Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

ROBIN SWEET
Director and
State Court Administrator

JOHN MCCORMICK
Assistant Court Administrator
Judicial Programs and Services

RICHARD A. STEFANI
Deputy Director
Information Technology

# MEETING NOTICE AND AGENDA
## Committee to Study Evidence-Based Pretrial Release
### VIDEOCONFERENCE

**Date and Time of Meeting:** Wednesday, July 19, 2017 @ 3:00 p.m.
**Place of Meeting:**

| Carson City | Las Vegas |
|---|---|
| Nevada Supreme Court<br>Law Library 107<br>201 S. Carson Street<br>Carson City, Nevada | Nevada Supreme Court<br>Conference Rooms A & B *(Committee Members and Presenters)*<br>Courtroom *(Guests and Public)*<br>408 E. Clark Avenue<br>Las Vegas, Nevada |
| Teleconference Access: 1-877-336-1829, passcode 2469586 | |

***All participants attending via teleconference should mute their lines when not speaking; it is highly recommended that teleconference attendees use a landline and handset in order to reduce background noise.***

## AGENDA

I. Call to Order
   a. Call of Roll
   b. Approval of 3-20-17 Meeting Summary **(Tab 1)**
   c. Opening Remarks
   d. Public Comment

II. Pilot Site Program - Status Updates - *Judge Stephen Bishop, Ms. Heather Condon, Ms. Kowan Connolly, and Ms. Anna Vasquez* **(Tab 2)**

III. NPR Assessment Results Update- *Dr. James Austin and Ms. Angela Jackson-Castain* **(Tab 3)**

IV. Pilot Site Program - Concerns and Recommendations and Next Steps Discussion **(Tab 4)**

V. Outcome Measures Discussion **(Tab 5)**

VI. National Task Force on Fines, Fees, and Bail Practice - Key Resources for States **(Tab 6)**

VII. Subcommittee to Study Bail Schedules Status Update - *Judge Mason Simons* **(Tab 7)**

VIII. Other Items/Discussion
- A. AB136
- B. *ODonnell, et al. v. Harris County, Texas* **(Tab 8)**
- C. Nevada Advisory Committee to the U.S. Commission on Civil Rights - Memo **(Tab 9)**

IX. Next Meeting Date: TBD

X. Public Comment

XI. Adjournment

- Action items are noted by * and typically include review, approval, denial, and/or postponement of specific items. Certain items may be referred to a subcommittee for additional review and action.
- Agenda items may be taken out of order at the discretion of the Chair in order to accommodate persons appearing before the Commission and/or to aid in the time efficiency of the meeting.
- If members of the public participate in the meeting, they must identify themselves when requested. Public comment is welcomed by the Commission but may be limited at the discretion of the Chair.
- The Commission is pleased to provide reasonable accommodations for members of the public who are disabled and wish to attend the meeting. If assistance is required, please notify Commission staff by phone or by email no later than two working days prior to the meeting, as follows: Jamie Gradick, (775) 687-9808 - email: jgradick@nvcourts.nv.gov
- This meeting is exempt from the Nevada Open Meeting Law (NRS 241.030)
- At the discretion of the Chair, topics related to the administration of justice, judicial personnel, and judicial matters that are of a confidential nature may be closed to the public.
- **Notice of this meeting was posted in the following locations**: Nevada Supreme Court website: www.nevadajudiciary.us; Carson City: Supreme Court Building, Administrative Office of the Courts, 201 South Carson Street; Las Vegas: Nevada Supreme Court, 408 East Clark Avenue.

# TAB 1

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**JUDICIAL COUNCIL OF THE STATE OF NEVADA**

*"To unite and promote Nevada's judiciary as an equal, independent and effective branch of government."*

# Committee to Study Evidence-Based Pretrial Release

*Summary Prepared by Jamie Gradick*
March 20, 2017
3:00 p.m. – 5:00 p.m.
Videoconference (Carson City, Las Vegas)

**Members Present**
Justice James Hardesty, Chair
Judge Stephen Bishop
Jeremy Bosler
Heather Condon
Kowan Connolly
Judge Gene Drakulich
Tad Fletcher
Judge Douglas Herndon
Chris Hicks
Judge Kevin Higgins
Phil Kohn
Judge Victor Miller
Judge Michael Montero
Judge Scott Pearson
Judge Thomas Perkins
Judge Melissa Saragosa
Judge Mason Simons
Dagny Stapleton
Judge Diana Sullivan
Judge John Tatro
Judge Ryan Toone
Judge Natalie Tyrrell
Anna Vasquez
Jeff Wells
Steven Wolfson
Bita Yeager

**Guests**
Jim Austin
John Boes
Tom Clark
Angela Jackson-Castain
Steve Krimel

**AOC Staff**
Jamie Gradick
Hans Jessup
Kandice Townsend

I. Call to Order

- Justice Hardesty called the meeting to order at 3:00 p.m.

- Roll call was taken, a quorum was present.
- The summary of the 11-18-16 meeting was approved.
- There was no public comment from either location.

II. Opening Remarks

- Justice Hardesty discussed the letter and white paper provided by Mr. Steven Krimel, with the Nevada Bail Agents Association.
  - These documents were circulated to committee membership prior to the meeting; committee members were encouraged to read the documents.
  - The white paper contains "good points" that should be discussed by this group.
- Justice Hardesty informed attendees that he provided an overview of this committee's work to the Assembly Judiciary Committee in connection with AB136.
  - AB136, proposed by Assemblywoman Neal, has gone through several revisions and is "in flux".
  - During the hearing, testimony was offered (from several differing perspectives) regarding the process and work of not only the Committee to Study Evidence-Based pretrial Release, but also of this bill and the impact it could have.
  - Justice Hardesty has offered support/participation of this committee to the Judiciary Committee.
- Justice Hardesty asked Mr. Chris Hicks to share his concerns regarding these issues (and the pilot sites' efforts) with those in attendance.
  - Mr. Hicks explained that he is not critical of the study or work the Committee is trying to do; his concerns center on the serious issues surrounding the criminal background justice history system in this state.

III. NPR Assessment Results Update *(See meeting materials for PowerPoint)*

- Dr. James Austin and Ms. Angela Jackson-Castain provided an overview of the results for the pilot sites to date.
- As of February 13, 2017 the pilot sites have been using revised versions of the tool: Washoe and Ely are using "Version 2" while courts in Clark County are using "Version 3".
  - The "Version 2" tool moves away from prior arrests to prior convictions; verifying employment and phone number drops from 2 points to 1 point.
  - Discussion was held regarding prior conviction data providing better predictability than prior arrest. Dr. Austin commented that, although this is the case, the prior arrest data was initially used because of the state's issues with accessing reliable and accurate conviction data.
  - Mr. Steven Wolfson asked if the judges in pilot sites are still getting access to data regarding number of prior arrests (in addition to convictions). A comment was made that, prior to the pilot site program, the judges never

had access to this information as it wasn't included on the original pretrial info sheet.
  - The "Version 3" tool does not require an interview; it is based on prior convictions and points can be removed if employment and phone can be verified. This version is not as predictive as version 2 but it's better than the original version.
- Mr. Jeremy Bosler asked for clarification regarding the use of overrides (slide 5) and whether there is a particular standard or percentage for overrides.
  - Dr. Austin commented that the override rate should be between 5% and 15%; if the rate is more than 20% there is an issue, likely with the screeners.
  - Overrides should be "up and down".
  - Discussion was held regarding who should be making the decisions to override - the screener or the judge? Judges should not be overriding risk level; the screeners make a recommendation.
- Justice Hardesty expressed concern regarding the idea that risk assessments can be discriminatory (particularly against black defendants) and referenced a quote from the white paper provided by Mr. Krimel.
  - Dr. Austin commented that risk assessment tools are based upon predictors for FTA and re-offense; the tool itself isn't discriminatory, it reflects the "discrimination that already exists" and bias in arrest/police/court practices. This "bias" is the subject of extensive literature and research nationwide.
  - A comment was made that using conviction data instead of prior arrest data can help "neutralize" this bias.
  - Justice Hardesty informed attendees that there is a provision in AB136 that requires assurance that there is no racial discrimination in the tool; is this something that is achievable?
  - Dr. Austin commented that, yes, this is achievable via a "multiple regression analysis" in which data is analyzed for each group to determine "independent effect of race" - is the instrument producing a higher score for a group of defendants independent of prior record pattern?
  - Discussion was held regarding the demographic information included on the tool and the fact that screeners see this info; a comment was made that the screening process should be "blind". Someone needs to track this info for research purposes but the screener should not have access to it.
  - Justice Hardesty asked Ms. Condon, Ms. Connolly, Ms. Vasquez, and the judges to work together with Dr. Austin to figure out a way to "sanitize" this process in order to gather the necessary demographic data without allowing it to impact scores.
- Justice Hardesty asked Mr. Hicks to share his concerns regarding the use of conviction data.

- Mr. Hicks commented that NCJIS is "inadequate" and case dispositions are not complete.
- Mr. Hicks expressed frustration with the creation of Version 2 "outside the scope" of the full-Committee's input, particularly since that version moved from arrest data to conviction data. Because of this change, Mr. Hicks withdrew his support from the pilot site program.
- Mr. Hicks provided attendees with an example: His office is prosecuting a defendant with extensive arrests in his NCJIS criminal record; out of 8 arrests, only one disposition is listed in NCJIS - his prior convictions are not included in the record.
- Mr. Hicks has applied all 3 versions of the NPR assessment tool to this defendant with the following results: original version - high risk; version 2 - low to moderate risk; version 3 - low risk.
- Justice Hardesty asked what the situation would have been if no risk assessment process was taking place and the defendant was incarcerated and sought bail. For $3,000, the defendant could have been released on bond.
- Justice Hardesty commented that this example demonstrates that the parties are "flying blind" - the fundamental problem is the flaws in the criminal justice reporting system.
- Mr. Hicks explained that part of this process is to "keep the right people in" and, without the conviction data, that judge can't do that.
- Mr. Hicks asked for clarification regarding how Version 2 has better predictability when it doesn't consider accurate conviction data; Dr. Austin explained that those people who are arrested but not convicted are creating "false positives" because they are being classified as higher risk than they should be. Arrest data "over-predicts" and keeps the wrong people in jail.
- Mr. Hicks commented that he doesn't feel Nevada is ready at this point because of the inadequacies of the criminal history system. Dr. Austin commented that this isn't an uncommon issue.

- Discussion was held regarding when and what arrest and conviction information is entered into the systems in Clark County (*much of this portion of discussion was inaudible).*
  - Dr. Austin explained that this instrument was created based on whether defendants were re-arrested while within the court's jurisdiction; this is the "dependent variable".
- Justice Hardesty asked Mr. Hicks (and the rest of the committee members) for opinions regarding whether these efforts should be "abandoned" until the criminal history system issues can be addressed and fixed.
  - Mr. Hicks commented that "now is not the time to mandate" the use of risk assessments; we shouldn't quit but right now is "too early". Mr. Hicks explained that he was under the impression that the original version of the NPRA would be used throughout the pilot site period.

  - Justice Hardesty went on record: AB136 is Assemblywoman Neal's bill and, although Assemblywoman Neal has asked what the Committee has been doing, the bill is not sponsored or drafted by this committee or by Justice Hardesty.
  - Justice Hardesty agreed with Mr. Hicks that Nevada is not ready for this type of legislative mandate.
- Judge Tatro commented that the arrest history is "never right" in NCJIS unless the defendant has a limited arrest history; convictions are never there.
  - Judge Perkins agreed with this comment and explained that he views the NPRA as a tool that is not meant to be a substitute for discretion; there are procedural safeguards built into our processes. If this is "all about the data," we can't use convictions as the data we rely on.
- Discussion was held regarding the use of Tiburon in Washoe County; this system is a report writing and database system, it doesn't keep conviction data.
- Discussion was held regarding the Advisory Commission on the Administration of Justice's recommendation that steps be taken to address and rectify Nevada's criminal history system and data issues. The legislature has put this in the form of a "mandated study committee" that would report in 2019.
  - Justice Hardesty would, ideally, like to get Clark County and Washoe County together independently of this legislative effort to troubleshoot these issues but that approach faces challenges as well since SCOPE is limited to Clark County defendants. The main issue is the need to "fix" NCJIS.
  - Discussion was held regarding the status of the NCJIS backlog and how extensive it truly is.
- Ms. Bita Yeager asked for clarification regarding the use of overrides for mental health. (*Portions of this discussion we inaudible*)
  - Ms. Heather Condon explained that her team created a guide to address these overrides including: self-reported, previous mental health court client, Legal 2000, history and obvious signs.
  - Washoe County overrode 24%-26% but is "different" because they have a praxis in place where lowest level defendants don't necessarily have conditions imposed but a lot of the defendant s in the top 5 overrides were bumped up for conditions.
  - Mr. Condon commented that her team will "override" if they see a red flag so a judge will review. Discussion was held regarding using overrides to impose conditions; Dr. Austin commented that this is why the rate in Washoe is so high. Additional training on override usage is needed.
- Discussion was held regarding whether the conviction data that is available is accurate.

- Dr. Austin commented that, while there is a correlation between arrest data and FTA and re-offense risk, the correlation between conviction and these risks is stronger.
- Justice Hardesty commented that, before this tool, the judges only had the info provided to them by the lawyers to go on. Discussion was held regarding timing and resources; it's very unlikely that the DA can provide the judge with the right information before the judge sees the pretrial risk assessment tool and makes his or her initial judgment.
- Concern was expressed regarding the time constraints surrounding pulling arrest and conviction information; arrests are "easier" but there needs to be a "statewide" solution so information can be shared.

- Justice Hardesty informed attendees that he has spoken with county commissioners and judges regarding the resources this process requires. To date, no court or administrator has written a letter of support.
  - Justice Hardesty urged the judges in attendance to consult with their colleagues regarding this issue before the Washoe and Clark County Commissions submit their budgets; pretrial services need adequate resources to accomplish what's being asked of them by this program.
  - Ms. Anna Vasquez commented that San Antonio's pretrial services department, which is comparable in size to her unit, has 71 employees whereas she has 22.
  - Mr. Jeff Wells commented that, at the last Clark County budget hearing, the recommendation for additional staff was discussed; amount depends on which version is used and the interview/verifying aspects.
  - Discussion was held regarding the cost-savings of this program.
- Justice Hardesty asked attendees for input regarding which version of the tool should be used; ideally he would like to see a statewide version.
  - Mr. Kohn suggested that we continue to use version 2 in Washoe and Ely and version 3 in Clark County (for the sake of resources) and review those results.
  - Mr. Wolfson asked what percentage of those not released are being interviewed in Clark County. If not everyone is begin interviewed, then the scores aren't accurate.
  - Those being interviewed are getting "mitigating" points which isn't fair to those not being interviewed.

IV. Pilot Site Program Status Updates

- Ms. Condon provided a few updates:
  - Pretrial services ORs in November were 4% and 41% in February.
  - Judge ORs in November were 58% and 34% in February.
  - Bails and bonds decreased from 38% to 25%.
  - FTA range between September and February was between 8-12%, increased in March by 3% - this is being tracked.
  - Re-arrest rate September to February was 4-5%

- Jail population decreased from 1185 in September to 1092 in February.
- Bookings increased from 1648 in September to in 1873 February.
- Active caseload went from 852-1947; contacts and random drug testing also increased.
- Ms. Condon commented that cost-savings will come from release; her department is setting supervised bail based on risk assessment
- Procedure has been changed so that cases are not being opened until the defendant actually posts bail or bond; this decreases the caseload.

- Ms. Anna Vasquez commented that her team interviewed 14%. *(Portions of this discussion were inaudible)*
  - Ms. Angela Jackson-Castain explained that from Feb 13- March 13 (the implementation of Version 3), there was a decline in high scores and shift in how the scoring is taking place.
  - A significant number of defendants are being released before the 72 hour mark; discussion was held regarding how many of these are "DA denials".
  - Clark County average length of stay is increasing; Mr. Wells commented that this is because the "right folks" are staying in. Ms. Condon commented that WCSO has told her that, since the pilot site started, the type of inmate has changed; there are more high-level inmates.
  - Justice Hardesty commented that this is a public safety issue.
  - In Washoe County, everyone is "seen" within 48 hours (either in person or on paper.
- Justice Hardesty asked Judge Perkins for an update on his "informal" participation in the pilot site and asked whether he has the staff and resources to possibly incorporate his data into the analysis.
  - Judge Perkins and Ms. Condon will discuss this to see what is involved.

V. Pilot Site Program - Concerns and Recommendations Discussion

- This agenda item was tabled for a future meeting in order to allow committee members to review the concerns and recommendations that were provided.

VI. COSCA 2015-2016 Policy Paper Discussion

- This agenda item was tabled for a future meeting.
- Justice Hardesty asked committee members to review/reread this in preparation for future discussions.

VII. National Task Forces on Fines, Fees, and Bail Practices - Key Resources for States

- Justice Hardesty reminded attendees that this Judicial Council of the state of Nevada "assigned" this issue to this committee for further study.
- Quite a bit of work has been done on the federal level; various recommendations are being forwarded to the states for consideration.
- This issue has come up in various forms in the legislature; discussion was held regarding the roles of administrative assessments in the funding of the judiciary.

- Given the shortage of time, this agenda item was tabled for a future meeting.

VIII. Subcommittee to Study Bail Schedules Status Update

- This agenda item was tabled for a future meeting.

IX. Other Items/Discussion

- Justice Hardesty reminded attendees that the purpose of this pilot site program is to determine how the NPRA will help or not help with release decisions. To do this, we need to gather valid, informative data. Judges participating in these pilot sites need to take advantage of the tool; if they would prefer to not participate, they should withdraw from the pilot site program.
  - Justice Hardesty asked the judges in attendance to take this request back to their colleagues.
- Justice Hardesty informed attendees that the committee will "continue to do what it's doing" for another month and will reconvene in late April or early May.
- Justice Hardesty asked attendees to revisit the outcome measurements adopted by the committee members and come to the next meeting prepared to discuss whether the measures can realistically be applied to/assessed for our program.
  - A subcommittee will be put together for this; Justice Hardesty will be reaching out to potential participants.
- Justice Hardesty asked attendees (particularly the judges) to review the guidelines put forth by the Subcommittee to Study Bail Schedules and discuss the document and getting "unanimous" support for a "uniform," statewide guideline with their colleagues. This will be discussed at the next meeting.

X. Public Comment

XI. Adjournment

- Justice Hardesty adjourned the meeting at 5:07 p.m.

# TAB 2

# Pretrial Services
# SJDC

Heather Condon

# Overview

- September 1, 2016 - NPRA
- November 1, 2016 - Judicially imposed bail
  - Removed the Uniform Bail Schedule
  - Required PC narratives at the time of arrest
  - Created a shared drive to securely transfer documents to/from the courts
  - Judges agreed to assess Pretrial paperwork 7 days a week
    - Probable Cause review
    - PD/LD appointment (if applicable)
    - Assess Bail (money or release)

# NPRA & Praxis

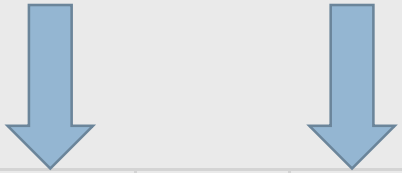
- NPRA – new charge(s)
- Praxis
  - Who can release
  - What supervision level – based on charge & NPRA score
- LSM = no NPRA

| RISK | Less Serious Misdemeanor | Serious Misdemeanor | Most Serious Misdemeanor | Other Felony & Gross Misd. | Serious Felony & Gross Misd. |
|---|---|---|---|---|---|
| Low 0-4 | Release Reminder Only | Release Reminder Only | Release With Supervision | Release With Supervision | Requires Judicial Review |
| Mod 5-8 | Release Reminder Only | Release With Supervision | Requires Judicial Review | Release With Supervision | Requires Judicial Review |
| Higher 9+ | Release Reminder Only | Requires Judicial Review | Requires Judicial Review | Requires Judicial Review | Requires Judicial Review |

# Overrides - May

- Total NPRAs – 978
- Total overrides – 122 (12%)
  - Disability – 0
  - Gang Member – 0
  - Prior Record Less Severe – 0
  - Mental Health – 10
  - Flight Risk – 15
  - Prior Record More Severe - 26
  - Other – 71
    - High BAC – 32 (45%)
    - Charges – similar history, active supervision, arrest narrative

# STATISTICS



**SUPERVISION STATISTICS**

| | Jun-16 | Jul-16 | Aug-16 | Sep-16 | Oct-16 | Nov-16 | Dec-16 | Jan-17 | Feb-17 | Mar-17 | Apr-17 | May-17 | Jun-17 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| New Cases | 371 | 337 | 343 | 380 | 408 | 353 | 531 | 962 | 1,012 | 857 | 783 | 809 | 838 |
| Active Cases | 971 | 860 | 853 | 852 | 916 | 863 | 1,116 | 1,725 | 1,947 | 1,832 | 1,780 | 1,772 | 1,787 |
| Closed Cases | 379 | 417 | 363 | 370 | 341 | 341 | 342 | 662 | 817 | 973 | 830 | 798 | 798 |
| FTA | 31 | 35 | 30 | 28 | 32 | 30 | 28 | 41 | 68 | 107 | 119 | 118 | 125 |
| Rearrest | 10 | 14 | 11 | 16 | 13 | 5 | 9 | 24 | 27 | 63 | 49 | 54 | 41 |
| Assign Random Testing | 166 | 169 | 138 | 113 | 104 | 86 | 190 | 308 | 303 | 311 | 345 | 350 | 341 |

| | Jun-16 | Jul-16 | Aug-16 | Sep-16 | Oct-16 | Nov-16 | Dec-16 | Jan-17 | Feb-17 | Mar-17 | Apr-17 | May-17 | Jun-17 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| FTA | 8% | 8% | 8% | 8% | 9% | 9% | 8% | * 9% | * 12% | *14% | *17% | 16% | 17% |
| Rearrest | 3% | 3% | 3% | 4% | 4% | 1% | 3% | * 5% | * 5% | *8% | *7% | 8% | 6% |

| | Jun-16 | Jul-16 | Aug-16 | Sep-16 | Oct-16 | Nov-16 | Dec-16 | Jan-17 | Feb-17 | Mar-17 | Apr-17 | May-17 | Jun-17 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Jail - ADP | 1,115 | 1,130 | 1,166 | 1,185 | 1,113 | 1,119 | 1,039 | 1,022 | 1,043 | 1,048 | 1,042 | 1,059 | 1,081 |
| Bookings | 1,748 | 1,774 | 1,906 | 1,648 | 1,600 | 1,552 | 1,595 | 1,839 | 1,873 | 2,104 | 1,948 | 2,097 | 2,023 |
| Active Cases | 971 | 860 | 853 | 852 | 916 | 863 | 1,116 | 1,725 | 1,947 | 1,832 | 1,780 | 1,772 | 1,787 |
| Contacts | 8,649 | 8,479 | 7,903 | 8,154 | 7,741 | 8,091 | 9,496 | 16,781 | 16,036 | 16,745 | 14,865 | 15,722 | 14,758 |

# Pending Issues

- Staff
  - FY17 requested 5, received 2 from reallocated funds
  - Increased assessment and supervision duties
- Case management system
  - Archaic – unable to complete some of the adopted data measures
- Consistent setting of bail (money or release)
- DA support – arrest vs. conviction
- PD access to NPRA – confidentiality and NCIC/NCJIS requirements
- DAS supervision – much higher level & supervision fees

To: Capt. Petzing, Detention Operations
Date: July 3, 2017
Subject: **Booking Data Related to Pre/Post Bail Restructuring**
**FY 15/16 and 16/17 Data: July 2015 to June 2017**

On Wednesday, 11/2/2016, the new bail restructuring/risk assessment process was implemented. This change eliminated the standard bail schedules, with new charges being processed as NO BAIL until seen by PreTrial Services personnel. Subsequent to the Pretrial interview and completion of the new Risk Assessment, arrestees are either released on a Court Services Own Recognizance (CSOR) release, or reviewed by a judge for further assessment. The judge can then either release the subject on a Judge Own Recognizance (JOR) release, set bail, or confirm the no bail status.

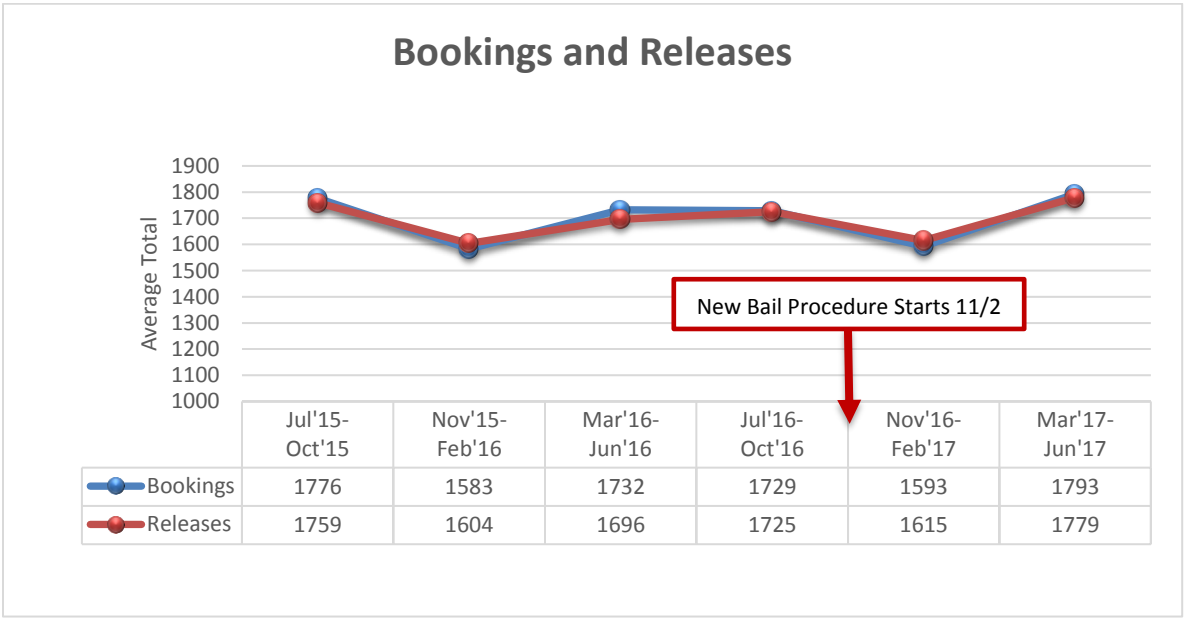
On February 1, 2017 a modification was approved by the judges that increased the types of charges that pretrial services could authorize for release without the risk assessment/judges approval.

On March 13, 2017 a request was made to increase the historical statistics for this review to include information from November 2015 to present. This required a change to the format of the associated charts to a quarterly template in order to display the full 17-month timespan.

This final report will encompass data from Fiscal Year 15/16 and 16/17 and will be averaged by 4-month periods.

**Bookings**

Bookings and releases should follow similar trend lines, with the goal of jail management being a release total equal to or exceeding the number of bookings for the same period. If the releases fall short of the bookings for an extended period of time, it could have a detrimental effect on the overall Average Daily Population (ADP) and Average Length of Stay (ALOS).




| | Jul'15-Oct'15 | Nov'15-Feb'16 | Mar'16-Jun'16 | Jul'16-Oct'16 | Nov'16-Feb'17 | Mar'17-Jun'17 |
|---|---|---|---|---|---|---|
| Bookings | 1776 | 1583 | 1732 | 1729 | 1593 | 1793 |
| Releases | 1759 | 1604 | 1696 | 1725 | 1615 | 1779 |

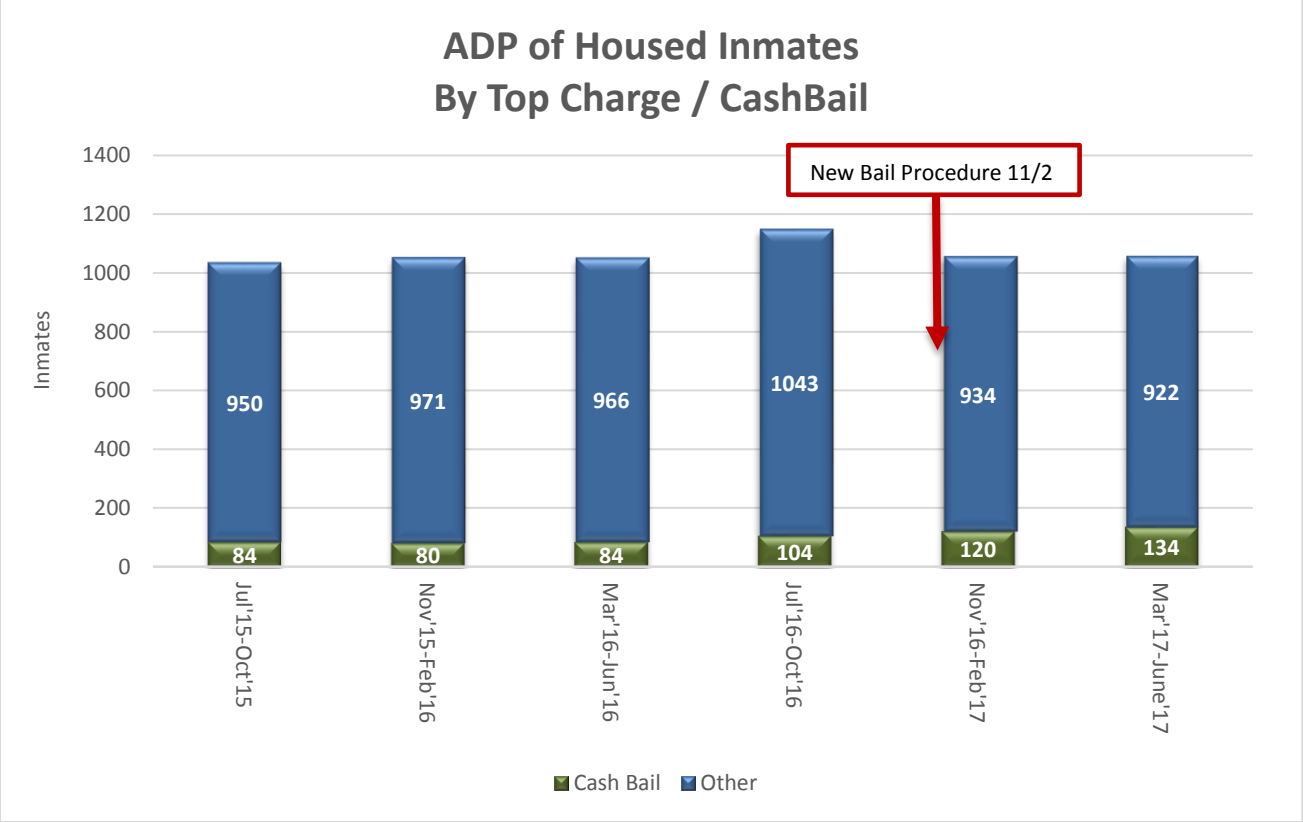
**Average Daily Population (ADP) – Inmates with Cash Bail Top Charge**

Cash only bails can be set by the reviewing judge in lieu of bond or O/R, or can be stipulated as part of a warrant.

When comparing the average number of inmates with a cash only top charge during the four periods prior to the bail restructuring with the average number of cash only top charge for the two periods following the implementation, there has been a 44.32% increase from an ADP of 88 to an ADP of 127 inmates.

The four periods prior to the bail restructuring show an average of 8% of housed inmates with a cash only top charge. The two periods following the bail restructuring show an average of 12% of housed inmates with a cash only top charge.

Overall ADP for the two periods following the implementation is 1.40% below the average seen in the four preceding periods.



**Release Types**

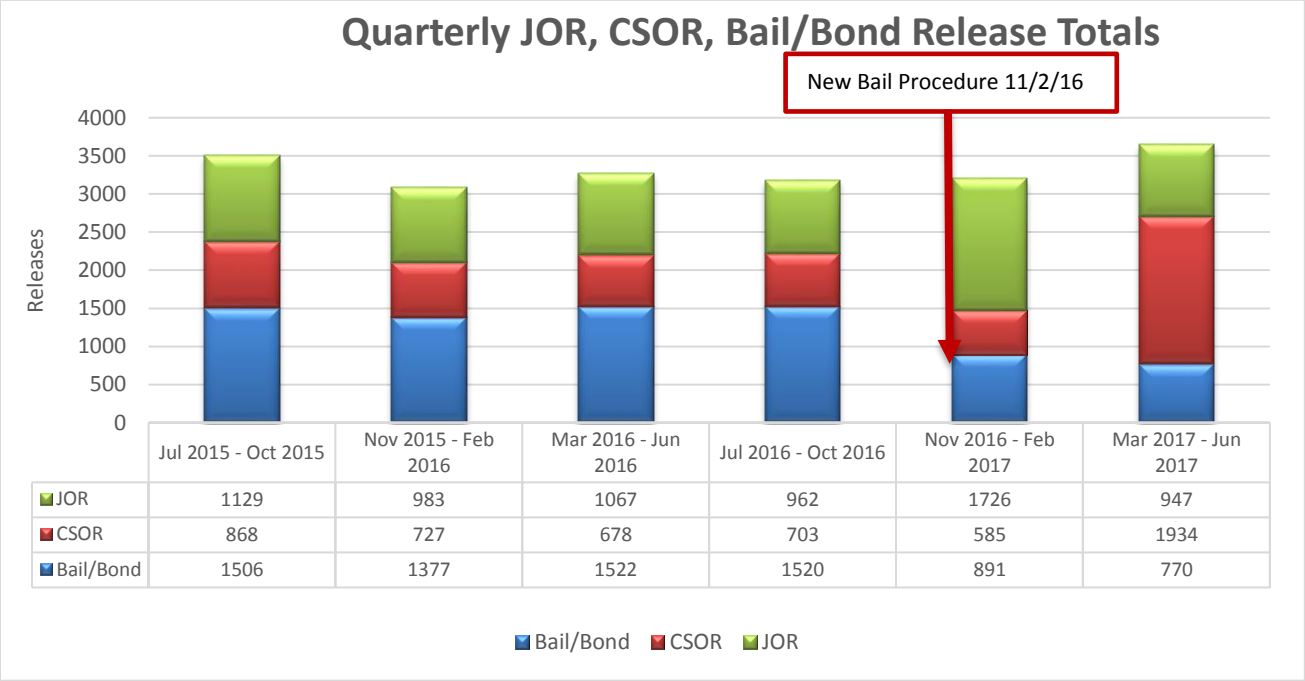
A review of the two fiscal year releases (16 months pre-implementation and eight months post implementation) in the categories of Bail or Bond, Judge O/R and Court Services O/R show a decrease in Bail/Bond releases, and an increased in both CSOR and JOR releases.

Comparison of the four period span preceding the bail restructuring implementation with the two periods following the implementation:

| Type | Pre **4**-Period Monthly Average | Post **2**-Period Monthly Average | Difference | % Change |
|---|---|---|---|---|
| Bonds | 106 | 50 | -56 | -53% |
| Bails | 260 | 150 | -110 | -42% |
| CSOR | 184 | 354 | +170 | +92% |
| JOR | 256 | 323 | +67 | +26% |

Both Court Services and Judge O/R's show increases following the implementation of the risk assessment program, and a decrease in Bail and Bond postings.

| | Bail / Bond | CSOR | JOR |
|---|---|---|---|
| July 2015-October 2015 | 43% | 25% | 33% |
| November 2015 – February 2016 | 45% | 24% | 32% |
| March 2016 – June 2016 | 47% | 21% | 33% |
| July 2016 – October 2016 | 48% | 22% | 30% |
| Implementation 11/2/2016 | | | |
| November 2016 – February 2017 | 28% | 18% | 54% |
| March 2017 – June 2017 | 21% | 53% | 26% |



**Move Events from Intake Unit**

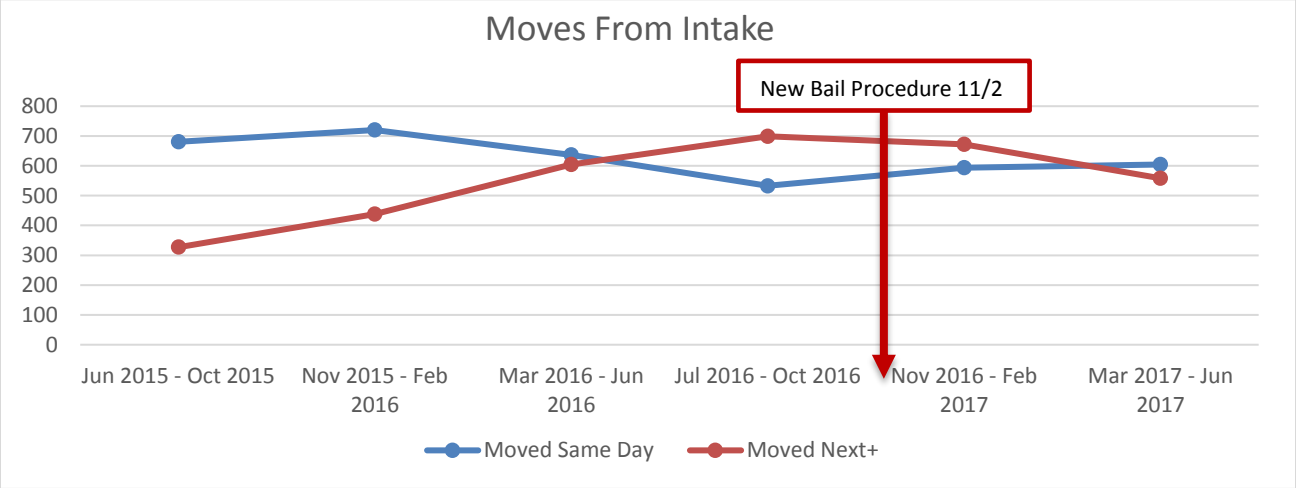
Move Events from Intake were reviewed and categorized as moved the same day, or moved the next day plus. (A small percentage of moves occurred on the 3rd day, and are included in the next day figures)

The average number of moves from intake per month during the four periods preceding the bail restructuring was 290 inmates. The average number of moves from intake per month during the two periods following the bail restructuring was 304. This is an average monthly increase of 14 moves or +4.83%.

The average number of inmates per month moved from intake the same day decreased by 11 or -6.83% on average following the risk assessment implementation.

The average number of moves that occurred one or more days after booking increased by 25 or +19.38% on average following the risk assessment implementation, but are currently showing a declining trend line when reviewing the post implementation data.

Overall, the average number of moves from intake increased following the implementation of the risk assessment program, as did the amount of time inmates spend in intake prior to being moved to housing.

