

# CUYAHOGA COUNTY BAIL TASK FORCE REPORT AND RECOMMENDATIONS

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All Cuyahoga County courts should transition from a bail system based on bond schedules, which vary widely from one court to the next, to a centralized, consistent, and comprehensive system of pretrial services initiated immediately after arrest. For most minor offenses, the presumption should be release on personal recognizance. Money bail should not be used to simply detain defendants. Rather than relying on bond schedules, courts should assess each defendant’s risk of non-appearance and danger to the community using a uniform risk assessment tool. If money bail is considered, courts should evaluate each defendant’s risk of non-appearance and ability to pay, and then tailor money bail accordingly.

A more robust and early evaluation of each defendant, using particularized information from a single, uniform database about a defendant’s criminal history and pending cases, as well as a risk assessment tool, would give judges better information upon which to make pretrial release decisions. Prompt centralized bail hearings before a judge, with defense counsel present, for all defendants in common pleas and municipal courts throughout the county would facilitate early and improved access to pretrial processes and services designed to reduce the risk of non-appearance and danger to the community. This system would lessen collateral consequences for the accused, such as loss of employment or housing while waiting in jail, and result in significant cost savings to government by reducing unnecessary detention.

This report and recommendations are consistent with the best practices and recommendations reflected in:

- The 2017 Report and Recommendations by the Ohio Sentencing Commission’s Ad Hoc Committee on Bail and Pretrial Services,<sup>1</sup>
- The findings of a Cuyahoga County Jail Population Analysis conducted in 2017 by the Pretrial Justice Institute,<sup>2</sup>
- Other reports recently issued throughout the state of Ohio,<sup>3</sup>
- The ABA Standards for Criminal Justice, Third Edition, Pretrial Release,<sup>4</sup> and
- Recent nationwide trends in bail reform.<sup>5</sup>

<sup>1</sup> Ad Hoc Committee on Bail and Pretrial Justice: Report and Recommendations, Ohio Sentencing Commission, March 2017 (hereinafter, “Report of Ad Hoc Committee on Bail and Pretrial Justice”), available at <https://www.supremecourt.ohio.gov/Boards/Sentencing/Materials/2017/March/finalAdHocBailReport.pdf>.

<sup>2</sup> John Clark and Rachel Sottile Logvin, *Enhancing Pretrial Justice in Cuyahoga County: Results from a Jail Population Analysis and Judicial Feedback* (Sept. 2017, Pretrial Justice Institute) (hereinafter “PJI Report”), available at [http://www.acluohio.org/wp-content/uploads/2017/10/Cuyahoga-County-Jail-Population-Analysis-Report-PJI-2017\\_final.pdf](http://www.acluohio.org/wp-content/uploads/2017/10/Cuyahoga-County-Jail-Population-Analysis-Report-PJI-2017_final.pdf).

<sup>3</sup> Recent reports in Ohio include the following: *Montgomery County, OH Bail Practices Review*, Public Performance Partners, Inc. (Jan. 11, 2018); Daniel J. Dew, “*Money Bail*”: *Making Ohio a More Dangerous Place to Live* (Dec. 11, 2017 The Buckeye Institute).

<sup>4</sup> ABA Standards for Criminal Justice, Third Edition, Pretrial Release, American Bar Association, 2007 (hereinafter, “ABA Standards, Pretrial Release”).

<sup>5</sup> See Report of Ad Hoc Committee on Bail and Pretrial Justice, pp. 1-2 (describing trends), and Appendix A (chart of states implementing reforms). For other recent literature consistent with the recommendations contained herein, see Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, U.S. Department of Justice, National Institute of Corrections (Aug. 2014); Timothy R. Schnacke, *Money as a Criminal Justice Stakeholder: The Judge’s Decision to Release or Detain a Defendant Pretrial*, U.S. Department of Justice, National Institute of Corrections (Sept. 2014); Megan Stevenson & Sandra G.

The Vera Institute of Justice recently referred to 2017 as “A Breakthrough Year for Bail Reform.”<sup>6</sup> Of particular note, a number of courts in recent years have held that traditional systems relying heavily on money bail, imposed without individualized assessments, violate the Due Process and Equal Protection clauses of the U.S. Constitution.<sup>7</sup> Most recently, the United States Court of Appeals for the Fifth Circuit upheld an injunction against Harris County (Houston), Texas, explaining that “[t]he fundamental source of constitutional deficiency in the due process and equal protection analyses is the same: the County’s mechanical application of the secured bail schedule without regard for the individual arrestee’s personal circumstances.”<sup>8</sup>

In a recent letter to all Ohio judges, Chief Justice Maureen O’Connor stressed similar concerns: “[p]ractices that penalize the poor simply because of their economic state; that impose unreasonable fines, fees, or bail requirements upon our citizens to raise money or cave to local funding pressure; or that create barriers to access to justice are simply wrong.”<sup>9</sup> Chief Justice O’Connor emphasized the critical obligation for state courts to “ensure that our practices fully comport with both state and federal constitutional standards.”<sup>10</sup>

Successful implementation of the recommendations in this report—consistent with statewide and national trends in pretrial reform—will assist the courts within Cuyahoga County in complying with these constitutional obligations and further the courts’ ongoing pursuit of fairness and justice for all citizens.

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Mayson, *Pretrial Detention and Bail*, in *Reforming Criminal Justice*, Volume 3 (Erik Luna, ed. 2017); Shima Baradaran Baughman, *The Bail Book: A Comprehensive Look at Bail in America’s Criminal Justice System*, Chapter 11 (“Optimal Bail: Using Constitutional and Empirical Tools to Reform America’s Bail System”) (Cambridge UP 2018).

<sup>6</sup> See <https://www.vera.org/state-of-justice-reform/2017/bail-pretrial>.

