to be viewed as another tool in the arsenal for release.

Despite the most effective risk assessment tools available, there will be defendants who are released and then fail to appear at their court dates. Bondsmen are in a position to assist in ensuring that those who fail to appear are found and brought before the court for a review of their violations. Under the current system, bond agents also can be involved in GPS monitoring and drug or alcohol testing. Courts generally would like to have as much information about the defendant appearing before them as possible. If a surety bond agent can provide insight into a defendant's history, the likelihood the defendant is to appear, or other information, the court should be able to utilize that information.

The Professional Bail Agents of the United States (PBUS) and the Ohio Bail Agents Association both submitted comments on the Ad Hoc Committee's recommendations prior to the public comment period. PBUS suggested a series of eligibility requirements for a personal recognizance bond that would limit the issuance of those bonds to a limited number of defendants. The Commission opted not to incorporate the PBUS changes into the initial draft released in March. The Ohio Bail Agents Association expressed concerns over failure to appear rates in those counties currently utilizing pretrial risk assessment and the costs associated with the Ad Hoc Committee's recommendations. The information provided by the Ohio Bail Agents Association was disseminated to all Commission members and is a part of this report in *Appendix E.*

J. Data Collection

Recommendations:

1) *The General Assembly and the Supreme Court of Ohio should Increase data collection and analysis for all facets of the bail and pretrial system in Ohio.*

2) *Specifically, local courts, or the most appropriate entity, should collect data on diversion outcomes to measure effectiveness of programs and develop a method to track the number of hearings on bond and information about violations that occur while defendants are out on bond.*

3) *The General Assembly should ensure appropriate resources for any required data collection regarding bail and pretrial services.*

Recent trends in criminal justice reform, including bail and pretrial service reform, call for the use of evidence-based practices. Evidence-based practices and decision making require a strategic and deliberate method of applying empirical knowledge and research-supported principles to justice system decisions.[55] In order to adequately determine the current state of pretrial services in Ohio and measure outcomes of any implemented reforms, the General Assembly and the Supreme Court of Ohio must require the collection of robust and useful data.

[55] National Institute of Corrections, Evidence Based Decision Making, January 23, 2017, http://info.nicic.gov/ebdm/.

NIC recognizes that performance management of the pretrial system is necessary to ensure effectiveness. As in other areas of Ohio's criminal justice system data regarding pretrial decisions, agencies, and outcomes is rarely collected. Fewer than 20 percent of respondents to the Ad Hoc survey collect data on failure-to-appear rates and even fewer collect data regarding arrests for crimes committed while on release pretrial. The Ad Hoc Committee recommends a dedicated and concerted effort to increase data collection and analysis for all facets of the bail and pretrial system in Ohio. At a minimum, the committee recommends that collection of appearance rates, safety rates, and concurrence rates (how often a judge accepts a pretrial service agency recommendation) be mandated for each jurisdiction. However, policy makers at both the General Assembly and the Supreme Court of Ohio should consider the more robust measurements advocated by NIC in its publication "Measuring What Matters".[56] In its work, NIC recommends the collection of the outcome measures mentioned above (appearance rates, safety rates, concurrence rates) and, in addition, the collection of performance rates, including universal screening and recommendation rates.[57] The recommended data points from NIC would vastly increase the knowledge policy makers have on the effectiveness of implemented reforms.

Additionally, the Ad Hoc Committee specifically recommends that data be collected regarding diversion programs and funding sources and data regarding diversion outcomes to measure the effectiveness of diversion programs. There is currently no existing clearinghouse of information on funding sources and information on diversion. Knowing success and failure rates of any diversion program is paramount in determining if the diversion programs are effective and if any risk assessment screening for diversion is effective.

Despite an increase in initial costs to begin collection of this data, whether through new systems or updates to case management systems, the Ad Hoc Committee strongly believes that these elements are the only true measure of the effectiveness of pretrial services. The Ad Hoc Committee acknowledges that data collection in a number of arenas too often falls on the clerks office. However, considering the dearth of data in the pretrial system the Ad Hoc Committee believes that clerks are going to have to be a part of a new emphasis on data collection. Specifically, the Ad Hoc Committee recommends the development of a method to track the number of hearings on bond and information about violations that occur while defendants are out on bond. The Ad Hoc Committee's survey showed that this data is not currently being collected, either by the court or the clerks. However, the Ad Hoc Committee recommends this information must be collected to ensure an effective system. Regardless of which entity, i.e., court, clerks of court, local law enforcement, prosecutors, etc., is deemed to be in the best position to collect data regarding bail and pretrial services, appropriate resources need to follow any data-collection requirements. The General Assembly must work with the Supreme Court of Ohio to determine an appropriate amount for updates to all case management systems or for development of a statewide collection capability.