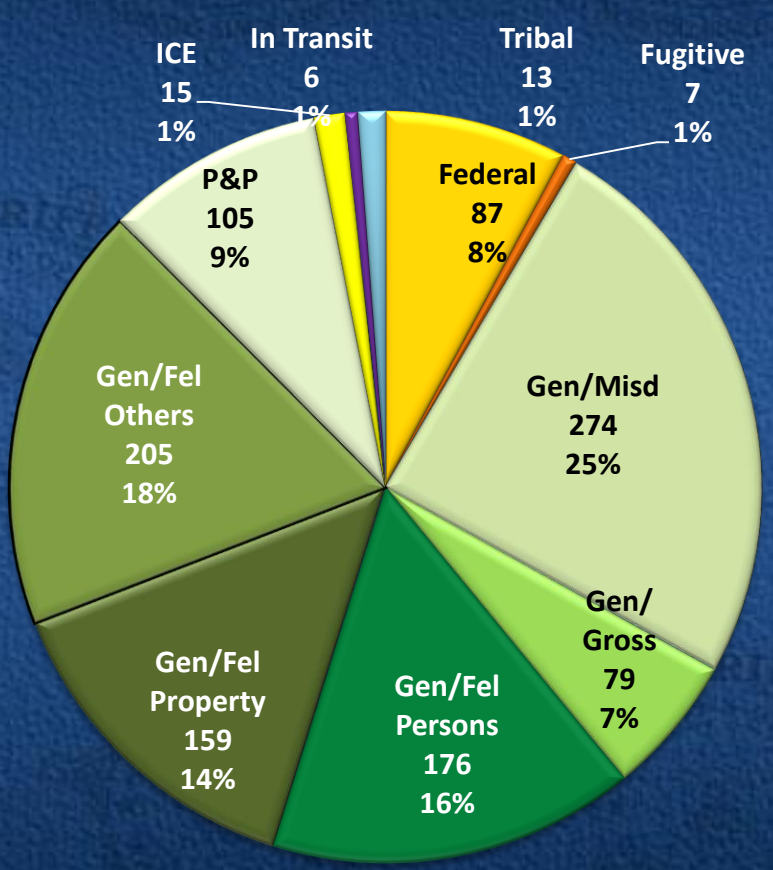


# Washoe County Detention Facility

# Prisoner Type/Charge Level Averages

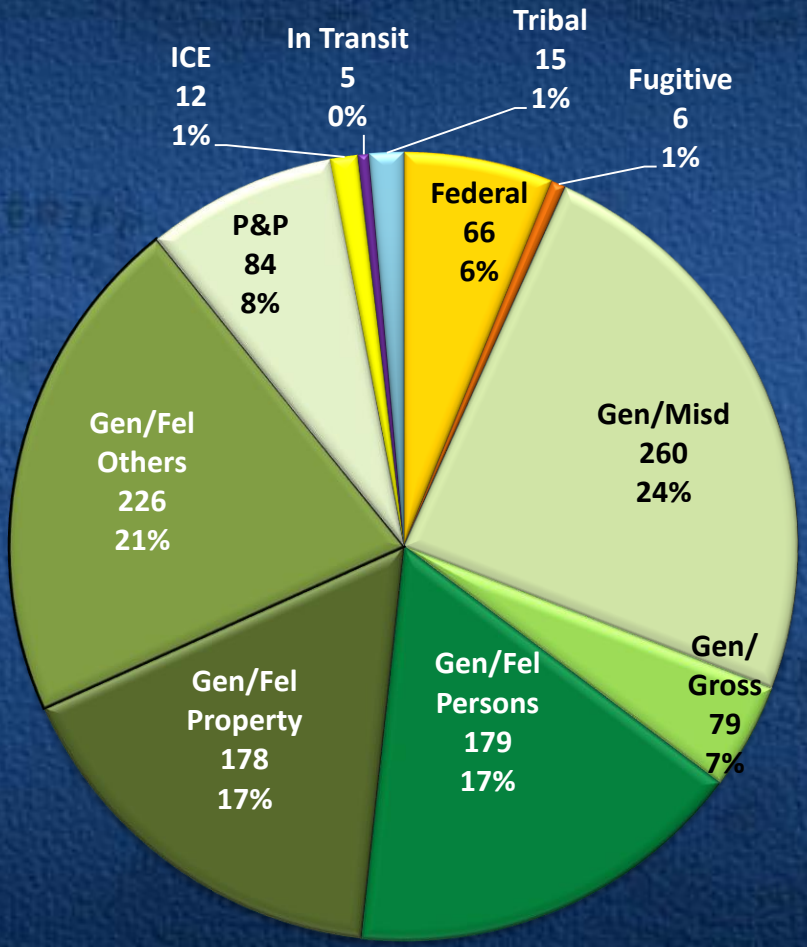
## 2016

**ADP 1,115**




## 2017

**ADP 1,081**




**Overall Average Felony/Gross Top Charge:**

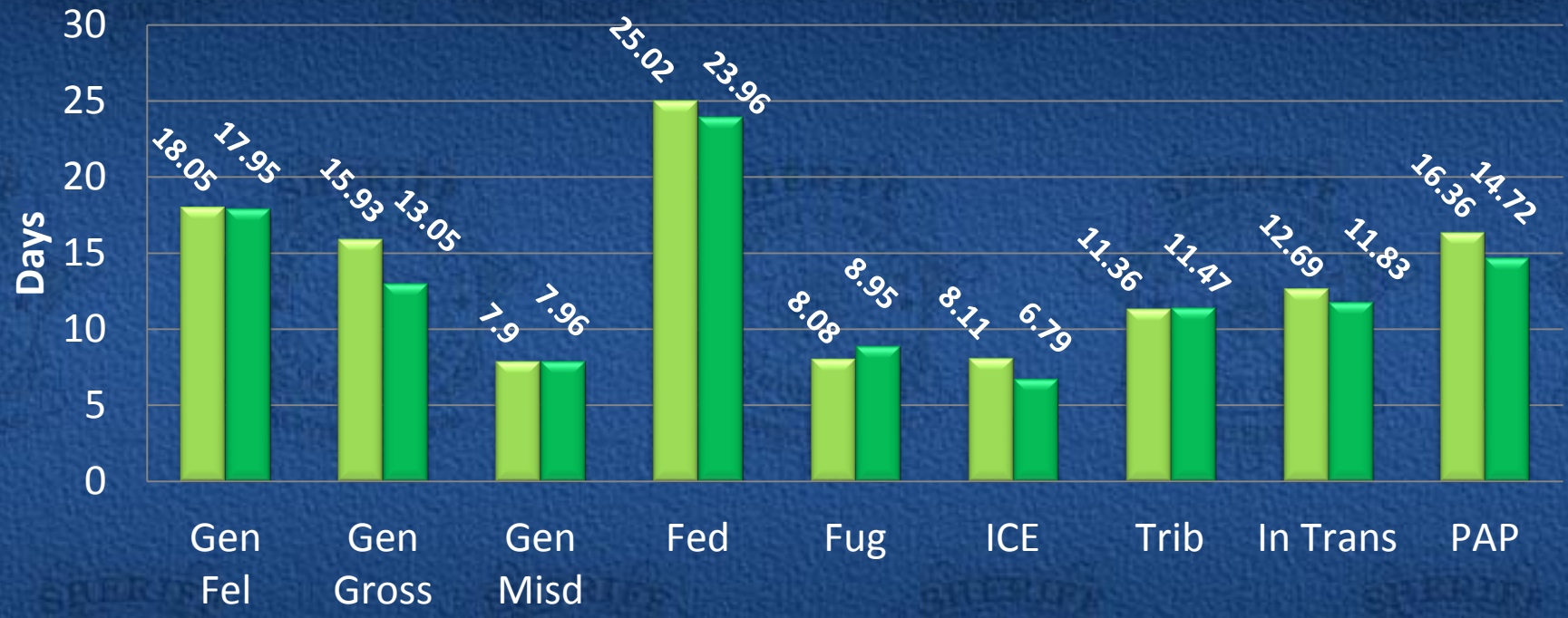
2016: **74%** 2017: **74 %**

June 2017

# Washoe County Detention Facility

# Average Length of Stay by Inmate Type

## Overall June ALOS - 2016: 14.40 2017: 14.34

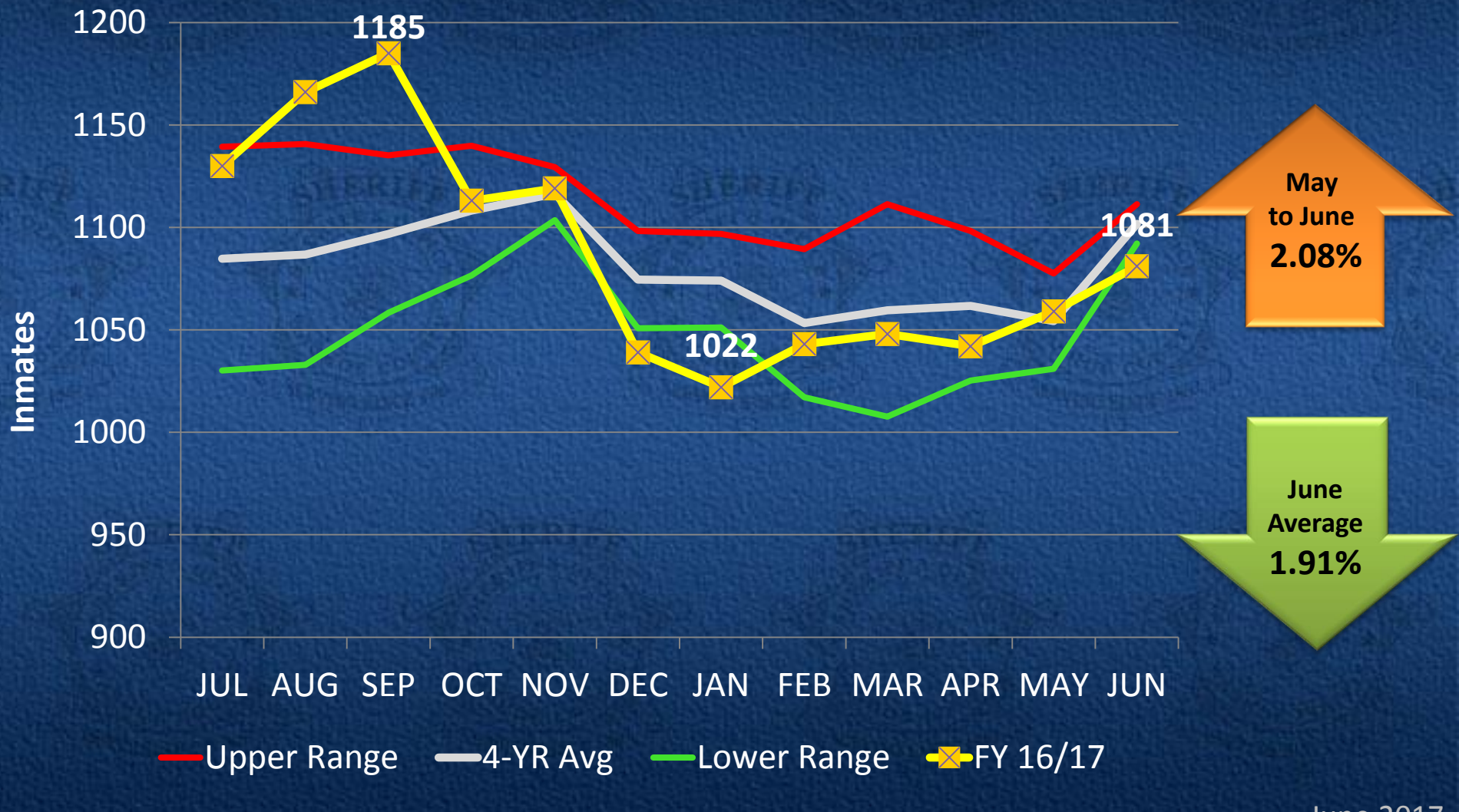



Inmates:

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| 2016 | **896** | **127** | **1042** | **102** | **26** | **56** | **33** | **13** | **193** |
| 2017 | 942 | 105 | 949 | 80 | 21 | 52 | 38 | 12 | 166 |

# Washoe County Detention Facility

# Average Daily Population




June 2017

# TAB 3

## Status Update

OJP DIAGNOSTIC CENTER
Data-Driven Justice Solutions

*July 2017*

# Nevada Pretrial Risk (NPR) Assessment

## *Opportunities for Evidence-based Technical Assistance*

***Deliberative and Pre-decisional***

# OJP Diagnostic Center Confidentiality Policy

*This document is confidential and is intended solely for the use and information of the U.S. Department of Justice (DOJ) and the Las Vegas Metropolitan Police Department, the Nevada Supreme Court Committee to Study Evidence-based Pretrial Release and its partners as part of an intergovernmental engagement between these entities.*

*The DOJ Office of Justice Programs (OJP) Diagnostic Center considers all information provided to the Diagnostic Center by the requesting state, local or tribal community or organization to be confidential in nature, including any materials, interview responses and recommendations made in connection with the assistance provided through the Diagnostic Center. Information provided to OJP is presented in an aggregated, non-attributed form and will not be discussed or disclosed to anyone not authorized to be privy to such information without the consent of the state, local or tribal requesting executive, subject to applicable laws.*

Booz | Allen | Hamilton

CNA ANALYSIS & SOLUTIONS

IIR Institute for Intergovernmental Research

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OJP DIAGNOSTIC CENTER Data-Driven Justice Solutions

# The NPR was developed, tested and validated using local data and adopted by the Committee. Implementation began September 1, 2016 on a pilot basis in four sites

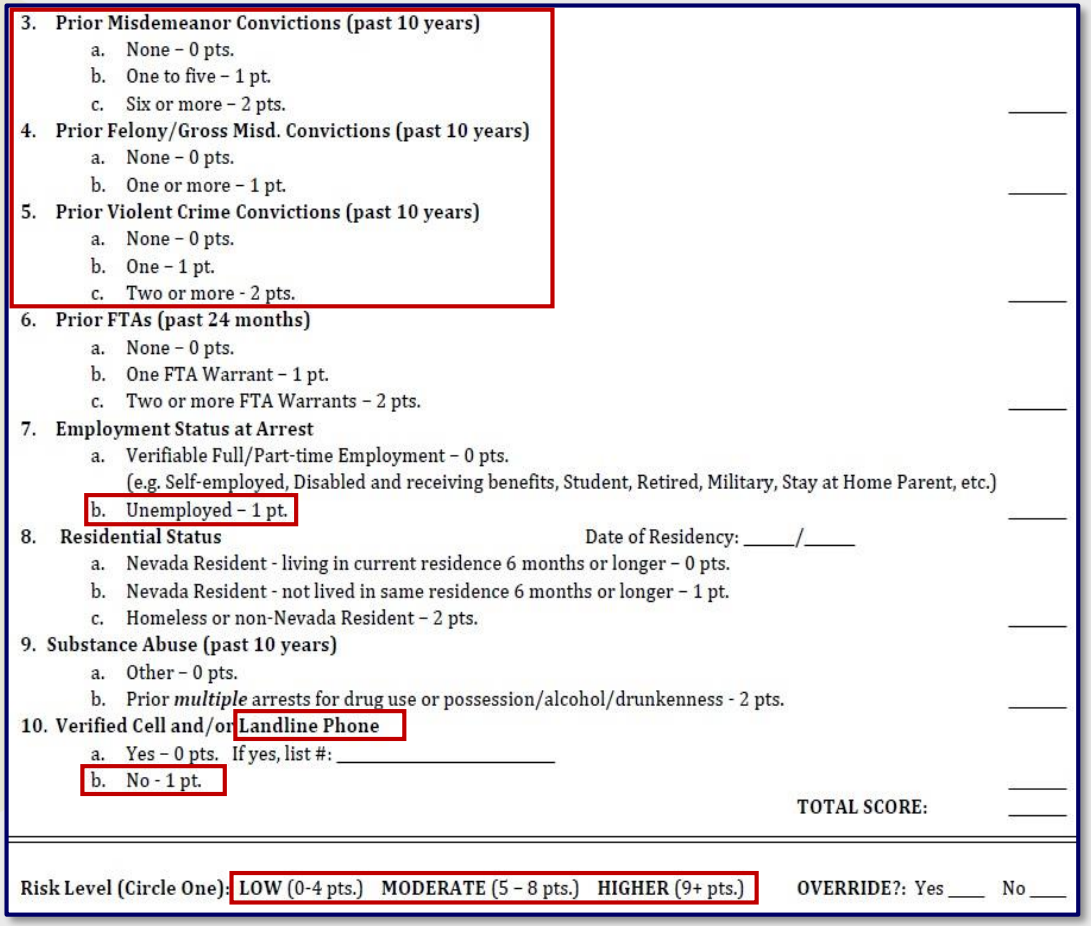
**The Diagnostic Center traveled to Reno and Las Vegas in January, 2017 to reviewed proposed modifications and recalibration of the NPR Assessment**

**Adopted changes include:**

- Use misdemeanor convictions as opposed to arrests and adjust weights
- Use felony convictions as opposed to arrests and adjust weights
- Use violent convictions as opposed to arrests and adjust weights
- Reduce unemployment score from 2 points to 1 point
- Add the presence of landline telephone to cell phone factor
- Reduce cell/landline phone score from 2 points to 1 point
- Rescale risk levels as follows:
  - 0 - 4 pts. = Low Risk
  - 5 – 8 pts. = Moderate Risk
  - 9 pts. and above = Higher Risk

***Changes produced Version 2 of the NPR Assessment***

**Snapshot of changes to NPR: VERSION 2**



3. **Prior Misdemeanor Convictions (past 10 years)**
   a. None – 0 pts.
   b. One to five – 1 pt.
   c. Six or more – 2 pts. _____
4. **Prior Felony/Gross Misd. Convictions (past 10 years)**
   a. None – 0 pts.
   b. One or more – 1 pt. _____
5. **Prior Violent Crime Convictions (past 10 years)**
   a. None – 0 pts.
   b. One – 1 pt.
   c. Two or more - 2 pts. _____
6. **Prior FTAs (past 24 months)**
   a. None – 0 pts.
   b. One FTA Warrant – 1 pt.
   c. Two or more FTA Warrants – 2 pts. _____
7. **Employment Status at Arrest**
   a. Verifiable Full/Part-time Employment – 0 pts.
   (e.g. Self-employed, Disabled and receiving benefits, Student, Retired, Military, Stay at Home Parent, etc.)
   b. Unemployed – 1 pt. _____
8. **Residential Status** Date of Residency: _____/_____
   a. Nevada Resident - living in current residence 6 months or longer – 0 pts.
   b. Nevada Resident - not lived in same residence 6 months or longer – 1 pt.
   c. Homeless or non-Nevada Resident – 2 pts. _____
9. **Substance Abuse (past 10 years)**
   a. Other – 0 pts.
   b. Prior ***multiple*** arrests for drug use or possession/alcohol/drunkenness - 2 pts. _____
10. **Verified Cell and/or Landline Phone**
    a. Yes – 0 pts. If yes, list #: _____
    b. No - 1 pt. _____

**TOTAL SCORE:** _____

**Risk Level (Circle One):** LOW (0-4 pts.) MODERATE (5 – 8 pts.) HIGHER (9+ pts.) **OVERRIDE?:** Yes ___ No ___

# After further discussion, additional modifications were made to adjust for implementation capacity constraints and ability to verify stability factors

**Additional modifications include all changes from Version 2 *and* the following:**

- Consolidation of employment, residency, cell phone/landline scoring items to mitigating verified stability factors and assign a negative one (-1) point score to each factor
- Rescale risk levels as follows:
  - 0 - 3 pts. = Low Risk
  - 4 – 8 pts. = Moderate Risk
  - 9 pts. and above = Higher Risk
- *Interview, not required*

***Changes produced Version 3 of the NPR Assessment***

**Both Versions 2 & 3 have been tested and are equally valid**

## Snapshot of changes to NPR: VERSION 3

3. **Prior Misdemeanor Convictions (past 10 years)**
   a. None – 0 pts.
   b. One to five – 1 pt.
   c. Six or more – 2 pts. _____

4. **Prior Felony/Gross Misd. Convictions (past 10 years)**
   a. None – 0 pts.
   b. One or more – 1 pt. _____

5. **Prior Violent Crime Convictions (past 10 years)**
   a. None – 0 pts.
   b. One – 1 pt.
   c. Two or more - 2 pts. _____

6. **Prior FTAs (past 24 months)**
   a. None – 0 pts.
   b. One FTA Warrant – 1 pt.
   c. Two or more FTA Warrants – 2 pts. _____

7. **Substance Abuse (past 10 years)**
   a. Other – 0 pts.
   b. Prior ***multiple*** arrests for drug use or possession/alcohol/drunkenness - 2 pts. _____

8. **Mitigating Verified Stability Factors (limit of -2 pts. total deduction)**
   a. Employed, Student or Retired (-1) pt.
   b. Nevada Resident - Living in current residence 6 mos. or longer (-1) pt.
   c. Verified Cell Phone/Landline (-1) pt. _____

**TOTAL SCORE:** _____

**Risk Level (Circle One):** LOW (0-3 pts.) MODERATE (4 – 8 pts.) HIGHER (9+ pts.) **OVERRIDE?:** Yes ____ No ____

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# Each pilot site elected a version to implement between April 1, 2017 – June 31, 2017

## Notable Differences

**NPR Assessment Version 2**

- Ten scoring Items
- Risk Levels:
  - Low (0-4 pts.)
  - Moderate (5-8 pts.)
  - Higher (9+ pts.)
- Interview required

**Washoe County**
**White Pine County**

**NPR Assessment Version 3**

- Eight scoring items
  - Seven mandatory, one optional
- Risk Levels:
  - Low (0-3 pts.)
  - Moderate (4-8 pts.)
  - Higher (9+ pts.)
- Interview *not* required, but preferred

**Clark County**
**Las Vegas Municipal**

## Results Under Modified Risk Instrument

| | Version 2 | | | | Version 3 | | | |
|---|---|---|---|---|---|---|---|---|
| | Washoe County | | White Pine County | | Las Vegas Justice Court (LVJC) | | Las Vegas Municipal | |
| Risk Level | Cases | % | Cases | % | Cases | % | Cases | % |
| Higher | 359 | 37% | 64 | 35% | 366 | 21% | 174 | 15% |
| Moderate | 322 | 33% | 59 | 32% | 562 | 32% | 585 | 51% |
| Low | 297 | 30% | 61 | 33% | 841 | 48% | 398 | 34% |
| Total Screened | 978 | 100% | 184 | 100% | 1769 | 100% | 1157 | 100% |

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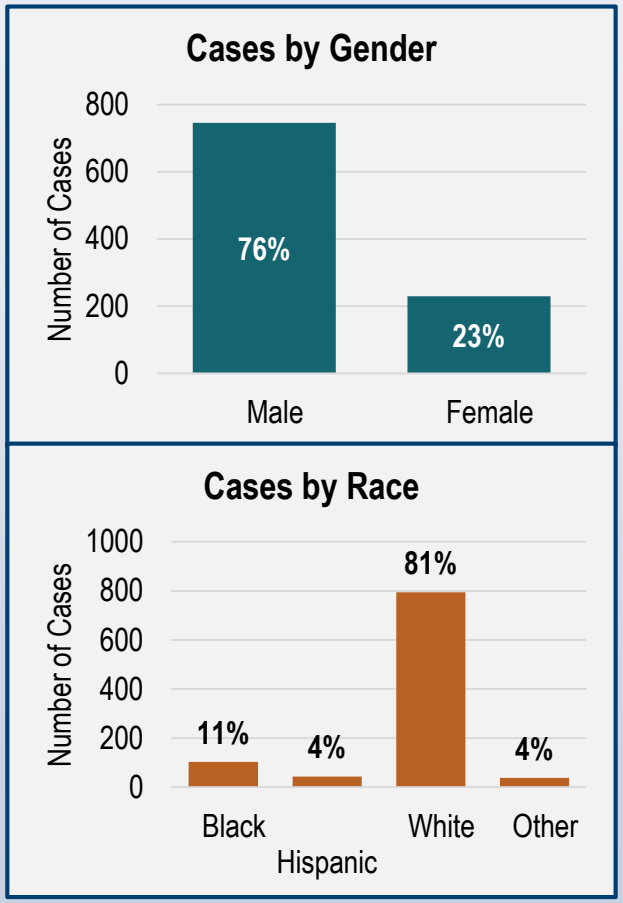
*Cases assessed under Version 3 for dates 3/6/2017 – 3/18/2017

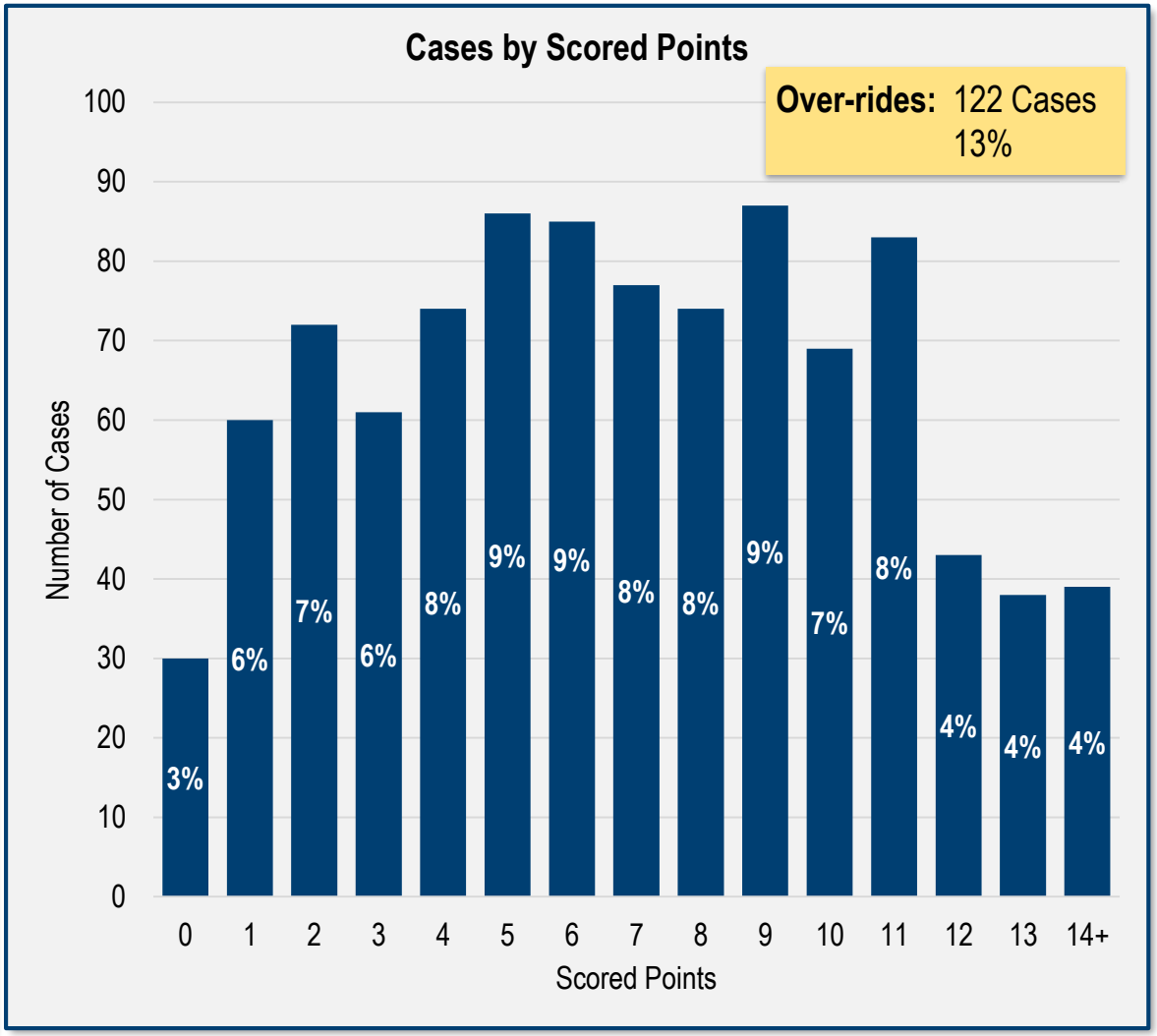
**See appendix for full list of overrides

# Washoe County Court – May Summary

**Total Cases:** 978




**Average Age:** 35 years

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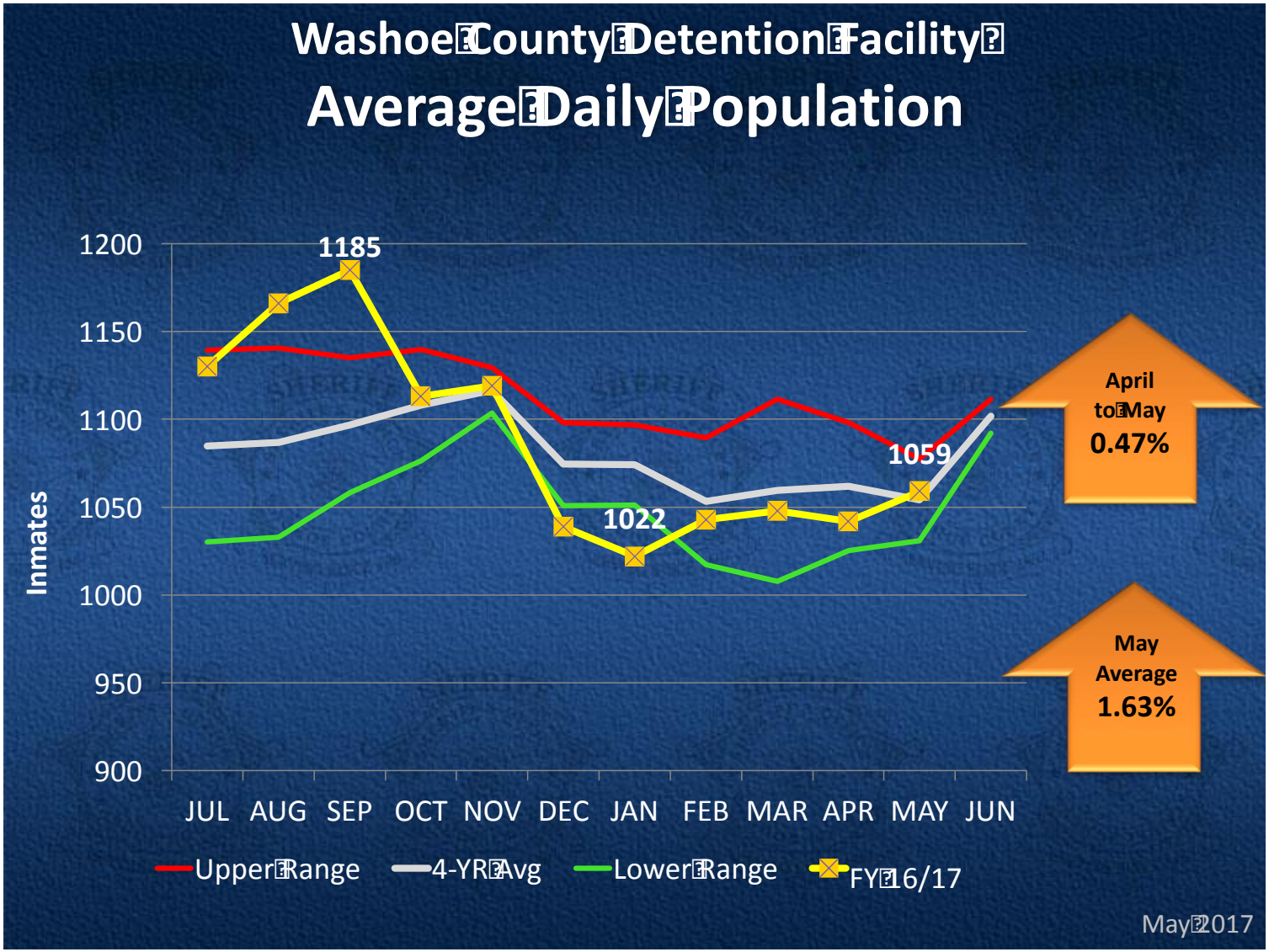
# Washoe County – Detention Facility Summary

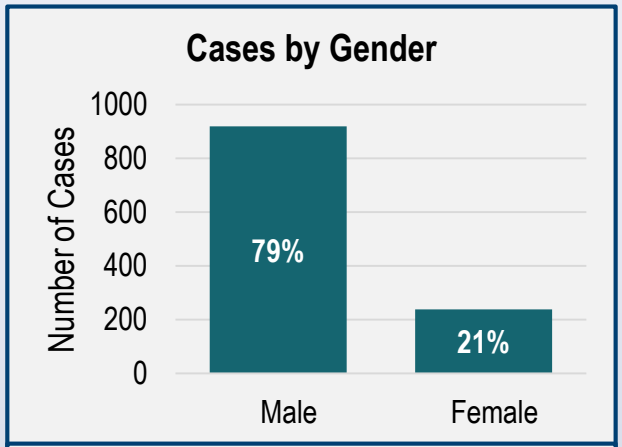


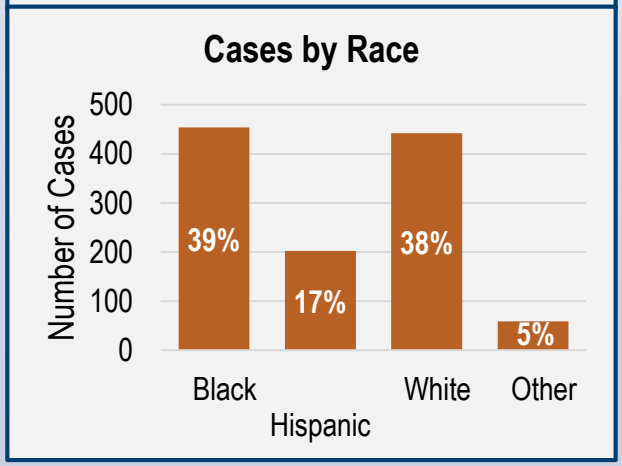



*Per the preface disclaimer, points of view or opinions in this document do not necessarily represent the official position or policies of the U.S. Department of Justice.*

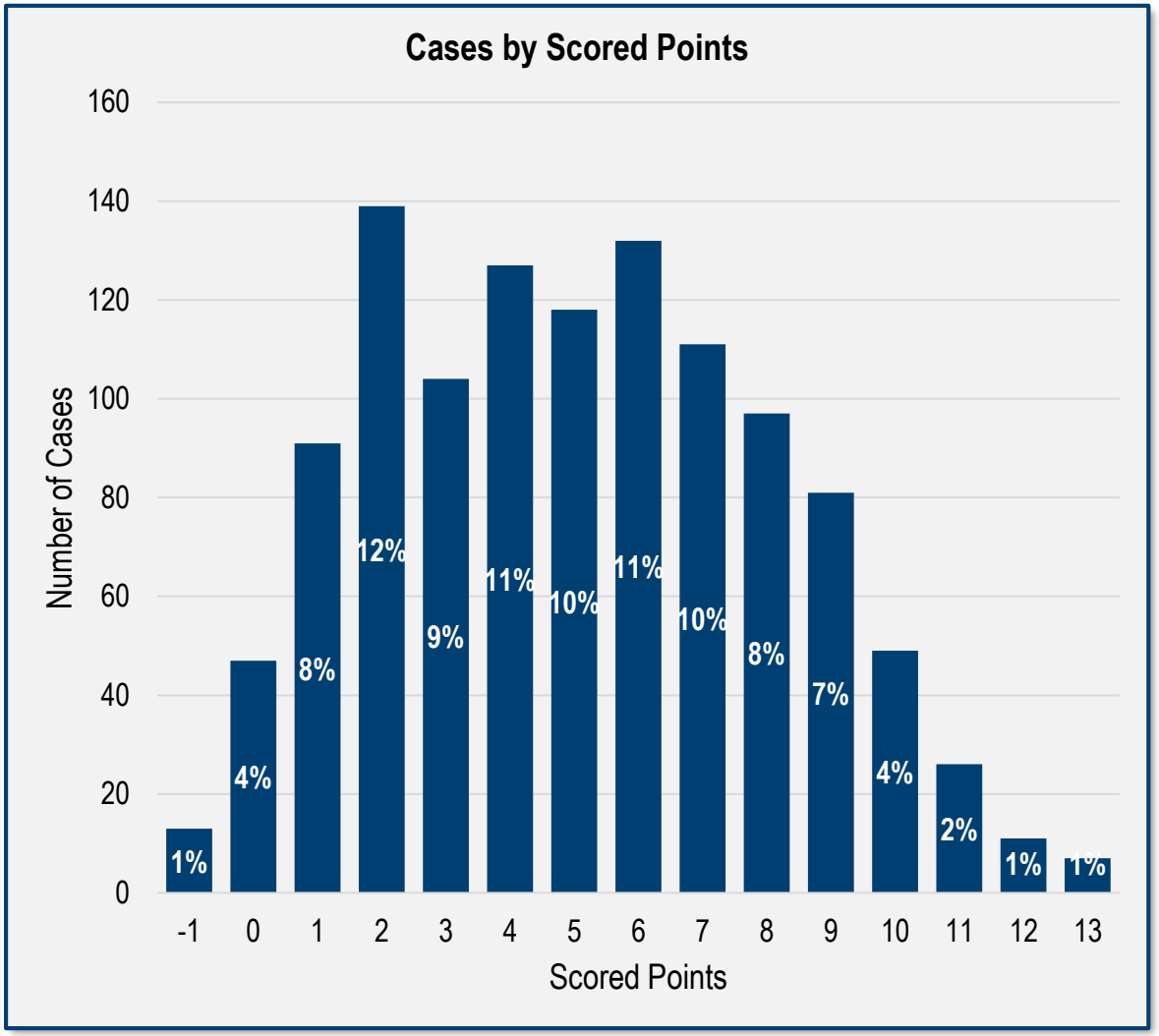
# Las Vegas Municipal Court – April, May and June Summary

**Total Cases:** 1,157




**Average Age:** 34 years

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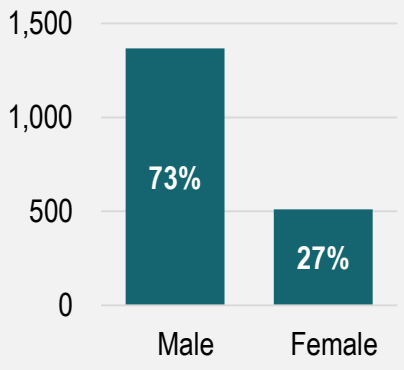
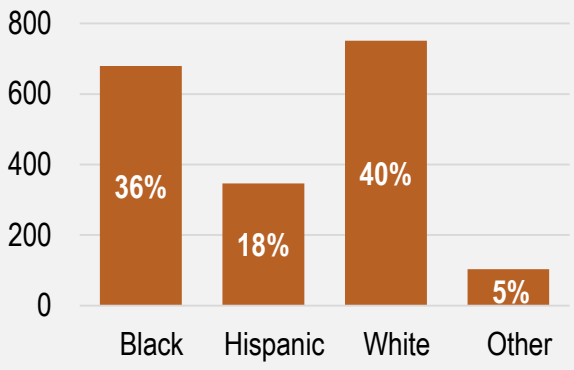
# LVJC (Clark County) – April, May and June Summary

**Total Cases:** 1,879

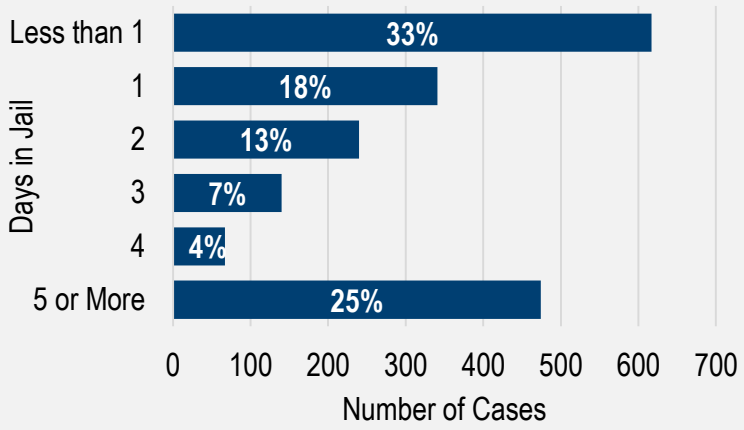
## Cases by Gender



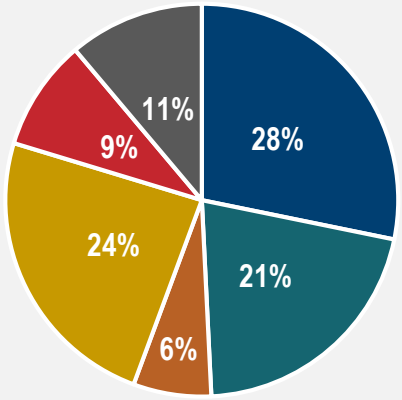

## Cases by Race




## Cases by Days Spent in Jail

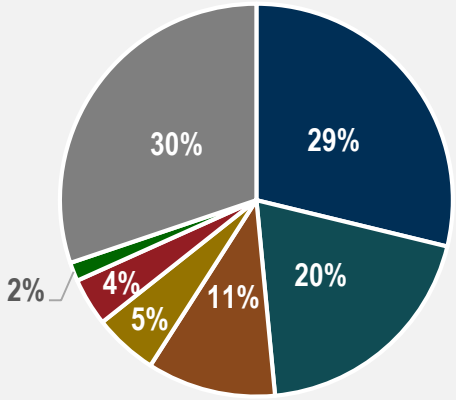



## Method of Release




| Method | # of Cases |
|---|---|
| Bail | 400 |
| CT OR | 298 |
| No Charges Filed | 91 |
| Sent Complete | 341 |
| Pretrial OR | 130 |
| Other | 158 |

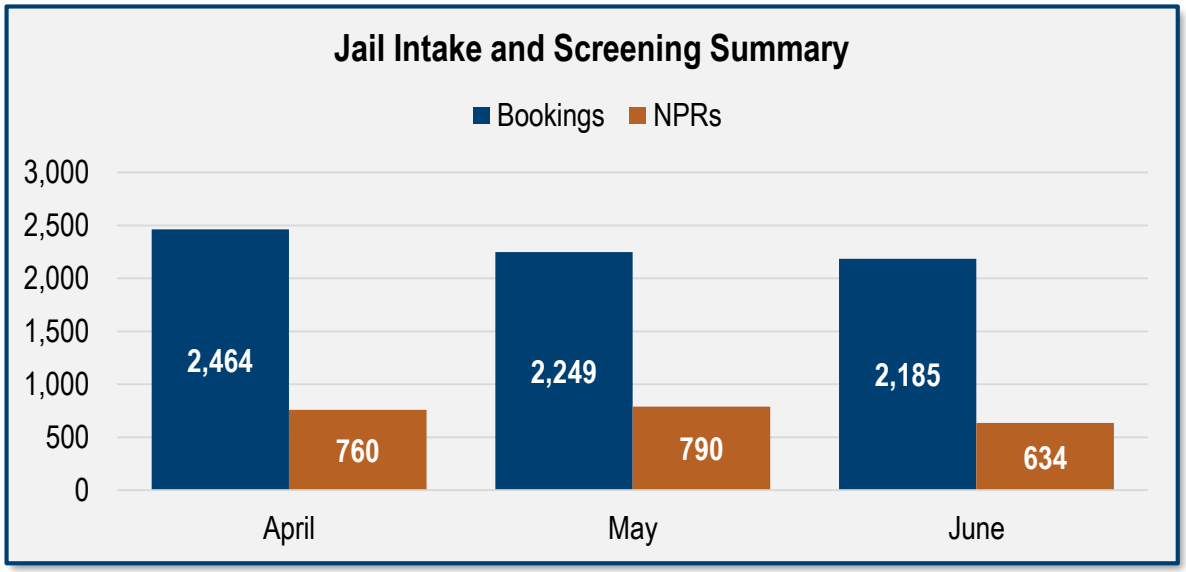
## Primary Charges

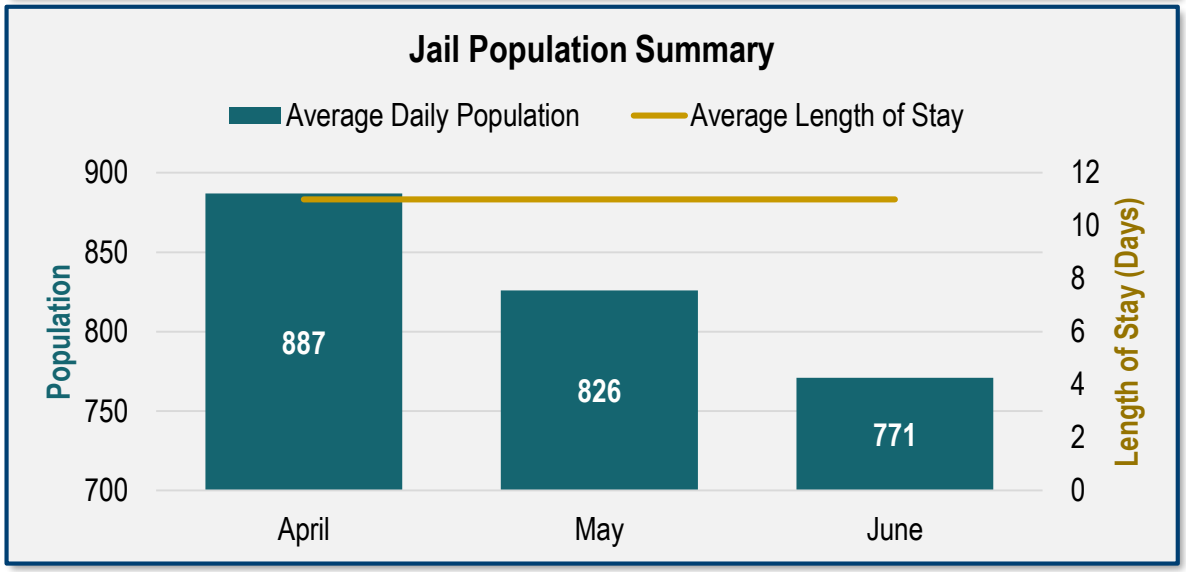



| Charge | # of Cases |
|---|---|
| Domestic Violence | 541 |
| DUI | 370 |
| Trespass | 199 |
| Obstruct/False Info | 99 |
| Drug Possession | 74 |
| Battery | 29 |
| Other | 567 |

# Las Vegas Municipal Jail – April, May and June Summary

| | April | May | June |
|---|---|---|---|
| Bookings | 2,464 | 2,249 | 2,185 |
| Releases | 760 | 790 | 634 |
| Average Daily Population | 887 | 826 | 771 |
| Average Length of Stay (in days) | 11 | 11 | 11 |

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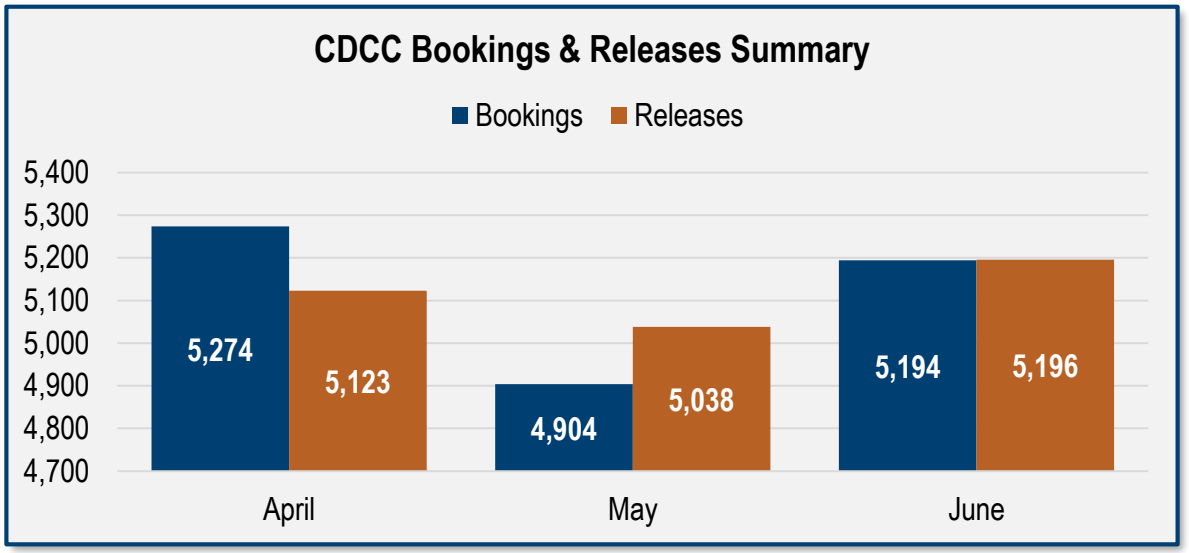
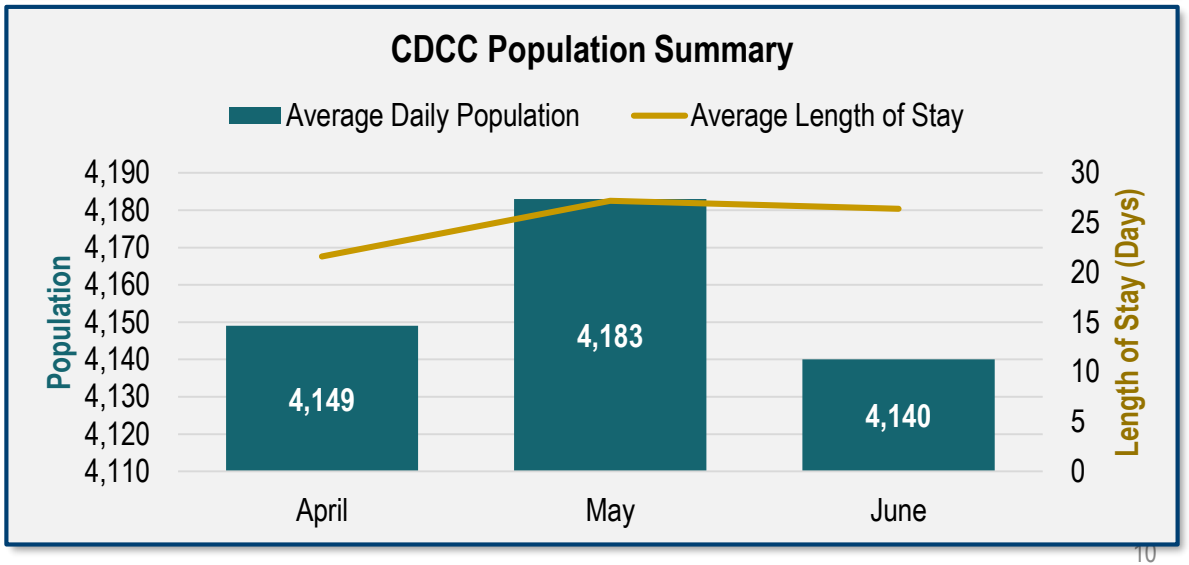
# Clark County Detention Center (CDCC) – April, May and June Summary

| | April | May | June |
|---|---|---|---|
| Bookings | 5,274 | 4,904 | 5,194 |
| Releases | 5,123 | 5,038 | 5,196 |
| Average Daily Population | 4,149 | 4,183 | 4,140 |
| Average Length of Stay (in days) | 21.6 | 27.2 | 26.4 |
| Average Daily Bookings | 176 | 158 | 173 |




OJP DIAGNOSTIC CENTER
Data-Driven Justice Solutions

# OJP Diagnostic Center

## Contact Information for the OJP Diagnostic Center

**Your Diagnostic Team:**

Angela Jackson-Castain, Diagnostic Center Specialist, Angela@OJPDiagnosticCenter.org