<sup>7</sup> See, e.g., *Walker v. City of Calhoun, Georgia*, 2016 WL 361612 (N.D. Georgia Jan. 28, 2016); *ODonnell v. Harris County, Texas*, 2018 WL 851776, No. 17-20333 (5th Cir. Feb. 14, 2018).

<sup>8</sup> *ODonnell*, slip op. at 20.

<sup>9</sup> The Honorable Maureen O’Connor, Chief Justice, Supreme Court of Ohio, letter dated Jan. 29, 2018, available at <http://www.supremecourt.ohio.gov/SCO/justices/oconnor/finesFeesBailLetter.pdf>.

<sup>10</sup> *Id.*

## PURPOSES OF BAIL AND PRETRIAL DETENTION

The two purposes of imposing conditions of pretrial release, or denying release, are (1) to ensure that the defendant will appear in court, and (2) to protect the community from a defendant who poses a danger to the community, including a danger to specific individuals.<sup>11</sup>

Financial conditions to release should not be used to simply detain an individual throughout the pretrial period. Further, it is not permissible to impose conditions of pretrial release, or to deny release, based on other considerations, such as: (1) a desire to send a signal to the defendant and the community about the seriousness of the charge; (2) to require the defendant to post money bail so that this money will be available to satisfy outstanding or anticipating court costs and fees; or (3) as a mechanism for resolving cases by detaining a defendant for a period equal to his or her expected sentence, and then inducing that person to enter a guilty plea for time served.<sup>12</sup> In addition, bail amounts should not be raised arbitrarily simply because the defendant has moved from one court to another. Thus bail set by one judge should not be raised by another judge without a hearing demonstrating new or additional information showing that the initial bail amount is insufficient to ensure the defendant's appearance.

Successful improvement of bail and pretrial release practices within the courts of Cuyahoga County will only be possible with cooperation among all of the criminal justice stakeholders, including law enforcement, the municipal courts and the Cuyahoga County Common Pleas court.

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<sup>11</sup> See *Moving Beyond Money: A Primer on Bail Reform*, Harvard Law School Criminal Justice Policy Program, October 2016, p. 5, available at <http://cjpp.law.harvard.edu/publications/primer-bail-reform> (hereinafter "Primer on Bail Reform"); ABA Standards, Pretrial Release, Standard 10-1.2 ("In deciding pretrial release, the judicial officer should assign the least restrictive condition(s) of release that will reasonably ensure a defendant's attendance at court proceedings and protect the community, victims, witnesses or any other person.").

<sup>12</sup> See *ODonnell*, slip op. at 5 (affirming an injunction against Harris County, Texas relating to bail and pretrial release practices; noting the district court finding that "prosecutors routinely offer time-served plea bargains at the hearing, and arrestees are under immense pressure to accept the plea deals or else remain incarcerated for days or weeks until they are appointed a lawyer.").

## I. **CENTRALIZED BAIL HEARING AND PRETRIAL SERVICES**

A. **Centralized Bail Hearing.** The municipal courts and common pleas court in Cuyahoga County should adopt a system of holding a centralized bail hearing for all defendants in the municipal courts and common pleas court within Cuyahoga County.

A system of centralized bail hearing would substantially increase the ability to improve bail and pretrial release processes in a number of ways:

- consistency of pretrial release process
- facilitates the consistent use of a single risk assessment tool
- enables the court to staff judges 6 or 7 days a week for uniformly prompt bail determinations
- enables the court to accept any reliable payment system and be available to accept money bail 24/7 to permit prompt release if money bail is set
- enables defense counsel to be present for bail hearings
- facilitates consistency of bond schedules
- facilitates access to improved pretrial services
- facilitates access to early screening for medical diagnosis and treatment, mental health diagnosis and treatment, and other factors that may create risks of non-appearance or danger to the community
- enables a single judge to consider and handle outstanding warrants or detainment orders against the defendant from others courts within the county

Many of these listed advantages are explained further below, as separate recommendations. Some of these reforms could also, in theory, be implemented separately by each of the municipal courts without a centralized bail hearing. In practice, however, it will be very difficult to effectively achieve many of these improvements without a centralized bail system. For example, it may be cost-prohibitive for some individual municipals courts to hold bond hearings 6 or 7 days a week, to have staff available to accept bail payments 24/7, or to have defense counsel present at all bail hearings. But with a centralized bail hearing system, featuring a larger volume of cases and a larger set of judges and staff persons, these reforms are more readily achievable.

Most major urban counties in Ohio use systems of centralized bail processing:

- Franklin County (Columbus)
- Hamilton County (Cincinnati)
- Summit County (Akron)

Cuyahoga County’s current system, in which defendants are processed through different courts and detained in different jails, results in considerable inconsistency across the county.

**B. Pretrial Services.** Cuyahoga County should invest in pretrial services to reduce unnecessary pretrial detention and reduce jail costs.<sup>13</sup>

The different courts in Cuyahoga County suffer from a lack of available pretrial services, and inconsistency in what pretrial services (if any) are available in one court versus another. The experience of Summit County (Akron) illustrates how investment in pretrial services can improve the bail process, reduce unnecessary detention, and save the county money.

Summit County pretrial services staff report that Summit County’s decision to invest in pretrial services has saved money while improving pretrial processes and reducing unnecessary pretrial detention. With a \$783,000 investment in pretrial services (2016), Summit County reduced its average length of stay for felony pretrial inmates from 60 days down to 21 days, resulting in a net savings to the county of \$7.3 million.<sup>14</sup>

In contrast with a daily cost of \$133.25 to detain inmates, Summit County’s pretrial supervision program costs ranges from a low of \$1.32 per day (for minimum supervision) to \$5.05 per day (for maximum supervision).<sup>15</sup>

According to a report by the Pretrial Justice Institute, “the Cuyahoga County Jail has been operating, on average, at over 100% capacity in four out of the past five years.”<sup>16</sup> There have been significant declines in the number of reported violent crimes and property crimes, and a significant decline in the number of criminal cases filed—and yet “there has not been a commensurate reduction in the number of jail bookings or average daily populations.”<sup>17</sup>

Summit County’s experience demonstrates how a county investment in pretrial services supervision can save a county millions of dollars while improving pretrial release processes and reducing unnecessary pretrial detention.