Public comment from the Office of the Ohio Public Defender suggested that counties be directed to submit all bail assessment results and arraignment/release hearing dockets to an

[56] "Measuring What Matters: Outcome and Performance Measures for the Pretrial Services Field", National Institute of Corrections, August 2011, https://s3.amazonaws.com/static.nicic.gov/Library/025172.pdf.
[57] *Id.* at p. 5.

independent entity. In addition, the suggestion was made to make all data a public record, including ORAS data. The Ad Hoc Committee did not favorably approve this suggestion for inclusion in the recommendations. However, the committee was split fairly evenly, which the Commission felt was important to note for policymakers as they consider increased data collection in bail and pretrial services.

K. Costs

The Ad Hoc Committee is not naïve and understands that its recommendations have a cost. Research on existing pretrial programs shows wide discrepancies in costs dependent upon the nature of the programs. In Kentucky, for example, which operates a statewide pretrial system with 294 employees covering 120 counties, the 2012 budget was $11,820,000. According to their Annual Report, the cost of pretrial release per defendant was $11.74 while the cost for pretrial incarceration was $613.80 per defendant.[58] In Salt Lake (Utah) County, where pretrial services are administered and funded at the local level, the budget for case management this year was $1,477,722. Jail screening is funded separately and costs $932,578.[59]

Summit County's pretrial service program began utilizing a validated risk assessment tool in felony cases in 2006. Pretrial investigations are conducted in the county jail on all new felony bookings, including an interview with the defendant, and the risk assessment tool's report is generated within two days of incarceration. Pretrial staff are present in all arraignments to assist the court in bail decisions. An independent, non-profit community corrections agency (Oriana House) provides pretrial supervision services to the court. In 2016 the program supervised 1,562 clients with a 77 percent success rate. Costs for pretrial supervision were dependent upon the level of supervision. A minimum supervision level cost $1.32 per day per defendant, medium supervision cost $2.64 per day and maximum supervision cost $5.02 per day. The total cost of the pretrial supervision program in 2016 was $783,000. Summit County Jail's daily rate for 2016 was $133.25 per person, per day.[60]

Data collection costs would vary, dependent upon whether a court's case management system has the ability to currently track the data or if the system has to be modified to add database fields or codes. The Ad Hoc Committee is fully aware that implementation of these recommendations, particularly implementation of risk assessment systems, dedicated pretrial service staff, increased diversion opportunities, and increased data collection, will have fiscal implications for both the state and local governments.

It should be remembered, however, that the price of reform is offset by the potential savings in the cost of detention. The Pretrial Justice Institute recently estimated that American taxpayers spend about $38 million per day incarcerating pretrial defendants, which works out to about $14 billion annually.[61]

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[58] Kentucky Pretrial Services; https://www.pretrial.org/download/infostop/Kentucky%20Pretrial%20Services%20History%20Facts%20and%20Stats.pdf

[59] Kele Griffone, Division Director, Salt Lake County Criminal Justice Services, December 1, 2016.

[60] All information was provided to the Ad Hoc Committee by Kerri Defibaugh, Summit County Pretrial Services Supervisor and Melissa Bartlett, OHI pretrial Services Coordinator, September 2016.

[61] "Pretrial Justice: How much does it cost", Pretrial Justice Institute, January 24, 2017.

V. Conclusion

<u>Recommendation:</u> The General Assembly should task the Ohio Criminal Sentencing Commission with creation of a committee for implementation and ongoing monitoring of the recommendations in this report.

The Ad Hoc Committee believes that implementation of these recommendations will, over time, result in cost savings to the justice system and result in a pretrial justice system that maintains due process and equal protection while ensuring public safety and court appearances. The work is not finished with the publication of this report. Historically, there have been many solid, forward-thinking recommendations put forth in various reports from a myriad of committees, task forces, and commissions that have never been implemented. For that reason, the Ad Hoc Committee recommends that the General Assembly amend the Ohio Revised Code to require the Ohio Criminal Sentencing Commission to form an ongoing committee tasked with facilitating implementation of these recommendations and monitoring progress and trends regarding bail and pretrial issues.

The Ad Hoc Committee believes that implementation of the recommendations contained herein will promote efficiencies and consistency in Ohio's pretrial system while decreasing the reliance on monetary bail as the primary release mechanism. Of vital importance, however, is education and training of court personnel, including judges and clerks of court, prosecutors, defense counsel, and others with a vested interest in the pretrial process. Without training and education, the individuals operating within the system will remain reluctant to embrace risk assessment and alternatives to monetary bail. The Ad Hoc Committee encourages ongoing monitoring, through data collection and analysis of the pretrial system in Ohio, and suggests that the Ohio Criminal Sentencing Commission be tasked with periodically reporting on pretrial practices and operations.