Dr. James Austin, Subject Matter Expert

Stephen Rickman, Diagnostic Center Senior Policy Advisor

**Main Telephone Number:**
(855) OJP-0411 (or 855-657-0411)

**Main Email:**
contact@OJPDiagnosticCenter.org

**Website:**
www.OJPDiagnosticCenter.org

**Facebook:**
www.facebook.com/OJPDC

**Twitter**
www.twitter.com/OJPDC

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# Appendix: Overrides

- Override options on NPR Assessments Versions 2 & 3:
  - Mental Health
  - Disability
  - Gang Member
  - Flight Risk
  - Prior Record more severe than scored
  - Prior Record less severe than scored
  - Other, explain
- Overrides are completed at the assessor's discretion, enabling risk level to move up or down one single level

# NEVADA PRETRIAL RISK (NPR) ASSESSMENT

Assessment Date: _____/_____/_____ Assessor: _____ County: _____

Defendant's Name: _____ DOB: _____/_____/_____ Case/Booking #:_____

Address: _____ ____ _____ Contact Phone#: _____ # of Current Charges:_____
City State Zip

Most Serious Charge: _____ Initial Total Bail Set: $ _____

**Demographic Information (optional):** Gender: Male _____ Female _____
Race: Hispanic _____ White _____ Black _____ Asian _____ Nat. Amer. _____ Other/Unknown_____

| **SCORING ITEMS** | **SCORE** |
|---|---|
| **1. Does the Defendant Have a Pending Pretrial Case at Booking?** | |
| a. Yes - 2 pts. If yes, list case # and jurisdiction: _____ | |
| b. No - 0 pts. | _____ |
| **2. Age at First Arrest (include juvenile arrests)** First Arrest Date: _____/____/_____ | |
| a. 20 yrs. and under - 2 pts. | |
| b. 21-35 yrs. – 1 pt. | |
| c. 36 yrs. and over - 0 pts. | _____ |
| **3. Prior Misdemeanor Convictions (past 10 years)** | |
| a. None – 0 pts. | |
| b. One to five – 1 pt. | |
| c. Six or more – 2 pts. | _____ |
| **4. Prior Felony/Gross Misd. Convictions (past 10 years)** | |
| a. None – 0 pts. | |
| b. One or more – 1 pt. | _____ |
| **5. Prior Violent Crime Convictions (past 10 years)** | |
| a. None – 0 pts. | |
| b. One – 1 pt. | |
| c. Two or more - 2 pts. | _____ |
| **6. Prior FTAs (past 24 months)** | |
| a. None – 0 pts. | |
| b. One FTA Warrant – 1 pt. | |
| c. Two or more FTA Warrants – 2 pts. | _____ |
| **7. Employment Status at Arrest** | |
| a. Verifiable Full/Part-time Employment – 0 pts. (e.g. Self-employed, Disabled and receiving benefits, Student, Retired, Military, Stay at Home Parent, etc.) | |
| b. Unemployed – 1 pt. | _____ |
| **8. Residential Status** Date of Residency: _____/_____ | |
| a. Nevada Resident - living in current residence 6 months or longer – 0 pts. | |
| b. Nevada Resident - not lived in same residence 6 months or longer – 1 pt. | |
| c. Homeless or non-Nevada Resident – 2 pts. | _____ |
| **9. Substance Abuse (past 10 years)** | |
| a. Other – 0 pts. | |
| b. Prior ***multiple*** arrests for drug use or possession/alcohol/drunkenness - 2 pts. | _____ |
| **10. Verified Cell and/or Landline Phone** | |
| a. Yes – 0 pts. If yes, list #: _____ | |
| b. No - 1 pt. | _____ |
| **TOTAL SCORE:** | _____ |

**Risk Level (Circle One): LOW** (0-4 pts.) **MODERATE** (5 – 8 pts.) **HIGHER** (9+ pts.) **OVERRIDE?:** Yes ____ No ____

**Override Reason(s):** Mental Health _____ Disability _____ Gang Member _____ Flight Risk _____
Prior Record More Severe than Scored_____ Prior Record Less Severe Than Scored _____
Other, explain: _____

**Final Recommended Risk Level: LOW**_____ **MODERATE** _____ **HIGHER** _____

**Supervisor/Designee Signature:** _____ **Date:** _____/____/_____

# NEVADA PRETRIAL RISK (NPR) ASSESSMENT

Assessment Date: _____/_____/_____ Assessor: _____ County: _____

Defendant's Name: _____ DOB: _____/_____/_____ Case/Booking #:_____

Address: _____ ____ _____ Contact Phone#: _____ # of Current Charges:_____
City State Zip

Most Serious Charge: _____ Initial Total Bail Set: $ _____

**Demographic Information (optional):** Gender: Male _____ Female _____
Race: Hispanic _____ White _____ Black _____ Asian _____ Nat. Amer. _____ Other/Unknown_____

**SCORING ITEMS** **SCORE**

1. **Does the Defendant Have a Pending Pretrial Case at Booking?**
   a. Yes - 2 pts. If yes, list case # and jurisdiction: _____
   b. No - 0 pts. _____

2. **Age at First Arrest (include juvenile arrests)** First Arrest Date: _____/____/_____
   a. 20 yrs. and under - 2 pts.
   b. 21-35 yrs. – 1 pt.
   c. 36 yrs. and over - 0 pts. _____

3. **Prior Misdemeanor Convictions (past 10 years)**
   a. None – 0 pts.
   b. One to five – 1 pt.
   c. Six or more – 2 pts. _____

4. **Prior Felony/Gross Misd. Convictions (past 10 years)**
   a. None – 0 pts.
   b. One or more – 1 pt. _____

5. **Prior Violent Crime Convictions (past 10 years)**
   a. None – 0 pts.
   b. One – 1 pt.
   c. Two or more - 2 pts. _____

6. **Prior FTAs (past 24 months)**
   a. None – 0 pts.
   b. One FTA Warrant – 1 pt.
   c. Two or more FTA Warrants – 2 pts. _____

7. **Substance Abuse (past 10 years)**
   a. Other – 0 pts.
   b. Prior ***multiple*** arrests for drug use or possession/alcohol/drunkenness - 2 pts. _____

8. **Mitigating Verified Stability Factors (limit of -2 pts. total deduction)**
   a. Employed, Student or Retired (-1) pt.
   b. Nevada Resident - Living in current residence 6 mos. or longer (-1) pt.
   c. Verified Cell Phone/Landline (-1) pt. _____

**TOTAL SCORE:** _____

---

**Risk Level (Circle One):** **LOW** (0-3 pts.) **MODERATE** (4 – 8 pts.) **HIGHER** (9+ pts.) **OVERRIDE?:** Yes ____ No ____

**Override Reason(s):** Mental Health _____ Disability _____ Gang Member _____ Flight Risk _____
Prior Record More Severe than Scored_____ Prior Record Less Severe Than Scored _____
Other, explain: _____

**Final Recommended Risk Level:** **LOW**_____ **MODERATE** _____ **HIGHER** _____

**Supervisor/Designee Signature:** _____ **Date:** _____/____/_____

# TAB 4

# NPR Assessment - Pilot Site Program Concerns/Comments

| Stakeholder | Concerns | Recommendations/Notes |
|---|---|---|
| Heather Condon<br>Washoe County | **# 1 CONCERN - Funding**<br>• Lack of full-time staff – The Second Judicial District Court has requested 5 additional FTEs in its above-base FY18 budget request to Washoe County. This request, if granted, would not be effective until July 1st. In the meantime, Washoe County increased the Pretrial Services budget for intermittent staff by $50,000 for the remainder of FY17.<br>  ○ Intermittent staff are difficult to hire and schedule because most have other full time jobs<br>  ○ Intermittent staff work only part time. It is difficult to train them and have them keep up with any changes.<br>  ○ Full-time staff have difficulty relaying the changes to intermittent staff due to the constant change, lack of understanding, and overwhelming amount of work.<br>  ○ This results in frustrated stakeholders regarding delays and inconsistencies.<br>  ○ The stakeholders then withdraw support of Pretrial Services.<br>  ○ The County Manager's Office has indicated it will not provide funding for full time staff if the program is a "pilot" only.<br>• Case Management System (CMS)<br>  ○ The Pretrial Services CMS is Scotia. All other courts in Washoe County use a different CMS. The majority of the courts use Odyssey.<br>  ○ Scotia is antiquated, difficult to use, and unable to track success/failure due to current system shortfalls to produce statistics and reports.<br>  ○ The court administrators have discussed the possibility of purchasing the Odyssey supervision module for use throughout Washoe County.<br>  ▪ $220k conversion/set up<br>  ▪ $99k license<br>  ▪ $21k yearly maintenance fee<br>  ○ This would streamline the processes and reduce duplicate/contradicting work by eliminating the shared drive. | **#1 RECOMMENDATIONS**<br>• Request all stakeholders formally provide their support for the NPRA and new process to the County Manager and the BCC.<br>• Stakeholders provide funding for additional staff and a new CMS.<br>  ○ Currently 2JDC funds Pretrial Services.<br>• Reduce services to non-county entities. |

| | | |
|---|---|---|
| | **#2 CONCERN – Conviction modification to NPRA**<br>• Conviction search is taking longer than arrest search.<br>  ○ Often times, convictions are not entered.<br>  ▪ PSO has to search individual court/jail case management systems for the disposition.<br>• In some occasions, arrests are not entered.<br>  ○ Ex. - misdemeanor FTA which can affect NPRA result.<br>• DA withdrew support based on this change.<br>  ○ His reasoning - it was not vetted or approved through the Supreme Court working group. | **#2 RECOMMENDATIONS**<br>• Hire more Pretrial staff due to the increased amount of work.<br>• Confirm accuracy of information provided by DPS regarding arrests/conviction entry.<br>• Vote as the larger group on using the conviction data to eliminate the DA's concern. |
| | **#3 CONCERN – Frequent changes to NPRA & processes**<br>• Difficult to track success/failure or pinpoint what caused it.<br>• Lack of understanding from judges, court and Pretrial personnel as to new process.<br>• Some stakeholders have individual agendas.<br>• Inability to keep track and push out changes to other parties who have indirect involvement (court clerks, jail staff). | **#3 RECOMMENDATIONS**<br>• Make no other changes to the NPRA or associated processes for the next 6 months.<br>• Retrain all judicial staff on purpose of change and goals, then provide supporting documentation.<br>• Push out training to other parties who have indirect involvement.<br>• Create a procedure manual to assist – attempt to gain consistency between pilot sites. |
| Anna Vasquez<br>Las Vegas Justice Court | **CONCERN**<br>• We have had to have several clarifications that should go out to the committee:<br>  ○ While items 3 thru 5 are based on conviction item 7 is based on arrest and not conviction that is not listed on the form should be added.<br>  ○ Traffic convictions are counted as misdemeanor convictions if the person was arrested on the traffic offense. | **RECOMMENDATIONS/NOTES**<br>• Clarify to the justice community that this assessment is a tool to help in making bail and release decisions but does not dictate an automatic detention or release.<br>• We removed from the form race and gender as our judges requested to be blind to this information when making decisions. We are collecting the information in our system but are not giving it to the judges. |

| | | |
|---|---|---|
| Kowan Connolly<br>Las Vegas Municipal Court | **CONCERN**<br>• Initial concern with going with only convictions and not basing the assessment on arrests. However, after looking at the stats Dr. Austin provided to us and his statement that national assessments are based on convictions, I would like to test Version 3 and have Dr. Austin evaluate the assessment.<br>  ○ The pilot sites agreed to look for dispositions on a Nevada offense that can be escalated to a felony (BDV and DUI) if the disposition is not available in triple I (NCIC), state (NCJIS), or SCOPE. We will keep track of the time difference if any. . | **RECOMMENDATIONS/NOTES**<br>• I think we should also keep track of how many dispositions are not in the state repository that should have been in order to determine if the state repository has good conviction data for the assessment.<br>• There are quite a few other changes in Version 3 that I have no issues with. I just want to compile the data and see how Version 3 does. |
| Judge Bishop<br>Ely Justice Court | **CONCERN**<br>• One concern raised by the jail about using convictions: they indicated that a lot of our defendants have long records that have a lot of arrest entries without dispositions. | **RECOMMENDATIONS/NOTES**<br>• I told them that if that happens to put a note on the NPRA and mark the override for more severe record than scored. |
| Judge Sullivan<br>Las Vegas Justice Court | **#1 CONCERN**<br>• The revised NPR is still including in the scores the results of an interview, i.e. weighing stability factors (residence, phone, and employment). In LVJC, because of staffing and some jail issues our pretrial department was having trouble getting everyone interviewed. This is why it was helpful to move away from the original scoring tool of giving a defendant *adverse* points for *not* having stability factors when the defendant was never interviewed. However, under the revised NPR the opposite is happening. We are deducting points (thereby reducing their total risk score) if pretrial can confirm stability factors based upon an interview. This scoring system is still treating the defendants who *are i*nterviewed different from those who *are not* interviewed.<br>**#2 CONCERN**<br>• I'm confused at why 6 or more prior misdemeanor convictions (in the last 10 years) is deserving of 2 points, but 6 more felony convictions (in the last 10 years) is deserving of only 1 point. Why does a defendant score more points in the misdemeanor conviction category than in the felony conviction category? | **RECOMMENDATIONS/NOTES** |

| | | |
|---|---|---|
| Judge Sciento<br>Las Vegas Justice Court | **#1 CONCERN**<br>• My concern is the risk assessment regarding convictions. I have a case today that shows a moderate risk at 6. Under number 4, Prior Felony/Gross Misd. Convictions the risk assessment shows 0, but pending cases show a District Court case pending. When I reviewed the pending case via district court minutes it showed that a sentence was imposed in 2015 for a gross misdemeanor. The Defendant was placed on probation on 7-2015 Further there was a revocation of probation hearing on 11-2015. On 12-2015 another Order was issued by District Court to reinstate the Defendant to probation, but a bench warrant was issued, and a probation violation report was filed. So the conviction for the Gross Misdemeanor was not noted on the risk assessment.<br>  ○ Further, for the same person there were two misdemeanor matters in Justice Court that resulted in a bench warrant for the defendant, not including the bench warrant in District Court. Under scoring item 6 it says on FTA warrant.<br>**#2 CONCERN**<br>• The information provided does not fully inform me of the prior convictions and non-traffic FTA's. I think this is important to know in setting a reasonable bail. | **RECOMMENDATIONS/NOTES** |
| Judge Zimmerman<br>Las Vegas Justice Court | **#1 CONCERN**<br>• The tool does not take into consideration the current charges that a defendant is facing. This results in some completely absurd recommendations on both ends of the spectrum.<br>**#2 CONCERN**<br>• The tool also does not seem to specifically take into consideration if someone is a fugitive or has an ICE detainer.<br>**#3 CONCERN**<br>• Are we tracking whether or not people show up for court and/or commit new offenses after they have been released? | **RECOMMENDATIONS/NOTES**<br>• I have provided Judge Bonaventure with specific examples over the past few months. I also believe that Las Vegas is unique in that it is a very transient community so it is very common for defendants not to show up for court. |

| | | |
|---|---|---|
| | **#4 CONCERN**<br>• I think it does matter greatly how many felony convictions that a person has. There is a significant difference between having 2 or 3 and having 10. While it should go to weight as to how old the convictions are, it still matters if they are more than 10 years old depending on the type of crime that the conviction or convictions are for. | |
| | **#5 CONCERN**<br>• With respect to Question 1 on the Scoring Items, "Does the Defendant Have a Pending Pretrial Case at Booking?", if a Defendant has a pending pretrial case at booking, it certainly does matter if this current arrest occurred while the Defendant was out of custody on the pending pretrial case.<br>  ○ If that is the case, the Defendant should not even be considered for release because he or she has already proven that they cannot stay out of trouble. | |
| Kim Kampling<br>Las Vegas Justice court Administrator | **#1 CONCERN**<br>• The supervision available to the different courts is different; it skews the results on how effective the tool is.<br><br>**#2 CONCERN**<br>• The DPS database is not up to date; there are more than 160,000 cases back-logged and NONE of the LVJC cases are entered because they have to be hand-entered. | **RECOMMENDATIONS/NOTES**<br>• There needs to be a statewide criminal history database that is up to date.<br>• There should be a uniform Pretrial Management system statewide; we could share information and statistics. |
| Chris Hicks<br>Washoe County District Attorney's Office | **CONCERN**<br>• There's been a significant increase in bail hearing requests to challenge the score on the NPR assessment. | |
| Jeremy Bosler<br>Washoe County Public Defender's Office | **CONCERN**<br>• There is concern whether information from the shared drive will be communicated to the Public Defender's office | |

# TAB 5

**U.S. Department of Justice**
National Institute of Corrections

NATIONAL INSTITUTE OF CORRECTIONS

# Measuring What Matters

## Outcome and Performance Measures for the Pretrial Services Field

NIC
National Institute of Corrections

**U.S. Department of Justice**
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NATIONAL INSTITUTE OF CORRECTIONS

# Measuring What Matters

## Outcome and Performance Measures for the Pretrial Services Field

The National Institute of Corrections
Pretrial Executives Network

NIC Accession Number 025172

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# Acknowledgments

The National Institute of Corrections' (NIC) Pretrial Executive Network includes directors of established pretrial service programs nationwide. Its mission is to promote pretrial services programming as an integral part of state and local criminal justice systems. Its goals are to make pretrial programming relevant in national criminal justice funding, training, and technical assistance; encourage expanded research in the pretrial field; and identify best and promising practices in the pretrial release and diversion fields.

The Network would like to recognize and thank the following individuals for their contribution to this monograph:

**Peter Kiers**, President, National Association of Pretrial Services Agencies

**Barbara Darbey**, Executive Director, National Association of Pretrial Services Agencies

**Tara Klute**, Manager, Kentucky Pretrial Services

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# Foreword

This monograph presents recommended outcome and performance measures and mission-critical data for pretrial service programs. It is hoped that these suggested measures will enable pretrial service agencies to gauge more accurately their programs' effectiveness in meeting agency and justice system goals. The contributors to this monograph believe the recommended elements are definable and measurable for most pretrial service programs and are consistent with established national pretrial release standards and the mission and goals of individual pretrial programs. The monograph defines each measure and critical data element and identifies the data needed to track them. It also includes recommendations for programs to develop ambitious but reasonable target measures. Finally, the monograph's appendix lists examples of outcome and performance measures from three nationally representative pretrial service programs.

## SUGGESTED OUTCOME MEASURES AND DEFINITIONS

***Appearance Rate:*** The percentage of supervised defendants who make all scheduled court appearances.

***Safety Rate:*** The percentage of supervised defendants who are not charged with a new offense during the pretrial stage.

***Concurrence Rate:*** The ratio of defendants whose supervision level or detention status corresponds with their assessed risk of pretrial misconduct.

***Success Rate:*** The percentage of released defendants who (1) are not revoked for technical violations of the conditions of their release, (2) appear for all scheduled court appearances, and (3) are not charged with a new offense during pretrial supervision.

***Pretrial Detainee Length of Stay:*** The average length of stay in jail for pretrial detainees who are eligible by statute for pretrial release.

## SUGGESTED PERFORMANCE MEASURES AND DEFINITIONS

***Universal Screening:*** The percentage of defendants eligible for release by statute or local court rule that the program assesses for release eligibility.

***Recommendation Rate:*** The percentage of time the program follows its risk assessment criteria when recommending release or detention.

***Response to Defendant Conduct:*** The frequency of policy-approved responses to compliance and noncompliance with court-ordered release conditions.

***Pretrial Intervention Rate:*** The pretrial agency's effectiveness at resolving outstanding bench warrants, arrest warrants, and capiases.

## SUGGESTED MISSION CRITICAL DATA

***Number of Defendants Released by Release Type and Condition:*** The number of release types ordered during a specified time frame.

***Caseload Ratio:*** The number of supervised defendants divided by the number of case managers.

***Time From Nonfinancial Release Order to Start of Pretrial Supervision:*** Time between a court's order of release and the pretrial agency's assumption of supervision.

***Time on Pretrial Supervision:*** Time between the pretrial agency's assumption of supervision and the end of program supervision.

***Pretrial Detention Rate:*** Proportion of pretrial defendants who are detained throughout pretrial case processing.

# Contents

# Introduction

***Performance Measurement:*** *Assessing progress toward achieving pre-determined goals, including information on the efficiency with which resources are transformed into goods and services (outputs), the quality of those outputs and outcomes, and the effectiveness of operations in terms of their specific contributions to program objectives.*

*—National Performance Review, Serving the American Public: Best Practices in Performance Measurement (Washington, D.C.: Executive Office of the President, 1997).*

The National Institute of Corrections' (NIC) Pretrial Executive Network includes directors of established pretrial service programs nationwide. The Network's mission is to promote pretrial services programming as an integral part of state and local criminal justice systems. Its goals are to make pretrial programming more prominent in national criminal justice funding, training, and technical assistance; encourage expanded research in the pretrial field; and identify best and promising practices in the pretrial release and diversion fields.

In 2010, the Network identified the need for consistent and meaningful data to track individual pretrial services program performance. Current information on pretrial programming is limited and usually does not describe individual program outcomes.[1] National data specific to pretrial program outcomes and performance would help individual programs measure their effectiveness in achieving their goals and objectives and in meeting the expectations of their justice systems. Consistent with public- and private-sector best practices,[2] pretrial services program outcome measures, performance measures, and mission-critical data would tie into the individual agency's mission, local justice system needs, state and local bail laws, and national pretrial release standards.

In October 2010, the Network commissioned a working group to develop suggested pretrial release outcome and performance measures and mission-critical data. This included identifying performance indicators based on the above-mentioned factors and recommending strategies for programs to develop ambitious but attainable measure targets. The working group relied on the Network's accepted definitions of outcome and performance measures and mission-critical data. They are presented here as follows:

***Outcome measure:*** An indicator of an agency's effectiveness in achieving a stated mission or intended purpose.

***Performance measure:*** A quantitative or qualitative characterization of performance.

***Mission-critical data:*** Supporting data in areas strategically linked to outcome and performance measures. These data track progress in areas and on issues that supplement specific measures.

## Scope of Outcome and Performance Measures

A central issue for the Network is whether certain recommended measures—such as appearance and safety rates—are indicators more of overall justice system performance than of the performance of individual programs. Appearance rates depend as much on the number of released defendants, their degrees of risk, and the number of court appearances (potential failure points) set as on the pretrial program's risk assessment and supervision protocols. Moreover, a pretrial services program's recommendation for release

or detention is not binding. In making pretrial release or detention decisions, courts consider other factors (such as strength of the evidence) that are not included in most risk assessment models. None of these external factors is fully under a pretrial program's control. However, the Network believes the measures identified are critical measures of pretrial program success and should be considered as individual agency indicators. Programs should use target measures to recognize and offset these external factors.

## Supporting Business Practices

Outcome and performance measures require an organizational structure that supports critical function areas, includes adequate resources for risk assessment and risk management, and fosters strong collaborative relationships within the local criminal justice system and the broader community. For the suggested measures, the Network recommends the key organizational elements for pretrial services programs identified by national standards promulgated by the American Bar Association (ABA)[3] and the National Association of Pretrial Services Agencies (NAPSA).[4] These include:

- Policies and procedures that support the presumption of release under the least restrictive conditions needed to address appearance and public safety concerns.
- Interviews of all detainees eligible for release consideration that are structured to obtain the information needed to determine risk of nonappearance and rearrest and to exercise effective supervision.
- Risk assessment schemes that are based on locally researched content and applied equally and fairly.
- Recommendations for supervision conditions that match the defendant's individual risk level and specific risks of pretrial misconduct.
- Monitoring of defendants' compliance with release conditions and court appearance requirements.
- Graduated responses to defendants' compliance and noncompliance.
- Tracking of new arrests occurring during supervision.
- Court notification of program condition violations and new arrests.
- Timely notice to court of infractions and responses.
- Monitoring of the pretrial detainee population and revisiting release recommendations if defendants remain detained or if circumstances change.

# Outcome Measures

## Appearance Rate

*Appearance rate* measures the percentage of supervised defendants who make all scheduled court appearances. This is the most basic outcome measure for pretrial service programs. Nearly all such programs have as part of their mission the goal of maximizing appearance rates among released and supervised defendants. Program assessment and supervision strategies seek to minimize each defendant's risk of nonappearance. Further, state and local bail statutes and provisions encourage court appearance to promote the effective administration of justice and to bolster public confidence in the judicial system. Finally, national standards on pretrial release identify minimizing failures to appear as a central function for pretrial programs.

The recommended data for this outcome measure are cases with a verified pretrial release or placement to the pretrial program and the subset of this population that have no bench warrants or capiases issued for missed scheduled court appearances. Depending on its information management system, the program may also track the appearance rate of various defendant populations—such as those charged with violent crimes or those released conditionally, financially, or on personal recognizance—although the primary group targeted should be defendants released to the agency's supervision.

Pretrial programs should count all cases with issued bench warrants and capiases under this outcome measure, including instances when defendants subsequently return to court voluntarily and are not revoked. The recommended *pretrial intervention* performance measure allows programs to gauge their efforts in resolving warrants. As a supporting business practice, pretrial services programs may also calculate and keep an adjusted appearance rate that considers defendant voluntary returns and warrant surrenders that the program brings about.

## Safety Rate

*Safety rate* tracks the percentage of supervised defendants who are not charged with a new offense during the pretrial stage. A *new offense* is defined here as one with the following characteristics:

- The offense date occurs during the defendant's period of pretrial release.[5]
- It includes a prosecutorial decision to charge.
- It carries the potential of incarceration or community supervision upon conviction.

At least 36 states and the federal judicial system factor a defendant's potential threat to the public or to specific individuals into the pretrial release or detention decision. National pretrial release standards also identify public safety as a legitimate pretrial concern for local justice systems.

The recommended data for this outcome measure are the number of defendants with a verified pretrial release or placement to the pretrial program and the subset of this population with no rearrests on a new offense. Depending on the program's information capabilities, the outcome measure should include recorded local and national arrests. As a supporting business practice, pretrial programs also may track separate safety rates by charge type (for example, misdemeanors, felonies, or local ordinance offenses), severity (violent crimes, domestic violence offenses, or property crimes), or by various defendant populations.

## Concurrence Rate

*Concurrence rate* is the ratio of defendants whose supervision level or detention status corresponds to their assessed risk of pretrial misconduct. Conditions of supervision recommended and imposed do not have to match exactly; however, the overall supervision level should be comparable. For example, a recommendation for release on personal recognizance with no conditions and a subsequent conditional supervision release with a requirement to report to the pretrial services program weekly would not be defined as concurrent. This measure counts only defendants eligible by statute for pretrial release[6] and is presented in the following matrix (exhibit 1):

**Exhibit 1. Matrix of Assessment Versus Release Level**

| ASSESSED LEVEL | RELEASE LEVEL | | | |
|---|---|---|---|---|
| | Low | Medium | High | Detention |
| Low | X | | | |
| Medium | | X | | |
| High | | | X | |
| No Release | | | | X |

Concurrence rate is an excellent measure of success in helping courts apply supervision levels that match the defendant's identified risk level. This is a recognized best practice in the criminal justice field. (It is assumed that the individual pretrial program does not overtly attempt to fit its release/detention recommendations to a perceived court outcome.) The measure also complements appearance and safety rates by allowing pretrial programs to track subsequent failure by defendants originally recommended for detention.

The recommended data for this outcome measure are the number of release and detention recommendations and subsequent release and detention outcomes.

## Success Rate

*Success rate* measures the percentage of released defendants who are (1) not revoked for technical violations due to condition violations, (2) appear for all scheduled court appearances, and (3) are not charged with a new offense during pretrial supervision. The measure excludes defendants who are detained following a guilty verdict and those revoked due to non-pretrial-related holds.

The recommended data for this outcome measure are the total number of defendants released to the program and the subset of this population that experiences no condition violations, failures to appear, or rearrests. Depending on the pretrial program's information system, revocations may show up as subsequent financial release or detention orders.

## Pretrial Detainee Length of Stay

*Detainee length of stay* represents the average length of jail stay for pretrial detainees who are eligible by statute for pretrial release. This is a significant outcome measure for the estimated 27 percent of pretrial programs that are located within corrections departments[7] and that have missions to help control jail populations, and it is a performance measure for other pretrial programs.

The recommended data for this outcome measure are admission and release dates for all pretrial-related jail detentions. *Release* as defined here is the defendant's full discharge from jail custody.

# Performance Measures

## Universal Screening

*Universal screening* reflects the percentage of defendants eligible for release by statute or local court rule that a program assesses for release. *Screening* includes any combination of pretrial interview, application of a risk assessment instrument, or measurement against other established criteria for release recommendation or program placement.

This measure conforms to national standards that encourage full screening of release-eligible defendants[8] and state bail statutes that mandate release eligibility for certain defendant groups. When measuring screening, jurisdictions should go beyond initial arrest and court appearance and consider all detainees who become eligible for pretrial release consideration at any point before trial. (These screens may occur at initial arrest or court hearings and be submitted to the court once the defendant becomes eligible for release.)

The recommended data for this performance measure are the total number of release-eligible defendants and the subset of this population that the pretrial program screened.

## Recommendation Rate

*Recommendation rate* reflects how frequently the pretrial program follows its risk assessment criteria when recommending release or detention. There are two potential data sources for this performance measure:

1) The pretrial program's total number of recommendations during a specific time frame and the number of these recommendations that conform to the release or detention level identified by the risk assessment.

2) The percentage of overrides to the risk assessment scheme.

## Response to Defendant Conduct

*Response to defendant conduct* measures how often case managers respond appropriately (by recognized policy and procedure) to compliance and noncompliance with court-ordered release conditions. This measure conforms to national standards for pretrial supervision[9] and evidence-based practices in criminal justice for swift, certain, and meaningful responses to defendant and offender conduct.

Response to defendant conduct requires pretrial programs to have in place clear definitions of compliance and noncompliance with conditions of supervision and procedures outlining appropriate case manager responses. The recommended data for this measure are the number of identified technical violations and the percentage of these violations with a noted appropriate staff response. This includes administrative responses by staff and recommendations for judicial action.

## Pretrial Intervention Rate

The *pretrial intervention rate* measures the pretrial program's effectiveness at resolving outstanding bench warrants, arrest warrants, and capiases. The measure tracks the percentage of:

- Defendants with outstanding warrants who self-surrender to the pretrial program, court, or law enforcement after being advised to do so by the pretrial program.
- Arrests brought about by pretrial program staff of supervised defendants with outstanding warrants.

# Mission-Critical Data

## Number of Defendants Released by Release Type and Condition

The *number of defendants released by release type and condition* tracks the number of defendants released by court-ordered release type, for example, personal recognizance, conditional supervision, or unsecured bond. For releases to the pretrial program, the data also track the frequency of individual release conditions.

## Caseload Ratio

The *caseload ratio* is the number of supervised defendants divided by the number of case managers. The data include the pretrial program's overall caseload rates and rates for special populations such as defendants in high-risk supervision units, under specialized calendars, or under high-resource conditions such as electronic monitoring and global positioning surveillance.

## Time From Nonfinancial Release Order to Start of Pretrial Supervision

*Time from nonfinancial release order to start of pretrial supervision* tracks the time between a court's order of release and the pretrial program's assumption of supervision. Data collected include the jail release date for cases involving initial detention or the actual date of the judicial order for defendants already in the community, and the first contact date with the pretrial program following release or the new judicial order.

The issuance of the judicial order is the most accurate indicator of the official start of pretrial agency supervision. However, evidence shows that too few pretrial programs receive timely notification of orders from the court to make this a practical indicator of when the agency first exercises supervision authority over the defendant. Therefore, the Network recommends the first contact date with the pretrial agency as a more realistic data source.

## Time on Pretrial Supervision

The *time on pretrial supervision* is measured by the length of time between the pretrial program's assumption of supervision authority and the end of program supervision. Supervision begins with the defendant's first contact with the pretrial program and terminates following case disposition or the issuing of new release or detention requirements.

## Pretrial Detention Rate

The *pretrial detention rate* is the proportion of pretrial defendants who are detained throughout pretrial case processing.

# Setting Targets

***Performance goal:*** *A target level of an activity expressed as a tangible measurable objective, against which actual achievement can be compared.*

—National Performance Review, *Serving the American Public: Best Practices in Performance Measurement* (Washington, D.C.: Executive Office of the President, 1997).

A *performance target* is a numeric goal for an outcome or performance measure; for example, an appearance rate of 90 percent for all released defendants. It is a specific gauge of performance achieved against performance expected. Well-defined, ambitious, and attainable performance targets can help organizations deliver expected services and outcomes and identify needed programmatic and system strategic changes. Conversely, static or unreasonable targets can encourage lower expectations, thereby minimizing the program's influence as a system partner, or burden organizations with objectives that are inconsistent with its mission and resources.

## Adopting the SMART Method

Given variances nationwide in defendant populations, court operations, and justice system practices, the Network believes recommended universal targets for each stated measure is impractical. Instead, the Network recommends that individual programs adopt the SMART (specific, measurable, achievable, realistic, and time-bound) method of setting effective targets.

### SPECIFIC

*Specific* targets are clear and unambiguous. They describe exactly what is expected, when, and how much. For example, a specific target for universal screening would be: "Interview 95 percent of defendants eligible by statute for pretrial release." Because the targets are specific, the pretrial program can easily measure progress toward meeting them.

### MEASURABLE

An effective target answers the questions "how much" or "how many." Each target must be a set number or percentage that can be *measured.* Further, each target must be based on existing and retrievable data. Programs must assess their information management capacity to determine a target's feasibility.

### ACHIEVABLE

Targets must be within the capacity of the organization to *achieve* while challenging the organization to improve its performance. They should be neither out of reach nor below an acceptable standard. Targets set too high or too low become meaningless and eventually worthless as indicators. The organization's most recent past performance (approximately the past 2 years) usually is a good indicator of what is feasible—at least as a beginning target.

### REALISTIC

*Realistic* targets consider an organization's resources and the areas it actually can influence.

### TIME BOUND

Effective targets have *fixed durations*—for example, a calendar or fiscal year—that allow time to achieve or calculate the outcome or performance measure.

## Other Recommendations for Targets

- When establishing initial targets, set a minimum target and a stretch target. The minimum target should be one the program believes is the most manageable, whereas the stretch target would serve as the rate the program would strive to accomplish. Programs also can set a minimum target for the first year or two of performance measurement and a stretch target for future years.
- Consider trends to establish a target baseline. If past data exist for performance on a particular measurement, examine those data for trends that can serve as a baseline for setting targets for future performance.
- Use "SWOT" analysis to gauge the program's internal *strengths* and *weaknesses*, as well as its external *opportunities* and *threats*. Consider target rates that can help build on strengths and leverage opportunities as well as minimize weaknesses and threats.
- Get feedback from stakeholders; their expectations can yield insights in setting appropriate targets.
- If available, consider the performance targets of comparable pretrial programs. The appendix to this monograph includes sample outcome and performance measures.
- Consider current or planned internal or external initiatives that may affect established or potential targets.

# Notes

1. For example, see T. Cohen and T. Kyckelhahn, *State Court Processing Statistics Data Limitations* (Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, 2010).

2. National Performance Review, *Serving the American Public: Best Practices in Performance Measurement* (Washington, D.C.: Executive Office of the President, 1997); National State Auditors Association, *Best Practices in Performance Measurement: Developing Performance Measures* (Lexington, KY: National State Auditors Association, 2004); Center for Performance Management, *Performance Measurement in Practice* (Washington, D.C.: International City/County Management Association, 2007): National Center for Public Performance, *A Brief Guide for Performance Measurement in Local Government* (Newark, NJ: Rutgers University, 2001).

3. American Bar Association, *Criminal Justice Standards on Pretrial Release: Third Edition* (Washington, D.C.: American Bar Association, 2002).

4. National Association of Pretrial Services Agencies, *Standards on Pretrial Release: Third Edition* (Washington, D.C.: National Association of Pretrial Services Agencies, 2004).

5. This excludes arrest warrants executed during the pretrial period for offenses committed before the defendant's case filing.

6. This excludes defendants detained on statutory holds, probation or parole warrants, or holds and detainers from other jurisdictions.

7. J. Clark and D.A. Henry, *Pretrial Services Programming at the Start of the 21st Century: A Survey of Pretrial Services Programs* (Washington, D.C.: U.S. Department of Justice, Bureau of Justice Assistance, 2003).

8. NAPSA Standard X-3; ABA Standard 10-4.2 (A)

9. NAPSA Standard 4.3; ABA Standard 10-1.10 (f)

# Appendix A: Examples of Pretrial Release Program Measures

## Pretrial Services Agency for the District of Columbia

### OUTCOME MEASURES

- Rearrest rates: overall and for violent and drug crimes, for drug users and nonusers.
- Failure to appear (FTA) rates overall and by drug users and nonusers.
- Percentage of defendants remaining on release at the conclusion of their pretrial status without a pending request for removal or revocation due to noncompliance.

### PERFORMANCE MEASURES

*Risk Assessment*

- Percentage of defendants who are assessed for risk of failure to appear and rearrest.
- Percentage of defendants for whom the Pretrial Services Agency (PSA) identifies eligibility for appropriate appearance and safety-based detention hearings.

*Supervision*

- Percentage of defendants who are in compliance with release conditions at the end of supervision.
- Percentage of defendants whose noncompliance is addressed by PSA either through the use of an administrative sanction or through recommendation for judicial action.

*Treatment*

- Percentage of referred defendants who are assessed for substance abuse treatment.
- Percentage of eligible assessed defendants placed in substance abuse treatment programs.
- Percentage of defendants who have a reduction in drug usage following placement in a sanctions-based treatment program.
- Percentage of defendants connected to educational or employment services following assessment.
- Percentage of referred defendants who are assessed or screened for mental health treatment.
- Percentage of service-eligible assessed defendants connected to mental health services.

*Partnerships*

- Number of agreements established and maintained with organizations and/or programs to provide education, employment, or treatment-related services or through which defendants can fulfill community service requirements.

*Note: Outcome and performance measure targets are being revised for fiscal years 2011–13.*

## Multnomah County (Portland, OR) Pretrial Services

### OUTCOME MEASURES

- Percentage of interviewed defendants released on their own recognizance who return to court.

### PERFORMANCE MEASURES

- Number of days from court referral to the Pretrial Services Program (PSP) to PSP's decision to accept supervision *(Target = 7 Days)*.
- Rate of negative case closures—new arrests or FTA warrants.
- PSP rate of acceptance or denial of defendant supervision.

## Kentucky Pretrial Services Department

### OUTCOME MEASURES

- Appearance rate *(Target=90%)*.
- Public safety rate *(Target=90%)*.
- Supervision compliance rate *(Target=85%)*.

### PERFORMANCE MEASURES

- Investigation rate *(Target=85%)*.
- Verification rate *(Target=85%)*.
- Release rate by risk level:
  - Low *(Target=85%)*.
  - Moderate *(Target=75%)*.
  - High *(Target=50%)*.

- Affidavit of indigence completion rate* *(Target=95%).*
- 24-hour reviews *(Target=100%).*

** The Pretrial Department is mandated by statute to complete affidavits on all defendants that request a public defender.*

## MISSION CRITICAL DATA

- Number of pretrial interviews.
- Pretrial interview rate.
- Pretrial release rate.
- Number of defendants who are placed on conditional release.
- Number of defendants who report to the department.
- Number of defendants who are drug tested.
- Risk levels of supervised defendants.
- Defendant-to-case manager ratio.
- Savings to individual counties for department services.
- Number of defendants who receive pretrial diversion.
- Number of diversion community service hours completed.
- Amount of restitution paid to victims through diversion placements.

# Appendix B: National Institute of Corrections Pretrial Executive Network

**Penny Stinson,** Maricopa Co. Adult Probation

**Tara Boh Klute,** Kentucky Pretrial Services

**Greg Johnson,** U.S. Pretrial Probation

**Frank McCormick,** Los Angeles County Probation Department

**Susan Shaffer,** District of Columbia Pretrial Services Agency

**Cyndi Morton,** Alachua County Department of Court Services

**Thomas McCaffrey,** Allegheny County Pretrial

**Elizabeth Simoni,** Maine Pretrial Services

**Sharon Trexler,** Montgomery County Department of Corrections

**Barbara Hankey,** Community Corrections, Oakland County

**Mary Pat Maher,** Ramsey County Pretrial Services

**Barbara Darbey,** Pretrial Services Corporation

**Jerome E. McElroy,** New York City Criminal Justice Agency

**Daniel Peterca,** Cuyahoga County Court of Common Pleas

**Wendy Niehaus,** Department of Pretrial Services

**Carol Oeller,** Harris County Pretrial Services

**Bill Penny,** Multnomah County Community Corrections

**Sharon Jones,** Virginia Beach Pretrial/Community Corrections

**Peter Keirs,** President, National Association of Pretrial Services Agencies

**Tim Murray,** Executive Director, Pretrial Justice Institute

**U.S. Department of Justice**
National Institute of Corrections

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# TAB 6

NATIONAL TASK FORCE ON FINES, FEES AND BAIL PRACTICES

# LAWFUL COLLECTION OF LEGAL FINANCIAL OBLIGATIONS

A BENCH CARD FOR JUDGES



Courts may not incarcerate a defendant/respondent, or revoke probation, for nonpayment of a court-ordered legal financial obligation unless the court:

1. Holds a hearing;
2. Makes a finding that the failure to pay was willful and not due to an inability to pay; and
3. Considers alternative measures of punishment other than incarceration.

*Bearden v. Georgia,* 461 U.S. 660, 671–72 (1983). The U.S. Supreme Court has recognized that punishment and deterrence can often be served fully by alternative means to incarceration, including an extension of time to pay or reduction of the amount owed. Id. at 671-72. The court may incarcerate a person who has made sufficient bona fide efforts to pay only if alternative measures are not adequate to meet the State's interest in punishment and deterrence. Id. at 672.

Court-ordered legal financial obligations (LFOs) include all discretionary and mandatory fines, costs, fees, state assessments, and/or restitution in civil and criminal cases.

## 1. Adequate Notice of the Hearing to Determine Ability to Pay

***Notice should include the following information:***

a. Hearing date and time;

b. Total amount claimed due;

c. That the court will evaluate the person's ability to pay at the hearing;

d. That the person should bring any documentation or information the court should consider in determining ability to pay;

e. That incarceration may result, only if alternate measures are not adequate to meet the state's interests in punishment and deterrence or the court finds that the person had the ability to pay and willfully refused;

f. Right to counsel*; and

g. That a person unable to pay can request payment alternatives, including community service and/or a reduction of the amount owed.

## 2. Meaningful Opportunity to Explain at the Hearing

***The person must have an opportunity to explain:***

a. Whether the amount charged as due is incorrect; and

b. The reason(s) for any nonpayment (e.g., inability to pay).

## 3. Factors the Court Should Consider to Determine Willfulness[1]

a. Income, including whether income is at or below 125% of the Federal Poverty Guidelines (FPG)[2] ;

***For 2016, 125% of FPG is:***

| | |
|---|---|
| *$14,850 for an individual;* | *$30,375 for a family of 4;* |
| *$20,025 for a family of 2;* | *$35,550 for a family of 5;* |
| *$25,200 for a family of 3;* | *$40,725 for a family of 6.* |

b. Receipt of needs-based, means-tested public assistance including, but not limited to, Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), or veterans' disability benefits (Such benefits are not subject to attachment, garnishment, execution, levy or other legal process);

[1] See *Bearden v. Georgia*, 461 U.S. 660 (1983)
[2] U.S. Dep't of Health & Human Servs., Poverty Guidelines, Jan. 26, 2016, https://aspe.hhs.gov/poverty-guidelines

c. Financial resources, assets, financial obligations and dependents;

d. Whether the person is homeless, incarcerated, or resides in a mental health facility;

e. Basic living expenses including but not limited to food, rent/mortgage, utilities, medical expenses, transportation, and child support;

f. The person's efforts to acquire additional resources, including any permanent or temporary limitations to secure paid work due to disability, mental or physical health, homelessness, incarceration, lack of transportation or driving privileges;

g. Other LFOs owed to the court or other courts;

h. Whether LFO payment would result in manifest hardship to the person or his/her dependents; and

i. Any other special circumstances that may bear on the person's ability to pay.

## 4. Findings by the Court

**The court should find, on the record, that the person was provided prior adequate notice of:**

a. Hearing date/time

b. Failure to pay an LFO is at issue;

c. The right to counsel*;

d. The defense of inability to pay;

e. The opportunity to bring any documents or other evidence of inability to pay; and

f. The opportunity to request an alternative sanction to payment or incarceration.

After the ability to pay hearing, the court should also find on the record that the person was given a meaningful opportunity to explain the failure to pay.

**If the Court determines that incarceration must be imposed, the Court should make findings about:**

1. The financial resources relied upon to conclude the nonpayment was willful; and/or
2. Why alternate measures are not adequate to meet the state's interests in punishment and deterrence given the particular violation.

### Alternative Sanctions Courts Should Consider Other than Imprisonment When There Is an Inability to Pay

a. Reduction of the amount due;

b. Extension of time to pay;

c. A reasonable payment plan or modification of an existing payment plan;

d. Credit for community service [*Caution*: Hours ordered should be proportionate to the violation and take into consideration any disabilities, driving restrictions, transportation limitations, and caregiving and employment responsibilities of the individual];

e. Credit for completion of a relevant, court-approved program (e.g., education, job skills, mental health or drug treatment); or

f. Waiver or suspension of the amount due.