Cuyahoga County should invest in pretrial services, creating a program that can serve all pretrial defendants in the county. A centralized bail hearing process would facilitate the uniform and efficient provision of pretrial services to all pretrial defendants within the county.

**C. Uniform Database.** The county should create a single, uniform database with information about a defendant’s criminal history and pending cases, accessible to all officials within the county involved in bail and pretrial release determinations.

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<sup>13</sup> See Report of Ad Hoc Committee on Bail and Pretrial Justice, pp. 10-11 (recommending statewide investment in pretrial services).

<sup>14</sup> Kerri Defibaugh (Summit County Pretrial Service Supervisor) and Melissa Bartlett (Oriana House, Inc. Pretrial Services Coordinator), *Summit County Pretrial Services* (PowerPoint presentation), Jan. 31, 2017, slide 13. Summit County estimates that it reduced its number of jail days by 60,918. Multiplied by a daily jail rate of \$133.25 per day, Summit County estimates that it reduced its jail costs by \$8,117,234. The pretrial services program costs an estimated \$800,000 per year, for a net benefit to the county of around \$7.3 million. *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> PJI Report, p. 3.

<sup>17</sup> *Id.*

Regardless of whether centralized bail hearing system is adopted, centralized pretrial services should be managed by the County Probation Department to provide equal and consistent access to pretrial services to individuals charged in both the municipal and county courts. Each municipal court would remain responsible for personnel decisions, staffing, and premises as their budgets permit. This would localize relations between the defendant and his probation officer allowing for modifications of procedures to accommodate local circumstances that affect the implementation of any specific pretrial condition or requirement.

Pretrial services staff in Hamilton County (Cincinnati), Ohio report that one substantial improvement in Hamilton County's system for bail and pretrial release was the creation of a single, uniform database for all of Hamilton County used by all of the judges, court clerks, law enforcement agencies, probation officers, prosecutors, and defense lawyers. This uniform database provides information on each defendant from all of these sources, enabling the court (and the parties) to have a consistent and informed view of the defendant's criminal history, other pending cases, and other relevant information.

Creation of a system of centralized bail hearing system would likely facilitate the creation of a uniform database of the type described here. Even without centralized bail hearings, however, the county should create a uniform database to enable consistent access to information across the county.

## II. CONSISTENCY IN CUYAHOGA COUNTY AND PREVENTING DETENTION DUE TO POVERTY

A significant risk for any system of bail and pretrial release that uses money bail is the unnecessary detention of individual defendants who do not pose a danger to the community, solely because they cannot afford the amount of money bail required for their release. As stated above, the purpose of money bail is to enable release, not to detain.<sup>18</sup>

The PJI Report demonstrates that this problem exists within the courts of Cuyahoga County:

- Twenty-five percent of the felony pretrial population remained detained throughout the pretrial period, with an average detention of 104 days.<sup>19</sup>
- Of the seventy-five percent of the felony pretrial population that was released at some point, the average period of detention was 17 days.<sup>20</sup>
- Of the defendants who were released on a personal bond, thirty-eight percent had spent more than a week in pretrial detention before their release.<sup>21</sup>
- Of the defendants with a bond of \$5000 or less, twenty-eight percent never posted the bond and remained detained throughout the pretrial period.<sup>22</sup>

This type of unnecessary pretrial detention is a lose-lose: the taxpayers spend money on unnecessary detention, and the individual defendants suffer an unnecessary loss of liberty—often also losing income, their job, housing, and even custody of their children. In addition, defendants detained pretrial have difficulty assisting counsel in their defense.<sup>23</sup> In comparison with released defendants, detained defendants have higher rates of guilty plea and conviction, are sentenced to prison more often and receive higher sentences.<sup>24</sup>

In addition to unnecessary detention, Cuyahoga County also suffers from the problem of inconsistency from one municipality to the next. A suspect arrested on the same charge in one part of town may end up with a bond many times higher than if he had been arrested in another area, simply due to large inconsistencies in bond schedules in the different municipal courts.

The recommendations below are designed to address these two problems: preventing unnecessary detention that results from poverty, and preventing inconsistency within Cuyahoga County.

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<sup>18</sup> See ABA Standards, Pretrial Justice, Standard 10-5.3(a) (“The judicial officer should not impose a financial condition that results in the pretrial detention of the defendant solely due to inability to pay.”). The Fifth Circuit recently emphasized that “magistrates may not impose a secured bail solely for the purpose of detaining the accused.” *ODonnell*, slip op. at 13.

<sup>19</sup> PJI Report, at 3.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> See Schnacke, *Money as a Criminal Justice Stakeholder: The Judge’s Decision to Release or Detain a Defendant Pretrial*, pp. 50-51 (citing research findings).

<sup>24</sup> *Id.*

A. **Presumption of PR Release for Certain Offenses.**<sup>25</sup> For the following offenses, release on personal recognizance should be the presumption, unless the prosecutor or the court objects in a particular case based on individual circumstances:

1. Traffic offenses
2. Driving under suspension
3. Non-jailable offenses
4. Offenses that are not defined as “crimes of violence” under R.C. § 2901.01(A)(9)

In addition, the municipal courts and common pleas court within Cuyahoga County should identify and agree on any additional state or municipal code offenses for which a presumption of personal recognizance is appropriate.

B. **No Secured Bonds for Municipal Court Offenses.** For offenses that are adjudicated in municipal courts, courts should use only personal recognizance, nonmonetary conditions of release, and unsecured or 10% bonds to reduce the financial burden on the defendants.

For municipal court offenses, courts could still offer defendants the option of posting a cash or property bond, or a secured bond, if the defendant prefers. But cash bonds or secured bonds should not be required for municipal court offenses.

C. **Uniform Bond Schedule.** The municipal courts and common pleas court in Cuyahoga County should adopt a uniform bond schedule that does not vary from one municipality to the next.<sup>26</sup>

A bond schedule should not be used as the “default” or “presumptive” bond amount during individualized bond hearings. Instead, the uniform bond schedule should be used as a means of release in the time between arrest and booking and a person’s initial appearance in front of a judge. Ohio’s recent Ad Hoc Committee on Bail and Pretrial Services states the following:

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.<sup>27</sup>

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<sup>25</sup> See Report of Ad Hoc Committee on Bail and Pretrial Justice, Recommendation 1 (“Establish a risk based pretrial system, using an empirically based assessment tool, **with a presumption of nonfinancial release** and statutory preventative detention”) (emphasis added), pp. 11-12 (recommending that police, prosecutors, and courts pursue alternatives to pretrial detention).

<sup>26</sup> See Report of Ad Hoc Committee on Bail and Pretrial Services, p. 3 (“Bond schedules should be consistent and uniform between counties and between courts within counties”).

<sup>27</sup> *Id.*

Currently, Rule 46 of the Ohio Rule of Criminal Procedure requires courts to adopt bond schedules for all misdemeanor and traffic offenses.<sup>28</sup> The Ad Hoc Committee on Bail and Pretrial Services recommends that the legislature should eliminate the use of bond schedules.<sup>29</sup>

The criticisms of bond schedules are directed at the practice of courts using bond schedules, even at individualized bail hearings, to create presumptions of a set bond amount based primarily on the offense charged, rather than on the defendant's individual circumstances, including that individual's risk of non-appearance, individual ability to pay, and the possibility of other conditions of release that could ensure a particular defendant's appearance.<sup>30</sup>

To the extent bond schedules remain in use in Cuyahoga County, they should be made uniform and consistent across the county.

In addition, when determining amounts for bond schedules the courts in Cuyahoga County should consult bond schedules in other jurisdictions within the state of Ohio, to improve uniformity across the state.<sup>31</sup>

**D. Less Costly Forms of Bail and Lower Bail Amounts.** In formulating a uniform bond schedule for all courts within the county, the courts should adopt bond amounts that are not excessively high. In all cases, courts should impose bail amounts tailored to the circumstances of the individual defendant, and not rely on bond schedules to create a presumptive amount of bail.<sup>32</sup> If a judge determines that a money bond is necessary in an individual case, the judge should use the least costly form of bond that will adequately ensure the defendant's appearance.

**E. Individualized Bail Determinations Within 48 Hours of Arrest.** Courts should make individualized determinations when setting conditions of pretrial release, and adjust the amount of any money bail based on the individual defendant's ability to pay and his or her risk of non-appearance, rather than imposing the same bail amounts for all defendants charged with a particular offense regardless of their financial circumstances or individual risk.

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<sup>28</sup> See Ohio R. Crim. P. 46(G).

<sup>29</sup> See Report of Ad Hoc Committee on Bail and Pretrial Services, p. 13.

<sup>30</sup> A primary problem with Harris County's bail process was the heavy reliance on bond schedules in misdemeanor cases, rather than making individualized assessments. See *ODonnell*, slip op. at 20: "The fundamental source of constitutional deficiency in the due process and equal protection analyses is the same: the County's mechanical application of the secured bail schedule without regard for the individual arrestee's personal circumstances."

<sup>31</sup> See Report of Ad Hoc Committee on Bail and Pretrial Services, p. 3 ("Bond schedules should be consistent and uniform between counties and between courts within counties").

<sup>32</sup> See Report of Ad Hoc Committee on Bail and Pretrial Services, Recommendation 1.

The purpose of requiring the posting of money bail is to enable the release of a defendant who poses a risk of non-appearance. The money bail serves as an incentive to these defendants to appear for future court dates.

The purpose of money bail is not to demonstrate the seriousness of the offense or to fine or punish the defendant. The purpose of money bail is not to detain defendants, but to release them.

According to the ABA Standards, money bail, if needed, should be set at lowest level to ensure appearance “and with regard to a defendant’s ability to post bond.”<sup>33</sup> According to the Harvard Primer on Bail Reform, if money bail is set, “it is critical to ensure that courts inquire into the defendant’s ability to pay any monetary sum imposed.”<sup>34</sup>

In the recent *ODonnell* decision by the Fifth Circuit, the court noted that even though Harris County procedures state that judges should make individualized assessments in setting bail, in practice in misdemeanor cases judges did not make individualized assessments, but simply followed the bond schedule.<sup>35</sup> The bond schedule was followed about 90 percent of the time.<sup>36</sup>

This individualized bond assessment should be completed and bond set as soon as possible, and not more than 48 hours after arrest. (This time period does not seem to pose a problem, as in most cases the courts in Cuyahoga County already set initial bail within 48 hours of arrest.)

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<sup>33</sup> ABA Standards, Pretrial Release, Standard 10-1.4(c).

<sup>34</sup> Primer on Bail Reform, p. 10.

<sup>35</sup> Slip op., at 4.

<sup>36</sup> *Id.*

### III. SHIFT FROM BOND SCHEDULES TO RISK ASSESSMENT TOOL

Courts in Cuyahoga County routinely use a bond schedule that sets a presumptive bond amount based on the offense charged in any particular case. While judges retain the discretion to depart from the bond schedule in individual cases, the bond schedules operate as the starting point for bail determinations.