*Determining whether an indigent defendant has a right to counsel pursuant to the federal and state constitutions, state statute, or court rule requires complex analysis. See *Best Practices for Determining Right to Counsel in Legal Financial Obligation Cases*.



This bench card was produced by the National Task Force on Fines, Fees and Bail Practices. The Task Force is a joint effort of the Conference of Chief Justices and the Conference of State Court Administrators, sponsored by the State Justice Institute and coordinated by the National Center for State Courts.

# A Brief Guide to the Work of the National Task Force on Fines, Fees, and Bail Practices

State courts are dynamic institutions, and the manner in which they administer justice must regularly be assessed and continually improved. Whether the demands placed on courts relate to funding, changing socioeconomic factors, or shifting public demands, judges and court leaders must be responsive to the issues facing their communities and be accountable for the manner in which they function.

Important questions have arisen over the last several years concerning the imposition and enforcement of legal financial obligations and the ways courts, in coordination with their justice system partners, manage the pretrial release of individuals awaiting trial. Courts are not revenue centers, but there is a constant temptation to view them as such, and historically litigants and defendants are charged fees for using courts. The issue is made more complex because supervisory authority over many municipal courts resides with the municipality rather than the state court system, exacerbating the pressure to produce revenue.

The Conference of Chief Justices (CCJ), the Conference of State Court Administrators (COSCA) and others (including the National Center for State Courts) have drafted guiding principles, prepared studies, and developed tools and templates to help courts focus on governance, inter branch relations, performance measurement, performance management, and related concepts.[1] Taken together these resources make clear that independence, fairness, transparency, and accountability are among the most important values to which courts can aspire.

Most courts operate in a manner consistent with the concepts and the values outlined in these resources, though all court leaders must continue to be vigilant in ensuring that they are doing so adequately, especially in light of recent research and other developments in the area of how courts meet the needs of people who are socioeconomically disadvantaged.

---

[1] *2011-2012 Policy Paper: Courts Are Not Revenue Centers*, Conference of State Court Administrators (2012), http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/CourtsAreNotRevenueCenters-Final.ashx;

*2015-2016 Policy Paper: The End of Debtors' Prisons: Effective Court Policies for Successful Compliance with Legal Financial Obligations*, Conference of State Court Administrators (2016), http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/End-of-Debtors-Prisons-2016.ashx;

*Principles for Judicial Administration*, The National Center for State Courts and The State Justice Institute (July 2012), http://www.ncsc.org/~/media/Files/PDF/Information%20and%20Resources/Budget%20Resource%20Center/Judicial%20Administration%20Report%209-20-12.ashx

There are due process and equal protection requirements that courts must adhere to that relate to the use of ability to pay determinations, the limited conditions under which incarceration can be used for individuals unable to satisfy their court ordered legal financial obligations (LFO), and the need for the use of alternatives to incarceration for those individuals unable to pay.

The U.S. Supreme Court has held that converting an individual's fine to a jail term solely because the individual is indigent violates the Equal Protection Clause of the United States Constitution. *Tate v. Short,* 401 U.S. 395, 398 (1971). Courts may only jail an individual when that person has the means to pay but refuses to do so. *Tate*, 401 U.S. at 400. *Bearden v. Georgia,* 461 U.S. 660, 662-63 (1983) held that courts cannot incarcerate for failure to pay without first making an inquiry into facts that demonstrate the defendant had the ability to pay, willfully refused to pay, and had access to adequate alternatives to jail for non-payment.

The Supreme Court has clearly set forth the guiding principles, and it is the responsibility of court leaders to ensure that these principles have been integrated into practice.

As a way of drawing attention to these issues and promoting ongoing improvements, in 2016 the CCJ and COSCA established the National Task Force on Fines, Fees, and Bail Practices (the "National Task Force") to develop recommendations that promote the fair and efficient enforcement of the law; to ensure that no citizen is denied access to the justice system based on race, culture, or lack of economic resources; and to develop policies relating to the handling of legal financial obligations that promote access, fairness, and transparency. The work of the National Task Force is intended to apply to any non-federal adjudicative body or entity, however denominated (including without limitation any court of general jurisdiction, court of limited jurisdiction, county court, municipal court, traffic court, mayor court, village court, or justice of the peace), that is empowered by law to levy fines, assess fees, or order imprisonment in connection with misdemeanors or infractions (including without limitation traffic-related offenses).

The National Task Force will continue its efforts on longer-term goals and its examination and expansion upon its work in order to promote its widest application. In the meantime, the following attached **Key Resources,** which are also available at [*insert National Task Force web site or hyperlink*], will assist courts now as they address the critical issues of fines, fees, and bail practices:

- ***A Brief Guide to the Work of the National Task Force on Fines, Fees, and Bail Practices***
- ***Bench Card on Lawful Collection of Legal Financial Obligations***
- ***Model Political Subdivision Court Registration Act***
- ***Model Political Subdivision Court Registration Form***

- ***Model Uniform Citation Notice language***

- ***Sample Court Rule on Recording of Limited Jurisdiction Proceedings Washington State's Administrative Rule for Courts of Limited Jurisdiction, ARLJ 13***

# Model Political Subdivision Court Registration Act

**Introductory Note:**

This "Model Political Subdivision Court Registration Act" is offered for the consideration of each State and U.S. Territory to assure that the State's highest ranking judicial officer, the State Court Administrator, or both are kept apprised, on a regular basis, of every court operating within the State's borders with the authority to levy fines, assess fees, or impose incarceration. The Courts and adjudicative bodies that would be affected by this Model Act include courts of general jurisdiction as well as courts of limited jurisdiction, including municipal courts, county courts, traffic courts, mayor courts, village courts, justices of the peace, and similar entities. Courts or other adjudicative bodies that lack the authority to levy fines, assess fees, or impose incarceration would not be covered by this Model Act.

Language enclosed in brackets is intended to provide alternative formulations of words or to express concepts rather than precise verbiage in order to leave room for individual States to tailor the provisions to their own circumstances. For example, "[State Court of Last Resort]" is intended as a placeholder for "Supreme Court" or "Court of Appeals" or "Supreme Judicial Court" or any other variation on this theme. Similarly, "[ninety] days" could be recast by an individual State as any time period, 30 days, 60 days, 120 days, etc. The default choice was "ninety" days, except in Section 4(a)(2), where "thirty" was chosen to reflect that a shorter period of time would be appropriate given the different information required for registration by a Court as opposed to registration by a Political Subdivision. The Political Subdivision could give 90 days' advance notice before a newly created Court commences operations, whereas the Court might not know that far in advance the names of the judges who will serve on the court (thus a shorter period for registration before commencement of operations would seem reasonable). Bracketed language may also be included as optional supplementary language, such as the phrase "[or is planned to be in operation within a [24]-month period]" in Section 2(a).

**SEC. 1. SHORT TITLE. –** This statute shall be known as the "Political Subdivision Court Registration Act."

**SEC. 2. DEFINITIONS. –** Except as otherwise specifically provided in this Court Registration Act, for purposes hereof the following definitions shall apply:

(a) "COURT." – The term "Court" means any non-federal adjudicative body or entity, however denominated (including without limitation any court of general jurisdiction, court of limited jurisdiction, county court, municipal court, traffic court, [mayor court], [village court] [justice of the peace]), that is in operation [or is planned to be in operation within a [24]-month period] within any Political Subdivision and that is empowered by law to levy fines, assess fees, or order imprisonment in connection with misdemeanors or infractions (including without limitation traffic-related offenses).

(b) "JOINT COURT." – The term "Joint Court" means any Court established by two or more Political Subdivisions pursuant to Section 4(b) of this Act.

(c) "POLITICAL SUBDIVISION" means, for purposes of this Act, any county, city, district, municipality, town, village, or similar entity within this State, whether incorporated or unincorporated.

**SEC. 3. ESTABLISHMENT OF REGISTRY.** – The State Court Administrator shall establish a registry of Courts subject to this Act. The registry shall include all information required to be provided by Political Subdivisions and Courts to the State Court Administrator under this Act and such other information as the State Court Administrator may, in his or her discretion, prescribe.

**SEC. 4. REQUIRED REGISTRATION. –**

(a) (1) BY POLITICAL SUBDIVISION. – Not less frequently than [annually] [biennially] [other periodicity], each Political Subdivision shall submit to the State Court Administrator, with a required copy to the [Chief Justice/Chief Judge] of the [State Court of Last Resort], a registration providing the name of each Court (whether established under this Act or otherwise) operating within its borders, the Court's address (or addresses, if the Court operates at more than one location), and such other information as may be required on a form and in a format (hard copy, electronic filing, or otherwise) prescribed by the State Court Administrator. In the event of a newly formed Court, such form shall be submitted to the State Court Administrator no later than [ninety] days prior to the date such newly formed Court begins operations.

(2) BY COURT. – Not less frequently than [annually] [biennially] [other periodicity], the presiding or administrative judge of each Court shall submit to the State Court Administrator, with a required copy to the [Chief Justice/Chief Judge] of the [State Court of Last Resort], a registration providing the name, address (or addresses, if the Court operates at more than one location) of the Court, the number of judges authorized to be on the Court, how they are selected, the duration of their terms of office, whether judges are full-time or part-time, the name and e-mail address of each judge serving on the court, the minimum qualifications (if any) for a person to serve as a judge of the Court, the nature of and limitations (if any) on its jurisdiction, whether jury trials are conducted, the maximum amount of fines (if any) the Court can impose, the maximum term of imprisonment (if any) the Court can impose, the source(s) of the Court's funding, and such other information as may be required on a form and in a format (hard copy, electronic filing, or otherwise) prescribed by the State Court Administrator. In the event of a newly formed Court, such form shall be submitted to the State Court Administrator no

later than [thirty] days prior to the date such newly formed Court begins operations.

(b) JOINT COURTS PERMITTED. – Except as otherwise provided by law, two or more Political Subdivisions may enter into an agreement sharing a single Joint Court with jurisdiction over persons residing and events occurring within any of the Political Subdivision parties to such agreement and providing for the administration of such Joint Court. A copy of each agreement establishing a Joint Court shall be filed with the State Court Administrator [, with a required copy to the [Chief Justice/Chief Judge] of the [State Court of Last Resort]].

(c) DISCONTINUATION OF COURT. – If for any reason a Court should cease to exist, the Political Subdivision shall [promptly] [within _____ days] thereafter transmit notice thereof, by such means as shall be prescribed by the State Court Administrator, to the State Court Administrator, the [Chief Justice/Chief Judge] of the [State Court of Last Resort], and the presiding judge of every Court within the Political Subdivision).

# Model Political Subdivision Court Registration Form

## Model Registration Form

**Introductory Note:** This form was created to accompany the Model Political Subdivision Court Registration Act but can be used, in whole or in part, separately and independently, as best suits the needs of a particular State. The purpose of this form is to assure that the competent authorities in the State's judicial branch – which could be the highest ranking judicial officer, the State Court Administrator, or both – are kept up-to-date on every court operating within the State's borders with the authority to levy fines, assess fees, or impose incarceration. These can include courts of general jurisdiction as well as courts of limited jurisdiction, including municipal courts, county courts, traffic courts, mayor courts, village courts, justices of the peace, and similar entities.

**General Court Information**

| | |
|---|---|
| **Name of Political Subdivision and Court:** | |
| **Address:** | **Zip Code:** |
| **Court Administrator:** | **Contact Number:** |
| **Name of Presiding/Administrative Judge:** | |

**Court Jurisdiction**

☐ General Jurisdiction ☐ Limited Jurisdiction

Jury Trials: ☐ Yes ☐ No

Indicate all areas where the court has jurisdiction:

| | |
|---|---|
| □ Tort | □ Felony |
| □ Contract | □ Misdemeanor |
| □ Real Property | □ Parking |
| □ Probate/Estate | □ Traffic Violations |
| □ Mental Health | □ Ordinance Violations |
| □ Domestic Relations | □ Juvenile |
| □ Small Claims | □ Criminal Appeal |
| □ Civil Appeal | □ Other: |

Maximum Monetary Penalty That Can Be Imposed: $_____

Maximum Incarceration: _____

Is this court or its jurisdiction shared by more than one municipality, district, county, city, town, village, or any other governing body of an established population? □ Yes □ No

***If yes, please list the name(s):*** _____

**Judges**

Judges are: □ Elected □ Appointed by:_____
Length of term:_____ years.

How (if at all) can a judge's term be extended?

□ Reappointment □ Reelection □ Retention without election □ Other:_____

Number of judges employed by the court:

Full-time: _____
Part-time: _____
Other (please specify): _____

***Please attach to this form the name and e-mail address of each judge currently serving.***

Is this court or its jurisdiction shared by more than one municipality, district, county, city, town, village, or any other governing body of an established population? □ Yes □ No

If yes, please explain:_____
_____

Qualifications to hold judicial office: please mark all that apply

- □ U.S. citizen
- □ State resident; year requirement (if applicable):_____
- □ Qualified elector
- □ Must be a resident where the court is located
- □ High school diploma or equivalent
- □ Law degree
- □ Admitted to practice law in the state
- □ State bar member
- □ Minimum years in practice:_____
- □ Minimum age requirement:_____
- □ Maximum age requirement to run for judicial office or to be appointed:_____
- □ Mandatory retirement age:_____

Education requirements: please mark all that apply

- □ Formal training on duties and functions of the court before a judge takes office.
- □ Judicial certification; Brief description of certification:_____
  _____
- □ _____ hours of continuing judicial education per year.
- □ Attend yearly training conferences.
- □ Pass a certification examination.
- □ _____ hours of continuing judicial education per year.
- □ Report yearly continuing judicial education hours and/or recertification to the state.
- □ Other: _____

**Funding**

Where does the court receive its funding? Check all that apply.

□ State Government □ Local Government □ Court Revenues

When assessing and collecting fines and fees, approximately what percentage of collections goes to the local government the state, and the court? If this is not known, please check the "Uncertain" box.

Percentages: _____%_ Local Government _____%_ State _____%_ Court □ Uncertain

**Appeals Process**

Is this court a court of record? □ Yes □ No

To what court are judgments and rulings appealed? _____

# Sample Court Rule: Washington State Rule on Recording of Limited Jurisdictions' Proceedings

ARLJ 13
LIMITED JURISDICTION COURTS ARE REQUIRED TO RECORD ALL PROCEEDINGS ELECTRONICALLY

(a) Generally. All limited jurisdiction courts shall make an electronic record of all proceedings and retain the record for at least as long as the record retention schedule dictates. The judicial officer shall assure that all case participants identify themselves for the record in keeping with RALJ 5.2(a).

(b) Nonelectronic Record in Emergency. In the event of an equipment failure or other situation making an electronic recording impossible, the court may order the proceeding to be recorded by nonelectronic means. The nonelectronic record must be made at the court's expense, and in the event of an appeal, any necessary transcription of the nonelectronic record must be made at the court's expense.

[Adopted effective October 1, 2002; amended effective September 1, 2015.]

# Sample Language for Model Uniform Citation

If you are assessed fines and court costs as a result of this citation and you are unable to pay, bring this to the attention of the judge. For more information, contact the court or an attorney, or visit the following website: [*insert your court's website here*].

# TAB 7

Supreme Court of Nevada

ADMINISTRATIVE OFFICE OF THE COURTS

ROBIN SWEET
Director and
State Court Administrator

JOHN MCCORMICK
Assistant Court Administrator
Judicial Programs and Services

RICHARD A. STEFANI
Deputy Director
Information Technology

**JUDICIAL COUNCIL OF THE STATE OF NEVADA**

*"To unite and promote Nevada's judiciary as an equal, independent and effective branch of government."*

**Committee to Study Evidence-Based Pretrial Release**

*Subcommittee to Study Bail Schedules*

March 14, 2017

**Members Present**

Judge Simons (Chair)
John Boes
Paul Caruso
Judge Bishop
Judge Pearson
Judge Stevens

I. Call to Order
- A quorum was present.
- Judge Simons called the meeting to order at 12:01 p.m. and welcomed attendees.

II. Discussion and Possible Approval of Draft Guidelines for Transmission to Full-Committee
- Judge Bishop expressed concern regarding the traffic portion ($50 per demerit) of the guidelines and the increased bail amounts that would result. Judge Bishop informed attendees that local law enforcement had also expressed this concern to him.
- Judge Pearson commented that the amounts can be reduced if the driver goes to the court; the purpose is take step towards uniformity.
- Discussion was held regarding law enforcement's concerns about "being the bad guy" in the field; Washoe has this proposed system in place already and this hasn't been a common issue.

- Judge Stevens commented that, in some instances, this would lower the amounts in his jurisdiction.
- Judge Simons commented on the need for an objective justification for bail amounts; there is "common ground" but individual jurisdictions have flexibility to modify the amount if the driver comes into court.
- Judge Pearson explained that this system allows for an "immediate" response when new laws come out of the legislature, rather than having to reconvene a group to determine a bail amount for the new offense.
- Mr. Boes commented that bonds on the lower end of the misdemeanors are more difficult to process due to various factors (travel, timing, etc.) Judge Simons commented that, depending upon what the Legislature does, those offenses may have a mandated release tied to them.
- Judge Bishop suggested that the disclaimer paragraphs at the end of the document be amended to include "citing officer" language in order to mitigate possible confusion regarding the traffic portion.
- Judge Simons asked for a motion to approve the draft guidelines for transmission to the full-Committee, as amended
  - Judge Pearson made the motion.
  - Mr. Boes seconded the motion.
  - The motion was approved; Judge Bishop voted against the motion.
- Judge Simons will make the changes and forward the revised document to Ms. Gradick for inclusion in the meeting materials for the full-Committee meeting.

III. Other Discussion Items
- Judge Simons commented that, given how the full-Committee proceeds, this could likely be the last meeting of this subcommittee. Judge Simons thanked attendees for their participation and efforts.

IV. Judge Simons adjourned the meeting at 12:17 p.m.

BAIL GUIDELINES
STATE OF NEVADA

**FELONY AND GROSS MISDEMEANOR OFFENSES**

| | | |
|---|---|---|
| Category A | (Max Punishment – Death) | NO BAIL |
| | (Max Punishment – Life w/o parole) | $500,000 |
| | (Max Punishment – Life w/ parole after 35 yrs) | $350,000 |
| | (Max Punishment – Life w/ parole after 25 yrs) | $250,000 |
| | (Max Punishment – Life w/ parole after 20 yrs) | $200,000 |
| | (Max Punishment – Life w/ parole after 15 yrs) | $150,000 |
| | (Max Punishment – Life w/ parole after 10 yrs) | $125,000 |
| | (Max Punishment – Life w/ parole after 5 yrs) | $100,000 |
| Category B | (Max Punishment – 20 years) | $50,000 |
| | (Max Punishment – 15 years) | $25,000 |
| | (Max Punishment – 10 years) | $20,000 |
| | (Max Punishment – 6 years) | $15,000 |
| Category C | (3rd DV or DV by Strang. or w/ SBH w/ prior DV) | $15,000* |
| | (All Others - Max Punishment – 10 years) | $10,000 |
| | (All Others - Max Punishment – 5 years) | $7,500 |
| | (DV by Strang. or w/ SBH w/ no prior DV) | $5,000* |
| Category D | (Max Punishment – 4 years) | $5,000 |
| Category E | (Max Punishment – 4 years) | $3,000 |
| Gross Misdemeanor | (Max Punishment – 364 Days in Jail) | $2,000 |

**NON-TRAFFIC MISDEMEANORS**

| | |
|---|---|
| Battery DV 2nd | $5,000* |
| Protection Order Violation 2nd | $5,000* |
| Stalking 2nd | $5,000 |
| Battery DV 1st | $3,000* |
| Protection Order Violation 1st | $3,000* |
| Stalking 1st | $3,000 |
| Misdemeanor Crimes Against the Person (NRS Chapter 200) or any other misdemeanor involving an alleged act of violence or in which a weapon was involved | $1,000 + fees |
| Misdemeanor Crimes Against Property (NRS Chapter 205) | $500 + fees |
| All other Non-Traffic Misdemeanors | $250 + fees |

**** These bails are statutorily mandated in NRS 178.484***

**TRAFFIC MISDEMEANORS**

| | |
|---|---|
| DUI 2ND Offense | $2,000 |
| DUI 1st Offense | $1,000 + fees |
| Vehicular Manslaughter | $1,000 + fees |
| Hit & Run | $1,000 + fees |

All other traffic-related misdemeanors:

If a mandatory fine amount is prescribed by statute, bail shall be set at the amount of the mandatory fine plus fees.

If a mandatory fine range is prescribed by statute, bail shall be set at the low end of the range plus fees.

If no fine amount is prescribed by statute, the bail shall be set at $50 per demerit point assigned to the violation, plus fees.

If the violation carries no demerit points, and a mandatory fine range or amount has not been set statutorily, bail shall be set at $50 plus fees.

**Discretion of Arresting Officer: The foregoing bail schedule is, except when required by statute, a guideline. Bail may be modified by the arresting/citing officer, should the facts known to the officer (i.e. flight risk, prior history, danger to victim/community) warrant such modification. Should bail be modified, the Prosecuting Attorney's Office should be prepared to appear and present such facts to the Court, at the Defendant's first appearance, to justify the deviation.**

**** The bail amounts listed in these guidelines are only a guide for the setting of bail upon initial booking into custody and/or citation by the officer. Once a defendant has been booked into custody and/or cited, and appears before a magistrate, an individualized bail determination must be made based upon the factors outlined in NRS 178.498 and NRS 178.4853, with a particular emphasis on the ability of the defendant to make bail. ****

# TAB 8

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

| | | |
|---|---|---|
| MARANDA LYNN ODONNELL, *et al.*, On behalf of themselves and all others similarly situated, Plaintiffs, | § | CIVIL ACTION NO. H-16-1414 |
| VS. | § | |
| HARRIS COUNTY, TEXAS, *et al.*, Defendants. | § | |

**MEMORANDUM AND OPINION SETTING OUT FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**Introduction**

"Twenty years ago, not quite one-third of [Texas's] jail population was awaiting trial. Now the number is three-fourths. Liberty is precious to Americans, and any deprivation must be scrutinized. To protect public safety and ensure that those accused of a crime will appear at trial, persons charged with breaking the law may be detained before their guilt or innocence can be adjudicated, but that detention must not extend beyond its justifications. Many who are arrested cannot afford a bail bond and remain in jail awaiting a hearing. Though presumed innocent, they lose their jobs and families, and are more likely to re-offend. And if all this weren't bad enough, taxpayers must shoulder the cost—a staggering $1 billion per year." The Honorable Nathan L. Hecht, Chief Justice of the Texas Supreme Court, *Remarks Delivered to the 85th Texas Legislature*, Feb. 1, 2017.

This case requires the court to decide the constitutionality of a bail system that detains 40 percent of all those arrested only on misdemeanor charges, many of whom are indigent and cannot pay the amount needed for release on secured money bail. These indigent arrestees are otherwise eligible for pretrial release, yet they are detained for days or weeks until their cases are resolved, creating the problems that Chief Justice Hecht identified. The question addressed in this Memorandum and Opinion is narrow: whether the plaintiffs have met their burden of showing a

likelihood of success on the merits of their claims and the other factors necessary for a preliminary injunction against Harris County's policies and practices of imposing secured money bail on indigent misdemeanor defendants. Maranda Lynn ODonnell, Robert Ryan Ford, and Loetha McGruder sued while detained in the Harris County Jail on misdemeanor charges. They allege that they were detained because they were too poor to pay the amount needed for release on the secured money bail imposed by the County's policies and practices. (Docket Entry Nos. 3, 41, 54). They ask this court to certify a Rule 23(b)(2) class and preliminarily enjoin Harris County, the Harris County Sheriff, and—to the extent they are State enforcement officers or County policymakers—the Harris County Criminal Court at Law Judges, from maintaining a "wealth-based post-arrest detention scheme." (Docket Entry No. 143 at 2).

This case is difficult and complex. The Harris County Jail is the third largest jail in the United States. Pls. Ex. 12(aa) at 1. Although misdemeanor arrestees awaiting trial make up about 5.5 percent of the Harris County Jail population on any given day, *see id*. at 13, about 50,000 people are arrested in Harris County on Class A and Class B misdemeanor charges each year. Pls. Ex. 10(c), *2015 Pretrial Services Annual Report* at 8.[1] The arrests are made by a number of law-enforcement agencies, including the Houston Police Department and the police forces of smaller municipalities, the Texas Department of Public Safety, and the Harris County Sheriff's Office. *Id*. Harris County's bail system is regulated by State law, local municipal codes, informal rules,

[1] The plaintiffs have not given each of their exhibits a unique number. When clarity requires, the opinion identifies the plaintiffs' exhibits by category number and unique title. After the motion hearing, the defendants produced the *2016 Pretrial Services Annual Report*. (Docket Entry No. 290, Ex. 1). When the opinion discusses or refers to the annual reports, the text uses the 2015 figures the parties' experts and briefing relied on, and the recently reported 2016 data is generally supplied in footnotes. The numbers do not differ significantly from year to year. In 2015, for example, 50,947 people were arrested only on misdemeanor charges, compared to 49,628 in 2016. (*Id*. at 8); Pls. Ex. 10(c), *2015 Pretrial Services Annual Report* at 8.

unwritten customary practices, and the actions of judges in particular cases. The legal issues implicate intertwined Supreme Court and Fifth Circuit precedents on the level of judicial scrutiny in equal protection and due process cases and on the tailoring of sufficient means to legitimate ends.

Bail has a longstanding presence in the Anglo-American common law tradition. Despite this pedigree, the modern bail-bond industry and the mass incarceration on which it thrives present important questions that must be examined against current law and recent developments. Extrajudicial reforms have caused a sea change in American bail practices within the last few years. Harris County is also in the midst of commendable and important efforts to reform its bail system for misdemeanor arrests. The reform effort follows similar work in other cities and counties around the country. This work is informed by recent empirical data about the effects of secured money bail on a misdemeanor defendant's likely appearance at hearings and other law-abiding conduct before trial, as well as the harmful effects on the defendant's life.

The plaintiffs contend that certainly before, and even with, the implemented reforms, Harris County's bail system for misdemeanor arrests will continue to violate the Constitution. This case is one of many similar cases recently filed around the country challenging long-established bail practices. Most have settled because the parties have agreed to significant reform. This case is one of the first, although not the only one, that requires a court to examine in detail the constitutionality of a specific bail system for misdemeanor arrestees. This case is also one of the most thoroughly and skillfully presented by able counsel on all sides, giving the court the best information available to decide these difficult issues.

One other complication is worth noting at the outset. Since this case was filed, the 2016 election replaced the Harris County Sheriff and the presiding County Judge of Criminal Court at Law

No. 16. (Docket Entry Nos. 158, 168). The new Sheriff and County Judge have taken positions adverse to their codefendants, although each continues to oppose certain aspects of the plaintiffs' request for preliminary injunctive relief.[2] Nonparty County officials, including the newly elected Harris County District Attorney and one of the Harris County Commissioners, have filed amicus briefs supporting the plaintiffs. (Docket Entry Nos. 206, 272). Harris County's Chief Public Defender has filed a declaration supporting the defendants. Def. Ex. 23. The lines of affinity and adversity between the defendants and their nonparty County colleagues are not always clear.

Even with the factual and legal complexities, at the heart of this case are two straightforward questions: Can a jurisdiction impose secured money bail on misdemeanor arrestees who cannot pay it, who would otherwise be released, effectively ordering their pretrial detention? If so, what do due process and equal protection require for that to be lawful? Based on the extensive record and briefing, the fact and expert witness testimony, the arguments of able counsel, and the applicable legal standards, the answers are that, 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.

Because Harris County does not currently supply those safeguards or protect those rights, the court will grant the plaintiffs' motion for preliminary injunctive relief. The reasons and the precise, limited relief granted are set out in detail below.

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[2] Judge Jordan disagrees with the approach of his County Judge colleagues to setting secured money bail and believes that he operates his court in a constitutionally sound manner. He argues that relief against him as a judicial officer in a judicial capacity would be "overbroad." (Docket Entry No. 162 at 9–10). Although Sheriff Gonzalez believes that Harris County's bail system is unconstitutional and is unlikely to change without an injunction from this court, he argues for additional time for the parties to negotiate with the hope of resolving the plaintiffs' claims through ongoing reforms or settlement. (*Id*. at 23); Hearing Tr. 3-2:9–10, 22–23.

More specifically, the court finds that:

- Harris County has a consistent and systematic policy and practice of imposing secured money bail as de facto orders of pretrial detention in misdemeanor cases.
- These de facto detention orders effectively operate only against the indigent, who would be released if they could pay at least a bondsman's premium, but who cannot. Those who can pay are released, even if they present similar risks of nonappearance or of new arrests.
- These de facto detention orders are not accompanied by the protections federal due process requires for pretrial detention orders.
- Harris County has an inadequate basis to conclude that releasing misdemeanor defendants on secured financial conditions is more effective to assure a defendant's appearance or law-abiding behavior before trial than release on unsecured or nonfinancial conditions, or that secured financial conditions of release are reasonably necessary to assure a defendant's appearance or to deter new criminal activity before trial.
- Harris County's policy and practice violates the Equal Protection and Due Process Clauses of the United States Constitution.

The court accordingly orders that:

- Harris County and its policymakers—the County Judges in their legislative and rulemaking capacity and the Harris County Sheriff in his law-enforcement capacity—are enjoined from detaining misdemeanor defendants who are otherwise eligible for release but cannot pay a secured financial condition of release.
- Harris County Pretrial Services must verify a misdemeanor arrestee's inability to pay bail on a secured basis by affidavit.

- The Harris County Sheriff must release on unsecured bail those misdemeanor defendants whose inability to pay is shown by affidavit, who would be released on secured bail if they could pay, and who have not been released after a probable cause hearing held within 24 hours after arrest.

The court does *not* order: relief in cases involving felony charges or a mix of misdemeanor and felony charges; the elimination of secured money bail; changes to Texas State law; changes to the written Harris County Criminal Courts at Law Rules of Court; modification of prior federal court orders, including the consent decree in *Roberson v. Richardson*; or a right to "affordable bail" under the Eighth Amendment. Instead, the relief ordered is consistent with Texas state and Harris County law as written, is required by the Equal Protection and Due Process Clauses, and is justified by the plaintiffs' evidence. The relief is narrow so as not to interfere with the improvements the County is working to implement by July 1, 2017.

The reasons for these rulings are set out in the detailed findings and conclusions below.

## I. Findings of Fact

### A. Procedural Background

Ms. ODonnell filed suit while she was in custody in the Harris County Jail on May 19, 2016. (Docket Entry No. 3). Ms. McGruder and Mr. Ford filed suit while they were in custody on May 21, 2016. Civil No. 16-1436. The court consolidated the actions in August 2016. (Docket Entry No. 41). The plaintiffs filed an amended complaint on September 1, 2016. (Docket Entry No. 54). After extensive briefing and two lengthy hearings on August 18 and November 28, 2016, the court issued a Memorandum and Opinion on the defendants' motions to dismiss. (Docket Entry No. 125); *ODonnell v. Harris Cty., Tex.*, — F.Supp.3d —, 2016 WL 7337549 (S.D. Tex. Dec. 16, 2016). The

court dismissed the claims against the Harris County Sheriff and the sixteen Harris County Criminal Court at Law Judges in their personal capacities. The court denied the motions to dismiss the claims against the County, the personal-capacity claims against five Harris County Hearing Officers, and the official-capacity claims against the Sheriff and the County Judges. (*Id*.). The court reset the preliminary injunction hearing scheduled for December 15, 2016 at the parties' request, to facilitate settlement negotiations between the parties and newly elected Harris County officials. (Docket Entry No. 109). The parties did not settle. The court held an eight-day hearing in March 2017, and the parties filed voluminous records, lengthy video recordings, and numerous briefs.

The pending motions are the plaintiffs' motion for class certification, (Docket Entry No. 146), the defendants' motion for summary judgment, (Docket Entry Nos. 101, 104, 108), the plaintiffs' motion for a preliminary injunction, (Docket Entry No. 143), and the defendants' contingent motion for a stay pending appeal should the court grant preliminary injunctive relief, (Docket Entry No. 252). The defendants argue, principally, that there is no constitutional right to "affordable bail," that Harris County's post-arrest policies are subject to rational basis review, and that Harris County's policies are constitutional under any level of judicial scrutiny. (*See* Docket Entry Nos. 101, 161, 162, 166, 193, 256, 286). The plaintiffs argue that Harris County's system of pretrial bail and detention in misdemeanor cases violates the Equal Protection and Due Process Clauses of the United States Constitution. (*See* Docket Entry Nos. 143, 145, 188, 189). They do not believe their claims raise an Eighth Amendment challenge, but they argue in the alternative that the County's bail system for misdemeanor arrestees fails under the Eighth Amendment as well. (Docket Entry No. 92 at 18 n.19; No. 188 at 14 n.13).

This Memorandum and Opinion addresses the parties' disputes on summary judgment and

the plaintiffs' entitlement to preliminary injunctive relief. Separate orders address class certification and the defendants' motion to stay.

### B. The Evidence in the Record

The motion for a preliminary injunction requires balancing the expediency demanded by the request for emergency relief with a full and fair consideration of the voluminous record. The parties submitted nearly 300 written exhibits, in addition to 2,300 video recordings of bail-setting hearings conducted within the last year in Harris County, all admitted without objection. (Docket Entry Nos. 244, 267). Thirteen witnesses testified at the eight-day hearing, including four expert witnesses. The court admitted depositions and declarations from many other witnesses as well.

The parties largely agree on the facts of the procedures Harris County follows after the arrest of misdemeanor defendants. Both parties' statistical experts used the same data from the County's administrative sources and largely agreed on the raw numbers produced by, and the gaps found in, the Harris County data. The parties' experts disagree about how to interpret the data. The parties disagree about the constitutional significance of the evidence about the County's bail procedures in misdemeanor cases and their effects.

The court reviews the factual record under the applicable legal framework to resolve these disagreements and to enter the findings of fact and conclusions of law.[3]

#### 1. The Parties

Maranda Lynn ODonnell, a 22-year-old single mother, was arrested on May 18, 2016 at 5:00 p.m. and charged with driving with an invalid license. Pls. Ex. 7(a). After she was booked into the Harris County Jail, she was informed that she would be released promptly if she paid a secured

[3] Any findings of fact that are also, or only, conclusions of law are so deemed. Any conclusions of law that are also, or only, findings of fact are so deemed.

money bail of $2,500 set according to the County's bail schedule, but that she would remain in jail if she did not pay either the full bail amount to the County or a premium to a bail bondsman up front. *Id*. Ms. ODonnell and her child struggled to meet the basic necessities of life. She received benefits from the federal government's Women, Infants, and Children program to feed her daughter. She could not afford housing, so she stayed with a friend. *Id*. At the time of her arrest, Ms. ODonnell was working, but it was at a new job she had held for only seven days. *Id.* She had no money to buy her release from detention. *Id*. She was otherwise eligible for release.

Harris County Pretrial Services interviewed Ms. ODonnell at 11:52 p.m. on May 18. Pls. Ex. 8(c)(1), ODonnell Pretrial Services Report. At 3:00 a.m., on May 19, Pretrial Services completed a risk-assessment report recommending her release on a personal bond—that is, an unsecured appearance bond requiring no up-front payment for release. *Id*. Ms. ODonnell appeared before a Hearing Officer at 7:00 a.m., by videolink from the Harris County Jail. Pls. Ex. 4(c)(1), ODonnell Docket Sheet. The Sheriff's deputies present ordered her not to speak. Pls. Ex. 7(a). Without explanation, the Hearing Officer told her that she did not "qualify" for release on personal bond and imposed the $2,500 scheduled amount as secured bail, meaning that she had to pay the full bail amount or a bondman's premium to be released. Pls. Ex. 8(c), ODonnell Hearing Video. When asked if she would hire her own lawyer or would be seeking help from a court-appointed lawyer, Ms. ODonnell responded, "Seeking help." These were her only words during her 50-second hearing. *Id*.

On the morning of May 20, Ms. ODonnell appeared before a County Criminal Court at Law Judge. (Docket Entry No. 31, Ex. 1). She completed an affidavit declaring her lack of assets and was found indigent for the purpose of appointing counsel. (*Id*.). Her bail amount was not changed or set on an unsecured basis, even though she declared on her affidavit that she remained in jail.

(*Id*.). That same day, but after Ms. ODonnell filed this suit, an insurance underwriter for a commercial bondsman posted her bail amount. Pls. Ex. 11 at *5. This third-party payment looks like an attempt to moot her claim. *See id*. Ms. ODonnell was released from jail after three days in pretrial detention on the charge of driving with an invalid license. Pls. Ex. 8(c), ODonnell Docket Sheet.

Robert Ryan Ford was arrested on May 18, 2016 at 8:00 p.m. He was charged with shoplifting from a Wal-Mart. Pls. Ex. 7(c). Mr. Ford could not pay the $5,000 secured money bail imposed as the condition for his release from pretrial detention. *Id*. This was the amount specified in the bail schedule. Mr. Ford was interviewed by Pretrial Services at 10:00 a.m. the morning after his arrest, but Pretrial Services did not complete Mr. Ford's risk assessment until the next day, May 20, at 2:00 a.m. Pls. Ex. 8(c)(iii), Ford Pretrial Services Report. The risk-assessment report recommended "Detain," stating that Mr. Ford had "[s]afety issues that conditions can't mitigate." *Id*. at *16. The form did not explain these issues nor why some combination of conditions of release could not address them. Notwithstanding the recommendation to detain, had Mr. Ford paid the $5,000 bail—or paid a bondsman a $500 premium[4]—he would have been promptly released, regardless of "safety issues." He could not pay the $5,000 secured money bail or the bondsman's premium, so he remained in jail. Pls. Ex. 7(c). As intended by Pretrial Services, the secured money bail served as a pretrial detention order because Mr. Ford was too poor to pay.

Mr. Ford did not see a Hearing Officer until May 20, 2016 at 4:00 a.m., 32 hours after his arrest. Pls. Ex. 8(c)(iii), Ford Docket Sheet. His hearing lasted less than 50 seconds. Pls. Ex. 8(c),

[4] The complaint alleges, and the record shows, that commercial sureties in Harris County typically charge a nonrefundable premium of 10 percent of the total value of the bond, but for low money bail amounts, such as those at the lower end of the misdemeanor bail schedule, bondsmen charge a premium higher than 10 percent. (Docket Entry No. 54 ¶ 44 n.8); Hearing Tr. 2-1:56.

Ford Hearing Video. He did not speak except to ask for a court-appointed lawyer. *Id*. His bail was confirmed at $5,000 on a secured basis. *Id.*

On May 23, 2016, Mr. Ford appeared before a County Criminal Court at Law Judge, pleaded guilty, and was sentenced to time served. Pls. Ex. 8(c)(iii), Ford Docket Sheet. He was released at 12:30 a.m. on May 24, 2016. *Id.* Mr. Ford was continuously detained on his misdemeanor charge for over five days, until the final disposition of his case.

Loetha Shanta McGruder, a pregnant 22-year-old mother of two, was arrested on May 19, 2016 at 5:20 p.m. She was charged with failing to identify herself to a police officer. Pls. Ex. 7(b). Ms. McGruder was indigent. *Id*. She depended on federal benefits to care for her older son, who has Down's Syndrome and other medical needs, and she depended on child-support payments for her other children. *Id*. Ms. McGruder was not working when she was arrested. She avoided homelessness by living with her boyfriend. *Id*. She could not pay the $5,000 secured money bail imposed as the condition for her release from pretrial detention. *Id*.

Ms. McGruder was interviewed by Pretrial Services the morning after her arrest, at 8:40 a.m. Pls. Ex. 8(c)(ii), McGruder Pretrial Services Report. Pretrial Services completed its risk-assessment report around 1:00 p.m. with no recommendation for either release or detention. *Id*. Ms. McGruder appeared before a Hearing Officer at 1:00 p.m. on May 20. Pls. Ex. 8(c)(ii), McGruder Docket Sheet. She did not speak at her hearing except to discuss her need for a court-appointed lawyer. Pls. Ex. 8(c)(ii), McGruder Hearing Video. Her bail was confirmed at $5,000 on a secured basis. *Id*.

After about 87 hours in jail, Ms. McGruder appeared before a County Criminal Court at Law Judge. Pls. Ex. 8(c)(ii), McGruder Docket Sheet. She was ready to enter a guilty plea because she believed it was the fastest way to be released. Hearing Tr. 2-1:80–81, 108. Her lawyer convinced

her to seek a personal bond instead. *Id.* At her first counseled hearing before a County Judge, Ms. McGruder was granted a personal bond—an unsecured $5,000 bond with no up-front payment required. She was released at 7:30 p.m. the same day. Pls. Ex. 8(c)(ii), McGruder Docket Sheet. Ms. McGruder spent four full days in pretrial detention on her misdemeanor charge of failing to identify herself to a police officer.

The plaintiffs sued Harris County under 42 U.S.C. § 1983, alleging that the County's policies have deprived them and others similarly situated of due process and equal protection by detaining them before trial on misdemeanor charges because of their inability to pay a secured money bail, and without a meaningful or timely inquiry into their inability to pay. (Docket Entry No. 54). The motions to dismiss resulted in earlier rulings on the claims against the various defendants.

- The court denied Harris County's motion to dismiss. The County may face municipal liability under § 1983 for the law-enforcement policies of its Sheriff, to the extent the Sheriff knowingly enforces invalid detention orders, and for the legislative and administrative policies of the County Judges to the extent those policies are not directly mandated by Texas law. *ODonnell*, 2016 WL 7337549 at *22–31.
- The court dismissed the plaintiffs' personal-capacity claim against the Harris County Sheriff but denied the motion to dismiss the official-capacity claim. *Id*. at *32. To the extent the Sheriff enforces facially valid but unconstitutional detention orders, the Sheriff may be liable for prospective relief under *Ex parte Young*, 209 U.S. 123 (1908). *Id*.
- The court dismissed personal-capacity claims against the sixteen Harris County Criminal Court at Law Judges, but denied the motion to dismiss the official-capacity claims against them. *ODonnell*, 2016 WL 7337549 at *27–28. To the extent the County Judges

administratively enforce facially constitutional Texas laws, such as the Texas Code of Criminal Procedure, in an unconstitutional manner, the County Judges may be liable for prospective relief. *Id*. at *28, 36–37.

- The court granted the motion to dismiss the official-capacity claims against five Harris County Hearing Officers. *Id*. at *34–35. They remain in the suit in their personal capacities for declaratory relief only. *Id*.

**2. The Fact Witnesses**

The fact witnesses testified about the post-arrest process for misdemeanor defendants in Harris County, as well as the reforms to the bail system the County expects to implement by July 1, 2017. The fact witnesses and their testimony are summarized below.

- Assistant District Attorney JoAnne Musick. Ms. Musick was appointed the Sex Crime Unit Chief at the Harris County District Attorney's Office in January 2017. She has practiced criminal defense privately for over thirteen years and has served as the vice-chair of the Criminal Law & Procedure Committee of the Houston Bar Association and as a board member of the Texas Criminal Defense Lawyers Association. Ms. Musick testified about her extensive experience with Harris County pretrial processes, both as a criminal defense lawyer and as an Assistant District Attorney. Ms. Musick filed a declaration stating her observation that Harris County consistently detains misdemeanor arrestees, who are otherwise eligible to be released, because they cannot pay a secured financial condition of release. As a consequence, many indigent misdemeanor arrestees plead guilty at their first appearance as the only way to be released from pretrial detention without waiting days or weeks for another hearing. Pls. Ex. 7(g) at 4–5.

- Sheriff Ed Gonzalez. Sheriff Gonzalez was elected Harris County Sheriff in November 2016 and assumed office in January 2017. He served eighteen years with the Houston Police Department and was a Houston City Council member for three terms before his election as Sheriff. Sheriff Gonzalez testified about his experience with the post-arrest process in Harris County. Sheriff Gonzalez also filed a declaration stating his observation that Harris County consistently detains misdemeanor arrestees, who are otherwise eligible to be released, because they are too poor to pay a secured financial condition of release. Pls. Ex. 7(r) at 1–2.
- Major Patrick Dougherty. Major Dougherty was appointed as a major with the Harris County Sheriff's Office in January 2017 after serving thirty-five years with the Houston Police Department. Major Dougherty testified about his experiences with the post-arrest processes in the City of Houston and in Harris County. Major Dougherty reviewed the technology limits and overcrowded conditions in the Harris County Jail that complicate the timely transfer and presentment of misdemeanor arrestees.
- Director of Pretrial Services Kelvin Banks. Mr. Banks began work as the Director of Pretrial Services for Harris County in October 2016. He served previously as the Director of Pretrial Services for the Third Circuit Court in Wayne County, Michigan, primarily overseeing pretrial services for the City of Detroit. Mr. Banks testified about the County's current Pretrial Services program, the planned changes to Pretrial Services's risk-assessment tool, and other changes impacting the use of secured money bail in misdemeanor cases. These changes are expected to be implemented by July 1, 2017.
- Chief Hearing Officer Blanca Villagomez. Judge Villagomez has been a Harris County Hearing Officer since the position was created in 1993. She testified about her own and

others' practices as Hearing Officers.