The false premise of bond schedules is that they bear very little relationship to the purposes of bail and pretrial release: (1) preventing failure to appear, and (2) protecting the community.

As stated above, money bail is only effective as a tool for addressing the first concern— incentivizing appearance. It does not address the second concern—protecting the community.<sup>37</sup>

Money bail should therefore be calibrated to incentivize a defendant to appear in court. But a bond schedule is set based on the offense charged, not on the risk of a particular defendant’s failure to appear. Thus bond schedules do not fit the judgment that judges should make in setting money bail—what is needed to ensure the defendant’s appearance.

Rather than setting money bail based on the offense charged (a fact relatively unrelated to risk of failure to appear), money bail should be set based on what is needed to incentivize the defendant to appear for court. There are two components to this question: (1) determining the risk of a defendant’s failure to appear, and (2) determining whether some amount of money bail mitigates that risk by incentivizing the defendant to appear.

The first question illustrates why courts should transition from bond schedules to risk assessment tools. A bond schedule does not reliably indicate a defendant’s risk of non-appearance, because the offense charged is not a reliable way to assess risk of non-appearance. A risk assessment tool, in contrast, directly addresses that issue.

The second question illustrates why, even after a risk assessment is performed, courts must assess an individual defendant’s financial circumstances. The amount of bail money required to incentivize appearance depends very heavily on the defendant’s financial resources. For a wealthy defendant posing a high risk of flight, a \$500 bond may represent a trivial amount of money that may not be sufficient to ensure his appearance. For a poor defendant, that same \$500 bond may be too high, as he may be unable to post it, and because a lesser bond would still adequately ensure his appearance.

As explained recently by the Fifth Circuit:

[T]ake two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. Applying the County’s current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to

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<sup>37</sup> See ABA Standards, Pretrial Release, Standard 10-5.3(b) (“Financial conditions of release should not be set to prevent future criminal conduct during the pretrial period or to protect the safety of the community or any person.”).

plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree.<sup>38</sup>

Because the purpose of money bail is not to punish or fine, but simply incentivize appearance in court, the amount must be tailored to the individual circumstances of each defendant.

- A. **Limit Use of Bond Schedule.** Bond schedules should only be used to facilitate the release of defendants, not to create a presumption of a particular money bail amount without regard to individual circumstances and ability to pay.<sup>39</sup>
- B. **Use a Validated Risk Assessment Tool.** The municipal courts and common pleas court in Cuyahoga County should adopt a validated risk assessment tool to assist judges in making bail and release determinations.<sup>40</sup>

Rather than rely primarily on a bond schedule tied to the offense charged, the courts should use a validated risk assessment tool. Unlike bond schedules, which are set only with regard to the offense, a risk assessment tool gauges an individual defendant’s risk of non-appearance, and danger to the community, based on a number of criteria about that defendant.

Risk assessment tools do not purport to be the last word or require the judge to make a particular bail determination in any particular case. Rather, the tool should be used by the judge, along with whatever additional information the judge has about the particular case, to make an informed, reasoned judgment about the appropriate conditions of release.

Risk assessment tools are not intended to, and should not, displace individualized judicial discretion. The Arnold Foundation states, “[i]t is critically important to note that tools such as this are not meant to replace the independent discretion of judges; rather, they are meant to be one part of the equation. We expect that judges who use these instruments will look at the facts of a case, and at the risk a defendant poses, and will then make the best decision possible using their judgment and experience.”<sup>41</sup>

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<sup>38</sup> *Id.* at 20.

<sup>39</sup> See Report of Ad Hoc Committee on Bail and Pretrial Services, pp. 3, 13.

<sup>40</sup> See Report of Ad Hoc Committee on Bail and Pretrial Justice, Recommendation 1 (“Establish a risk based pretrial system, using an empirically based assessment tool, with a presumption of nonfinancial release and statutory preventative detention”), and pp. 9-10 (recommending the use of a validated risk assessment tool).

<sup>41</sup> Arnold Foundation, *Research Summary: Developing a National Model for Pretrial Risk Assessment*, p. 5, available at [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary\\_PSA-Court\\_4\\_1.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary_PSA-Court_4_1.pdf). See also Primer on Bail Reform, p. 21 (“Without being considered in a broader context, quantitative risk assessment scores may also displace other potentially relevant considerations, resulting in mechanical application of pretrial outcomes that may be poorly suited to the circumstances and needs of individual defendants. . . . In many instances, an actuarial tool may be very predictive for the group on average but not accurate for any

It should be noted that several courts within Cuyahoga County already use a risk assessment tool. The Cleveland Municipal Court recently adopted the Arnold Foundation risk assessment tool and has been working on implementing that tool as part of its bail assessment process. The Cuyahoga County Court of Common Pleas uses the Ohio Risk Assessment System: Pretrial Assessment Tool (ORAS-PAT), and interviews detained defendants to confirm information relevant to bail determinations. Most initial bail hearings in Cuyahoga County currently occur in a municipal court, not in the Common Pleas Court, and thus the ORAS-PAT assessment does not ordinarily occur immediately after arrest, but after the defendant has already been processed through a municipal court and already had an initial bond.

**C. Adopt the Arnold Foundation Risk Assessment Tool.** The Task Force recommends the risk assessment tool developed by the Arnold Foundation for the following reasons:

1. The Arnold Foundation tool has already been adopted by the largest municipal court in Cuyahoga County, the Cleveland Municipal Court, and thus if this tool seems effective it would be more efficient to simply expand its use rather than transition to a different tool.
2. The Arnold Foundation risk assessment tool is simpler (requires less information) than some other risk assessment tools, and Arnold Foundation research indicates it is still as effective in assessing risk. The tool thus does not demand as large of an investment in pretrial services resources as some other tools.
3. In contrast with some other tools, the Arnold Foundation risk assessment tool provides a separate risk score for (1) failure to appear and (2) dangerousness to the community, which is preferable to a tool that combines those different factors into a single risk score.