- Hearing Officer Eric Hagstette. Judge Hagstette has been a Harris County Hearing Officer for over eleven years. He was a Harris County Assistant District Attorney for ten years and a criminal defense attorney for ten years. Judge Hagstette testified about his practices as a Hearing Officer and his impressions of the pretrial process from his time as a practicing criminal lawyer.
- County Judge Darrell Jordan. Judge Jordan was elected to be the presiding judge of County Criminal Court at Law No. 16 in November 2016. He assumed office in January 2017. Judge Jordan previously practiced as a criminal defense attorney for eight years. Judge Jordan testified about his practices as a County Judge and about his past experiences as a lawyer defending misdemeanor arrestees in Harris County.
- County Judge Paula Goodhart. Judge Goodhart was appointed to be the presiding judge of County Criminal Court at Law No. 1 in 2010. She was an Assistant District Attorney for Harris County for fourteen years and a criminal defense attorney for three years. Judge Goodhart testified about her practices as a County Judge and about her past experiences practicing in the Harris County Criminal Courts at Law.
- County Judge Margaret Harris. The defendants offered the testimony of Judge Harris, the presiding judge of County Criminal Court at Law No. 5 since 2003. The parties stipulated that Judge Harris's testimony would be consistent in material respects with Judge Goodhart's testimony. Hearing Tr. 5:152.
- Dr. Marie VanNostrand. Dr. VanNostrand is a project manager for Luminosity, a consulting firm that advises pretrial services programs. Dr. VanNostrand is a former probation and

parole officer and pretrial services provider. She began working as a consultant for pretrial services agencies in 2003 and through Luminosity has been consulting with Harris County to reform its pretrial processes and services since February 2015. Hearing Tr. 6-1:131. Dr. VanNostrand testified about her statistical studies on pretrial detention and about the reforms to the Harris County pretrial process planned for implementation by July 1, 2017.

**3. The Expert Witnesses**

The plaintiffs presented Dr. Stephen Demuth to testify under Rule 702 of the Federal Rules of Evidence on sociology and criminal pretrial procedure. Dr. Demuth has a doctorate in sociology with a concentration in chronology and quantitative methods of research. He is a professor of sociology at Bowling Green State University in Ohio. He has published extensively in peer-reviewed journals on pretrial criminal processes and on the appropriate use of large data sets. Dr. Demuth testified that he received no compensation for his consultation and testimony in this case. He has invested at least 150 hours of work analyzing the data Harris County has produced since the plaintiffs retained him on February 9, 2017.

The plaintiffs also presented Judge Truman Morrison to testify under Rule 702. Judge Morrison is a Senior Judge of the Superior Court of the District of Columbia. He has served on that court for over thirty-seven years. After taking senior status in 2000, Judge Morrison has focused on misdemeanor cases. Since the late 1980s, he has led reform efforts in his court to eliminate the use of secured money bail in the D.C. criminal justice system. He has also worked to educate judicial officers and others around the country on the benefits of eliminating money bail and the harms of continuing to use it in misdemeanor cases.

The defendants offered the testimony of Dr. Robert Morris as a Rule 702 witness in

criminology. Dr. Morris holds a doctorate in criminal justice and was a professor of criminology at the University of Texas in Dallas for nine years. Since August 2016, he has been the cofounder and chief executive officer of Predicto, a company that uses machine learning to predict failures in industrial equipment. Dr. Morris testified that he has worked 45 to 50 hours analyzing data produced by Harris County since his retention and has invoiced the County $325 per hour. Hearing Tr. 4-2:156.

The defendants also offered the testimony of Mr. Bob Wessels as a Rule 702 witness with specialized knowledge in court administration and pretrial procedures, particularly in Harris County. Mr. Wessels was the court manager of the Harris County Criminal Courts at Law for thirty-five years, until he retired in 2011. He has received numerous awards and national recognition for his work on court administration and is a former president of the National Association of Court Administrators.

The court finds that Drs. Demuth and Morris meet the Rule 702 requirements to testify about Harris County's pretrial arrest data and system and that Judge Morrison and Mr. Wessels are qualified to testify about court administration. Specific findings about the reliability, helpfulness, and credibility of their opinions are set out in detail below.

**4. Overview of the Factual and Legal Issues**

The parties dispute three broad issues: (1) whether Harris County impermissibly sets secured money bail to serve as de facto orders of pretrial detention in misdemeanor cases; (2) whether Harris County provides misdemeanor defendants due process and equal protection in their bail settings; and (3) whether planned reforms will sufficiently address the plaintiffs' allegations of constitutional violations. Each issue raises complex questions of fact and law.

The defendants argue that Harris County judicial officers do not intentionally use secured money bail to detain and are not recklessly indifferent to that effect of secured money bail. Instead, the defendants argue, Hearing Officers and County Judges apply the Texas Code of Criminal Procedure's requirement to consider five factors—only one of which relates to a defendant's ability to pay—in setting bail. *See* TEX. CODE CRIM. PRO. art. 17.15. The plaintiffs respond that the evidence shows Harris County judicial officers do not in fact give individualized consideration of the five factors in setting bail in each misdemeanor case, but instead routinely set secured money bail to conform to a predetermined schedule, even when it is clear that the effect will be pretrial detention.

The parties' disputes extend beyond whether the facts show rare, occasional, or frequent individual consideration of bail in particular cases. The parties also dispute whether imposing secured money bail on an indigent or impecunious misdemeanor arrestee is a *but-for cause* or a *proximate cause* of pretrial detention if an arrestee with financial means could pay and secure prompt release. The defendants argue that virtually no misdemeanor defendant is detained before trial "solely by" or "because of" an inability to pay secured money bail. Instead, the defendant's past criminal history, prior failures to appear, or other risk factors all contribute to a judicial officer's decision to impose secured money bail at a particular amount. Under this view, the arrestee's criminal history, prior failures to appear, or other risk factors—not just the bail amount—are among the reasons for pretrial detention. (*See, e.g.*, Docket Entry No. 162 at 15–16; No. 164 at 8–9); Hearing Tr. 1:99–100.

The plaintiffs counter with a but-for argument. A judicial officer's decision to set secured money bail means that the misdemeanor defendant has been found eligible for release and would be

released but for their inability to make the up-front payment of the secured money bail bond. The plaintiffs argue that detaining misdemeanor defendants before trial solely because of their inability to pay violates the Equal Protection Clause, because defendants with similar histories and risks but with access to money are able to purchase pretrial release. The plaintiffs contend that all rigorous studies of pretrial release in misdemeanor cases show that release on secured money bail does no more to mitigate the risk of nonappearance or of new criminal activity during pretrial release than release on unsecured or nonfinancial conditions. (*See, e.g.*, Docket Entry No. 143 at 15–17; No. 188 at 4–7); Hearing Tr. 4-2:15–16.

For the reasons set out below, the court finds and concludes that the plaintiffs have the better understanding of the case. A misdemeanor defendant's criminal background or risk factors may give the County a persuasive reason to detain that defendant. But an order imposing secured money bail is effectively a pretrial preventive detention order only against those who cannot afford to pay. It is not a detention order as to defendants who can pay, even if they present a similar risk of failing to appear or of committing new offenses before trial as those who cannot pay. And the reliable record evidence shows that release on secured money bail does not mitigate those risks for misdemeanor defendants better than release on unsecured or nonfinancial conditions, in Harris County or elsewhere. The issue is not a right to "affordable bail," as the defendants insist, but a violation of the Equal Protection and Due Process Clauses.

The plaintiffs allege that Harris County's pretrial misdemeanor bail system violates procedural due process because: (1) misdemeanor arrestees who cannot pay the up-front amount for release on secured money bail are frequently held longer than 24 hours before any meaningful bail review, contrary to Texas law and to federal court orders; (2) misdemeanor arrestees are not able

even to ask for a review of their bail in a counseled, adversarial proceeding, with an opportunity to present evidence and a right to findings on the record, until at least two or three days and often up to two weeks after their arrests; (3) misdemeanor arrestees who cannot afford their secured money bail are jailed for more than 48 hours if they do not plead guilty at their first court appearances; and (4) the County imposes secured money bail to serve as de facto detention orders, without affording misdemeanor defendants the due process protections the Constitution requires for detention orders. (*See, e.g.*, Docket Entry No. 144 at 13–14; No. 145 at 7–9; No. 188 at 13–15).

The defendants argue that Harris County's pretrial process is among the fastest in the nation and that its bail practices are not out of step with the majority of other United States jurisdictions. (*See, e.g.*, Docket Entry No. 286). While insisting that the County's current system is legal, the defendants acknowledge that it needs improvement. They argue that the planned reforms will make the County's pretrial system more efficient, more rational, and more equal across classifications of wealth and risk factors. (Docket Entry No. 162 at 23); Hearing Tr. 1:100–01, 8-2:30–32. The plaintiffs respond that until the expected reforms are implemented, serious constitutional violations will continue to occur, affecting hundreds of individuals every day. Even under the reforms, the plaintiffs contend, Harris County will continue its policy of imposing secured money bail as de facto pretrial detention orders in violation of federal due process requirements. (Docket Entry No. 188 at 26–27).

The court finds and concludes that, based on the credible, reliable evidence in the present record, the plaintiffs are likely to succeed on the merits of at least some of their claims that the present system violates due process and equal protection, and that the plaintiffs are likely to succeed in part in their challenges to the new pretrial system as currently proposed by Harris County. The

plaintiffs are entitled to a preliminary injunction, as set out in detail below.

### C. The Historical Development of Bail in the United States and in Harris County

#### 1. The Constitutionalization of Bail

Bail originated in medieval England "as a device to free untried prisoners." Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964* 1 (1964); *see* 4 William Blackstone, *Commentaries on the Laws of England* (Rees Welsh & Co. [1769] 1902) ("By the ancient common law, before and since the [Norman] conquest, all felonies were bailable, till murder was excepted by statute; so that persons might be admitted to bail before conviction almost in every case." (footnotes omitted)); *see generally* William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 34–66 (1977); Elsa de Haas, *Antiquities of Bail* 128 (1940). In 1275, the English Parliament enacted the Statute of Westminster, which defined bailable offenses and provided criteria for determining whether a particular person should be released, including the strength of the evidence against the accused and the accused's criminal history. *See* Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 966 (1961); June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 523–26 (1983). In 1679, Parliament adopted the Habeas Corpus Act to ensure that an accused could obtain a timely bail hearing. In 1689, Parliament enacted an English Bill of Rights that prohibited excessive bail. *See* Carbone, *supra*, at 528.

Early American constitutions codified a right to bail as a presumption that defendants should be released pending trial. *See* Note, *Bail*, *supra*, at 967. One commentator who surveyed the bail laws in each state found that forty-eight states have protected, by constitution or statute, a right to bail "by sufficient sureties, except for capital offenses when the proof is evident or the presumption

great." Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 916 (2013). States modeled these provisions on the Pennsylvania Constitution of 1682. *See* Carbone, *supra*, at 531–32. Texas substantially incorporated that language into its Constitution in 1845, and it remains.[5] TEX. CONST. art. 1 § 11.

Texas law interprets Article I, § 11 to prohibit preventive pretrial detention except in specific and narrow circumstances set out in constitutional amendments. *Id*. § 11a *et seq.* "The exceptions contained in Article I, § 11a, supra, to the constitutional right to bail proclaimed by Article I, § 11, supra, include the seeds of preventive detention urged by many to be abhorrent to the American system of justice. It is obvious that for these reasons the provisions of said § 11a contain strict limitations and other safeguards." *Ex parte Davis*, 574 S.W.2d 166, 169 (Tex. Cr. App. 1978). The exceptions are narrow. All but one are limited to felonies. The one exception is under §§ 11b and 11c, which permit a denial of bail and pretrial preventive detention for those accused of a crime of family violence, including misdemeanors, if: (1) the accused has violated a condition of pretrial release or a protective order; and (2) a magistrate determines at an adversary hearing by a preponderance of the evidence that the accused violated the condition of release or protective order in a manner "related to the safety of a victim of the alleged offense or the safety of the community." TEX. CONST. art. 1, §§ 11b–11c.

Historians and jurists confirm that from the medieval period until the early American republic, a bail bond was typically based on an individualized assessment of what the arrestee or his surety could pay to assure appearance and secure release. In medieval England, an arrestee was forbidden to pay his sureties for obtaining his release. If an accused failed to appear, the sureties

[5] The Texas Constitution contains an additional provision making bail available even in capital cases after indictment. TEX. CONST. art. 1 § 11.

were "amerced" with a fine, but there were "maximum amercements depending on the wrong-doer's rank; the baron [did] not have to pay more than a hundred pounds, nor the routier more than five shillings." 2 Frederick William Polluck & Frederic William Maitland, *The History of English Law Before the Time of Edward I* 514 (2d ed. 1984 [1898]). Joseph Chitty, an eminent proceduralist, summarized the English practice when the United States Constitution was ratified: "The rule is, where the offence is prima facie great, to require good bail; moderation nevertheless is to be observed, and such bail only is to be required as the party is able to procure; for otherwise the allowance of bail would be a mere colour for imprisoning the party on the charge." 1 J. Chitty, *A Practical Treatise on the Criminal Law* 88–89 (Philadelphia ed. 1819); *see also Bates v. Pilling*, 149 Eng. Rep. 805, 805 (K.B. 1834) ("a defendant might be subjected to as much inconvenience by being compelled to put in bail to an excessive amount, as if he had been actually arrested"); *Rex v. Bowes*, 99 Eng. Rep. 1327, 1329 (K.B. 1787) (per curiam) ("[e]xcessive bail is a relative term; it depends on the nature of the charge for which bail is required, upon the situation in life of the parties, and on various other circumstances") & (Archbald, J.) (permitting a "lessening" of bail if there were "difficulty" procuring the decreed sum); *Neal v. Spencer*, 88 Eng. Rep. 1305, 1305–06 (K.B. 1698) (collecting cases showing a diversity of bail amounts given for the same offense). The pre-Texas history of bail confirms the modern holdings of Texas courts, that bail is a mechanism for pretrial release and not for continued pretrial preventive detention.

**2. Statutory and Judicial Bail Reform: Pretrial Services, Probable Cause Hearings, and "Meaningful" Alternatives to Secured Money Bail**

In the mid-nineteenth century, bail reform was crucial to abolishing imprisonment for debt. In Massachusetts, the 1831 survey of the Prison Discipline Society noted that the availability of bail in debtors' prisons created class distinctions between "poor seamen, poor laborers, and poor

mechanics" who could not find sureties and remained in jail, "while there is scarcely an instance on record of a poor minister, a poor physician, or a poor lawyer in Prison for debt." Sixth Annual Rep. of the Prison Discipline Society 22 (1831). After Massachusetts abolished imprisonment for debt in 1855, the State permitted those jailed on mesne[6] process in contract cases to swear an oath of indigence and to be released on personal recognizance as an alternative to secured money bail. 1857 Mass. L. 489–97. From 1831 to 1833, Congress passed legislation abolishing imprisonment for debt at the federal level. 4 STAT. 467, 594, 676. Ultimately, forty-one states, including Texas, constitutionally banned imprisonment for debt.[7] *See* TEX. CONST. art. 1 § 18.

Another wave of bail reform began with the 1960s Manhattan Bail Project, conducted by the Vera Foundation in New York City. *See* Wayne H. Thomas, Jr., *Bail Reform in America* 3, 20–27 (1976); Ronald Goldfarb, *Ransom* 150–72 (1965). The Project interviewed defendants before their first court appearance to evaluate whether they were good candidates for pretrial release on recognizance; that is, release "on one's honor pending trial." Goldfarb, *supra*, at 153–54. The standard interview questions asked about a defendant's personal background, community ties, and criminal history. *Id*. The interviewer scored a defendant's answers using a point-weighting system and verified the answers, usually by telephone, with references the defendant provided. *Id*. at 154–55, 174–75. The interviewers gave the information to the court and recommended which defendants should be released on nonfinancial conditions. *Id*. at 155. During the first three years

[6] "Mesne" is a medieval French legal term meaning "intermediate," or process issued after a suit began but before it ended. It often referred to a writ issued during a civil case. The word remained in the Federal Rules of Civil Procedure until 2007, despite the fact that few knew what it meant and fewer ever used it.

[7] For an up-to-date collection of state constitutional provisions banning imprisonment for debt, see Note, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024, 1035 n.95 (2016).

of the Project, defendants released on nonfinancial conditions at the recommendation of the Vera Foundation were about three times more likely to appear for trial than were defendants in control groups who were found eligible for release on nonfinancial conditions but who were instead released on secured money bail. *Id*. at 155, 157. The success of the Manhattan Bail Project inspired the creation of pretrial services programs across the country. *See* Timothy R. Schnacke *et al*., Pretrial Justice Inst., *The History of Bail and Pretrial Release* 10 (2010).

In the 1970s, a major prisoners' class action challenged the facial and as-applied constitutionality of Florida's pretrial detention system. The litigation led to two foundational opinions, one by the United States Supreme Court and one by the former Fifth Circuit. In *Gerstein v. Pugh*, 410 U.S. 103 (1975), the Supreme Court ruled that criminal defendants arrested without a warrant and then detained before trial had to be taken "promptly" before a judicial officer to determine probable cause for the arrest. 410 U.S. at 127. The Court did not specify what would meet the promptness standard, instead noting that "the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole. . . . It may be found desirable, for example, to make the probable cause determination at the suspect's first appearance before a judicial officer, or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release." *Id*. at 124 (internal citations omitted).

In *Pugh v. Rainwater*, 572 F.2d 1053 (1978) (en banc), the Fifth Circuit considered the same class's challenge to Florida's pretrial bail system. The en banc court vacated as moot the panel decision finding the system unconstitutional, because Florida had amended its rules while the appeal was pending. *Id*. at 1058–59. The en banc court ruled that the Constitution did not require the statute to include a presumption that indigent arrestees would be released without financial

conditions to be facially valid. *Id*. at 1057–58. But the court noted that while "[u]tilization of a master bond schedule provides speedy and convenient release for those who have no difficulty in meeting its requirements[, t]he incarceration of those who cannot, without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." *Id*. at 1057.

In the decade following *Gerstein* and *Rainwater*, the City of Houston and Harris County were sued in two lawsuits disputing how to apply those precedents locally. In *Sanders v. City of Houston*, 543 F.Supp. 694 (S.D. Tex. 1982), the court ruled after a bench trial that *Gerstein*'s promptness standard required a probable cause hearing for those arrested without a warrant by the City of Houston within 24 hours of arrest. *Id*. at 702. The court also ruled that bail had to be set within 24 hours of arrest to avoid an unconstitutional denial of bail under the Texas Constitution.[8] *Id*. at 704.

In *Roberson v. Richardson*, Agreed Final Judgment, Civil No. 84-2974 (S.D. Tex. Nov. 25, 1987), the court entered a final agreed judgment that applied the 24-hour time limit to misdemeanor cases throughout the County.[9] The *Roberson* order's stated purpose was to ensure that misdemeanor arrestees in Harris County had "the right to a prompt, fair and reliable determination of Probable Cause as set out in *Gerstein v. Pugh*, 420 U.S. 103 (1978), a meaningful review of alternatives to pre-scheduled bail amounts as set out in *Rainwater v. Pugh*, 572 F.2d 1053 (5th Cir. 1978) (*en banc*), and the right to the prompt appointment of counsel." *Id*. at 1. The *Roberson* order required the County Criminal Courts at Law Judges to provide probable cause hearings within 24 hours of

[8] The *Sanders* plaintiffs challenged the City of Houston's practices under the Fourth Amendment, and the court ruled that the permissible period for the "administrative steps incident to arrest" concluded at 24 hours. 543 F.Supp. 699. The plaintiffs did not raise, and the court did not decide, challenges under the Equal Protection and Due Process Clauses of the Constitution.

[9] The order is available at Def. Ex. 95.

misdemeanor arrests, allowing the hearings to be by videolink rather than in person. *Id*. at 2 (videolink), 3 (24 hours).

The *Roberson* order required judicial officers at the probable cause hearing to "set the amount of bail required of the accused for release and determine the accused's eligibility for release on personal bond or alternatives to prescheduled bail amounts." *Id*. at 3. Substantially repeating Article 17.15 of the Texas Code of Criminal Procedure, Section D of the *Roberson* order stated:

> Such bail determinations shall be according to the following criteria:
>
> 1. The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with;
>
> 2. The nature of the offense for which Probable Cause has been found and the circumstances under which the offense was allegedly committed are to be considered, including both aggravating and mitigating factors for which there is reasonable ground to believe shown, if any;
>
> 3. The ability to make bail is to be regarded, and proof may be taken upon this point;
>
> 4. The future safety of the victim may be considered, and if this be a factor, release to a third person should also be considered; and
>
> 5. The Judicial Officer shall also consider the accused's employment history, residency, family affiliations, prior criminal record, previous court appearance performance and any outstanding bonds.

*Id*. at 3.

The *Roberson* order required the County Judges to "implement and maintain a bond schedule for all misdemeanor offenses within their jurisdiction." *Id*. at 4. The schedule had to "establish the initial amounts of bail required in each type or category of offense." *Id*. The *Roberson* order required that:

> At the Probable Cause hearing the [Hearing] Officer shall use the Bail Schedule, in addition to the criteria in Section D, in determining the appropriate bail in a given case. The [Hearing] Officer shall have the authority to order the accused released on personal bond or

> released on other alternatives to prescheduled bail amounts. The [County] Judges shall direct the Pretrial Services Agency to make every effort to insure that sufficient information is available at the time of the hearings required herein for the [Hearing] Officer to determine an accused's eligibility for a personal bond or alternatives to prescheduled bail amounts.

*Id*.

Nothing in the *Roberson* order contemplated detention based on a misdemeanor arrestee's inability to pay the scheduled bail amount set on a secured basis. Rather, the order required Hearing Officers to make individualized adjustments to the bail schedule in each case to provide a mechanism for release, either by lowering the scheduled amount when setting a secured bond; setting nonfinancial conditions of release; or granting release on unsecured "personal bonds" without additional conditions. *See id*. at 4, 1 (the purpose of the order is to provide "a meaningful review of *alternatives* to pre-scheduled bail amounts" (emphasis added)).

Finally, the *Roberson* order required the County Judges to appoint counsel "prior to any adversarial judicial proceedings" or "where the Judge concludes that the interests of justice require representation, for all accused indigents who do not refuse the appointment of counsel." *Id*. at 4. In determining indigency for the purpose of appointing counsel, the *Roberson* order required the County Judges to consider the accused's income and expenses, assets and debts, dependents, and "whether the accused has posted or is capable of posting bail." *Id*. In no case could a County Judge "deny appointed counsel to an accused solely because the accused has posted, or is capable of posting bail." *Id*.

Efforts to comply with the *Roberson* order have produced the system Harris County has in place today, examined in greater detail below.[10] (Docket Entry No. 101 at 11); Hearing Tr. 4-2:222–29; 5:6–20. Harris County operates a Pretrial Services Agency that interviews

[10] *See* Part I.D.2–3 *infra*.

misdemeanor arrestees to provide criminal risk and financial background information to the Hearing Officers. The Hearing Officers hold videolink hearings for those arrested, charged, and booked into the Harris County Jail on misdemeanor charges.[11] These hearings usually, but far from always, are held within 24 hours of arrest. The Hearing Officers usually jointly determine probable cause and set bail.

### 3. Bail at the Federal Level

At the federal level, the Judiciary Act of 1789 provided an absolute right to bail in noncapital cases and bail at the judge's discretion in capital cases. *See* 1 STAT. 73, 91. The first Congress also proposed the Eighth Amendment to the United States Constitution, which, like the Texas Constitution and the English Bill of Rights, prohibits excessive bail. *See* U.S. CONST. amend. VIII; TEX. CONST. art. 1, § 13. But unlike the Texas Constitution, the United States Constitution does not explicitly state a right to bail. The Eighth Amendment guarantees only that "[e]xcessive bail shall not be required." U.S. CONST. amend. VIII; *see Carlson v. Landon*, 342 U.S. 524, 545–46, (1952) (the Eighth Amendment does not provide a "right to bail"). But the United States Supreme Court has made clear that "[b]ail set at a figure higher than an amount reasonably calculated to fulfill [the] purpose [of assuring the defendant's appearance at trial] is 'excessive' under the Eighth Amendment." *Stack v. Boyle*, 342 U.S. 1, 5 (1951). As the Court explained,

> From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), 18 U.S.C.A., federal law has unequivocally provided that a person arrested for a noncapital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves

[11] The Harris County Hearing Officers also hold hearings, determine probable cause, and set bail in felony cases under rules and a bail schedule promulgated by the Harris County District Judges. Hearing Tr. 4-1:115. The *Roberson* order applied to procedures in Class A and B misdemeanor cases only. *See, e.g.*, Def. Ex. 160 at 6. The Hearing Officers' practices with regard to felony cases are not a subject of this litigation.

> to prevent the infliction of punishment prior to conviction. See Hudson v. Parker, 1895, 156 U.S. 277, 285 . . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

*Id.* at 4; *see also Bandy v. United States*, 81 S.Ct. 197, 198 (1960) (Douglas, J., in chambers) ("It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom. Yet in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release." (citing *Stack*, 342 U.S. at 1)); *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969) ("the setting of bond unreachable because of its amount would be tantamount to setting no conditions at all").

The Bail Reform Act of 1966 became "the first major reform of the federal bail system since the Judiciary Act of 1789." *State v. Brown*, 338 P.3d 1276, 1286 (N.M. 2014); *see* Bail Reform Act of 1966, 80 STAT. 214 (repealed 1984). The stated purpose of the Bail Reform Act of 1966 was "to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges . . . when detention serves neither the ends of justice nor the public interest." *Id*. § 2. The Act required: (1) a presumption of release on personal recognizance unless the court determined that release would not reasonably assure the defendant's appearance in court; (2) the option of conditional pretrial release under supervision or other terms designed to decrease the flight risk; and (3) a prohibition on using money bail when nonfinancial release options such as supervisory custody or restrictions on "travel . . . or place of abode" could reasonably assure the defendant's appearance. *See id.* § 3, § 3146(a).

Congress again revised federal bail procedures with the Bail Reform Act of 1984, enacted as part of the Comprehensive Crime Control Act of 1984. *See* Bail Reform Act of 1984, 98 STAT. 1837, 1976 (codified at 18 U.S.C. §§ 3141–3150 (2012)). The legislative history of the 1984 Act

states that Congress wanted to "address the alarming problem of crimes committed by persons on release" and to "give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released." S. Rep. 98–225, at 3 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3185. The 1984 Act, as amended, retains most of the 1966 Act but "allows a federal court to detain an arrestee pending trial if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions 'will reasonably assure . . . the safety of any other person and the community.'" *United States v. Salerno*, 481 U.S. 739, 741 (1987) (omission in original) (quoting the Bail Reform Act of 1984) (upholding the preventive detention provisions in the 1984 Act).

The federal history of bail reform confirms that bail is a mechanism of pretrial release, not of preventive detention. Pretrial preventive detention in federal cases requires counseled, adversarial hearings with findings stated on the record that, by clear and convincing evidence, no less restrictive alternative can reasonably assure the defendant's presence at trial. *See id*. In *United States v. McConnell*, 842 F.2d 105 (5th Cir. 1988), the Fifth Circuit held that "a bail setting is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement." *Id*. at 107. The magistrate judge in *McConnell* had initially ordered the felony defendant detained before trial with no release condition under the provision of the Bail Reform Act recently upheld in *Salerno*. *See id*. at 106. The district court replaced the detention order with a set of conditions for release, including weekly check-ins with pretrial services, travel restrictions, and secured money bail of $750,000. *Id*. The defendant moved for reconsideration, alleging that he did not have the assets to pay the secured money bail. The defendant appealed the district court's denial of his motion for reconsideration, and the Fifth Circuit remanded to the district court for a written

opinion with findings on the record. *Id*. The court issued written findings, and a second appeal followed. *Id*.

The Fifth Circuit recognized that under the Bail Reform Act, Congress "proscrib[ed] the setting of a high bail as a *de facto* automatic detention practice." *Id*. at 109. The Fifth Circuit relied on the Senate Report of the Bail Reform Act, which explained that:

> section 3142(c) provides that a judicial officer may not impose a financial condition of release that results in the pretrial detention of the defendant. The purpose of this provision is to preclude the sub rosa use of money bond to detain dangerous defendants. However, its application does not necessarily require the release of a person who says he is unable to meet a financial condition of release which the judge has determined is the only form of conditional release that will assure the person's future appearance. Thus, for example, if a judicial officer determines that a $50,000 bond is the only means, short of detention, of assuring the appearance of a defendant who poses a serious risk of flight, and the defendant asserts that, despite the judicial officer's finding to the contrary, he cannot meet the bond, the judicial officer may reconsider the amount of the bond. If he still concludes that the initial amount is reasonable and necessary then it would appear that there is no available condition of release that will assure the defendant's appearance. This is the very finding which, under section 3142(e), is the basis for an order of detention, and therefore the judge may proceed with a detention hearing pursuant to section 3142(f) and order the defendant detained, if appropriate. The reasons for the judicial officer's conclusion that the bond was the only condition that could reasonably assure the appearance of the defendant, the judicial officer's finding that the amount of the bond was reasonable, and the fact that the defendant stated that he was unable to meet this condition, would be set out in the detention order as provided in section 3142(i)(1). The defendant could then appeal the resulting detention pursuant to section 3145.

*Id*. at 108–09 (quoting S.Rep. No. 225, 98th Cong.2d Sess. 16, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3199). The Fifth Circuit concluded that the district court could set a secured money bail amount beyond the defendant's ability to pay, but "[i]n such an instance, the court must explain its reasons for concluding that the particular financial requirement is a necessary part of the conditions for release. It is sufficient for the court to find by a preponderance of evidence that the defendant poses a serious risk of flight." *Id*. at 110. When federal bail functions as an order of detention because of the defendant's inability to pay, the court must treat the bail as an order of detention under

§ 3142(e) and must provide the procedural protections that section requires, with a preponderance-of-the-evidence standard. *See also United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991) ("once a court finds itself in this situation—insisting on terms in a 'release' order that will cause the defendant to be detained pending trial—it must satisfy the procedural requirements for a valid *detention* order").

**4. Bail under Texas Law**

The Texas state appellate court practice is similar to federal court practice. Texas courts have imposed or confirmed high money bail after a judicial officer holds an adversarial hearing, with defense counsel present, and issues a reasoned opinion with written findings permitting secured money bail despite inability to pay in felony cases in which pretrial preventive detention without bail is available under Article I, § 11 of the Texas Constitution. *See, e.g.*, *Jobe v. State*, 482 S.W.3d 300 (Tex. App.—Eastland 2016) (charge of capital murder); *Ex parte Ragston*, 422 S.W.3d 904 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (capital murder, first-degree murder, and aggravated robbery); *Ex parte Vasquez*, 558 S.W.2d 477 (Tex. Cr. App. 1977) (capital murder). In cases in which preventive detention is not available, Texas appellate courts have confirmed high money bail in felony cases when the evidence did not show the defendant's inability to pay. *See, e.g.*, *Ex parte Dupuy*, 498 S.W.3d 220, 233 (Tex. App.—Houston [14th Dist.] 2016, no pet.) ("Appellant offered no evidence, and we see none in the record, suggesting the trial court set his bail at $200,000 for each case in order to keep him incarcerated."); *Cooley v. State*, 232 S.W.3d 228, 235 (Tex. App.—Houston [1st Dist.] 2007) ("Cooley owns half of a multi-million dollar air freight business and did not introduce evidence that revenues from it were unavailable to him."); *Ex parte Charlesworth*, 600 S.W.2d 316, 317 (Tex. Cr. App. 1980) (evidence showed the defendants "live

in a style inconsistent with poverty"); *Ex parte Welch*, 729 S.W.2d 306, 310 (Tex. App.—Dallas 1987, no pet.) (incomplete and conflicting evidence on ability to pay in a case charging solicitation of capital murder committed while the defendant was already on pretrial release on a secured money bail).

In a narrow set of felony cases, Texas courts have imposed or confirmed high money bail despite evidence of inability to pay the amount needed for pretrial release. "When the offense is serious and involves aggravating factors that may result in a lengthy prison sentence," a higher money bail than the defendant can pay is permissible, but only after satisfying the same due process requirements as an actual detention order. *Dupuy*, 498 S.W.3d at 230; *see, e.g.*, *Maldonado v. State*, 999 S.W.2d 91 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) (charges of possessing cocaine with a street value of $11–72 million with a possible sentence of 99 years); *Ex parte Miller*, 631 S.W.825 (Tex. App.—Ft. Worth 1982) (charges of murder and rape carrying life sentence); *Ex parte Runo*, 535 S.W.2d 188 (Tex. Cr. App. 1976) (bail set at $125,000 on a charge carrying a life sentence was not excessive, but bail set at $75,000 on a charge carrying a minimum two-year sentence was excessive and had to be reduced to $5,000). Even so, Texas courts are careful to distinguish between transparent pretrial preventive detention orders and de facto pretrial detention orders imposed by setting bail higher than the defendant can pay. *See, e.g.*, *Dupuy*, 498 S.W.3d at 230; *Ex parte Harris*, 733 S.W.2d 712, 714 (Tex. App.—Austin 1987, no pet.) (setting bail "on the obvious assumption that appellant could not afford bail in that amount and for the express purpose of forcing [the defendant] to remain incarcerated" was overturned for abuse of discretion); *Ex parte Nimnicht*, 467 S.W.3d 64, 70 (Tex. App.—San Antonio 2015) ("There is no evidence the trial court set bail with the intent to prolong Nimnicht's incarceration, especially in light of the fact the trial

court reduced the bail amount.").[12]

The defendants argue that, while Texas law forbids setting bail higher than a defendant can pay in order to impose a de facto pretrial detention order, if a judicial officer weighs all five factors of Article 17.15 of the Texas Code of Criminal Procedure and then imposes a bail amount that an indigent arrestee cannot pay, the bail is not a de facto detention order. (*See, e.g.*, Docket Entry No. 164 at 8–10, 18; No. 263 at 3–4; No. 266 at 7–8). The defendants overstate the Article 17.15 factors and their role. The Texas cases make clear that a judge may arrive at a bail amount that a defendant cannot pay when the defendant is facing a felony charge carrying an extended prison sentence. Even then, the bail setting requires an adversarial, counseled hearing at which the defendant can put on evidence of indigence and likelihood of compliance with nonfinancial conditions of release, and reviewable findings, stated on the record, that the secured financial condition is reasonably necessary to assure the defendant's appearance at trial or law-abiding conduct.[13] In misdemeanor cases, pretrial

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[12] The unpublished, nonprecedential Texas cases the defendants cite are all along the same lines. The cases involve felony charges, most of them first-degree felonies. In each, the appellate court found that: the evidence did not support a finding of indigence; *see, e.g.*, *Ex parte Murray*, 2013 WL 5425312 (Tex. App.—Ft. Worth 2013, no pet.) (defendant's father owned several rental properties and did not disclose whether collateral would be available for bond); *Ex parte Cleveland*, 1997 WL 451601 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd) (defendant had $200,000 in stocks and had filed a motion to unfreeze the assets to meet a bail of $200,000); *In re Flores*, 2003 WL 22682520 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (testimony from a bail bondsman insufficient to establish inability to pay); *Lawhon v. State*, 2015 WL 7424763 (Tex. App.—Austin 2015, no pet.) (testimony from defendant's mother did not establish whether defendant could pay the bail or not); or the fact of indigence was outweighed because the case charged either capital murder or multiple serious felonies, for which preventive detention was available; *see, e.g.*, *Ex parte Tomlinson*, 2002 WL 31008642 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *Smith v. State*, 2001 WL 421236 (Tex. App.—Houston [14th Dist. 2001, no pet.); *Peterson v. State*, 1993 WL 406758 (Tex. App.—Houston [14th Dist.] 1993, no pet.); or bail was irrelevant because the defendant was held for a probation violation; *see, e.g.*, *Ex parte Abdullah*, 2011 WL 2226153 (Tex. App.—Texarkana 2011, pet ref'd). In each case, the defendant was provided an adversarial hearing with the opportunity to present evidence and contest the State's evidence. And in many cases, the trial court lowered the initial bail amount after making specific findings on the balance of the state-law factors. *See, e.g.*, *Abdullah*, *Cleveland*, *Flores*, and *Lawhon*, *supra*.

[13] The Texas cases do not specify the evidentiary standard for bail-setting hearings. The burden of proof is on a defendant who claims bail is excessive. *Ex parte Rubac*, 611 S.W.2d 848, 849 (Tex. Crim. App.

preventive detention is permitted only when a defendant is facing a family violence charge after previously violating a release condition in an earlier family violence case. In those cases, it is not necessary to use secured money bail to effect the detention of those who cannot pay. The Texas Constitution permits a transparent order of pretrial preventive detention.

**5. Recent Distinctions Drawn Between Bail and Preventive Detention**

*a. Washington, D.C.*

In 1994, Washington, D.C. amended its Code using language substantially similar to the federal Bail Reform Act. The amended Code permits a judicial officer to set "a financial condition to reasonably assure the defendant's presence at all court proceedings that does not result in the preventive detention of the person, except as provided in" the Code's regulations of preventive pretrial detention orders. D.C. CODE § 23-1321(c)(3). The Code permits preventive detention only in cases involving a charge of violent or dangerous crime, as well as in cases presenting a "serious risk that the person will flee." *Id.* § 23-1322(b)(1). To order preventive detention, a judge must: hold a hearing at the first appearance of the defendant before a judicial officer; appoint counsel for the defendant; permit the defendant to put on evidence, testify, and call witnesses; and make written findings "by clear and convincing evidence that no condition or combination of conditions will reasonably assure the appearance of the person as required, and the safety of any other person and the community." *Id.* § 23-1322(b)(2)–(d)(7).

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1981); *Ex parte Martinez–Velasco*, 666 S.W.2d 613, 614 (Tex. App.—Houston [1st Dist.] 1984, no pet.). In reviewing a trial court's ruling for an abuse of discretion, an appellate court will not intercede as long as the trial court's ruling is at least within the zone of reasonable disagreement. *Ex parte Beard*, 92 S.W.3d 566, 573 (Tex. App.—Austin 2002, pet. ref'd) (citing *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990)). But an abuse-of-discretion review requires more of the appellate court than simply deciding that the trial court did not rule arbitrarily or capriciously. *Beard*, 92 S.W.3d at 573; *Montgomery*, 810 S.W.2d at 392. The appellate court must instead measure the trial court's ruling against the relevant criteria by which the ruling was made. *Id.*

Judge Truman Morrison of the D.C. Superior Court credibly testified at the motion hearing that until the 1994 amendment, the D.C. courts did not order preventive detention outright. The statutory prohibition on using secured money bail to assure community safety was also "a dead letter." Hearing Tr. 2-2:137. "So in cases of any seriousness, judges made an effort nontransparently, never saying what they were doing out loud, to immobilize high-risk people—who they thought were high-risk people—with money bonds that they hoped would be beyond their reach." *Id*. Judge Morrison testified that after the 1994 rule change, "[f]or the high-risk people that we used to immobilize nontransparently, we turned to this preventive detention statute that was moldering on the bookshelf, and prosecutors and judges began using that for high-risk people." *Id*. at 2-2:139. For "somewhat serious misdemeanors who we had been keeping in the jail on lower levels of money bond," judges began to order alternative nonfinancial conditions of release with supervision provided by D.C.'s pretrial services agency. *Id.* at 2-2:139–40. Based on a recent report by that agency, Judge Morrison testified that although secured money bail is still available under the D.C. Code, such bail is almost never imposed in misdemeanor cases. Transparent preventive detention orders are issued in only about 1.5 percent of misdemeanor cases, and then only after counseled, adversary hearings with findings on the record that there are no less restrictive conditions that will assure the defendant's presence at trial or the safety of the community.[14] *Id*. at 2-2:149, 154; D.C. CODE § 23-1322(b)(2)–(d)(7).

[14] Judge Morrison testified that one exception in his past practice was to automatically impose a $500 bond on pretrial arrest warrants with the intent of revisiting conditions of release at a counseled first appearance hearing, generally held within 24 hours of arrest. Hearing Tr. 2-2:163–64. Judge Morrison credibly testified that his participation in this litigation has caused him to rethink the practice and petition the chief judge of the D.C. Superior Court to have the practice changed across the court system. *Id*. at 2-2:164.

*b. New Mexico*

In 2014, the New Mexico Supreme Court ruled that "[n]either the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release." *Brown*, 338 P.3d at 1292 (citing N.M. CONST. art. II, § 13—substantially the same language as TEX. CONST. art. I, § 11). The court explained that "[i]ntentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether." *Id*. The supreme court held that the trial court had abused its discretion by requiring secured money bail "solely on the basis of an accusation of a serious crime" and had failed to apply the New Mexico Code of Criminal Procedure requirement that trial courts impose the least restrictive bail and release conditions to reasonably assure a defendant's appearance and the public's safety. *Id*. at 1291–92.

In 2016, New Mexico voters codified the holding of *State v. Brown* in a constitutional amendment that passed with 87.2 percent of the vote.[15] The amendment provided that "[b]ail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. An appeal from an order denying bail shall be given preference over all other matters." Constitutional Amendment 1, New Mexico Senate Joint Resolution 1, March 1, 2016.[16] The amendment also required that "[a] person who is not detainable on grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money

[15] Official Results of the November 8, 2016 General Election, New Mexico Secretary of State, *available at* http://electionresults.sos.state.nm.us/resultsSW.aspx?type=SW&map=CTY.

[16] *Available at* http://www.sos.state.nm.us/uploads/files/CA1-SJM1-2016.pdf.

or property bond." *Id.* Under the amendment, courts cannot order preventive detention for misdemeanor arrestees or accomplish the same effect by setting a secured money bail that an indigent defendant cannot pay.

*c. New Jersey*

New Jersey recently amended its constitution and statutes to enact statewide bail reforms. The changes went into effect on January 1, 2017. The New Jersey Constitution now provides that "[p]retrial release may be denied to a person if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person's appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process." N.J. CONST. art. 1, § 11.

In a detailed law-enforcement directive, the New Jersey Attorney General concluded that under New Jersey's prior practice, "in most cases the critical determination whether a defendant [was] released pending trial or instead incarcerated in a county jail [was] not made by a judge issuing a well-reasoned court order. Rather, for all practical purposes, defendants [were] released or detained based on whether they happen[ed] to have the financial means to post bail." N.J. Attorney General Law Enforcement Directive No. 2016-6 at 9. New Jersey changed. Its current system creates a presumption against the use of secured money bail unless the prosecutor can show that "no non-monetary release condition or combination of conditions would be sufficient to reasonably assure the defendant's appearance in court when required"; "the defendant is reasonably believed to have financial assets that will allow him or her to post monetary bail in the amount requested by the prosecutor without having to purchase a bond from a surety company or to obtain a loan"; and

"imposition of monetary bail set at the amount requested would . . . make it unnecessary for the prosecutor to seek pretrial detention." *Id.* at 56. Secured money bail cannot be used to achieve or to have the effect of a pretrial detention order. Out of 3,382 cases filed in the first month under the new law, judges imposed transparent orders of pretrial detention in 283 cases and denied pretrial detention when requested to do so in 223 cases. Secured money bail was set in only 3 cases. Pls. Ex. 7(k) at 1.

New Jersey does not distinguish between felony and misdemeanor cases but between numbered "categories" of offenses, making comparisons to the Texas misdemeanor bail system difficult. The New Jersey numbers are for all case categories. *Id.* Because this approach clearly applies to more serious felony-level cases, the basis for applying it to misdemeanor cases is even stronger.

*d. New Orleans*

On January 12, 2017, the Council of the City of New Orleans, where the municipal courts have jurisdiction only over misdemeanor cases, passed a measure reforming its bail ordinance. Pls. Ex. 12(tt). The preamble states that "incarcerating people solely due to their inability to pay for their release through the payment of cash bond violates the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 1 (citing *Barnett v. Hopper*, 548 F.2d 550, 554 (5th Cir. 1977). The new ordinance requires that except for four enumerated offenses—battery, possession of weapons, impersonating a peace officer, and domestic violence—all misdemeanor arrestees are to be released on personal recognizance. *Id.* at 2–3. For those charged with one of the enumerated offenses, the municipal courts must "impose the least restrictive non-financial release conditions." *Id.* at 3. "For any person who qualifies for indigent defense, or does not have the present ability to pay, the Court

may not set" any financial condition of release or a nonfinancial condition of release "that requires fees or costs to be paid by the defendant." *Id*. Other than the four specific exceptions for offenses that involve violence or other public safety threats, all defendants must be released with no financial conditions. If a financial condition is imposed, the defendant must have "the present ability to pay the amount set." *Id*.

*e. Maryland*

On February 17, 2017, the Maryland Court of Appeals adopted detailed changes to its court rules, the main source of criminal procedural law in Maryland. The rule changes will take effect on July 1, 2017. Pls. Ex. 12(p)(i), Court of Appeals of Maryland, Rules Order, Feb. 17, 2017 at 3. The rule changes are "designed to promote the release of defendants on their own recognizance or, when necessary, unsecured bond" by establishing a "[p]reference" for "additional conditions [of release] without financial terms." *Id*. at 33. All defendants—both felony and misdemeanor—must be released on personal recognizance or unsecured bond unless a judicial officer makes written findings on the record "that no permissible non-financial condition attached to a release will reasonably ensure (A) the appearance of the defendant, and (B) the safety of each alleged victim, other persons, or the community." *Id*. at 35. Even in those circumstances, the new rules require that "[a] judicial officer may not impose a special condition of release with financial terms in form or amount that results in the pretrial detention of the defendant solely because the defendant is financially incapable of meeting that condition." *Id*. at 39. Pretrial detention must not be the intended use or the incidental effect of secured money bail.