The Cleveland Municipal Court recently adopted the Arnold Foundation risk assessment tool. At this point, reports indicate that the use of this tool has improved the quality of information available to judges making bail determinations. In particular, the tool ensures that in each case the judge receives comparable information about the defendant, making it easier to improve consistency in bail determinations.

Potential concerns that have been raised about the Arnold Foundation tool include that it does not include information about a defendant's mental health, and that it is not always reliable with respect to residency.

While this Report recommends the Arnold Foundation risk assessment tool for the reasons stated above, the more important recommendation is that the courts adopt a uniform, validated risk

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given member of that group. If a judge relies on a risk score without considering other factors that may be relevant in making a bail determination, the risk score could carry undue weight.”).

assessment tool rather than continuing to rely on bond schedules unrelated to an individual defendant's circumstances and ability to pay.

**D. Intimate Partner Violence and Domestic Violence Risk Assessment.** The municipal courts and common pleas court in Cuyahoga County should consider adopting a specialized risk assessment tool for cases involving intimate partner violence and domestic violence.

We recommend that the courts consider adopting a specific risk assessment tool for intimate partner violence and domestic violence cases, as the Arnold Foundation risk assessment tool is not designed to reflect the unique risks of intimate partner violence or domestic violence situations. Anecdotally, some judges have expressed concern about bail decision in intimate partner violence or domestic violence cases particularly because an accused may have an otherwise "low risk" score on more generic assessment tools when it comes to failure to appear and danger to the community assessments, but the accused may still present a high risk of violence to a spouse or family member. These specialized tools may also assist probation departments, prosecutors, and judges in fashioning appropriate pre-trial release conditions.

There are several assessment tools targeted to intimate partner violence and domestic violence. The following is not an exhaustive list, but serves as a guide for further investigation and implementation:

1. "Danger Assessment" or "Danger Assessment for Law Enforcement" (DA-LE)—used by the Cleveland Police Department. This tool is based on the research of Dr. Jacquelyn C. Campbell, PhD, RN, FAAN of Johns Hopkins University School of Nursing and Dr. Jill Theresa Messing, MSW, PhD, Arizona State University School of Social Work and developed with the Jeanne Geiger Crisis Center. There is also a version of the Danger Assessment (DA-R), which is used with women in same sex relationship.<sup>42</sup>
2. Domestic Violence Screening Instrument (DVSI-R).<sup>43</sup>
3. Ontario Domestic Assault Risk Assessment (ODARA).<sup>44</sup>
4. Spousal Assault Risk Assessment (SARA).<sup>45</sup>

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<sup>42</sup> See Goodman, L.A., Dutton, M.A., & Bennett, L. (2000). *Predicting repeat abuse among arrested batterers: Use of the Danger Assessment Scale in the Criminal Justice System*. *Journal of Interpersonal Violence*, 15, 1. The most recent versions of the "Danger Assessment" tool are available at <https://www.dangerassessment.org/DATools.aspx>.

<sup>43</sup> Williams, K., *Family Violence Risk Assessment: A Predictive Cross-Validation Study of the Domestic Violence Screening Instrument-Revised (DVSI-R)*, Law and Human Behavior 2011 American Psychological Association, 2012, Vol. 36, No. 2.

<sup>44</sup> 5 Muskie School of Public Service, University of Southern Maine, *An Evaluation Comparing the Effectiveness of Two Evidence-Based Risk Assessment Tools for Domestic Violence Offenders*. August 2008.

<sup>45</sup> Dutton, D. G. & Kropp, R. P. 2000, *A review of domestic violence risk instruments*, *Trauma, Violence and Abuse*, vol. 1, no. 2, pp.171-181.

In addition, Hamilton County has a risk assessment tool that used specifically for domestic violence cases, and the courts could consider that tool as well as those listed above.

It should also be noted that Revised Code section 2919.251 requires a bail hearing in certain domestic violence cases. At those hearings, the Revised Code requires that the court consider the following enumerated factors, in addition to any further information that may be available, before determining the appropriate bail:

- (1) Whether the person has a history of domestic violence or a history of other violent acts;
- (2) The mental health of the person;
- (3) Whether the person has a history of violating the orders of any court or governmental entity;
- (4) Whether the person is potentially a threat to any other person;
- (5) Whether the person has access to deadly weapons or a history of using deadly weapons;
- (6) Whether the person has a history of abusing alcohol or any controlled substance;
- (7) The severity of the alleged violence that is the basis of the offense, including but not limited to, the duration of the alleged violent incident, and whether the alleged violent incident involved serious physical injury, sexual assault, strangulation, abuse during the alleged victim's pregnancy, abuse of pets, or forcible entry to gain access to the alleged victim;
- (8) Whether a separation of the person from the alleged victim or a termination of the relationship between the person and the alleged victim has recently occurred or is pending;
- (9) Whether the person has exhibited obsessive or controlling behaviors toward the alleged victim, including but not limited to, stalking, surveillance, or isolation of the alleged victim;
- (10) Whether the person has expressed suicidal or homicidal ideations;
- (11) Any information contained in the complaint and any police reports, affidavits, or other documents accompanying the complaint.<sup>46</sup>

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<sup>46</sup> O.R.C. § 2919.251(B).

## IV. PROPERLY ADDRESS DANGER TO THE COMMUNITY

**A. Danger to the Community.** Money bail should not be used to address danger to the community, only risk of failure to appear.

Money bail, when appropriate, can serve as a tool to incentivize a defendant who poses a high risk of non-appearance to appear in court. Thus money bail is a tool that can be used to address the risk of failure to appear.

Money bail should not be used, however, to address a defendant's danger to the community. The ABA Standards state plainly: "Financial conditions should not be employed to respond to concerns for public safety."<sup>47</sup>

A defendant's danger to the community is not reduced by the amount of money bail required. The question of whether a particular defendant is released for a given amount of money bail depends on that defendant's financial resources, which has nothing to do with his dangerousness to other persons or the community in general.<sup>48</sup>

Many non-monetary conditions of release can be used to reduce a defendant's danger to the community, such as effective pretrial monitoring through pretrial services, treatment for addiction, mental health treatment, and medical treatment. For higher-risk defendants more invasive measures such as electronic monitoring or even house arrest can be used.

When a court increases a bond amount due to the defendant's dangerousness, the court is increasing the likelihood that the defendant will not be able to be released due to limited financial resources, but is not protecting the community if the defendant is released. If the defendant is too great of a danger to be safely released, he should be denied bail and ordered detained after an adversarial hearing at which he is represented by counsel (see Recommendation IV.B below). If he can be safely released (perhaps under conditions discussed above), then any money bail should be used only to ensure his appearance (if necessary).

Recommendation III.B, above, suggests adopting a Risk Assessment Tool that separately assessed risk of failure to appear and danger to the community. Thus it would assist judges in focusing the use of money bail, if appropriate, on risk of failure to appear and not on danger to the community.

**B. Deny Release When Necessary to Protect the Community.** For defendants who pose too great a danger to the community to be released on any conditions, courts should deny

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<sup>47</sup> ABA Standards, Pretrial Release, Standard 10-1.4(d). The commentary to this standard notes, "[t]his Standard strongly emphasizes the principle that financial bail is not an appropriate response to concerns that the defendant will pose a danger if released. . . . Money bail should not be used for any reason other than to respond to a risk of flight. The practice of setting very high bail in situations where the defendant is regarded as posing a risk of dangerousness is explicitly proscribed by this Standard." ABA Standards, Pretrial Release, Commentary to Standard 10-1.4(d), p. 44.

<sup>48</sup> "When pretrial detention depends on whether someone can afford to pay a cash bond, two otherwise similar pretrial defendants will face vastly different outcomes based merely on their wealth." Primer on Bail Reform, p. 4.

bail, after an adversarial hearing at which the defendant is represented by counsel, rather than setting arbitrarily high bail amounts.

As stated in the Primer on Bail Reform, “[o]ne of the most significant pathologies of money bail is its use as a subterranean mode of preventive detention; judges address perceived risk to the community by setting bond at a level that will be presumptively out of reach to a defendant.”<sup>49</sup>

The ABA Standards suggest the preferable approach. Under Standard 10-5.8:

If, in cases meeting the eligibility criteria specified in Standard 10-5.9 below, after a hearing and the presentment of an indictment or a showing of probable cause in the charged offense, the government proves by clear and convincing evidence that no condition or combination of conditions of release will reasonably ensure the defendant’s appearance in court or protect the safety of the community or any person, the judicial officer should order the detention of the defendant before trial.<sup>50</sup>

Because the outright denial of bail results in the detention of the defendant before conviction or sentence, it should only be used for defendants who pose a serious risk of danger to other individuals or the community at large and who cannot safely be released under any set of conditions.

Ohio Revised Code section 2937.222 sets forth the procedures under which a defendant may be denied release on bail. These procedures include, among other things, that the court hold a hearing at which the defendant is represented by counsel. The statute also provides for the standard for denial of release on bail:

No accused person shall be denied bail pursuant to this section unless the judge finds by clear and convincing evidence that the proof is evident or the presumption great that the accused committed the offense described in division (A) of this section with which the accused is charged, finds by clear and convincing evidence that the accused poses a substantial risk of serious physical harm to any person or to the community, and finds by clear and convincing evidence that no release conditions will reasonably assure the safety of that person and the community.<sup>51</sup>

A denial of pretrial release under section 2937.222 is a final appealable order under Ohio law, and thus defendants may seek appellate review of any denial of release even while the trial court process continues.<sup>52</sup> The statute also provides for expedited appellate review of these orders.<sup>53</sup>

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<sup>49</sup> Harvard Primer on Bail Reform, p. 24.

<sup>50</sup> ABA Standards, Pretrial Release, Standard 10-5.8(a).

<sup>51</sup> O.R.C. § 2937.222(B).

<sup>52</sup> See O.R.C. § 2937.222(D).

<sup>53</sup> *Id.*

## V. IMPROVED NOTICE OF HEARINGS, AND QUICK ACCESS TO BAIL AND RELEASE

- A. **Improved Notice of Court Dates.** The courts should adopt the most effective mechanisms for providing notification to individuals of upcoming court appearance dates.

Providing notice of upcoming court appearance dates through the mail is sometimes ineffective, in particular for transient, indigent populations. In 2018, it is far more common for individuals to communicate and keep track of their schedules through electronic means than to use the mail system. Courts should experiment with different ways of providing notice to defendants of upcoming court appearances.

Studies have demonstrated that improved notification systems can significantly improve court appearance rates for defendants.<sup>54</sup>

Specific notification mechanisms could include the following:

- text messages
- phone calls (live or automated)
- providing a receipt, signed by the defendant, at the conclusion of the preceding hearing, clearly stating the upcoming hearing date, time, and location.

- B. **Bail Hearings 6 or 7 Days a Week.** The municipal courts and common pleas court in Cuyahoga County should hold bail hearings 6 or 7 days a week to prevent defendants from sitting in jail for days waiting for an initial bail hearing.