Before the rule change, the Maryland Attorney General wrote to the rules committee chairman that "[a]lthough Maryland law permits unconditional pretrial detention only where no

conditions of release will reasonably protect the public or ensure the defendant's appearance at trial, nearly every evaluation of Maryland's pretrial system has found no relationship between a pretrial detainee's perceived risk and the bond amount set. . . . Lower risk defendants are detained because they cannot afford the bail, while higher risk defendants who have access to financial resources are able to make bail and are often permitted to do so without imposition of other conditions to protect the public." Pls. Ex. 12(p) at 3 (citing reports). An advisory memo from the then United States Attorney General stated that "[a]s a general proposition, Maryland's judicial officials . . . do not properly and consistently consider defendants' individual circumstances, and particularly their financial resources, in making bail determinations. As a result, arrestees in Maryland habitually face extended periods of pretrial detention not as a result of their dangerousness to the community or because they pose a substantial risk of flight, but solely because they are unable to pay bail." Pls. Ex. 12(p)(ii) at 7. The memo concluded that this system, and those like it, violated both state law and the federal Constitution. *Id*. at 4–11.

*f. Alabama*

Some of the same lawyers representing the plaintiffs in this case have brought similar actions challenging bail systems around the country. Several actions were resolved with an agreed final judgment. These judgments typically state that "[i]f the government offers release from custody after arrest upon the deposit of money pursuant to a bail schedule, it cannot deny release from custody to a person, without a hearing regarding the person's indigence and the sufficiency of the bail setting, because the person is unable to deposit the amount specified by the schedule." *Jones v. City of Clanton, Alabama*, Civil No. 15-34, 2015 WL 5387219 at *4 (M.D. Ala. Sep. 14, 2015) (citing *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978); *Bearden v. Georgia*, 461 U.S. 660 (1983); *State*

*v. Blake*, 642 So.2d 959 (Ala. 1994)); *see also Jenkins v. City of Jennings*, Civil No. 15-252 (E.D. Mo. Dec. 14, 2016); *Bell v. City of Jackson*, Civil No. 15-252 (E.D. Mo. June 20, 2016); *Thompson v. Moss Point*, Civil No. 15-182 (S.D. Miss. Nov. 6, 2015); *Snow v. Lambert*, Civil No. 15-567 (M.D. La. Aug. 27, 2015); *Cooper v. City of Dothan*, Civil No. 15-425 (M.D. Ala. June 18, 2015); *Pierce v. City of Velda*, Civil No. 15-570 (E.D. Mo. June 3, 2015). In *Jones*, the court independently confirmed the need for relief, reasoning that "[b]ail schemes such as the one formerly enforced in the municipal court result in the unnecessary pretrial detention of people whom our system of justice presumes to be innocent," and that "[c]riminal defendants, presumed innocent, must not be confined in jail merely because they are poor." *Jones*, 2015 WL 5387219 at *3.

The U.S. Department of Justice filed a statement of interest in *Jones*, stating that "[i]ncarcerating individuals solely because of their inability to pay for their release, whether through the payment of fines, fees, or a cash bond, violates the Equal Protection Clause of the Fourteenth Amendment."[17] *See Varden v. City of Clanton, Alabama*, Civil No. 15-34, Docket Entry No. 26 at 1 (M.D. Ala. Feb. 13, 2015). The Justice Department reasoned that because rigidly adhering to a secured money bail schedule "do[es] not account for individual circumstances of the accused, [it] essentially mandate[s] pretrial detention for anyone who is too poor to pay the predetermined fee. This amounts to mandating pretrial detention only for the indigent." *Id*. at 9. After *Jones*, fifty of Alabama's largest cities, accounting for 40 percent of the population, voluntarily reformed their bail systems to either release misdemeanor defendants on personal recognizance or, at a minimum, to set

[17] The following year, the Justice Department issued a "Dear Colleague Letter" advising state and local courts that due process and equal protection principles forbid using "bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release." Letter from Vanita Gupta to Colleagues at 2 (Mar. 14, 2016), *available at* https://www.justice.gov/crt/file/832461/download.

an early hearing to consider alternative methods of release to secured money bail. Pls. Ex. 12(l).

*g. Calhoun, Georgia*

Some of the plaintiffs' counsel also represented the plaintiffs in *Walker v. City of Calhoun, Georgia*, Civil No. 15-170, 2016 WL 361612 (N.D. Ga. Jan. 28, 2016). A putative class of misdemeanor arrestees alleged that Calhoun detained them on prescheduled amounts of secured money bail that were not reviewed except at court sessions held each Monday. *Id*. at *1. The trial court granted the plaintiffs' motion for a preliminary injunction, finding that "keeping individuals in jail solely because they cannot pay for their release, whether via fines, fees, or a cash bond, is impermissible." *Id*. at *10 (citations omitted). The court ordered Calhoun to "implement postarrest procedures that comply with the Constitution," and directed that "until Defendant implements lawful postarrest procedures, Defendant must release any other misdemeanor arrestees in its custody, or who come into its custody, on their own recognizance or on unsecured bond in a manner otherwise consistent with state and federal law and with standard booking procedures." *Id*. at *14. The Eleventh Circuit vacated the injunction because requiring the defendant to implement constitutional procedures was "the archetypical and unenforceable 'obey the law' injunction" forbidden by Federal Rule of Civil Procedure 65. *Walker v. City of Calhoun, Georgia*, — F.App'x —, 2017 WL 929750 at *2 (11th Cir. Mar. 9, 2017). The panel did not consider the merits, instead remanding for the district court to enter a specific order consistent with Rule 65. *See id*.

*Walker* attracted significant attention. Ten amicus briefs were filed, including by the American Bar Association, the U.S. Department of Justice, the Pretrial Justice Institute and National Association of Pretrial Services Agencies, the Cato Institute, and various representatives of bail bonds associations, Georgia law-enforcement personnel, and other municipalities and their insurers.

The relevant amicus briefs are included in the record here.

The American Bar Association's amicus brief in *Walker* argued that "[m]onetary conditions of release should never be drawn from an inflexible schedule, should be imposed only after consideration of the defendant's individual circumstances, and should never prevent the defendant's release solely because the defendant is unable to pay." Pls. Ex. 12(ff) at 12. The Third Edition of the *ABA Standards for Criminal Justice, Pretrial Release* (3d ed. 2007), recommend "procedures designed to promote the release of defendants on their own recognizance or, when necessary, unsecured bond." Standard 10-1.4(a). Jurisdictions should impose financial conditions only "when no other conditions will ensure appearance," and financial conditions "should not be employed to respond to concerns for public safety." Standard 10-1.(4c)–(d). The *Standards* also emphasize that "[t]he judicial officer should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay." Standard 10-1.4(e).

The American Bar Association's brief emphasizes that "[u]nwarranted pretrial detention infringes on defendants' constitutional rights, 'making it difficult for the defendant to consult with counsel, locate witnesses, and gather evidence' and placing a particularly heavy burden on 'poor defendants and on racial and cultural minorities.'" Pls. Ex. 12(ff) at 14 (quoting *Standards* at 32–33). The commentary to the *Standards* states that "[i]f the court finds that unsecured bond is not sufficient, it may require the defendant to post bail; however, *the bail amount must be within the reach of the defendant* and should not be at an amount greater than necessary to assure the defendant's appearance in court." *Id*. (quoting with emphasis *Standards* at 43–44). The brief concludes that detaining a defendant solely for failure to pay a secured financial condition of release is unwarranted and unconstitutional. *Id*.

The Justice Department's brief expanded the statement of interest it submitted in the *Jones* Alabama bail case. The brief reasoned that, based on Supreme Court precedent, "[i]f a court finds that no other conditions may reasonably assure an individual's appearance at trial, financial conditions may be constitutionally imposed—but 'bail must be set by a court at a sum designed to ensure that goal, and *no more*.'" Pls. Ex. 12(dd) at 18 (quoting with emphasis *Salerno*, 481 U.S. at 754). "Although the imposition of bail in such circumstances may result in a person's incarceration," the Department explained, "the deprivation of liberty in such circumstances is not based *solely* on inability to pay." *Id*. But adhering to "fixed bail schedules that allow for the pretrial release of only those who can pay, without accounting for ability to pay and alternative methods of assuring future appearance, do not provide for such individualized determinations, and therefore unlawfully discriminate based on indigence." *Id*.

The Justice Department's argument is stated less strongly than the American Bar Association's. While the American Bar Association argues that defendants must not be detained solely because of their inability to pay secured money bail, the Justice Department interprets "solely" to exclude those who cannot pay a secured money bail because it has been set beyond their reach due to their risk of flight. *See id*. Both arguments are consistent with the reforms surveyed above. Some jurisdictions, such as Washington, D.C., New Mexico, New Jersey, and New Orleans, do not permit secured money bail settings to result in pretrial detention or operate as de facto pretrial preventive detention orders in misdemeanor cases, in line with the American Bar Association's recommendations. Others, such as Maryland and Alabama, permit secured money bail to have the effect of detention only if the court follows the procedures required for pretrial preventive detention, in line with the Justice Department's argument. In those cases, a judicial officer must make written

findings after an adversarial, counseled hearing that secured money bail in the amount set is the only, or the least restrictive, condition that can reasonably assure the defendant's appearance at trial.

The Pretrial Justice Institute and the National Association of Pretrial Services Agencies submitted a brief in *Walker* using empirical data to argue that secured money bail, as opposed to an unsecured appearance bond, is never the only reasonable condition that will assure an individual's appearance at trial or community safety. Pls. Ex. 12(hh). The brief presented data showing that those released on secured money bail do not appear at greater rates or commit new crimes at lower rates than those released on unsecured bonds. *Id*. Secured money bail schedules can effectively increase rates of appearance when they operate as detention orders, but "the use of such schedules inevitably leads to the detention of some persons who pose little threat to public safety, but are too poor to afford release, while releasing others that pose a higher safety risk (but can afford to post bond)." *Id*. at 25.

*h. Conclusion*

In addition to the policy changes that a number of jurisdictions have already implemented or are in the process of implementing, even more jurisdictions have announced that they are examining or are about to reform their bail systems.[18] A common theme among these reformed and reforming jurisdictions is that, before recent rule changes, each jurisdiction as a matter of routine practice either intentionally used or indifferently permitted the use of secured money bail as de facto detention orders against those financially unable to pay. *See, e.g.*, *Brown*, 338 P.3d at 1292 ("We

[18] *See, e.g.*, Arizona Supreme Court, *Justice for All: Report and Recommendations of the Task Force on Fair Justice for All: Court-Ordered Fines, Penalties, Fees, and Pretrial Release Policies* (Oct. 31, 2016), *available at* Pls. Ex. 12(vv); Utah Auditor General, *A Performance Audit of Utah's Monetary Bail System* (Jan. 2017), *available at* Pls. Ex. 12(uu); *see also* "Foxx agrees to release of inmates unable to post bonds of up to $1,000 cash," *Chicago Tribune*, Mar. 1, 2017; "Committee Announces Sweeping Code Reforms, Changes to Bail," *Delaware Law Weekly*, Mar. 22, 2017.

understand that this case may not be an isolated instance and that other judges may be imposing bonds based solely on the nature of the charged offense without regard to individual determinations of flight risk or continued danger to the community."); Pls. Ex. 12(p); Hearing Tr. 2-2:137. The other theme is that this practice did not hold up to historical, empirical, political, or legal scrutiny.

Whether by legislative enactment, judicial rulemaking, or court order, there is a clear and growing movement against using secured money bail to achieve a misdemeanor arrestee's continued detention. Of course, it is not a federal court's role in any way to make policy judgments. *See, e.g.*, *Brown v. Plata*, 563 U.S. 493 at 537–38 (2011). The question this case presents is not what is the best or even a good bail policy. The question is what bail system the Constitution requires and what system it prohibits. The Constitution sets minimum standards of due process and protects basic rights such as the presumption of innocence and the ability to prepare for trial. State and local governments may add to, but may not detract from, these basic protections. *See, e.g.*, *Gerstein*, 420 U.S. at 124. The question is whether Harris County meets the constitutionally minimum standards and procedures.

### D. The Use of Bail in Harris County Misdemeanor Pretrial Detention

#### 1. The Statutory Framework

The Texas Code of Criminal Procedure defines "bail" as "the security given by the accused that he will appear and answer before the proper court the accusation brought against him, and includes a bail bond or a personal bond." TEX. CODE CRIM. PRO. art. 17.01. Except for certain types of felonies, "a magistrate may, in the magistrate's discretion, release the defendant on his personal bond without sureties or other security."[19] *Id*. art. 17.03(a). A personal bond requires the defendant

[19] Felony defendants may be released on personal bond only by the "court before whom the case is pending." TEX. CODE CRIM. PRO. art. 17.03(b). The Texas Code of Criminal Procedure designates the

to swear an oath that if he or she fails to appear, the principal sum the court sets becomes due. *Id*. art. 17.04. The magistrate granting a personal bond may assess a nonrefundable bond fee "of $20 or three percent of the amount of the bail fixed for the accused, whichever is greater." *Id*. art. 17.42, § 4(a). Magistrates may postpone, reduce, or waive the fee. *Id*. art. 17.03(g).

Texas law does not facially provide for release on no financial conditions. The "personal bond" defined in Texas law differs from what other jurisdictions call a personal bond or a personal recognizance bond by requiring a principal sum that becomes due if the defendant fails to appear. *See, e.g.*, Goldfarb, *supra*, at 153–54 (personal recognizance in New York is release solely "on one's honor pending trial"); *Brown*, 338 P.3d at 1289 (distinguishing release on "personal recognizance" from release "upon the execution of an unsecured bond," which makes a sum due if the defendant fails to appear).[20]

The Texas Code of Criminal Procedure states that "[t]he amount of bail to be required in any case is to be regulated by the court, judges, magistrate or officer taking the bail; they are to be governed in the exercise of this discretion" by five rules:

1. The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with.

2. The power to require bail is not to be so used as to make it an instrument of

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Harris County Hearing Officers and County Criminal Court at Law Judges as magistrates. *Id*. art. 2.09.

[20] Texas's scheme points up a flaw in the amicus brief filed by the American Bail Coalition, the Professional Bondsmen of Texas, and the Professional Bondsmen of Harris County. (Docket Entry No. 182). The brief consistently and ahistorically assumes that references to "bail" always mean secured money bail with a monetary payment required up front as a condition of release. (*See id*. at 4–6). But in many instances, sureties would provide no payment unless the principal failed to appear—what many jurisdictions in modern parlance call an unsecured appearance bond (and what Texas calls a "personal bond" to indicate that the surety and principal are the same person). *See* Part I.C.1 *supra*. By assuming that all pretrial release must either be conditioned on secured money bail with an up-front financial payment or on no financial condition at all, the bondsmen's brief provides little relevant argument or evidence for this case in Texas, in which all release is on one sort of financial condition or another.

oppression.

3. The nature of the offense and the circumstances under which it was committed are to be considered.

4. The ability to make bail is to be regarded, and proof may be taken upon this point.

5. The future safety of a victim of the alleged offense and the community shall be considered.

TEX. CODE CRIM. PRO. art. 17.15.

In Harris County, "magistrates" include Hearing Officers and County Judges. *See id*. art. 2.09. In addition to a magistrate's discretion to issue a personal bond, the Texas Code of Criminal Procedure permits the arresting officer to release defendants accused of certain misdemeanors by citation only. *Id*. art. 14.06. The Code permits the arresting officer to cite-and-release those arrested for Class A or B misdemeanors for possessing small amounts of marijuana or certain other controlled substances, criminal mischief causing damage up to $2,500, graffiti, theft of property or service up to the value of $2,500, supplying contraband to prisoners, or driving without a license. *Id*. Major Patrick Dougherty testified that the Houston Police Department and Harris County follow the cite-and-release practice only for traffic-related Class C misdemeanor arrestees. Hearing Tr. 3-2:47–48 ("All Houston police officers basically book all their prisoners in the City Jail, regardless of whether it is a felony, misdemeanor or a Class C offense."), 52. The Harris County District Attorney has recently implemented a cite-and-release policy, as well as a diversionary program, for misdemeanor arrests for possessing small amounts of controlled substances. Hearing Tr. 3-2:178. Under the County's diversionary program, the District Attorney's office postpones charges for misdemeanor arrestees who agree to complete educational courses. These arrestees are not subjected to the booking and bail setting processes described below because

the District Attorney declines charges at that time. Hearing Tr. 4-1:21–22.

The Texas Government Code permits the County Judges to "adopt rules consistent with the Code of Criminal Procedure . . . for practice and procedure in the courts. A rule may be adopted by a two-thirds vote of the judges." TEX. GOV'T CODE ANN. § 75.403(f). At least three times since the beginning of 2016, the Harris County Criminal Courts at Law Judges, sitting en banc and voting by two-thirds majority, adopted or amended the Harris County Criminal Courts at Law Rules of Court.[21] The current version is the Rules of Court as amended on February 9, 2017. The Rules of Court contain a misdemeanor bail schedule, *id.* Rule 9, and provide that "[t]he initial bail amount may be changed on motion of the court, the hearing officer, or any party subject to the following criteria":

> 4.2.3.1.1. the bail shall be sufficiently high to give reasonable assurance that the defendant will comply with the undertaking;
>
> 4.2.3.1.2. the nature of the offense for which probable cause has been found and the circumstances under which the offense was allegedly committed are to be considered, including both aggravating and mitigating factors for which there is reasonable ground to believe shown, if any;
>
> 4.2.3.1.3. the ability to make bail is to be regarded, and proof may be taken upon this point;
>
> 4.2.3.1.4. the future safety of the victim and the community may be considered, and if this is a factor, release to a third person should also be considered; and
>
> 4.2.3.1.5. the criminal law hearing officer shall also consider the employment history, residency, family affiliations, prior criminal record, previous court appearance performance, and any outstanding bonds of the accused.

*Id*. Rule 4.2.3. The County Rules of Court state that "all law enforcement officials in Harris County shall cause the pretrial detainees in their respective custody, who have been charged with a class A or class B misdemeanor, to be delivered to the criminal law hearing officer not later than 24 hours

[21] *See* Rules of Court, *as amended* March 7, 2016; Rules of Court, *as amended* August 12, 2016; Rules of Court, *as amended* February 9, 2017.

after arrest." *Id.* Rule 4.2.1.1. Misdemeanor defendants arrested without a warrant who are not given a probable cause hearing within 24 hours after arrest must be released on a personal bond of no more than $5,000 when the 24 hours have expired.[22] *See* TEX. CODE CRIM. PRO. art. 17.033; *Sanders v. City of Houston*, 543 F.Supp. 694, 705–06 (S.D. Tex. 1982); *Roberson v. Richardson*, Agreed Final Judgment, Civil No. 84-2974 (S.D. Tex. Nov. 25, 1987).[23]

At the 24-hour hearing, commonly referred to as the probable cause hearing, in addition to finding probable cause for the arrest, Hearing Officers are to "set the amount of bail required of the accused for release and shall determine the eligibility of the accused for release on personal bond, cash bond, surety bond, or other alternative to scheduled bail amounts, and shall issue a signed order remanding the defendant to the custody of the sheriff." Rules of Court 4.2.2.1.11. On August 12, 2016, the County Judges amended the County Rules of Court to provide that "personal bonds"—unsecured appearance bonds—"are favored" in twelve specific misdemeanor categories.[24] *Id*. Rule 12. Rule 12 lists five circumstances in which personal bonds "are disfavored," including when "the defendant has demonstrated a risk to reoffend or harm society" or "has previously failed to appear in court as instructed." *Id*.

The next step in the process is scheduling cases for arraignment, referred to as the "first appearance settings." Arrestees released on secured money bail before booking are scheduled for

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[22] The detention is permitted to extend, regardless of whether bond has been set or paid, for an additional 48 hours if the charge is a crime of family violence, and if a magistrate issues written findings that the violence is likely to continue if the defendant is released. TEX. CODE CRIM. PRO. art. 17.29.

[23] The *Roberson* order is available at Def. Ex. 95.

[24] The twelve misdemeanors for which personal bonds are favored include: (1) theft by check; (2) driving with an invalid license; (3) gambling offenses; (4) illegal dumping; (5) fictitious vehicle license plate or registration; (6) prostitution; (7) violation of laws regulating sexually oriented businesses; (8) public intoxication; (9) driving without a license; (10) class B criminal trespass; (11) class B retail theft; (12) possessing marijuana or certain other controlled substances. Rules of Court, Rule 12.

arraignment one week from the day of their arrests (or on a Friday if the arrest was over a weekend). *Id*. Rule 4.1.2. Those released on a personal bond are scheduled for arraignment the same day, or the next business day if released after 9:00 a.m. *Id.* Rule 4.1.4. Those booked into the County Jail who request counsel are scheduled for arraignment the next business day, when counsel may be appointed. *Id*. Rule 24.9.1.

On February 9, 2017, the County Judges amended the County Rules of Court to provide first appearance settings for all misdemeanor arrestees booked into the County Jail the next business day after booking, "regardless of whether the defendant has been released from custody." *Id*. Rule 4.1.2. At this first appearance, the County Judge must "review conditions of release, bail amount set, and personal bond decision and modify if good cause exists to do so." *Id*.

**2. Arrest and Booking**

According to the 2015 annual report of Harris County Pretrial Services, 50,947 people were arrested in Harris County on only Class A or Class B misdemeanor charges in 2015. Pls. 10(c), *2015 Pretrial Services Annual Report* at 8. In that year, 27.9 percent were arrested by the Harris County Sheriff's Office. The rest were arrested by other law-enforcement agencies, principally the Houston Police Department.[25] *Id*.

Major Dougherty testified based on his thirty-five years of service with the Houston Police Department that those arrested without a warrant by the City of Houston are taken to the City Jail, tested for drugs or alcohol if applicable, and fingerprinted. Hearing Tr. 3-2:48–49. Either at the site of the arrest or at the City Jail, the arresting office calls a District Attorney hotline that is staffed 24 hours a day by an Assistant District Attorney, who decides whether to accept the charge. *Id*. at 3-

[25] In 2016, 49,628 people were arrested on only Class A or B misdemeanor charges. (Docket Entry No. 290, Ex. 1 at 8). Of those, 28.2 percent were arrested by the Sheriff's Office. (*Id*.).

2:50–51. If the Assistant District Attorney declines the charge, the arrestee is promptly released. *Id*. at 3-2:50. If the charge is accepted, an officer prepares a District Attorney Intake Management System (DIMS) report and electronically forwards it to the District Attorney's office, where the formal charge is prepared. *Id*. at 3-2:48–49. Major Dougherty testified that by this point in the process, 1 to 3 hours have elapsed, depending on the time spent transporting arrestees from outlying areas of Houston to the City Jail. *Id*. at 3-2:49.

The District Attorney's office prepares a formal charging document and applies a secured money bail using the County Judges' bail schedule to set the amount. *Id*. at 3-2:51; *see* Rules of Court 2.3. The scheduled bail amount is set based on the charge and the defendant's criminal history. *See* Rules of Court 9.1. The document is forwarded to the District Clerk's office, which assigns the case to a County Judge's court and sets a first-appearance date. Major Dougherty testified that the Clerk's assignment makes the case "paper-ready" and is completed about 12 to 16 hours after arrest. Hearing Tr. 3-2:52. Once the case is paper-ready, a misdemeanor defendant with access to enough money may pay the amount necessary for release and be promptly released from custody.[26] *Id*. at 3-2:54. A defendant may pay the entire bond amount into the registry of the court, to be refunded at case disposition if the defendant makes all scheduled appearances—a "cash bond." Or, and most often, the defendant pays a nonrefundable premium to a commercial bondsman, who

[26] If an Assistant District Attorney wants a misdemeanor defendant to be detained until a magistrate can set a bail amount, he or she will enter "88888888" as the bail amount. Hearing Tr. 2-1:100–01. While that is technically a bail amount that, if paid, would permit release, in practical effect it is a code indicating that the misdemeanor defendant should not be released until a magistrate can set bail and issue a protective order if necessary. *Id*. In 2015, bail was set under the 88888888 code in 4,059 cases—8.0 percent of all misdemeanor arrests. Pls. Ex. 10(c), *2015 Pretrial Services Annual Report* at 8. In 2016, the 88888888 code was used in 2,535 cases—5.1 percent of all misdemeanor arrests. (Docket Entry No. 290, Ex. 1 at 8).

posts the principal with the court—a "surety bond."[27] *See* Pls. 10(c), *2015 Pretrial Services Annual Report* at 9; 2-1:55–58.

Harris County Pretrial Services personnel have offices at the City Jail. Hearing Tr. 3-2:57, 59. Arrestees who have not bonded out at the earliest opportunity and who have not already been taken from the City to the County Jail have their interview with a Pretrial Services officer while at the City Jail. *Id*. at 3-2:56–58. Harris County Director of Pretrial Services Kelvin Banks testified that interviews typically take 15 to 20 minutes. *Id*. at 3-2:170. In the interview, Pretrial Services asks for the defendant's background information, including residence, employment, education level, and past criminal history. *See, e.g.*, Pls. Ex. 8(d). After the interview, Pretrial Services tries to verify the information by calling references and running internet searches. Hearing Tr. 3-2:171.

Before this suit was filed, an unwritten policy required Pretrial Services to obtain two verified references before a defendant could be released on a personal bond. (*See* Docket Entry No. 162 at 5; No. 166 at 10 n.13); *see also* Def. Ex. 52. In August 2016, the County Judges sent a letter to the Hearing Officers changing the policy to permit release on personal bond with only one verified reference. Def. Ex. 52. The verification requirement is not codified in the County Rules of Court or in State law. Until the August 2016 letter, the requirement appears to have been an unwritten policy promulgated by County Judges and enforced as a practice or custom by Hearing Officers and by Pretrial Services personnel.[28]

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[27] The court uses "secured money bail" or "secured financial conditions of release" to mean both surety bonds and cash bonds. Both are "secured" by having collateral paid up front before release, either by a bondsman (who charges a defendant a nonrefundable premium) or by the defendant (who can have the collateral refunded after case disposition). The court uses "unsecured or nonfinancial conditions" to mean personal bonds, with or without additional nonfinancial conditions of supervised release, such as GPS monitoring.

[28] The Pretrial Services verification requirement is an example of a policy systematically applied across the board as an unwritten practice or custom established by "multiple and overlapping authorities."

Pretrial Services officers complete a validated risk-assessment form, which uses a point-weighting system to itemize and evaluate the defendant's risk of flight or risk of new criminal activity during pretrial release. Hearing Tr. 3-2:172; Pls. Ex. 8(d). A risk-assessment tool is "validated" when its risk indicators have been empirically shown to reliably predict outcomes such as nonappearance or new criminal activity. Hearing Tr. 3-2:172.

The current risk-assessment tool that Harris County Pretrial Services uses assigns points to seventeen different risk indicators. *See, e.g.*, Pls. Ex. 8(d). Under "Criminal Risk Items," arrestees are given a point if the current charge involves a crime of violence, a point if the defendant is on probation, a point if the defendant is on parole, a point for a prior misdemeanor conviction and another point for multiple prior convictions, a point for a prior felony conviction and another point for multiple prior convictions, a point for a past failure to appear, and a point if the defendant has a formal "hold," such as an outstanding warrant from another jurisdiction. *See id*; Hearing Tr. 2-1:134–37.

Under "Background Risk Items," a defendant receives a point for being male, a point for lacking a high school diploma or GED, a point for not having a land line phone, a point for living with someone other than a spouse or family, a point for not owning an automobile, a point for lacking full-time employment, and a point for being under 30 years of age.[29] Hearing Tr. 2-1:134–37; *see generally* Pls. Ex. 8(d).

The point totals from both the Criminal Risk Items and Background Risk Items are added to

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*ODonnell*, 2016 WL 7337549 at *38. The County Judges' policy and practice support finding that the plaintiffs have sufficiently alleged and shown a local policymaker for the purposes of § 1983 liability. *See Monell v. Dept. of Social. Serv.*, 436 U.S. 658 (1978); *ODonnell*, 2016 WL 7337549 at *22–27.

[29] If the defendant is under 21 and has a prior juvenile adjudication, he or she is given a point under that category rather than the under-30 category. Pls. Ex. 8(d); Hearing Tr. 2-1:134–37.

reach a single score which is set on a risk scale. *Id*. Defendants with three points or fewer are scored as low risk, four to five points are scored as "low moderate risk," six to seven points are scored as moderate risk, and eight points or above are scored as high risk. *Id*. Criminal risk points are weighted the same way as background risk points. A 29-year-old man who works part-time and rents and apartment with a roommate, who does not own a car or a land line phone, but who has no criminal history would receive the same risk score as an older woman on probation who has multiple felony convictions, a past failure to appear, an outstanding warrant and a current charge involving a crime of violence. Both cases would be assigned at least six points and be categorized as "moderate" risk. *See id*. Mr. Banks testified that for defendants whose risk scores are increased because of the background factors that correlate with poverty rather than criminal activity, the standard Pretrial Services procedure is to recommend release on personal bond, notwithstanding the higher risk score. Hearing Tr. 4-1:55.

The collected information, verified references, risk-assessment score sheet, and the Pretrial Services recommendation for release are all gathered into a report and transmitted to a Hearing Officer for the defendant's probable cause hearing. *See generally* Pls. Ex. 8(d). Mr. Banks testified that currently, if Pretrial Services makes a recommendation, it recommends either that a Hearing Officer grant a personal (unsecured) bond with standard conditions (such as supervision by Pretrial Services), grant a personal (unsecured) bond with additional conditions (such as geographic restrictions), or "detain." *Id*. at 3-2:173. Mr. Banks explained that Pretrial Services makes a recommendation to "detain" misdemeanor arrestees with immigration or other warrant holds on their record. *Id*. at 3-2:173–75; 4-1:41–44. A recommended high bail setting is intended to keep arrestees detained to address the hold. *Id*. at 3-2:175; 4-1:41–42. But, as explained below, secured money

bail, if unpaid, prevents the defendant from addressing the hold or from being transferred to the agency imposing the hold, extending the overall time spent in custody.[30] Mr. Banks testified that Pretrial Services also recommends "detain" for "high risk" arrestees. *Id*. at 3-2:173–75; 4-1:41–44. Because Texas law prohibits pretrial preventive detention in most misdemeanor cases, a recommendation to "detain" is a recommendation to set a high secured bail in order to detain until a judicial officer considers the case or the case is terminated. *Id*. at 3-2:175; 4-1:41–42. A defendant who pays the bail is released, despite the "high risk" category and the recommendation to detain.

Pretrial Services does not directly ask defendants whether they can pay the bail amount set or what amount they could pay. Hearing Tr. 4-1:47. Mr. Banks testified that instead, Pretrial Services asks a "litany" of questions about a defendant's assets, income, and expenses. *Id*. at 4-1:48. Defendants sometimes refuse to be interviewed, and the record indicates that they may do so because they do not understand that the interview is non-adversarial and that providing responsive answers is the only way they can be released on nonfinancial conditions. Hearing Tr. 2-2:29–30; 3-2:125. Other defendants are confused by the questions. For instance, "Do you have a place to stay?" may be taken to mean "Can you afford rent or housing?" But it could also mean "Are you likely to leave the jurisdiction because you do not have a place to live here?" Answering the first question in the negative when the second question is the one asked can—and in Harris County does[31]—become the basis for detention rather than release on unsecured financial conditions. Hearing Tr. 2-2:12–13.

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[30] *See* Part I.E.4 *infra*.

[31] The example is drawn from a recorded probable cause hearing. Pls. Ex. 3, May 16, 2016, 6.46 at 14:40 (L. P.). After answering that she does not have a place to stay, the defendant learns that she could be released on an unsecured personal bond if she has a place to stay. The Hearing Officer cuts her off as she tries to explain that she does in fact have a place to stay but misinterpreted his earlier question. The Hearing Officer does not let her explain and confirms her bond at the prescheduled amount with the clear understanding that she will not be able to purchase her release on a secured basis. *Id*.

If Pretrial Services officers at the City Jail determines that an arrestee is a good candidate for release on personal bond, they may forward the interview papers to their counterparts at the County Jail for "early presentment" to a Hearing Officer. Hearing Tr. 3-2:182–83. The Hearing Officer may approve or deny release on personal bond using only the charging papers (the DIMS report) and interview papers prepared for the early presentment. *Id*. If the Hearing Officer approves release on personal bond, the arrestee can be released from the City Jail without being transported to or booked in the County Jail. *Id*. 3-2:57–58. Early presentment depends on the availability of Pretrial Services personnel. The record evidence clearly shows that early presentments are rare. In 2015, only 90 out of 21,748 Houston Police Department arrestees were released on personal bonds after early presentment.[32] Pls. Ex. 4(d), Second Rebuttal Report at 15; Pls. Ex. 10(c), *2015 Pretrial Services Annual Report* at 8.

Arrestees who do not pay for release or obtain release on personal bond by early presentment at the City Jail are taken to and booked in the Harris County Jail. Hearing Tr. 3-2:65. Transport buses run every two hours, but Major Dougherty testified that capacity limits at the County Jail Inmate Processing Center create significant delays. These limits prevent paper-ready misdemeanor arrestees from being transported to the County Jail on the next available bus. *Id*. at 3-2:67–68. Because the Inmate Processing Center is the only holding facility for County arrestees, they are given priority over arrestees waiting for transport from the City Jail, which adds to the delays. *Id*. at 3-2:69–70.

Major Dougherty testified that those arrested without a warrant by the County are taken either

[32] In 2016, the number of those released on a personal bond instead of transported to and booked in the County Jail rose to 240. Pls. Ex. 4(d), Second Rebuttal Report at 15). The total number of misdemeanor arrestees by the Houston Police Department in 2016 was 21,274. (Docket Entry No. 290, Ex. 1 at 8).

directly to the County Jail or to one of four outlying County detention centers, with transport to the County Jail within 4 hours. *Id*. at 3-2:54–55. Once at the County Jail, County arrestees go through the same process as City arrestees—they are charged, fingerprinted, drug and alcohol tested, and interviewed by Pretrial Services in the Inmate Processing Center next to the Jail. *Id*. at 3-2:84–85. The Inmate Processing Center runs 24 hours a day, 7 days a week. The booking process takes between 8 and 12 hours. *Id*. at 2-1:38. Booking at the County Jail relies on a paper, rather than an electronic, system. *Id*. at 3-2:85. Arrestees with the financial means to do so may pay their money bonds or a bondsman's premium while still in the Inmate Processing Center and be released, usually within 12 to 15 hours of arrest. *Id*. While in the Processing Center, arrestees do not have access to counsel or family members. *Id*. at 2-1:43. Those who do not pay their secured money bonds while in the Processing Center are assigned and transferred to a housing unit in the County Jail. *Id*.

About 7 percent of misdemeanor arrests annually are arrested after a warrant has issued. Pls. Ex. 10(c), *2015 Pretrial Services Annual Report* at 8; (*see also* Docket Entry No. 290, Ex. 1 at 8). When Harris County magistrates—Hearing Officers or County Judges—issue warrants, they affix the prescheduled secured money bail amount to the warrant. Hearing Tr. 2-1:216–17; 3-2:55; 8-2:108. Misdemeanor defendants with access to money can pay the secured amount or a bondsman's premium and be processed without being arrested. *Id*. Misdemeanor defendants who are arrested on a warrant but cannot pay are subject to the same procedures as warrantless arrests. *Id*. Although a magistrate has already found probable cause to issue the warrant, the Texas Code of Criminal Procedure requires each arrestee to appear before a magistrate to be informed of his or her rights and to request counsel. TEX. CODE CRIM. PRO. art. 15.17. What Harris County calls "probable cause hearings" fulfill the function of informing arrestees of their rights, finding probable cause for

warrantless arrests, and setting bail or, more often, confirming the prescheduled amount of bail on a secured basis.

### 3. The Probable Cause and Bail-Setting Hearing

The Hearing Officers hold probable cause hearings every 2 hours, 24 hours a day, 7 days a week. Hearing Tr. 4-1:160. Defendants arrested without a warrant who have completed processing at the Inmate Processing Center are put on the next available docket for a probable cause hearing. *Id*. at 2-1:93. Probable cause hearings are conducted by videolink connecting a Hearing Officer's courtroom, an Assistant District Attorney's office, and a large room in the County Jail. *See generally* Pls. Ex. 2. Up to forty-five arrestees may be adjudicated at a single probable cause hearing. Hearing Tr. 4-1:161. When an arrestee's case is called, the arrestee stands on a marked square in the center of the room and faces a screen showing the Hearing Officer and Assistant District Attorney. *See* Pls. Ex. 2. The hearings are recorded. *Id*.

Hearings typically last about one to two minutes per arrestee.[33] *See generally* Pls. Ex. 2. During this brief period, the Assistant District Attorney reads the charge, and the Hearing Officer determines probable cause and sets bail. *Id*. Hearing Officers have discretion to release arrestees on personal bond, to impose additional conditions of release (such as geographical restrictions), or to raise or lower the bail amount from the scheduled amount. *See* TEX. CODE CRIM. PRO. art. 17.03, 17.15, 17.40–44. For those misdemeanor arrestees who have not had their Pretrial Services papers given to a Hearing Officer for early presentment—the vast majority—the first setting is their earliest

[33] In their Exhibit 3, the plaintiffs have provided 121 videos of individual hearings, with lengths ranging from 20 to 28 seconds for in absentia hearings (D. N., J. H., J. L.) to nearly six minutes for a hearing that involved a lengthy recitation to enter a family violence protective order (J. P.). (A sixteen-minute hearing is an extreme outlier where the hearing was suspended while County personnel tended to a defendant in the background having a seizure (D. S.)). Of the 121 individual videos, 26 are under one minute, 98 are at or under two-and-a-half minutes, and 115 are at or under 4 minutes. Pls. Ex. 3.

opportunity to be considered for release on a personal bond. Hearing Tr. 2-1:45–46.

As noted, under Texas law, misdemeanor defendants arrested without a warrant must be released on an unsecured personal bond if a magistrate does not find probable cause within 24 hours of arrest. TEX. CODE CRIM. PRO. art. 17.033. The Houston City Jail is not equipped to provide videolink hearings and does not provide opportunities for live presentment to the Hearing Officers. Hearing Tr. 3-2:61–63. When the Inmate Processing Center at the County Jail is at capacity and arrestees cannot be transported promptly from the City Jail, those who have not paid and been released may wait at the City Jail more than 24 hours before they are transported to the County Jail and can have their probable cause and bail-setting hearing before a Hearing Officer. *Id*. at 4-1:9, 136. To avoid releasing these arrestees on unsecured personal bonds at the 24-hour time limit, the customary unwritten practice is to hold in absentia "paper hearings." *Id*. at 2-1:92–93. At a paper hearing, the Hearing Officer finds probable cause based on the DIMS report that the arresting officer prepared and that the Assistant District Attorney used to draw up the charge. *Id*. Pretrial Services forms are not made available at paper hearings. The DIMS report does not provide any of the defendant's financial information. Hearing Officers do not set bail or consider eligibility for unsecured personal bonds at paper hearings. *Id*. at 4-1:133–35.

Defendants almost never have counsel at the probable cause and bail-setting hearing. *See* Def. Ex. 23. Those who are indigent have not yet had counsel appointed. Those who can afford counsel have either paid their bonds and been released or have not been able to arrange their counsel's presence. *See id*. Both the Sheriff's deputies and the Hearing Officers instruct the defendants not to speak except to answer specific questions, lest they incriminate themselves. Hearing Tr. 4-1:178. Because the Hearing Officers are not judges of courts of record, they do not

make written findings or issue reasoned opinions explaining why they set bail on a secured or unsecured basis, or why they select the bail amount imposed. (Docket Entry No. 138 ¶ 72); Hearing Tr. 4-1:145. The video recordings show that Hearing Officers occasionally state that bail is set at a certain level or that a personal bond is denied "based on your priors" (see below). Hearing Officers occasionally make notes on the Pretrial Services forms, such as "Criminal History"; "Safety of Community"; or "Safety." *See* Pls. Ex. 9, e.g., (M. W.), (A. G.), (H. P.). These cryptic, one-to-three word notations are just that. They do not show that Hearing Officers weighed the statutory factors in setting bail, much less how they did so.

Chief Hearing Officer Blanca Villagomez testified that before granting an unsecured personal bond, she "look[s] at the five factors obviously that are set out in Article 17.15. I listen to the prosecutor and whatever allegations that led to their charge, secondly. I will look at all of the information that is available to me that is provided by Pretrial Services and reach a conclusion on that." Hearing Tr. 4-1:117. She testified that on occasion, based on the circumstances and the evidence presented, she has denied release on an unsecured personal bond to defendants who score low on the risk scale because she perceived a threat to public safety. On other occasions, she disregards a high risk score based on background resource factors, such as not owning a land line phone or a car. *Id*. at 4-1:126. Judge Villagomez testified that she does not reach a conclusion on whether secured money bail will operate as a condition of detention, but that she does realize that detention, rather than release, will be the outcome of setting secured money bail for indigent defendants more than "rare[ly]." *Id*. at 4-1:140–42. She nevertheless sets bail on a secured basis at the scheduled amounts in those cases. *Id*. She testified that she believes it is lawful under Texas law to require a secured money bail she knows a defendant cannot pay "if I have taken in all of the

factors in 17.15 into consideration because [ability to pay] is not the only one." *Id*. at 4-1:144–45.

Hearing Officer Eric Hagstette testified that he discounts high risk scores when they are based on background factors showing poverty rather than a history of nonappearance or criminal activity. *Id*. at 4-1:163–65. He did not disagree with Judge Villagomez's approach. He testified that the Hearing Officers "all go about our job pretty much the same way, do what we are statutorily required to do during these hearings and then make the decision with the information that is available and is presented at the hearing." *Id*. at 4-1:168–69. He explained that he does not impose secured money bail with an intent to detain but that "[t]he intent is to set a bond that is sufficiently high based on the factors I'm obligated to consider." *Id*. at 4-1:171. When asked how he would approach a defendant with no job, no income, no assets, and a history of failing to appear, for whom the scheduled bond amount would be $4,000, he testified that he would not release that defendant on an unsecured $4,000 bond because "[i]t depends again on the other factors being balanced." *Id*. at 4-1:172.

Judge Villagomez testified that she does not and cannot keep track of how many times she raises or lowers a bond, how often she rejects a Pretrial Services recommendation, or whether, and how often, defendants she releases on unsecured personal bonds fail to appear at hearings. *Id*. 4-1:126–27, 132, 150. Judge Hagstette testified that he raises and lowers bail amounts in roughly equal numbers—"I knock them down and I raise them up"—but he does not know how often those he releases on unsecured personal bonds fail to appear. *Id*. at 4-1:163, 167–68, 173.

The Pretrial Services Annual Report provides system-wide statistics on how often Hearing Officers implement or reject Pretrial Services recommendations. Pls. Ex. 10(c), *2015 Pretrial Services Annual Report* at 14. In 2015, for the 9,388 defendants for whom Pretrial Services

recommended release on unsecured personal bond with standard conditions of supervision, Hearing Officers denied a personal bond 56.3 percent of the time.[34] *Id*. In 1,831 cases, Hearing Officers granted release on unsecured personal bonds on the condition that Pretrial Services could verify the references. *Id*. The data do not show in how many cases that did or did not happen.[35] For the 4,816 defendants for whom Pretrial Services recommended release on personal bond with enhanced supervisory conditions, Hearing Officers denied a personal bond 84.8 percent of the time.[36] *Id*. For the 11,935 defendants for whom Pretrial Services made no recommendation, Hearing Officers denied a personal bond 96.9 percent of the time.[37] *Id*. For the 4,716 defendants for whom Pretrial Services recommended "detain" (15.3 percent of all defendants interviewed by Pretrial Services), Hearing

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[34] The report lists "total reports reviewed" as well as a higher number for "total cases reviewed," apparently reflecting the fact the some defendants (who receive only one recommendation) may have more than one charge pending (each of which is counted as a separate case outcome). Pls. Ex. 10(c), *2015 Pretrial Services Annual Report* at 14. The tables break down personal bond denials into several categories, including "PB denied," "PB denied, bond lowered," "PB denied, bond raised," "Reviewed, no action on personal bd," and so forth. *Id*. The percentages in the court's findings are based on dividing the total number of personal bond denials by the total number of cases.

In 2016, Hearing Officers rejected Pretrial Services recommendations for release on personal bond with standard conditions 50.4 percent of the time. (Docket Entry No. 290, Ex. 1 at 14).

[35] Pretrial Services does track the number of defendants granted a personal bond but not released from jail, which may indicate an inability to verify references. In 2015, 798 misdemeanor defendants were granted a personal bond but not released until case disposition or until they posted a secured money bail. Pls. Ex. 10(c) at 18. In 2016, the Hearing Officers followed Pretrial Services recommendations for granting a personal bond, but on the condition references could be verified, in 2,404 cases. That year, 685 misdemeanor defendants were granted a personal bond but not released until case disposition or until they posted a secured money bail. (Docket Entry No. 290, Ex. 1 at 14, 18).