To the extent that smaller municipal courts do not have the staffing and/or budget to be open for business 6 or 7 days per week, this is a strong argument to implement a centralized bail hearing system that would facilitate access to bail hearings 6 or 7 days per week.

- C. **Accept Payment 24/7.** The municipal courts and common pleas court in Cuyahoga County should adopt payment systems that allow defendants to post money bail at any time of the day or night and using any reliable payment system.

Once a bail amount has been set for a defendant, and the defendant has some reliable means to post the bail amount, there is no good reason to delay the defendant's release by hours or overnight simply because the clerk's office only accepts one type of payment system or is only open for certain limited hours. A defendant who can post bail at 9pm with a reliable payment

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<sup>54</sup> See Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, p. 33 (“The available research shows that phone-call reminders can increase appearance rates by as much as 42%, and mail reminders can increase appearance rates by as much as 33%”) in *Reforming Criminal Justice*, Volume 3 (Erik Luna, ed. 2017).

method should be able to spend that night at home, not in a jail bed at taxpayer expense because the office accepting payment is closed.

To the extent that smaller municipalities would find it difficult to accept payment at any time of the day or night, this is an additional reason to adopt a centralized bail hearing system that would accommodate payment 24/7 and through different payment systems.

**D. Defense Counsel at Bail Hearing.** Provide counsel for all defendants at the initial bail hearing.<sup>55</sup>

As stated above, a process of centralized bail hearings would greatly facilitate improved bail and pretrial processes. Among other things, it would enable the consistent presence of defense counsel at the initial bail hearing.

In the alternative, video conferencing capacity should be coordinated to permit attorney client interviews and expedite remote bail hearings.

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<sup>55</sup> See Report of Ad Hoc Committee on Bail and Pretrial Justice, Recommendation 4 (“Mandate the presence of counsel for the defendant at the initial appearance.”).

## VI. DATA COLLECTION, TRAINING, AND IMPLEMENTATION

- A. **Collect Data.** The municipal courts and common pleas court in Cuyahoga County should implement a data reporting and collection system to enable the court and the public to assess how well the bail and pretrial release system is functioning.<sup>56</sup>

A significant problem in Cuyahoga County—one common to many other cities—is a lack of data about many important questions related to how the bail and pretrial release process actually functions, such as: how many individuals are detained and for how long, what amounts of bail are set, and how many individuals are unable to afford bail amounts. The PJI Report, discussed above, provided an important snapshot of data but does not provide an ongoing mechanism for monitoring what is happening within the county.

This recommendation is important to enable the courts and the public to assess whether any changes in the bail and pretrial release system are having an effect.

One finding from the PJI Study was “[t]here were significant differences in in the demographic characteristics, particularly regarding race, of those released from the three municipal jails on the date of the snapshot, June 1, 2017, compared to those released from the Cuyahoga County Jail.”<sup>57</sup> As part of the data collection process, the courts should ensure that bail and pretrial release procedures are not creating unwarranted disparities among different demographic groups.

- B. **Regional Coordinator for Bail and Pretrial Release.** The county should appoint a Regional Coordinator for Bail and Pretrial Release, to monitor implementation of the recommended reforms.

If the county moves to a centralized bail hearing system, as recommended above, then a Regional Coordinator is less important because centralized bail hearings will inherently provide substantial opportunity for coordination and consistency in bail practices throughout the county. In the absence of a centralized bail hearing system, however, the county should appoint a Regional Coordinator for Bail and Pretrial Release to ensure that the different municipal courts and common pleas court within Cuyahoga County are adopting the consistent and uniform bail practices recommended in this report.

- C. **Judicial Training.** All of the municipal court and common pleas court judges in Cuyahoga County should attend a Judicial Summit and Training on best practices for bail and pretrial release.<sup>58</sup>

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<sup>56</sup> See Report of Ad Hoc Committee on Bail and Pretrial Services, Recommendation 2 (“Implement a performance management (data collection) system to ensure a fair, effective and fiscally efficient process.”), Recommendation 6 (“Continued monitoring and reporting on pretrial services and bail in Ohio.”).

<sup>57</sup> PJI Study, p. 3.

<sup>58</sup> See Report of Ad Hoc Committee on Bail and Pretrial Justice, Recommendation 5 (“Require education and training of court personnel, including judges, clerks of court, prosecutors, defense counsel and others with a vested

The survey by PJI demonstrated very high levels of support among the judges in Cuyahoga County for better information and training on best practices for bail and pretrial release. Of the municipal and common pleas court judges responding to the survey:

- 82% of the judges felt there was value in the Criminal Justice Committee examining the pretrial process in Cuyahoga County and its municipalities, and
- 79% felt it is important to provide judicial-specific education to understand possible ways to improve the bail system in the areas of actuarial risk assessment (87%) and research-informed risk management strategies (87%).<sup>59</sup>

**D. Training for Prosecutors, Defense Lawyers, and Court Staff.** In addition to training for judges, the county should offer training in best practices in bail and pretrial release (including the proper use of any risk assessment tool) for prosecutors, defense lawyers, and court staff within the courts of Cuyahoga County.<sup>60</sup>

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interest in the pretrial process.”). *See also* Harvard Primer on Bail Reform, p. 21 (“Second, judges and other system actors must undergo training that allows them to understand precisely what it is that a risk score conveys: a statistical estimate of a particular outcome based on the observed outcomes among a population of individuals who share certain characteristics. In many instances, an actuarial tool may be very predictive for the group on average but not accurate for any given member of that group. If a judge relies on a risk score without considering other factors that may be relevant in making a bail determination, the risk score could carry undue weight.”).

<sup>59</sup> PJI Report, pp. 3-4.

<sup>60</sup> *See* Report of Ad Hoc Committee on Bail and Pretrial Justice, Recommendation 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.”). *See also* Harvard Primer on Bail Reform, p. 21.