[36] In 2016, for the 4,493 defendants for whom Pretrial Services recommended release on a personal bond with enhanced supervisory conditions, Hearing Officers denied a personal bond 78.9 percent of the time. (Docket Entry No. 290, Ex. 1 at 14).

[37] In 2016, for the 12,335 defendants for whom Pretrial Services made no recommendation, Hearing Officers denied a personal bond 95.9 percent of the time. (Docket Entry No. 290, Ex. 1 at 14).

Officers denied a personal bond 97.1 percent of the time.[38] *Id*. Overall, Hearing Officers reject Pretrial Services recommendations for release on a personal bond 66.3 percent of the time. *Id*. Pretrial Services acknowledges the wide discrepancy between what they recommend based on the County's validated risk-assessment tool and what the Hearing Officers order based on the preset bail schedule. The Frequently Asked Questions page on the Pretrial Services public website asks, "Why aren't there more Personal Bonds approved?" The answer: "Good question!"[39] Hearing Tr. 4-1:57.

Among all cases in which Pretrial Services interviewed the misdemeanor defendant, whether Hearing Officers granted release on secured or on unsecured financial conditions, the Hearing Officers lowered the bail amount from what was stated on the charging document in 7.2 percent of cases and raised the bail amount in 10.7 percent of cases.[40] Pls. Ex. 10(c), *2015 Pretrial Services Annual Report* at 14. In 2015, Hearing Officers lowered the amount below $500—the minimum amount on the bail schedule—in 4 cases, out of nearly 51,000 arrests with bail set.[41] *Id*. at 8. The plaintiffs' expert, Dr. Stephen Demuth, credibly testified that from the beginning of 2015 to the end of January 2017, Hearing Officers adhered to the prescheduled bail amount stated on the charging documents in 88.9 percent of all misdemeanor cases.[42] Pls. Ex. 4(d), Second Rebuttal Report at 10;

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[38] In 2016, for the 2,263 defendants for whom Pretrial Services recommended "detain," Hearing Officers denied a personal bond 96.2 percent of the time. (Docket Entry No. 290, Ex. 1 at 14).

[39] *Available at* https://pretrial.harriscountytx.gov/Pages/FAQs.aspx (last accessed April 24, 2017).

[40] Among all cases in which Pretrial Services interviewed the misdemeanor defendant in 2016, Hearing Officers lowered the bond from that posted on the charging document in 5.9 percent of cases and raised the bond amount in 9.2 percent of cases. (Docket Entry No. 290, Ex. 1 at 14). Altogether, the year-to-year rates hardly changed from the end of 2015 to the end of 2016.

[41] In 2016, Hearing Officers lowered the bail amount below $500 in 6 cases, out of nearly 50,000 arrests with bail set. (Docket Entry No. 290, Ex. 1 at 8).

[42] The defendants' expert, Dr. Robert Morris, disagrees. He found that Hearing Officers adhered to the prescheduled bail amount on the charging documents in 80.7 percent of all cases. Def. Ex. 28A at 4.

Hearing Tr. 6-2:119–21. When they do change the amount, they raise it about 67 percent of the time. *Id*.

Dr. Demuth presented credible evidence based on Harris County's administrative data that from January 2015 through January 2017, only 9.7 percent of all misdemeanor arrestees were granted release on an unsecured personal bond, with or without additional nonfinancial conditions. Pls. Ex. 8(d), Second Rebuttal Report at 9. That figure is consistent with the Pretrial Services annual reports, which show that 8.5 percent of misdemeanor arrestees were granted an unsecured personal bond in 2015, and 10.8 percent in 2016.[43] Pls. Ex. 10(c) at 9; (Docket Entry No. 290, Ex. 1 at 9). In 2015,

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His method for arriving at that number is not clear. His report states that the figure is based on a mislabeled defendants' exhibit showing bond activity only in January 2017. *See* Def. Ex. 28A at 4 (relying on Def. Ex. 36); Hearing Tr. 2-2:85 (Def. Ex. 36 mislabeled). At the hearing, he testified that he reviewed the underlying data set which covers the period from January 2015 through January 2017. Hearing Tr. 6-2:17–19. Dr. Demuth testified that he performed the same calculations on the underlying data as Dr. Morris but arrived at the higher figure. *Id*. at 6-2:119–21.

The 8-point difference in the experts' figures is not significant. Either way, Hearing Officers adhere to the bail schedule over 80 percent of the time—a high majority of cases. The inconsistencies between Dr. Morris's written report and his testimony leads the court to find that Dr. Demuth's calculation of 88.9 percent is the more reliable figure.

[43] The defendants argue that the relevant figure is that Hearing Officers granted personal bonds in over 25 percent of the cases they heard in November and December 2016, showing an increase in granting personal bonds based on recent rule changes dropping the number of verified references from two to one and presuming release on personal bonds in twelve categories of misdemeanor cases. (Docket Entry No. 286 at 9). The proper denominator, however, is the total number of misdemeanor cases. All misdemeanor defendants arrested by the City of Houston are eligible for early presentment to a Hearing Officer for release on personal bond. Under the forthcoming reforms, all misdemeanor defendants arrested by any agency in Harris County will be eligible for early presentment. *See* Part I.D.2 *supra*; Part I.H.2 *infra*. Even defendants who are released before their probable cause hearings without early presentment are effectively denied a personal bond by Pretrial Services and the Hearing Officers. In addition, under Fifth Circuit law, the payment of a secured money bail does not moot a claim that the bail amount, or the requirement of the bail on a secured basis, is unreasonable. *Simon v. Woodson*, 454 F.2d 161, 166 n.8 (5th Cir. 1972).

Even accepting the defendants' higher figure for grants of personal bonds, the same reports the defendants rely on show that personal bonds are almost never granted to misdemeanor arrestees scored as "high risk," including those whose risk scores are high because of poverty indicators like not owning a car or a land line phone. In 2015, of all personal bonds granted, only 2.9 percent were granted to arrestees scored as high risk and most likely unable to pay any secured bail because of indigence. Pls. Ex. 10(c) at 17. Over 72 percent of personal bonds were granted for low and low-moderate risk defendants who, at least as measured by the assessment tool, would have had more resources. *Id*. In 2016, the comparative figures were

46.1 percent of arrestees were released on a surety bond, 5.1 percent on a cash bond, and the remaining 40.3 percent were detained until case disposition. In 2016, the figures were nearly identical: 43.4 percent released on a surety bond, 5.6 percent on a cash bond, and 40.1 percent detained until case disposition. *Id*. Virtually all misdemeanor arrestees detained until disposition have a secured bail amount set that, if paid, would result in the prompt release of the arrestee. *See* Pls. Ex. 10(c) at 8; (Docket Entry No. 290, Ex. 1 at 8).

The court credits the Hearing Officers' testimony that they consider the Article 17.15 factors in some way. But their impressions about how frequently certain case outcomes occur is not reliable and not worthy of greater weight than the data presented in the Pretrial Services Annual Report. The Hearing Officers' testimony that they do not "know" whether imposing secured money bail will have the effect of detention in any given case, *e.g.*, Hearing Tr. 4-1:141, 4-2:16, and their testimony that they do not intend that secured money bail have that effect, is not credible. Other record evidence, including the Pretrial Services public reports; the high number and percentage of misdemeanor defendants detained rather than released because they are subject to secured money bail at the scheduled amount; the high number and percentage whose bail is set by the schedule rather than by an individualized inquiry; the infrequency of deviations from imposing the scheduled bail amount on a secured basis; and the video recordings of probable cause hearings, which consistently show an indifference as to whether pretrial detention will result from setting secured bail, all weigh heavily in favor of finding little to no credibility in the Hearing Officers' claims of careful case-by-case

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5.8 percent for high-risk defendants and 68.7 percent for low- and low-moderate-risk defendants. (Docket Entry No. 290, Ex. 1 at 17). These figures show that Hearing Officers are not granting personal bonds out of a consideration of inability to pay, as the defendants argue, but are instead systematically using secured money bail to address risk, even when the secured money bail operates to detain defendants who are scored as high-risk because of their indigence.

consideration under the *Roberson* order and the Article 17.15 factors.

This is not a personal criticism of any one or all of the Hearing Officers. To say that their job is difficult is a dramatic understatement. The sheer numbers of defendants the Hearing Officers confront on a daily basis makes individual consideration extraordinarily difficult. The absence of counsel adds to the difficulty. The Hearing Officers clearly work steadily and hard. They see a difficult population—including both misdemeanor and felony defendants—every day and all day. It is unsurprising that a system of virtually automatic adherence to a bail schedule has developed, given the large number of defendants, the small number of Hearing Officers, and the limited time for hearings.

The record contains 2,300 recordings of misdemeanor probable cause hearings before the Hearing Officers. The recordings begin in March 2016—before the lawsuit was filed—and continue through early November 2016. Pls. Ex. 2. The court has reviewed many hours of footage. The results are consistent and support this court's findings and conclusions. Two hearings are illustrative. The court chooses them not because they are extreme examples of any particular feature, but because they appear pretty ordinary. Neither hearing is procedurally unusual. The parties did not cite or play either one at the motion hearing.[44]

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[44] Unsurprisingly, both parties emphasized video recordings that were most favorable to their arguments. The plaintiffs, for instance, displayed one recording in which the Hearing Officer doubled a defendant's secured bail amount when the defendant answered "yeah" instead of "yes," a penalty clearly unrelated to the defendant's risk of nonappearance or of new criminal activity before trial. Pls. Ex. 3, May 14, 2016, 15.58 at 8:15, B. J.; *see also id*., May 21, 2016, 12.45 at 43:59, E. P. (Hearing Officer raises bond from $5,000 to $25,000 on a misdemeanor charge because the defendant answers "yeah" instead of "yes"). The plaintiffs highlight 121 recordings, pretty evenly distributed across the five defendant Hearing Officers. *See generally* Pls. Ex. 3.

The defendants highlight only 6 recordings, which show hearings before only two of the defendant Hearing Officers. *See* Def. Ex. 70. All 6 recordings involve defendants with minor, nonviolent charges and little or no criminal history—what Pretrial Services calls low-risk defendants. *Id*. In each case, the Hearing Officer grants the defendant's release on an unsecured personal bond before asking whether the defendant needs a court-appointed lawyer. *Id*. The Hearing Officer's decision is apparently based on the low-risk

D. M. was arrested early in the morning of August 24, 2016 and charged with possessing less than two ounces of marijuana. *See* Pls. Ex. 4(b), Working Database. His probable cause hearing was at 4:00 p.m. the same day. *Id*. The recording shows the following:

- The Hearing Officer finds probable cause and tells the defendant, "Your bond is incorrect based on" his five prior felony and nine misdemeanor convictions. Pls. Ex. 3, August 24, 2016, 15.22 at 37:25.
- The defendant responds that he has only one prior felony conviction. The Hearing Officer spends the bulk of the unusually long four-and-a-half minute hearing thumbing through the defendant's record and counting convictions. The Hearing Officer counts as prior felony convictions two felony charges that were reduced to misdemeanor convictions but still does not arrive at five felony convictions. He tells the defendant, "Either way your bond was incorrectly set, so it's now set at $5,000, which is what it should have been set at. [I'm] going to deny your personal bond based on all your priors." *Id*.
- The defendant requests a personal bond because his fiancée is pregnant and he is the only income earner in the household. The Hearing Officer responds, "I take all that into consideration" but again points to the defendant's prior convictions. The defendant points out that he has never missed a court appearance for any of those prior arrests and convictions. The Hearing Officer cuts him off, stating, "That is one factor, the other factor is everything else. . . . Based on the nature of the offenses for which you were charged, I'm not going to consider you" for a personal bond. *Id*.
- The defendant confirms he will need a court-appointed lawyer. The Hearing Officer

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profile of the defendant, and not on whether the defendant could pay a secured financial condition of release.

concludes that if the defendant would like a personal bond, he can ask the County Judge for one in the morning at his first appearance. *Id*.

If the defendant had been able to pay a bondsman's premium, he would have been released notwithstanding his criminal history. D.M. appeared before a County Judge the next day and pleaded guilty. He was released later that day. *See* Pls. Ex. 4(b), Working Database.

A. G. was arrested on October 1, 2016 at 9:30 p.m. for unlawfully wielding a five-inch knife. *See id.* His probable cause hearing was held the next afternoon. It is one of the more recent recordings in evidence. *Id*. The recording shows the following:

- The Hearing Officer finds probable cause and confirms the scheduled secured money bail amount of $2,500. Pls. Ex. 3, October 2, 2016, 12.16 at 27:39.
- The defendant confirms that he will need a court-appointed lawyer and tries to ask a question. The Hearing Officer cuts him off, stating, "Nobody who's got the criminal history you have out of Florida is going to get a pretrial [bond] from me, for fear of what would happen to the safety of the community." The defendant again tries to speak. The Hearing Officer again cuts him off: "I have more people to consider than you in this, and the safety of the public is one of them." The defendant tries a third time to speak, and again the Hearing Officer shouts over him, saying "You're not going to be able to talk to me because I'm not letting you talk, because I'm going by what I feel is best for the community." *Id*.
- After a pause, the defendant quietly asks if he may speak. The Hearing Officer shouts "No!" The defendant pauses again and then states that his only criminal history is a 25-year-old matter in Florida and that he is nearly finished with his exams to become a medical professional. The Hearing Officer responds that "your 25 year ago tendencies seem to be

revisiting me, and I am afeared for the people in the State of Texas." *Id*.

- The Hearing Officer again confirms that the defendant will need a court-appointed attorney, then dismisses him. As the defendant leaves the room, the Hearing Officer quips to the Assistant District Attorney that it "makes me feel better" that the defendant is returning to detention. The Assistant District Attorney laughs. *Id*.

The defendant's first appearance before a County Judge was held the next day but then reset for October 7, 2016. Pls. Ex. 4(b), Working Database. At the rescheduled hearing, after seven continuous days in detention, A.G. was released on an unsecured personal bond. *See id*. His case remained pending at the time of the most recent data production from the County. There is no indication that he has failed to appear or has been re-arrested since October 2016. *See id*.

The two recordings illustrate what many other recordings confirm. Hearing Officers treat the bail schedule, if not as binding, then as a nearly irrebuttable presumption in favor of applying secured money bail at the prescheduled amount.[45] Amounts that deviate from the schedule are treated as "incorrect,"[46] and requests for a personal bond, if not denied outright, are deferred until

[45] *See, e.g.*, Pls. Ex. 3, September 1, 2016, 9.25 at 39:23, R. W. (bail raised "based on the [County] Judges' bail schedule"; Mr. W.: "My bond has already been posted, so what does that mean?" Hearing Officer: "That means that they'll have to make up the difference, if you're going to get out on the bonds."); November 2, 2016, 6.06 at 1:00:02, B. J. ("Bond was set at $1,000. However, you are on probation. Based on the schedule, the [County] Judges' schedule, bond is set at $5,000. Your pretrial bond release is denied.").

[46] *See, e.g.*, Pls. Ex. 3, May 14, 2016, 15.58 at 50:55, V. V. (bond "corrected" to $6,000); March 15, 2016, 16.06 at 20:28, B. G. (raising secured bond because it was "incorrectly set" at $1,000, and stating that: "The correct bond should be $2,500 so I have to raise your bond to $2,500."); May 12, 2016, 15.48 at 16:57, W.S.T. ("Your bond is incorrectly set."; raising bail to $2,000 based on prior convictions); November 2, 2016, 22.07 at 18:17, T. S. ("Your bond is incorrectly set at $3,000. . . . It's $500 for the four misdemeanors each so that's $2,000 makes $3[,000], and $1,000 for the felony prior, is $4[,000], so I'm going to raise your bond to $4,000.")

the County Judge holds a later hearing.[47] Hearing Officers routinely adjust initial bail settings to conform to, not to deviate from, the bail schedule. Defendants who try to speak are commanded not to, shouted down, or ignored.[48]

The Hearing Officers testified that they cannot let one factor—the inability to pay—control their bail determination. Hearing Tr. 4-1:124, 171. But they frequently cite only one factor—criminal history—as controlling their decision to set secured money bail that the defendant clearly cannot pay.[49] And although the Hearing Officers testified that they do not "know" in any given case whether a defendant can pay secured money bail, they routinely set secured scheduled money bail amounts despite: (1) being informed of a defendant's indigence on the Pretrial Services report; (2) being told of a defendant's indigence by the defendant; (3) being aware that a defendant's charge clearly relates to poverty (such as begging or sleeping at a bus stop); and (4) recording that

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[47] *See, e.g.*, Pls. Ex. 3, March 18, 2016, 18.03 at 1:37, H. W. ("If no one bonds you out of jail, on Monday morning, he [the County Judge] can determine if he will grant you a personal bond."); October 2, 2016, 1.14 at 24:48, K.L.M. (denying request for nonfinancial conditions of release, stating, "It's not happening today."); May 22, 2016; 15.45 at 39:15, N. R. (Mr. R.: "I got a question, sir. Do you think it's possible I could get a PR bond, because my job is on the line and my apartment, too. Do you think that's possible?" Hearing Officer: "It's possible, but you're going to have to ask Judge Standley when you get to him. It's not happening today."); May 17, 2016, 17.45 at 5:02, W. F. (Mr. F.: "I just want to get released." Hearing Officer: "That's not going to happen immediately, Mr. F[.]").

[48] *See, e.g.*, Pls. Ex. 3, May 12, 2016, 15.48 at 18:36, K. C. (Hearing Officer: "We're not here to have a conversation. You're here to listen to what she says and I'm here to determine whether I feel probable cause exists or not."); May 16, 2016, 3.44 at 26:05, T.D.E. (Hearing Officer: "No, you don't say anything Mr. E[.] You get to say that to your court-appointed lawyer. Thank you and you can go with the deputy."); October 2, 2016, 9.12 at 12:30, L. R. (Mr. R.: "Your Honor, may I speak?" Hearing Officer: "No."); J.L.A. (Mr. A.: "I have no way of getting out of here, like, I swear, the $5,000—"; cut off by Hearing Officer).

[49] *See, e.g.*, Pls. Ex. 3, May 12, 2016, 15.48 at 16:57, W.S.T. (raising bail to $2,000 based on prior convictions and "for the same reason deny your personal bond"); August 23, 2016, 15.46 at 40.29, J. B. (Mr. B.: "I was asking for leniency on my bond, sir." Hearing Officer: "Based on your priors, that's as lean as I can get."); November 2, 2016, 22.07 at 18:17, T. S. (based on "priors," "going to deny your personal bond.").

a defendant needs court-appointed counsel because of indigence.[50] The evidence that this occurs is overwhelming. The Hearing Officer's wisecrack that setting a $2,500 bond for reasons of community safety "makes me feel better" clearly shows intent to use secure money bail to detain that defendant indefinitely.[51]

The court finds and concludes that in the typical case, Hearing Officers set secured money bail as a condition of detention operating only against those who are indigent and cannot pay the bail, rather than as a mechanism for pretrial release. In the vast majority of cases, the Hearing Officers

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[50] *See, e.g.*, Pls. Ex. 3, May 12, 2016, 9.49 at 24:41, F. C., (Hearing Officer: "I would consider you for release on a personal bond, but you've indicated you have no residence. Is that correct?" Mr. C.: "Yes, ma'am." Hearing Officer: "Okay, your pretrial bond release is denied."); May 16, 2016, 6.46 at 14:40, L. P. (Ms. P.: "What is a personal bond?" Hearing Officer: "A personal bond is where you have a place to stay. You just told me you don't have any other place to stay, so I'm not going to consider you for a personal bond."); May 18, 2016, 19.48 at 8:10, K. H. ("You indicated to Pretrial [Services] that you were living in a car, so I'm not going to be able to consider you for a personal bond."); October 7, 2016, 22.15 at 18:45, C.D.D. (Mr. D.: "Currently, I'm mostly living out of my car." Hearing Officer: "A little too unstable for a personal bond. I'm setting your bond at, well it's as low as it goes, $500."); October 2, 2016, 1.14 at 24:48, K.L.M. (arrested for shoplifting $54 worth of clothing from a Goodwill thrift store); August 24, 2016, 6.21 at 4:55, F. O. (arrested for "camping" at a bus shelter); May 21, 2016, 22.52 at 32:15, A. C. (soliciting money at a gas station and sleeping at the carwash; "You don't qualify for a personal bond."); May 12, 2016, 3.48 at 40:40, J. M. ("bothering customers, begging for money" outside of a shopping center); May 21, 2016, 3.55 at 25:43, R. L. ("begging" for money outside a gas station; "You don't qualify for a personal bond."); August 23, 2016, 3.18 at 31:21, E. B. ("begging" at Wal-Mart); August 25, 2016, 15.27 at 48:44, J.L.A. (arrested for soliciting money outside a Walgreens); August 26, 2016, 12.25 at 17:38, A.C.R.W. (panhandling at a gas station); November 1, 2016, 3.06 at 20:33, J. G. (panhandling outside a store); November 2, 2016, 1.03 at 28:54, C. T. (arrested for panhandling at a gas station); November 2, 2016 9.09, 31:42, T. O. (arrested for sleeping in an abandoned bank); February 8, 2017, 6.41 at 37:36, J. H. (arrested for asking for money outside of a Shop N Go); October 6, 2016, 15.18 at 30:42, R. W. (arrested for attempting to use a bathroom at a hospital); May 22, 2016, 3.47 at 22:58, R. J. ("You do not qualify for a personal bond. . . . Will you be hiring your own attorney or seeking help?" Mr. J.: "Seek help. I ain't got no money."). November 3, 2016, 12.14 at 13:38, T. P. (in absentia; "She appears to be homeless. I'm going to leave the bond at $1,000."; requesting appointed counsel on her behalf, stating, "I'm going to make the assumption that she's indigent.").

[51] *See also* Pls. Ex. 3, November 3, 2016, 01.04 at 26:20, L. I. (after lowering bond from $50,000 to $5,000, Hearing Officer threatens to re-raise the bond to $50,000 if Mr. I. does not have a place to stay, stating "The order says you can't go there, so here's how we're going to work it out. It'll be your choice. If you get out on bond, you're going to tell me you got someplace else to go. Now if you don't have any place else to go then I have to give you a place to stay. My place, I'm going to give you the address, it's 701 San Jacinto [the County Jail]. . . . So I'll raise your bond back where it was, and I'll leave you in jail. So either you got another place to stay, or you're going to stay in jail.").

use their discretion to consider the five Article 17.15 factors to almost automatically impose the prescheduled secured bail amounts, notwithstanding Pretrial Services recommendations to release defendants on unsecured personal bonds and notwithstanding clear evidence of indigence. Hearing Officers make these decisions in brief, uncounseled hearings at which the defendants are actively discouraged from speaking, and no reviewable findings are made on the record.

**4. The First Appearance Before a County Judge**

Before the most recent change to the County Rules of Court in February 2017, any "incarcerated person" who remained in detention after the probable cause hearing would be scheduled to appear before a County Judge "the next business day" after the probable cause hearing. At this first appearance before a County Judge, counsel was appointed if requested. Rules of Court, Rule 24.9. The plaintiffs offered unrebutted testimony that, although misdemeanor defendants were taken to the County Courthouse on the scheduled day, they usually did not appear in the courtroom before the County Judge unless they offered to plead guilty at that time. Hearing Tr. 2-1:59–61, 63; 3-1:8–9. Bail review was at the County Judge's initiative, and done only in a minority of the cases. In some cases, the review was prompted by a Pretrial Services recommendation or by defense counsel. *See* Pls Ex. 10(c), *2015 Pretrial Services Annual Report* at 15; Hearing Tr. 5:108; 7-2:56–61. One County Judge testified that in his experience as a former criminal defense attorney, seeking a bail reduction before a County Judge was formally available, but practically futile. Hearing Tr. 2-1:10. Defendants who did not plead guilty but wanted to contest their bail settings depended on court-appointed counsel filing a formal motion for bail review. That motion would not be considered until a later hearing, usually held one or two weeks later. *Id*. at 3-1:10–11. The only way to gain release earlier was to pay the bail or to plead guilty.

The February 9, 2017 amendment took effect on March 9, 2017. The amended County Rules of Court require "any arrestee that is booked into the Harris County Jail" to be presented at a "Next Business Day Setting," even if that arrestee is released from custody between booking and the next business day. Rules of Court, Rule 4.3.1. If the probable cause hearing has not been held by the Next Business Day Setting, the County Judge rather than the Hearing Officer will determine probable cause and set bail. *Id*. The amended Rules state that "[a]bsent a waiver by the defendant and defense counsel, the court will review conditions of release, bail amount set, and personal bond decision and modify if good cause exists to do so." *Id*.

Judge Darrell Jordan, the presiding judge of County Criminal Court at Law No. 16, testified that in e-mail exchanges, some County Judges have objected that because the new Rule 4.3.1 is not based on the Texas Code of Criminal Procedure, County Judges do not have to review bail at the Next Business Day Setting. Hearing Tr. 3-1:98, 117. Whether County Judges do or do not review the bail that the Hearing Officers set, Judge Jordan testified that in his experience as a criminal defense attorney on many misdemeanor cases, seeking a bail review at the first appearance was futile because County Judges "stick to the bond schedule. That would be the answer. What does the bond schedule say?" *Id*. at 3-1:10.

Judge Jordan testified that he takes a different approach to bail from his fifteen County Judge colleagues. *Id*. at 3-1:16–17. The Hearing Officers and other County Judges who testified agreed. *Id*. at 3-2:176–77; 4-1:113–16, 180–81; 5:62, 120. Judge Jordan testified that in his interpretation of the *Roberson* order and Article 17.15 factors, the first factor—that "the bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with"—means that a person who has the funds available for a secured money bail should post security within his or her financial

means to assure appearance at trial. *Id*. at 3-1:62–63. The fourth factor—requiring consideration of ability to pay—means that bail should be set at an amount and on terms the defendant can meet to be released. That may mean a $2,000 secured bail if the defendant can afford the $200 commercial surety premium, and an unsecured personal bond if the defendant cannot pay the premium. *Id*. at 3-1:65–66. "Otherwise, I[ would be] keeping them in jail because they can't afford the bond." *Id*. at 3-1:66.

As for the nature of the offense and consideration of community safety, Judge Jordan testified that he reviews charging documents with the assigned Assistant District Attorney before the first appearance hearings. *Id*. at 3-1:66–67. For cases that present troubling charges or circumstances, Judge Jordan has the defendants appear in his courtroom and engages them in a colloquy. *Id*. "I want to talk to them and fully understand what is going on so then I can make a decision on what we should do with their bond." *Id*. at 3-1:66. "But at no time in my analysis do I say setting a money bond is going to make them a better person or make the victim safer because the person had $500. . . . Money does not make somebody safe." *Id*. at 3-1:71. Instead, Judge Jordan testified that he orders additional, nonfinancial conditions of release on personal bond, such as GPS monitoring for those at risk of violating a protective order. *Id*. at 3-1:73–74.

Judge Jordan has experienced the Harris County misdemeanor pretrial justice system both as a lawyer representing defendants and as a County Judge ruling on defendants' cases. He does not believe that the Texas Code or County Rules of Court are unconstitutional as written. He testified that judges can apply the rules in a constitutional manner, and that the way he applies them is constitutional. *Id*. at 3-1:87–88. But he also believes that outside of his jurisdiction over those assigned to County Court No. 16, the County engages in a widespread practice of detaining

misdemeanor defendants before trial on secured bail amounts County personnel know the defendants cannot pay because they are indigent. *Id*. at 3-1:61. Judge Jordan testified that without an injunction from this court, that practice will continue. *Id*.

Testifying on behalf of herself and County Judge Margaret Harris, Judge Paula Goodhart, the presiding judge of County Criminal Court at Law No. 1, testified that she believes Judge Jordan "consider[s] one factor and one factor only, which is the ability to pay." *Id*. at 5:115, 120. She interprets the *Roberson* order and Article 17.15 to require her to "look at a person's individual liberty and weigh that with the risk to the community and the risk that they are not going to appear and consider it altogether with all of those factors and set a reasonable and rational bond that we believe is going to secure their reappearance and it is going to minimize their risk to reoffend." *Id*. at 5:116. She testified that "[a]fter going through the whole process, I have set a bond that I did not think it was likely that the person could make, not as an instrument of oppression or with the intent to detain, but because after considering all of the factors, that was the reasonable and rational non-excessive thing to do." *Id*. at 3-1:121.

Judge Goodhart disagreed with Judge Jordan's conclusions about the incentives resulting from the secured money bail system. She testified to her understanding that under Texas law, having a bond revoked for new criminal activity creates a financial incentive for those who post secured money bail to comply with the conditions of their release. *Id*. at 3-1:123. Judge Goodhart apparently did not know that Texas does not permit a financial forfeiture when a defendant released on bond commits a new offense. *See* TEX. CODE CRIM. PRO. art. 22.01–02 (permitting forfeiture with a right to collect the financial security only in cases of failure to appear). In fact, the re-arrest of a defendant during pretrial release guarantees that the bond will not be forfeited. *Id*. art. 22.13(5).

Judge Goodhart testified that no Harris County policymaker, so far as she is aware, has examined Harris County data to compare pretrial failure-to-appear rates or bond forfeiture rates between those released on secured or unsecured financial conditions. Hearing Tr. at 5:137–38. Her impression was confirmed by Director of Pretrial Services Kelvin Banks and the Hearing Officers. *See id.* at 3-2:146; 4-1:149–50, 162–63. Dr. Marie VanNostrand, the County's consultant on pretrial reform, testified that Harris County may collect the data that would allow this study but has never undertaken such a study or compiled the data to do so. *Id*. at 6-1:111. Judge Goodhart testified on behalf of herself and another County Judge that even if she learned from such a study that secured money bail provides no financial incentive to comply with the conditions of release, it would not change her subjective belief that secured money bail is better for community safety than unsecured bail. *Id*. at 5:131.

The court finds and concludes that the Harris County policymakers with final authority over the County's bail system have no adequate or reasonable basis for their belief that for misdemeanor defendants, release on secured money bail provides incentives for, or produces, better pretrial behavior than release on unsecured or nonfinancial conditions. The policymakers are apparently unaware of important facts about the bail-bond system in Harris County, yet they have devised and implemented bail practices and customs, having the force of policy, with no inquiry into whether the bail policy is a reasonable way to achieve the goals of assuring appearance at trial or law-abiding behavior before trial. In addition to the absence of any information about the relative performance of secured and unsecured conditions of release to achieve these goals, the policymakers have testified under oath that their policy would not change despite evidence showing that release on unsecured personal bonds or with no financial conditions is no less effective than release on secured money bail

at achieving the goals of appearance at trial or avoidance of new criminal activity during pretrial release.

Dr. Demuth presented uncontroverted and reliable evidence that in 2015 and 2016, the County Judges changed the bond amount and type from that set by the Hearing Officers in fewer than 1 percent of misdemeanor cases. Pls. Ex. 4(d), Second Rebuttal Report at 10; *see also* Pls. Ex. 10(c), *2015 Pretrial Services Annual Report* at 15. That is compelling evidence that, like the Hearing Officers, County Judges presiding over Court Nos. 1 through 15 are not making individualized bail assessments under either the *Roberson* Order or the Article 17.15 factors.

The County's rule change to require a bail review at a defendant's first appearance within one business day of booking, rather than within one business day of the probable cause and bail-setting hearing, has been in effect only since March 9, 2017. *See* Rules of Court 4.3.1. The record evidence does not show whether this earlier bail review has had any effect. Mr. Bob Wessels, who served as court administrator for the County Criminal Courts at Law for decades, testified that the bail review is not a new change to the rules but a codification of prior consistent practice. Hearing Tr. 5:29. Judge Jordan credibly testified that some of his colleagues have refused to conduct bail reviews, even under the new rule. *Id*. at 3-1:98. Judge Jordan also testified that bail reviews are usually futile because the County Judges adhere to the bail schedule on a secured basis. *Id*. at 3-1:10. Assistant District Attorney JoAnne Musick testified that, before the rule change, County Judges typically presumed that a misdemeanor defendant was indigent and appointed counsel if the defendant was still detained at the first appearance. *Id*. at 2-1:60–61. Only those who had posted bond to be released were made to submit an affidavit of indigence before counsel could be appointed. *Id*. That means that for years, under a consistent practice now codified in the County Rules of Court, the

County Judges have presumed misdemeanor defendants to be indigent because they remained detained by their inability to pay a secured financial condition of release, yet in about 99 percent of the cases, the County Judges have neither adjusted the bail nor granted release on unsecured or nonfinancial conditions. There is no basis in the record to find or conclude that the rule change requiring bail review at the Next Business Day Setting has altered or will alter these practices.

**5. Disposition of Misdemeanor Cases**

Unless a district attorney declines a charge or a Hearing Officer finds no probable cause, the earliest opportunity to dispose of a misdemeanor case is at the defendant's first appearance before a County Judge, if the defendant pleads guilty and is sentenced.[52] Ms. Musick testified based on her lengthy experience as a criminal defense attorney that many misdemeanor defendants "don't really want to plead guilty, but sometimes they want to get out of jail, return to family, return to work, what have you. So they will inquire about a plea so that they can get out." Hearing Tr. 2-1:65. Judge Jordan testified that in his experience, Assistant District Attorneys would make a plea offer in 85 or 90 percent of the misdemeanor cases at a defendant's first appearance. *Id*. at 3-1:14. Both testified that the typical sentence for those pleading guilty at a first appearance is either the time already served in pretrial detention, or some number of days that with a two-for-one or three-for-one credit for the time served would allow release within a day of the first appearance. *Id*. at 2-1:67; 3-1:12. Judge Goodhart testified that prosecutors sometimes threaten to seek sentencing enhancements for certain offenses to convince misdemeanor defendants to plead and receive a time-served sentence

[52] According to the *2015 Pretrial Services Annual Report*, Hearing Officers did not find probable cause in 1.5 percent of the cases reviewed by Pretrial Services. Pretrial Services reviewed about 81 percent of the total cases of misdemeanor arrestees in 2015. Pls. Ex. 10(c) at 10, 14.

According to the *2016 Pretrial Services Annual Report*, Hearing Officers did not find probable cause in 1.7 percent of the cases reviewed by Pretrial Services. Pretrial Services interviewed about 79 percent of the total cases of misdemeanor arrestees in 2016. (Docket Entry No. 290, Ex. 1 at 10, 14).

at their first appearances. *Id*. at 5:114.

Another indication that misdemeanor defendants abandon valid defenses and plead guilty to obtain faster release than if they contested their charges is a report from the National Registry of Exonerations showing that Harris County has led the United States in the total number of criminal exonerations each of the last two years. Def. Ex. 110. Most of Harris County's exonerations come from misdemeanor drug offenses that evidence samples conclusively prove the defendant did not commit. *See id*. But rather than wait for lab tests that may exonerate them, misdemeanor arrestees who cannot pay for release before their first appearances plead guilty in order to end their pretrial detention and be released. *See id*.; Pls. Ex. 13(a); 7(h) at 2.

Defendants who do not plead guilty at the first appearance have a hearing set, generally two or three weeks later. *Id*. at 2-1:10. Defendants who cannot pay their bail during this time remain in pretrial detention. *Id*. at 2-1:10–11. Defendants released on bond typically have their hearings set much later. Dr. Demuth presented uncontroverted and reliable testimony that from 2015 to early 2017, for misdemeanor arrestees who did not bond out—40 percent of all misdemeanor arrestees—the median time between arrest and case disposition was 3.2 days. Of those, 72 percent resolved their cases within 7 days; 90 percent resolved their cases within 30 days. Pls. Ex. 4(d), Second Rebuttal Report at 4. Over the same period, for misdemeanor arrestees released on bond (either secured or unsecured)—60 percent of misdemeanor arrestees—the median time to disposition was 120 days. Of those, 5 percent resolved their cases within 7 days; 13 percent resolved their cases within 30 days. *Id*.

Dr. Demuth presented uncontroverted and reliable testimony, based on the County's own data, that the likelihood of a conviction differs dramatically depending on whether a defendant is

detained before trial. In 2015 and 2016, 84 percent of misdemeanor arrestees detained at case disposition pleaded guilty, while 49 percent of those released before disposition pleaded guilty. *Id.* at 4. Only 13 percent of those still detained at case disposition had their cases dismissed, and 2 percent received deferred adjudications. *Id.* For those released before case disposition, 32 percent had their cases dismissed and 12 percent received deferred adjudications. *Id.*; Pls. Ex. 4(b), First Rebuttal Report at 16–18. These figures are consistent with, and support, the plaintiffs' theory that for misdemeanor defendants unable to pay secured money bail, Harris County maintains a "sentence first, conviction after" system that pressures misdemeanor defendants to plead guilty at or near their first appearances because that is the only way to secure timely release from detention. Hearing Tr. 6-2:172–73.

In one of the most sophisticated and rigorous studies of bail and pretrial detention in misdemeanor cases to date,[53] researchers at the University of Pennsylvania examined hundreds of thousands of Harris County misdemeanor arrest cases. The results are presented in a peer-reviewed

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[53] Dr. Demuth credibly testified that the Heaton Study, along with a study by Arpit Gupta *et al.*, discussed in Part I.F below, are "the most rigorous studies available on this kind of question of trying to isolate a causal effect of detention or money bail on these outcomes [failure to appear and recidivism] later on." Hearing Tr. 6-2:137. The Heaton Study not only ran multiple regression analyses, controlling for all relevant variables available in Harris County's data, it also treated the data as a natural experiment in which the weekday of an arrest acted as a random sorting tool to isolate time in detention as the only significant variable between like cases. *Id.* at 6-2:125–130. The Gupta *et al.* study observed a similar natural experiment based on the random variable of judicial case assignments in Philadelphia. Pls. Ex. 12(h).

Dr. Morris criticized the Heaton Study principally for not controlling for specific charge types in its natural experiment, and for overstating the causal effects of detention. Def. Ex. 28A at 5. Dr. Morris's criticism is not credible. The Heaton Study specifically states that, and explains how, it controlled for the charged offense in its regression analysis, *id.* at 18, and in the natural experiment, *id.* at 28. In fact, the Study criticized other researchers who failed "to control for the particular offense charged." *Id.* at 9. The Study carefully distinguished between correlational estimates offered by regression analysis and causal estimates that derive from the natural experiment. *Id.* at 46. As Dr. Demuth credibly explained, no study ever perfectly proves causation, but experimental studies can approach causal inferences that simple regression studies cannot. Hearing Tr. 6-2:125. Dr. Morris's criticisms of the Heaton Study are particularly weak given his own analytical shortcomings in studying Harris County's data, as discussed in Part I.E.4 below. The court finds that Dr. Morris's criticisms of the Heaton Study are unpersuasive and lack record support.

study forthcoming in the *Stanford Law Review*. Pls. Ex. 12(d), Paul Heaton *et al*., *The Downstream Consequences of Misdemeanor Pretrial Detention* 69 STAN. L. REV. (forthcoming) (July 2016) ("Heaton Study"); Pls. Ex. 12(d)(i) (peer-review policy for empirical research). The Heaton Study analyzed the differences in case outcomes between misdemeanor defendants who did not post bond within the seven days following the probable cause hearing, and those who did post bond within that period and were released. The researchers found that the still-detained defendants were 25 percent (14 percentage points) more likely to be convicted, and 43 percent (17 percentage points) more likely to be sentenced to jail than those who bonded out earlier. *Id*. at 4. Detained defendants received sentences nine days longer on average, more than double the average sentence of similar, released defendants. *Id*. The researchers concluded that the fact of detention itself, rather than the defendant's charge, criminal history, or other variables, causally affects these outcomes. *Id*. at 3–4.

The findings of Dr. Demuth and of the Heaton Study are supported by the record, case law, and commentary. The case law and commentary recognizes that those released from pretrial detention are better able to consult with counsel and prepare a defense without hazarding their employment, housing, or family obligations. *See, e.g.*, *Brown*, 338 P.3d at 1287 ("Congress attempted to remediate the array of negative impacts experienced by defendants who were unable to pay for their pretrial release, including the adverse effect on defendants' ability to consult with counsel and prepare a defense, the financial impacts on their families, a statistically less-favorable outcome at trial and sentencing, and the fiscal burden that pretrial incarceration imposes on society at large.") (citing 1966 U.S.C.C.A.N. at 2293, 2299); (*see also* Docket Entry No. 182 at 7; No. 272 at 9). Above all, they are free from the pressure to plead guilty as the only way to be released from detention in a reasonably short period. Ms. Musick credibly testified that many of her misdemeanor

clients chose to abandon valid defenses by pleading guilty at the first appearance so they could get out of jail instead of remaining detained for the two or three weeks it would take even to raise those defenses—or their inability to pay secured bail—in court. Hearing Tr. 2-1:68–69. Judge Jordan credibly testified that it was common to have misdemeanor clients who professed their innocence and had valid defenses to nevertheless plead guilty in order to be released much earlier than if they sought an unsecured bond based on indigence or challenged the prosecution's case. *Id*. at 3-1:11–12.

The defendants note that every misdemeanor defendant who pleads guilty affirms under oath that he or she does so voluntarily. That is true. It is also true that the County Judges engage the misdemeanor defendant in a counseled colloquy to affirm that the plea is made voluntarily. *Id*. at 2-1:83–84; 3-1:98–99; 5:112–13. But these arguments miss the point. The credible, reliable, and well-supported testimony of the witnesses and the statistical studies in the record overwhelmingly prove that thousands of misdemeanor defendants each year are voluntarily pleading guilty knowing that they are choosing a conviction with fast release over exercising their right to trial at the cost of prolonged detention. This Hobson's choice is, the evidence shows, the predictable effect of imposing secured money bail on indigent misdemeanor defendants.

**6. The Use of Bail to Detain**

The consistent testimony of the plaintiffs' witnesses, including Assistant District Attorney Musick, Sheriff Gonzalez, and Judge Jordan, is that Harris County routinely detains misdemeanor defendants, who would be released if they could pay secured money bail, because they are unable to pay the amount needed for release. Hearing Tr. 2-1:68–69; 3-1:51–52, 61; 3-2:9; *see also* Pls. Ex. 7(h) ¶ 5; (Docket Entry No. 206). The consistent testimony of the Hearing Officers and other County Judges is that they do not detain misdemeanor defendants solely because they cannot pay but

because the balance of state-law factors, including the need to ensure future appearances and to protect community safety, require money bail that is secured and generally (in 90 percent or more of the cases) set at the scheduled bail amount, calculated based on the charge and the defendant's criminal history and no other factors. These requirements, the defendants testified, can and frequently do outweigh the misdemeanor defendant's inability to pay the bail on a secured basis. *Id.* at 4-1:117–18, 123–25, 144–45, 168–69; 5:34, 58, 71–72; Def. Ex. 23. At the motion hearing, the parties agreed with the court's characterization of this conflict as one between a *but-for cause* and a *proximate cause* view of detention. *Id.* at 1:99–100; 4-2:15–16. In the plaintiffs' theory, thousands of defendants are detained but for their ability to pay secured money bail. (*See, e.g.*, Docket Entry No. 143 at 15–17; No. 188 at 4–7). In the defendants' view, secured money bail for many defendants is out of reach because of the defendants' problematic criminal history, the serious nature of the charges, the need for mental health evaluations, or other factors. (*See, e.g.*, Docket Entry No. 162 at 15–16; No. 164 at 8–9).

Closer examination of the record evidence and the hearing testimony undermines the defendants' proximate-cause explanation for detention. First, there is the overwhelming credible evidence that, with the exception of Judge Jordan, Harris County Hearing Officers and County Judges do not make individualized determinations of bail based on each defendant's circumstances, but instead consistently adhere to the predetermined bail schedule. Second, the facts established by other overwhelming evidence undermines the judicial defendants' position that in many cases, their individualized review shows that the public interest in the misdemeanor defendant's appearance in court and law-abiding behavior before trial requires secured money bail at the scheduled amount, notwithstanding the misdemeanor defendant's apparent indigence and the state-law prohibition on

preventive detention orders in misdemeanor cases. *See, e.g.*, Hearing Tr. 5:71–72.

The defendants argue that secured money bail provides incentives not delivered by unsecured personal bonds to induce appearance at trial. *See, e.g.*, Hearing Tr. 5:127–28. The defendants cite what they call the "indemnitor effect": commercial sureties and acquaintances of a defendant who put up the money for the defendant's pretrial release on secured bail have an incentive to ensure that defendant's return to court. *See, e.g.*, *id*. at 4-2:79–80; 6-2:68. Under Texas law and the County Rules of Court, however, unsecured personal bonds provide similar incentives, or lack thereof. Texas law requires those released on unsecured personal bonds to swear to appear or forfeit the principal bond amount. *See* TEX. CODE CRIM. PRO. art 17.04. Harris County Pretrial Services is required by its policies to supervise misdemeanor defendants released on unsecured personal bond, keep them informed of court dates, administer drug tests and other appropriate monitoring services, and send out an investigator when a defendant fails to appear. Hearing Tr. 3-2:148; 4-1:18–19; Pls. Ex. 10(c), *2015 Pretrial Services Annual Report* at 5. Pretrial Services is required by its policies to supply the "indemnitor effect" for those released on unsecured bonds. At most, commercial sureties and a defendant's social network can prompt the defendant to appear at hearings, or, in the case of sureties, petition the courts to revoke the release on bond. But these are the same actions that Pretrial Services may—and under its policies, must—take for those released on unsecured personal bonds. *Compare* Hearing Tr. 5:127–28, *with id*. at 4-1:18–19; Pls. Ex. 10(c), *2015 Pretrial Services Annual Report* at 5.

Formally, the financial incentives are the same across bond types. Those who are released and fail to appear either forfeit a cash bond, become civilly liable to Harris County for the principal

bail amount, or become civilly liable to a bondsman for the principal bail amount.[54] In each case and for each category of bond, nonfinancial incentives provide more powerful reasons to appear. These reasons include fear of a warrant for re-arrest and the possibility of being charged with, and convicted of, an additional misdemeanor for failure to appear. *See* TEX. PENAL CODE § 38.10.

At bottom, even if there were a difference between the indemnitor effects of having a commercial bondsman paid by the defendant's friends or family monitor and encourage the defendant's appearance,[55] versus having Harris County Pretrial Services provide the monitoring and encouragement, that difference cannot be the basis for imposing secured, rather than unsecured, bail without making indigence at least the proximate cause of the differential treatment. The defendants essentially argue that co-indemnitors—family and friends with access to money—makes secured bail a better assurance of appearance than unsecured bail. *See, e.g.*, Hearing Tr. 3-1:16, 129. On that basis, the homeless and the friendless are denied release on personal bond because they lack co-indemnitors.[56] *See id*. at 3-1:43–44; Pls. Ex. 1, Appendix E at 6. An indigent homeless individual's lack of co-indemnitors is, however, both a cause and a consequence of indigence. The rigid demand for secured, rather than unsecured, money bail from a homeless individual is indistinguishable from

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[54] In fact, the incentives are somewhat stronger for defendants released on cash bonds and personal bonds, since they can avoid financial liability and loss altogether by appearing at their hearings. Those released on surety bonds suffer the permanent loss of the nonrefundable premium they pay to the surety, whether or not they appear. *See* Hearing Tr. 5:126.

[55] *But see* Hearing Tr. 3-2:154 (Mr. Banks: "It's my understanding the bail bondsman doesn't monitor anything or enforce anything unless a person does not show.").

[56] Mr. Banks testified that Harris County follows an "[u]nwritten custom" of recommending detention for the homeless. Hearing Tr. 4-1:43–44; *see also* Pls. Ex. 1 at 6 (County defendants' response to interrogatory: "The Hearing Officers, in considering all five factors under 17.15, as well as using common sense, generally find that a homeless person is ineligible for a personal bond in that if such a person lacks a sufficient connection to Houston or lacks a reasonable means of being contacted in the event that they fail to appear in court, judicial experience leads to the reasonable conclusion that such a person is ineligible for a personal bond.").

an order that a misdemeanor defendant so indigent as to be homeless be detained because of that indigence.

Other than a fully-paid-up-front cash bond, the unsecured personal bond and the secured surety bond provide an equivalent lack of financial incentives to appear during pretrial release. Harris County personnel testified that the County does not try to collect unsecured bonds forfeited for nonappearance. Hearing Tr. 3-1:36; 3-2:148; 5:24. Even if commercial bondsmen file civil suits to collect forfeited bond amounts, for misdemeanor defendants who lack assets—who are judgment-proof—that civil liability does not create a meaningful incentive. *See id*. at 1:190; 3-2:148–49; 4-1:170. The up-front payment of the bondsman's premium is a sunk cost, and is not recoverable even if the defendant appears for every court date. *Id*. at 2-1:53; 4-2:13–14. Neither secured nor unsecured bonds provide meaningfully different financial incentives.

The incentive argument fares no better with respect to deterring new criminal activity during pretrial release. The evidence is that neither a secured nor unsecured bond is subject to forfeiture for new criminal activity. *See* TEX. CODE CRIM. PRO. art. 22.01–02; 22.13(5); Hearing Tr. 4-1:58–59. The record establishes that requiring secured money bail provides no incentive to law-abiding behavior during pretrial release that is not equally provided by unsecured personal bonds—the main incentive, of course, being the threat of re-arrest and extended sentences for new criminal activity, incentives that apply equally across all classes of released defendants. *See* TEX. PENAL CODE § 38.10.

Secured money bail ensures better results than unsecured appearance bonds only when the secured money bail operates as an order of detention because the defendant cannot pay. Those who are detained because they cannot pay secured money bail necessarily make their court appearances

and do not re-offend. But that success is because of the detention, not because of the financial security. And it applies only to those who cannot pay the secured financial conditions of release.[57]

The defendants argue that even if judges gave greater consideration to a misdemeanor defendant's inability to pay, the defendants argue, some indigent defendants would still be detained under other state-law factors, such as a history of prior failures to appear or criminal convictions. The defendants cite Ms. ODonnell and Mr. Ford as examples. (Docket Entry No. 164 at 18). The problem is that although there is no meaningful difference in the financial or other incentives provided between secured and unsecured money bail, those with "priors" will be detained on secured bail, *only* if they are too poor to pay it. *See also* Hearing Tr. 5:33–34. The defendants repeatedly argue that because Texas law does not permit pretrial preventive detention in most misdemeanor cases, the only way to address serious concerns about nonappearance or new criminal activity is with a secured money bail too high for the defendant to pay. Hearing Tr. 1:115–16; 3-1:72–73; 5:43–44, 70; (Docket Entry No. 166 at 13–14). But it is the fact of pretrial detention, not the secured money amount, that addresses these concerns, and only for those too poor to pay. An arrestee with access to money but with similar present charges, similar prior failures to appear, and similar criminal history could pay the secured bond and be released, despite the risks to public safety or of nonappearance. That arrestee would face no meaningfully different incentives than if released on an unsecured bond for the same amount.

Both Judge Goodhart and Judge Villagomez testified that one reason they reject Pretrial

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[57] The record provides no support for defense counsel's argument that some defendants choose remain detained, meaning they are able but unwilling to pay the secured bail amount. *See* Hearing Tr. 5:79–80; Def. Ex. 28 at 18; (Docket Entry No. 162 at 15–16). The credible testimony from every witness and declarant with experience representing criminal misdemeanor defendants is that no one remains in the Harris County Jail out of a desire to be there. *See, e.g.*, Hearing Tr. 2-1:60; 3-1:13; Pls. Ex. 7(h) ¶ 6. Nevertheless, the court's relief permits defendants to remain in pretrial custody if they choose to do so.

Services recommendations to release defendants on unsecured financial conditions in some cases is that the judges are able to access and consider the charging documents and other information that make the misdemeanor offense worse than the charge makes it appear, while Pretrial Services is limited to resource and criminal-history information obtained in the interview with the defendant. Hearing Tr. 4-1:125–26; 5:69–70; *see also id*. at 5:6–7. This is not a credible explanation for why the Hearing Officers and County Judges adhere to the bail schedule nearly 90 percent of the time. That aside, the judges' reasoning assumes at the least that if the circumstances surrounding the crime appear graver than the misdemeanor charge on its own indicates, imposing secured money bail at the scheduled amount will induce better pretrial behavior from the defendant. That assumption has no basis in evidence or experience in misdemeanor cases when the defendant is released. In effect, the defendants' position is that misdemeanor defendants should be incarcerated for the risks they pose, but only if a secured financial condition beyond the their ability to pay accomplishes the incarceration.

The fact that the defendants consistently interpret the *Roberson* order and Article 17.15 of the Texas Code of Criminal Procedure to refer only to secured bail is telling. The order and the Code provision refer only to "the amount of bail." The Code defines "bail" as both secured and unsecured bonds. *See* TEX. CODE CRIM. PRO. art. 17.01; 17.15. While the defendants may increase the bail amount based on a misdemeanor defendant's past conduct, neither the Code nor the *Roberson* order require the higher level of bail to be imposed only on a secured basis. Judge Hagstette acknowledged that on occasion he has, consistent with the order and Code, set misdemeanor bail at the maximum scheduled amount of $5,000 but on an unsecured basis, so that the defendant could be released on a personal bond. Hearing Tr. 4-1:169; *see also Ex parte Gentry*, 615 S.W.2d 228, 231

(Tex. Cr. App. 1981) (confirming bail at $2,500 but ordering release on "the security of a personal bond in the amount fixed"). The fact that Hearing Officers and County Judges rarely engage in this practice shows they set secured money bail not with an eye to the incentives provided by higher bail amounts, but with the understanding and expectation that secured bail will detain outright. Their shorthand for personal bonds as "PR bonds," meaning "pretrial release bonds," betrays the same understanding. *Id*. at 3-2:86–87; 4-1:75, 169; *see also* Pls. Ex. 3, February 8, 2017, 6.41 at 37:36; November 2, 2016, 6.06 at 1:00:02; May 12, 2016, 9.49 at 24:41.

Although the Texas Code consistently states that the purpose of the probable cause hearing is to "determine[] whether probable cause exists to believe that the person committed the offense," *see, e.g.*, TEX. CODE CRIM. PRO. art. 17.033, the orders the Hearing Officers issue are titled "probable cause for further detention," *see generally* Pls. Ex. 9. On these orders, Hearing Officers check a box stating that "[t]he Court FINDS PROBABLE CAUSE for further detention EXISTS" and requiring that the "Defendant shall remain in the Sheriff's custody until he posts [secured] bail in this cause." *Id*. In Harris County, secured money bail is not just a de facto pretrial detention order; it is literally a pretrial detention order.

The plaintiffs' understanding of those detained "solely" because they are financially unable to pay secured money bail at the scheduled amount more accurately describes the current reality in Harris County. While Texas law guides the judicial officers' discretion in setting bail amounts, it does not require bail to be set on a secured basis. Judicial officers in Harris County follow a custom and practice, without sufficient basis in data or experience, of setting bail on a secured basis to address concerns about a defendant's risk of failing to appear or of committing new criminal activity. The only way that secured bail addresses those concerns is by effectively ordering pretrial preventive

detention. This occurs only when, and because, the defendant is too poor to pay the amount of bail imposed. In Harris County, secured financial conditions of release in misdemeanor cases effectively function as detention orders only against the indigent.

### E. The Population Statistics of Misdemeanor Detainees at Each Stage in the Post-arrest Process

In mid-February 2017, Harris County produced data drawn from its administrative records purporting to account for all adults booked into the Harris County Jail from January 1, 2015 to February 14, 2017. Def. Ex. 28 at 2. The data set included 106,055 case entries. Pls. Ex. 4(b), Second Supplemental Report at 1. *Id*. at *2–3. Both parties' experts relied principally on this data set to reach their conclusions about the misdemeanor population in the Harris County Jail.

#### 1. Arrestees Detained More than 24 Hours Before the Probable Cause Hearing

From 2015 to early 2017, nearly 67 percent of misdemeanor arrestees were detained from arrest until the probable cause hearing. Pls. Ex. 4(b), Expert Report at *2, Second Supplemental Report at 2. Almost all of the remaining 33 percent paid a secured money bond to be released before the probable cause hearing. Only 90 people were released on personal bond through early presentment to a Hearing Officer in 2015, and 240 in 2016. That is around 1 percent of arrestees held in custody by the City of Houston Police Department. *Id*; (Docket Entry No. 207-1 at 15; No. 290, Ex. 1 at 8).

Of those still detained at the probable cause and bail-setting hearing, more than 14,000 misdemeanor defendants—a little over 20 percent of those detained at that point[58]—waited more

[58] Dr. Demuth arrived at these numbers from the available data from January 1, 2015 to November 25, 2016 and from December 1, 2016 to January 31, 2017. Pls. Ex. 4(b), Expert Report at *2, Second Supplemental Report at 2. Dr. Demuth calculated that after removing duplicate entries for multiple charges filed at the same time, the sample includes 97,715 misdemeanor arrestees. Pls. Ex. 4(b), First Supplemental

than 24 hours after arrest for the hearing. Pls. Ex. 4(d), Second Rebuttal Report at 1. Over 600 people—1.0 percent of those detained—waited more than 72 hours after arrest for the hearing.[59] *Id*. The plaintiff Robert Ryan Ford was detained 32 hours after his arrest before he appeared before a Hearing Officer. *See* Pls. Ex. 8(c)(iii), Ford Docket Sheet.

Under Texas law, Harris County is required to release misdemeanor defendants if they have not had a probable cause hearing within 24 hours of arrest. TEX. CODE CRIM. PRO. art. 17.033. Release must be on an unsecured personal bond if the defendant cannot pay secured money bail. *Id*. at 17.033(b). Probable cause hearings for those arrested by the City of Houston Police Department may be delayed because of crowded conditions at the County Jail, causing backups in transporting arrestees from the City to the County Jail and booking them there.[60] For some whose probable cause hearings are delayed more than 24 hours after their arrests, the Hearing Officers may hold hearings in absentia or "on the papers." Hearing Tr. 2-1:92–93. The Hearing Officers find probable cause based on the DIMS report provided in the charging documents. *Id*. That situation rarely occurs. The parties' experts agreed that only 3 to 4 percent of the entire arrest population has probable cause determined on the papers. *See* Def. Ex. 28A; Hearing Tr. 6-2:31–32, 121–22. That means Harris County has over the last two years detained more than 10,000 misdemeanor arrestees more than 24 hours after arrest without either a probable cause hearing or a probable cause determination on the

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Report at *2. That is, misdemeanor defendants arrested and charged with multiple offenses on the same arrest are not double-counted, but defendants who were arrested multiple times on different charges may appear multiple times in the sample. *Id*. at *2–3.

[59] The parties do not meaningfully dispute the basic numbers. The parties dispute whether the average or median length of detention is less than 25 hours, Hearing Tr. 1:152; 2-2:61–64; 4-2:42, 52–53, but the average and median periods are not critical. The issue is not whether Harris County complies with the law on average, but the extent to which it violates its legal obligations. Meeting a due process standard 50.1 percent of the time would not save the defendants' case.

[60] *See* Part I.D.2 *supra*.

papers. And on the relatively few occasions when Hearing Officers make probable cause determinations on the papers, they testified that they do not consider the amount of bail or eligibility for release on unsecured personal bond at that time. *Id*. at 4-1:133–35.

The court finds and concludes that Harris County is not providing a bail-setting hearing within 24 hours in thousands of cases.

**2. Arrestees Detained More than 48 Hours Before a Bail Review**

From 2015 to early 2017, nearly 50 percent of misdemeanor arrestees were detained from arrest until their first appearance before a County Judge. Pls. Ex. 4(d), Second Rebuttal Report at 2. In April 2016, one month before the plaintiffs filed suit, only 7.5 percent of all misdemeanor arrestees were released on personal bond, almost all of them by Hearing Officers at the probable cause hearing. Def. Ex. 47; Pls. Ex. 4(d), Second Rebuttal Report at 10. By the end of 2016, seven months after the plaintiffs filed suit and three months after the County Judges changed the Rules of Court to instruct the Hearing Officers to presume that unsecured personal bonds for twelve offense categories,[61] 16 percent of all misdemeanor arrestees were released on personal bond. Def. Ex. 47; Pls. Ex. 10(b), *December 2016 Pretrial Services Monthly Report*. The overall rate of release of misdemeanor defendants on unsecured personal bonds from 2015 to early 2017 was 9.7 percent—10.8 percent in 2016 alone. Pls. Ex. 4(d), Second Rebuttal Report at 9; (Docket Entry No. 290, Ex. 1 at 9).

Over the last two years, around 52,000 misdemeanor arrestees were still detained after their probable cause hearings before the Hearing Officers. Pls. Ex. 4(d), Second Rebuttal Report at 2. The next hearing, before a County Judge, is generally within one business day after the probable

[61] *See* Part I.D.1 *supra*.

cause hearing. But more than 26,000 misdemeanor arrestees—over 51 percent of those still detained—waited more than 48 hours after their arrests before their first appearances before a County Judge. *Id*. Over 6,800 people—just over 13 percent of the detained population—were held longer than 96 hours after arrest before their first appearance. Pls. Ex. 4(b), Second Supplemental Report at 1. The plaintiff Loetha McGruder was detained 87 hours after her arrest before her first appearance before a County Judge. Pls. Ex. 8(c)(ii), McGruder Docket Sheet.

The defendants dispute these numbers, but their expert, Dr. Morris, provided no alternative figures on the length of detention between arrest and first appearances. *See* Def. Ex. 28A at 1–3. He argued that Harris County's data contains too many gaps, clerical errors, and problematic distributions to provide a basis for reliable calculations or conclusions. *Id*.; Hearing Tr. 4-2:201–03. Dr. Morris specifically cited a distribution chart showing hours-to-release as containing too many sharp peaks and valleys, indicating that the data did not accurately reflect the length of detention. Def. Ex. 28A at 1–3; Hearing Tr. 6-2:79.

The plaintiffs' expert, Dr. Demuth, accounted for the problems Dr. Morris identified. Dr. Demuth excluded arrestees who had holds, had prior failures to appear, were on probation, faced multiple charges, faced concurrent felony charges, had prior convictions, were admitted for mental health or medical evaluations, or had high-risk designations. Pls. Ex. 4(b), Rebuttal Report at 3. Dr. Demuth found the same rates and distribution of delays across the remaining population. *Id*. Dr. Demuth testified that the peaks and valleys in the distribution are likely caused by the fact that Harris County does not record the time of first appearance. Hearing Tr. 6-2:112–16. Dr. Demuth adjusted for this by assuming that first appearances occur for all defendants at 9:00 a.m., when the County Courts open their sessions for the day. *Id*. at 6-2:115–16. This is a realistic estimate and a

conservative approach. Rather than the smoother distribution that actually occurs as arrestees make their first appearances throughout the day, the 9:00 a.m. assumption makes the distribution reflect and exaggerate the rhythms of the County's arrest cycle. The relatively more numerous misdemeanor defendants arrested in the afternoon and evening appear to have their first appearances all at once at 24-hour intervals of 9:00 a.m. on the days after their arrest. The relatively smaller number arrested late at night make their assumed 9:00 a.m. appearances seem relatively scarcer. *Id.* at 6-2:112–16. Dr. Demuth's calculations and conclusions are reliable and helpful, even with the gaps and flaws in the Harris County records and data. Of course, Harris County is welcome to provide more accurate information at the merits trial. On the present record, Dr. Demuth has sufficiently addressed Dr. Morris's concerns by basing his calculations on realistic and conservative assumptions.

The court finds and concludes that at least half of the detained misdemeanor population in Harris County wait 48 hours or longer after arrest before seeing a County Judge, and at least 13 percent wait 96 hours or longer.

**3. Arrestees Detained Until Case Disposition**

Harris County's annual and monthly Pretrial Services reports show that a remarkably stable 40 percent of misdemeanor arrestees remained detained until case disposition. *See generally* Pls. Ex. 10(b), 10(c). In both the 2014 and 2015 annual reports, the rate is identical: 40.3 percent. Pls. Ex. 10(c). The *2016 Pretrial Services Annual Report*, released after the motion hearing, shows that 40.1 percent of misdemeanor arrestees were detained until case disposition in 2016. (*See* Docket Entry No. 290, Ex. 1 at 8). The 2016 change in the County Rules of Court to presume release on

personal bond in twelve offense categories has apparently had little impact.[62]

Of the 84 percent of detained arrestees who plead guilty at their first appearance,[63] 67 percent are released within a day. Pls. Ex. 4(d), Second Rebuttal Report at 3. About 83 percent are released within five days of their first appearance. *Id*. Those who do not plead guilty typically wait for one to three weeks or more before a second hearing before a County Judge. *See* Hearing Tr. 2-1:68; 6-2:168–69.

Dr. Demuth testified that the likelihood a misdemeanor defendant will be detained at disposition correlates strongly with the indicators of poverty Pretrial Services uses to assess risk. Those who had one point for criminal risk on the assessment but no points for background, or resource, factors were detained at disposition 14 percent of the time. *Id*. at 7-1:9–10. Those with one point for criminal risk and seven points for background risk—meaning young males who did not own a home, an automobile, or a land line and who were unemployed or underemployed, or poorly educated—were detained at disposition 53 percent of the time. *Id*. At two points of criminal risk, those with no background risk points were detained until case disposition 33 percent of the time; those with seven background risk points were detained until case disposition 74 percent of the time. *Id*. at 7-1:10–13.

**4. Arrestees Detained "Because of" Indigence**

The defendants argue that the plaintiffs' statistical reports do not prove that large numbers of misdemeanor arrestees are detained solely because of indigence and that the plaintiffs are assuming that if those detained could pay for release, they would. (Docket Entry No. 162 at 15–16);

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[62] *See* Part I.D.1 *supra*.

[63] *See* Part I.D.5 *supra*.

Hearing Tr. 8-2:53. Both parties' experts tried to discern from Harris County data whether and to what extent misdemeanor defendants are detained because they cannot pay a secured money bail. Dr. Demuth relied on a computer program the plaintiffs developed that took "snapshots" of the data on the Harris County Jail's misdemeanor population at particular times on particular dates, pulled each defendant's public records from the County's public-facing online interface, and excluded those with nonfinancial reasons for detention on misdemeanor charges, such as concurrent pending felony charges. Hearing Tr. 2-2:5–7; 7-1:38–39. The most recent series of snapshots showed that on average, between February 15, 2017 and March 14, 2017, every day in the Harris County Jail there were:

- 328 people charged only with misdemeanors.
- 240 people charged only with misdemeanors and not subject to formal holds, such as warrants from another jurisdiction.
- 154 people charged only with misdemeanors, not subject to holds, who had been in jail for 3 or more days.
- 126 people charged only with misdemeanors, not subject to holds, who had been in jail for 5 or more days.
- 84 people charged only with misdemeanors, not subject to holds, who had been in jail for 10 or more days.

Pls. Ex. 4(d), Second Rebuttal Report at 9. The plaintiffs contend that at the very least, the 154 people in the County Jail every day who have been detained for three days or more on misdemeanor charges and are not subject to other holds have been found eligible for pretrial release and would be

released if they paid the secured money bail.[64] (Docket Entry No. 145 at 6; 146 at 13; No. 188 at 11). Dr. Demuth credibly testified that only the arrestees' inability to pay keeps them detained. 6-2:168, 180–81; 7-1:39.

The defendants' cross-examination of Dr. Demuth demonstrated that in a handful of entries for February 15, 2017, the plaintiffs' computer program had failed to capture the fact that a misdemeanor arrestee was also charged with a felony or was about to be released on bond. *Id*. at 7-1:41–58. In some instances, these additional docket activities took place the same day as the snapshot and may have occurred hours after the snapshot captured the data. This would indicate that the program worked as designed, including that it captured data only for a particular point in time and did not track cases over time. *Id*. at 7-1:33–34, 43. In a few other instances, the program did not work as designed in that an entry was miscoded. *Id*. at 7-1:43, 45.

The defendants also demonstrated that certain entries in the "snapshot" included misdemeanor arrestees who were detained for mental-health evaluations or had formal "holds," such as flags indicating that the arrestee was subject to extradition to another jurisdiction. *Id*. at 7-1:57–74. The court finds that the defendants' focus on mental-health status and other holds is misplaced. Article 16.22 of the Texas Code of Criminal Procedure permits magistrates—including the Harris County Hearing Officers and County Judges—to collect information about, and order the assessment of, an arrestee's mental-health status. But Article 16.22(d) clearly states that "[t]his

[64] The data on arrestees detained in the Harris County Jail for three days or more undermines the declaration and testimony of Bob Wessels, the defendants' expert on Harris County court administration. Mr. Wessels testified that most misdemeanor defendants who have not bonded out are detained only because they are still in "processing," and that only a few high-risk defendants are detained on money bail they cannot pay. Def. Ex. 26 at 10; Hearing Tr. 5:31–34. The court finds that Mr. Wessels is knowledgeable about the history of the Harris County courts and the implementation of the *Roberson* order, but because he has been retired from the position of court administrator for over six years, his knowledge of the present system, especially the detailed statistics on the prison population, is entitled to substantially less weight.

article does not prevent the applicable court from, before, during, or after the collection of information regarding the defendant as described by this article: (1) releasing a mentally ill or mentally retarded defendant from custody on personal bond or surety bond. . . ." TEX. CODE CRIM. PRO. art 16.22. Article 16.22 is the only legal basis the defendants identified to detain misdemeanor arrestees for mental-health evaluations. Hearing Tr. 8-2:16. Judge Jordan testified that while misdemeanor arrestees who are ordered to have a mental-health evaluation ordinarily are detained pending the evaluation, the only way to ensure detention is to order secured money bail and refuse to grant a personal bond, knowing that the arrestee cannot pay the secured bail. *Id*. at 3-1:46–48. If the court ordered the arrestee evaluated but the arrestee had access to money, he or she could pay for prompt release, despite the evaluation order. *Id*. Misdemeanor arrestees waiting for mental-health information to be collected or evaluated are detained by secured money bail because they cannot pay.

As for "holds," the plaintiffs offered unrebutted testimony that misdemeanor arrestees subject to holds, such as immigration detainers or pending warrants in other counties, are released "to their holds" only when they have either posted bond or disposed of the misdemeanor case. *Id*. at 2-2:30–32; 4-1:154–57. For instance, if an arrestee has a warrant pending in a neighboring county, that county has ten days to take custody of the arrestee. But the ten days do not begin to run until the arrestee has either paid the secured money bail set in the misdemeanor case, been granted a personal bond, or resolved that case by pleading guilty, being convicted, or having the charges dismissed. *Id*. Misdemeanor arrestees who have secured money bail imposed for their misdemeanor charges are detained in Harris County not because of the hold, which they are legally unable to address, but because they are unable to pay the secured money bail.

Excluding bail-as-detention-orders for mental-health evaluations and holds that are irrelevant to this case (because they do not prevent release for a defendant who can pay the secured money bail), the defendants have shown that Dr. Demuth's estimated average of those detained because they are unable to pay is inflated at most by a dozen entries in each category of the "snapshot." On the present record, the court finds and concludes that more than 100 individuals are detained in the Harris County Jail each day, who have judicially been found eligible for release and who would be released but for their inability to pay secured money bail.

The defendant's expert, Dr. Morris, attempted a different method of counting who was detained in the Harris County Jail solely due to indigence. Def. Ex. 28. Dr. Morris drew on the Pretrial Services risk assessments for all interviewed misdemeanor defendants from January 1, 2015 to February 14, 2017, a total of 92,941 risk-assessment reports. *Id*. at 10. He excluded those with prior arrests or higher risk scores, because "[t]hose who have more of a criminal history are of a higher risk to have some unmeasured legal factor delaying release." *Id*. Dr. Morris concluded that over the nearly 26-month period, no defendants who had all five indicators of indigence tracked by Pretrial Services—no employment, no car, no land line phone, no high school education, and no family residence—were detained solely by inability to pay. *Id.* He found only 65 detained individuals who had one Pretrial Services resource factor of indigence who were low risk, had no other reasons for detention, were eligible for release on a secured bond, but had not paid the bond and been released. *Id.*

Dr. Morris's study is critically flawed in at least two ways. It first adopts the defendants' mistaken outlook that Texas law allows misdemeanor-only defendants to be detained before trial. *See id*. ("some unmeasured legal factor delaying release"). With a narrow exception for certain

family violence cases, Harris County uses no other mechanism to detain misdemeanor defendants before trial than by imposing secured money bail. By excluding defendants with prior arrests or high-risk scores from consideration, Dr. Morris excluded a significant population of misdemeanor arrestees who were judicially deemed eligible for pretrial release and would have been released if they could have paid the up-front amount needed under the secured money bail set.[65]

An even more basic flaw in Dr. Morris's study was his exclusion of all misdemeanor defendants who had "moderate" or "high" risk scores from the population he considered. As explained above, Pretrial Services current risk-assessment tool counts resource factors such as the lack of a land line phone or an automobile as the same type of risk points as prior convictions or failures to appear.[66] A misdemeanor defendant with no criminal history who met all of the poverty indicators would have at least five risk points—for not having a car, a family residence, a land line phone, a high school diploma, and for being unemployed or underemployed—and up to seven points if the defendant were a young male. *See generally* Pls. Ex. 8(d). But Dr. Morris excluded these defendants from his survey.

In sum, Dr. Morris excluded indigent defendants from his survey to conclude that, of the misdemeanor defendants surveyed, none was detained because of indigence. Dr. Morris's conclusion is not entitled to any weight. These critical flaws undermine his credibility and diminishes the court's confidence in the reliability of the opinions he expressed, whether deriving from his own research or criticizing the analytic methods and conclusions of others.

In his supplemental report, Dr. Morris ran his calculations including those with low-moderate

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[65] *See* Part I.D.6 *supra*.

[66] *See* Part I.D.2 *supra*.

and moderate risk scores. Def. Ex. 28, Supplemental Report at 3. Dr. Morris's attempt to salvage his report is not successful. He again excluded "high risk" defendants, which automatically excludes many young misdemeanor defendants who have all five poverty indicators on the Pretrial Services current risk-assessment form. His exclusion of defendants with prior arrests, mental-health evaluations, or assault charges again assumes that people are being detained for those reasons when the only mechanism under Texas law to detain them is to impose secured money bail that they are unable to pay. Even with all of these exclusions, Dr. Morris found that 1,623 people with at least one poverty indicator were detained in Harris County solely because of their inability to pay the secured bail imposed. *Id*.

**5. Bond Forfeitures and Re-Arrests for New Criminal Activity**

Harris County does not track the comparative failure-to-appear or new-criminal-activity rates of misdemeanor defendants released on different types of bonds. Pls. Ex. 4(d), Second Rebuttal Report at 11; Hearing Tr. 3-2:146; 4-1:88; 5:138; 6-1:127. Harris County has not coded, collected, or analyzed data on the different types of pretrial misconduct. It cannot, as other jurisdictions have, determine whether new misconduct by those released on surety bond or on personal bond is violent or is the type of nonviolent offense for which release on unsecured personal bond is presumed. *See id*. The defendants' expert, Dr. Morris, agreed that "it's a shame we don't have good data on court appearance." Hearing Tr. 6-2:50. Dr. VanNostrand noted that Harris County does not currently compile the data to know how many defendants fail to appear for hearings when released on different types of bonds. The County will have to compile data on failures to appear as part of the Arnold Tool's risk assessment. *Id*. at 6-1:110–12, 127–28. But for now, the County is imposing secured money bail, usually at prescheduled amounts, for almost all misdemeanor defendants, with no ability

to tell how effective this type of bond is to prevent failures to appear or new criminal activity compared to release on unsecured or nonfinancial conditions.

Harris County does keep, and was able to produce, data coded as "bond forfeiture," "bond revocation," and "bond surrender." But this data is not consistently kept or recorded. *See* Pls. Ex. 4(d), Second Rebuttal Report at 11. Some County Judges "forfeit" a bond after a single failure to appear. Others reset hearings and do not record a bond as forfeited until after multiple failures to appear. A single entry in the "forfeiture" data may mean one failure to appear or many. Hearing Tr. 3-1:105. A bond may be revoked because a defendant failed a drug test, even if the defendant appeared at every court setting and is never arrested or charged with another offense, or revoked because the defendant failed to appear. *Id*. at 3-1:105; 3-2:148, 154. Similarly, one "revocation" entry may indicate one failure to appear, many, or none at all, and may or may not indicate new criminal activity. Commercial sureties can ask for bond surrender for a variety of reasons. Judges may rely on a variety of factors to grant or deny the request. Hearing Tr. 5:132–33.

The parties' experts nonetheless tried to compare the "failure" rates of misdemeanor defendants released on different kinds of bonds. Dr. Demuth treated all coded forfeitures, revocations, and surrenders as a general proxy for pretrial misconduct, without distinguishing between failures to appear or new criminal activity. Pls. Ex. 4(d), Second Rebuttal Report at 12; Hearing Tr. 6-2:157–58. Dr. Morris apparently examined coded forfeitures as a straightforward proxy for failures to appear. Def. Ex. 28A at 11. Using this approach, Dr. Demuth calculated that those released at any stage in the pretrial process on a surety bond have a failure rate of 11.1 percent; those released on an unsecured personal bond have a failure rate of 13.7 percent; and those released on a cash bond have a failure rate of 5.9 percent. Pls. Ex. 4(d), Second Rebuttal Report at 12.

Dr. Demuth credibly explained that this comparison of these general populations is misleading, because it does not control for the fact that many released early in the arrest process on surety bonds are, because of their relatively greater access to money or credit, likely to be an inherently less risky population than those released later in the arrest process, whether on a surety or a personal bond. *See id.*; Hearing Tr. 6-2:157–58; *see also id*. at 6-1:113. Dr. Demuth tried to account for this difference by comparing misdemeanor defendants released on different types of bonds only after a probable cause hearing. That is, he considered and compared those who could not afford to bond out right away on secured money bail, but who were able to come up with the money to post bond at a later stage in the process. *Id.* Dr. Demuth found that among these populations with a more similar risk profile, those released on surety bond have a failure rate of 14.4 percent, while those released on unsecured personal bond have a failure rate of 13.6 percent. Pls. Ex. 4(d), Second Rebuttal Report at 12. That is, even with Harris County's incomplete data, those released on unsecured personal bond have slightly *better* pretrial success rates than those released on a commercial surety bond.

Dr. Morris also tried to control for the different risk profiles by rejecting a general comparison of populations and using a propensity score matching algorithm that "pairs" criminal defendants who share background characteristics but who are released under different conditions. *See* Def. Ex. 28A at 11–12. Using this method, Dr. Morris concluded that for female misdemeanor arrestees, there was no difference in the pretrial performance between those released on surety bonds and those released on unsecured personal bonds. *Id.* For male defendants, those released on surety bonds had a failure rate of 14.0 percent, while those released on personal bonds had a failure rate of

16.2 percent.[67] Def. Ex. 28A at 12; Hearing Tr. 6-2:43–44.

Dr. Morris's decision to disaggregate his findings by gender and provide no overall failure rates is puzzling, to say the least. Dr. Morris's earlier reports did not disaggregate by gender. His broader past work in the field of pretrial studies did not disaggregate by gender. None of the studies that Dr. Morris seeks to rebut disaggregate by gender. Harris County's forthcoming reforms specifically aim to be gender-blind in their risk assessments and prescriptions. *See* Hearing Tr. 6-2:40–41; 6-1:78–79. Dr. Morris found identical failure rates among women. His decision to disaggregate his findings had the effect of inflating the slight difference in failure rates between secured and unsecured bonds among men and made it appear greater than the overall rate of failure, which Dr. Morris did not provide.

On the credible, reliable evidence in the present record, the court finds and concludes that: (1) Harris County has not compiled the data it has to compare failure-to-appear or new-criminal-activity rates by bond type among misdemeanor defendants during pretrial release; and (2) to the extent the information is available, it shows that those released on personal bond have substantially similar—or even somewhat better—pretrial failure rates as those released on surety bonds.[68] Secured money bail in Harris County does not meaningfully add to assuring misdemeanor defendants'

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[67] Dr. Morris excluded from his calculations defendants who could not be paired by the propensity score matching algorithm. *See* Def. Ex. 28A at 12. His total sample size of paired defendants was 5,667 male misdemeanor defendants and 2,684 female misdemeanor defendants. *Id*.

[68] The defendants tried to show that the misdemeanor defendants Judge Jordan released on personal bond fail to appear at higher rates than those released on personal bond by the other County Judges. *See* Def. Ex. 128A. Their exhibit contains numerous errors. It counts cases rather than people, so the real number of defendants who fail to appear is unknown. Hearing Tr. 4-1:94–95. It tracks only cases that have been disposed in each Criminal Court at Law since January 1, 2017. Def. Ex. 128A. But many, if not most, cases *disposed* in that time would have had release conditions set by the presiding judge who preceded Judge Jordan in Court No. 16. Hearing Tr. 4-1:92. It is not clear if the exhibit tracks actual failures to appear or only bond forfeitures, which may include multiple failures to appear per forfeiture. The exhibit is entitled to no weight.

appearance at hearings or absence of new criminal activity during pretrial release.

This finding is consistent with recent empirical work in other jurisdictions. According to the most recent and credible evidence, secured financial conditions of pretrial release do not outperform alternative nonfinancial or unsecured conditions of pretrial release in ensuring the appearance of misdemeanor defendants at hearings. *See, e.g.*, Pls. Ex. 12(h), Arpit Gupta *et al*., *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEG. STUDIES 471, 475 (2016) ("We find no evidence that money bail increases the probability of appearance."). One landmark study examined appearance rates in Colorado, where courts presume that misdemeanor defendants should be released on unsecured bonds and, unlike Harris County, track comparative rates of pretrial failures to appear. This study found that unsecured appearance bonds are equally effective as secured money bail, at both assuring appearance at trial as well as law-abiding behavior before trial. Pls. Ex. 7(q), Ex. 2, Claire M.B. Brooker *et al*., *The Jefferson County Bail Project: Impact Study Found Better Cost Effectiveness for Unsecured Recognizance Bonds Over Cash and Surety Bonds* (Pretrial Justice Institute, June 2014).

In New York City, which holds bail-setting hearings every day from 9:00 a.m. to 1:00 a.m., *see* Pls. Ex. 17, two large charitable bail-fund programs have paid the secured money bail amounts in misdemeanor cases for thousands of defendants for years. *See* Pls. Ex. 7(u). None of those defendants has a financial incentive to return to court. Only the bail funds lose money if the arrestee fails to appear. But the bail funds have consistently achieved 95 to 96 percent appearance rates. *Id*. The bail funds achieve these rates of appearance through simple and relatively inexpensive supervision methods, like sending text message reminders of hearings to the misdemeanor defendants. *Id*.; Pls. Ex. 12(ss).

These studies are consistent with Harris County's own data. Although Harris County does not track pretrial failures-to-appear or new criminal activity by secured versus unsecured conditions of release, the parties' experts found only slight, if any, differences in pretrial failure rates between those released on secured money bail and those released on unsecured personal bonds.

The defendants rely on a single study comparing rates of failures to appear and new criminal activity for misdemeanor defendants: that of their expert, Dr. Morris.[69] In a study that has not yet been published or completed the peer-review process, Dr. Morris compared failure-to-appear rates and rates of new criminal activity for misdemeanor defendants released on different categories of bond in Dallas County, Texas in 2008. Def. Ex. 30; *see also* Def. Ex. 163 (2012 update). Dr. Morris found that those released on a commercial surety bond failed to appear 26.7 percent of the time and were charged with a new offense 26 percent of the time within 12 months of their initial arrest. Def. Ex. 30 at 7–8. Those released on personal bond failed to appear 39.6 percent of the time and were charged with a new offense 29.1 percent of the time within 12 months of arrest. *Id*. Those released on cash bond failed to appear 30.2 percent of the time and were charged with new offenses 13.7 percent of the time within the 12-month period. *Id*. Dr. Morris testified that the difference in recidivism was not statistically significant. Hearing Tr. 6-2:53.

The court finds that Dr. Morris's study is entitled to substantially less weight than the

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[69] The court considers, but does not give significant weight to, the studies that compare case outcomes in felony cases only. *E.g.*, Def. Ex. 115, Eric Helland, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J. OF L. & ECON. 93 (2004); Def. Ex. 116, Thomas Cohen & Brian Reaves, *Pre-trial Release of Felony Defendants in State Courts, Bureau of Justice Statistics, Special Report* (Nov. 2007). Felony cases present risks of flight and greater risks of failures to appear and to reoffend than misdemeanor cases. Nor does the court give particular weight to anecdotal impressions of how release on secured money bail compares to completely unsupervised release. *E.g.*, Def. Ex. 83, Cynthia Kent, *Security and Success of the Surety Bond: A View from the Bench* (Aug. 12, 2008) (impressionistically comparing failure-to-appear rates in Smith County, Texas); *but see Travis County: No Place for Bondsmen*, AUSTIN MONITOR, Mar. 30, 2017, *available at* https://www.austinmonitor.com/stories/2017/03/travis-county-no-place-bondsmen/ (impressions arriving at the opposite conclusion for Travis County, Texas).

published, peer-reviewed articles in the record that rigorously compare pretrial failure rates among misdemeanor arrestees released on different categories of bond. Dr. Morris testified that, as is true of Harris County, Dallas County does not compile comparative data on failures to appear. Instead, Dallas County tracks "forfeitures," which may include multiple failures per entry. *Id*. at 6-2:50, 55. Dr. Morris did not provide the court or opposing counsel with access to the underlying data tables his calculations generated. The reason he gave—to protect the peer-review process the article is still undergoing—does not take into account the availability of a confidentiality or protective order, or a partially sealed filing, to achieve this same protection. *Id*. at 6-2:67–69.

The plaintiffs offered reliable evidence that in Dallas County, only those posting commercial surety bonds may be released within the first 24 hours after arrest on misdemeanor charges. Commercial bondsmen use the time to offer secured bonds to the least risky defendants. Pls. Ex. 7(i). Although Dr. Morris used his proximity score matching algorithm to attempt to control for background risk factors, it is unclear without the underlying data whether or to what extent it is possible to control for the significant dissimilarities between the two populations created by the commercial sureties' "head start" on selecting the least risky and most financially secure misdemeanor defendants for surety bonds. *See* Pls. Ex. 4(d), Rebuttal Report at 13–14. And unlike Harris County's extensive Pretrial Services program, Dallas County provides almost no supervision and therefore no incentives or reminders to those released on personal bond. Hearing Tr. 6-2:53–54. In sum, the court finds that Dallas County's procedures, and Dr. Morris's study of them, do not offer an effective or reliable comparison to Harris County.

### F. The Effects of Pretrial Detention on Misdemeanor Defendants Who Cannot Pay Secured Money Bail

Recent studies of bail systems in the United States have concluded that even brief pretrial

detention because of inability to pay a financial condition of release increases the likelihood that misdemeanor defendants will commit future crimes or fail to appear at future court hearings. *See, e.g.*, Pls. Ex. 12(c), Christopher T. Lowenkamp *et al*., *The Hidden Costs of Pretrial Detention* (Laura and John Arnold Foundation, Nov. 2013). A study co-authored by Dr. VanNostrand, who is helping Harris County reform its bail system, found that for misdemeanor defendants, even two to three days of pretrial detention correlated at statistically significant levels with recidivism. *See id*. at 26. Pretrial detention made it more likely that misdemeanor defendants would fail to appear at future hearings. *See id*. at 14. Other studies have confirmed these findings and shown that the likelihood of recidivism and failure to appear correlates with the imposition of secured money bail, not with a particular bail amount. *See* Pls. Ex. 12(h), Gupta *et al*., *supra*, at 473; *see also* Heaton Study at 19–24; Pls. Ex. 12(g), Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* (Working Paper, University of Pennsylvania, Nov. 2016).

The Heaton Study found that if, during the six years between 2008 to 2013, Harris County had given early release on unsecured personal bonds to the lowest-risk misdemeanor defendants—those receiving secured bail amounts of $500 or less—40,000 more people would have been released pretrial; nearly 6,000 convictions and 400,000 days in jail at County expense would have been avoided; those released would have committed 1,600 fewer felonies and 2,400 fewer misdemeanors in the eighteen months following pretrial release; and the County would have saved $20 million in supervision costs alone. *See* Heaton Study at 45–46. Sheriff Gonzalez credibly testified that the research showing the "criminogenic" effects of even a short period of pretrial detention and the high public costs of extended detention is consistent with his own experience as a Harris County law-enforcement officer. Hearing Tr. 3-2:11, 14.

A growing literature examines empirical data on "cumulative disadvantage" in pretrial detention. "Cumulative disadvantage" is a "sequence of undesirable events whereby the occurrence of earlier negative events increases the odds of subsequent negative events." Hearing Tr. 6-1:66 (referencing Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 CRIMINOLOGY 873 (2003)). "Bail exacerbates and perpetuates poverty because of course only people who cannot afford the bail assessed or to post a bond—people who are already poor—are held in custody pretrial. As a consequence, they often lose their jobs, may lose their housing, be forced to abandon their education, and likely are unable to make their child support payments." Pls. Ex. 12(f), Lisa Foster, Office for Access to Justice, *Remarks at the American Bar Association's 11th Annual Summit on Public Defense* (Feb. 6, 2016); *see also* Pls. Ex. 12(a)(iii), Marie VanNostrand, *Legal and Evidence-Based Practices: Applications of Legal Principles, Laws, and Research to the Field of Pretrial Services* at 15 (National Institute of Corrections, Apr. 2007); (Docket Entry No. 182 at 7; No. 272 at 9).

Money-based pretrial systems exacerbate the racial disparities in pretrial detention and posttrial outcomes. *See* Pls. Ex. 12(mm), Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 LEGISLATION & PUB. POL'Y 919 (2013). An amicus filing by Harris County Commissioner Rodney Ellis and the NAACP Legal Defense and Educational Fund notes that African-Americans make up 18 percent of Harris County's adult population but 48 percent of the Harris County Jail's adult population. (Docket Entry No. 272 at 8). A 2011 study found that in Harris County, 70 percent of white misdemeanor defendants obtain early pretrial release from detention, but only 52 percent of Latino misdemeanor defendants and 45 percent of African-

American misdemeanor defendants do so. (*Id.*). The defendants did not dispute this data.

**G. Comparisons to Other Jurisdictions**

The parties supplied additional briefing comparing, when possible, Harris County's pretrial misdemeanor system to systems used in other jurisdictions. (Docket Entry Nos. 233, 237, 255). The parties agree that "relatively little attention has been paid to analyzing bail determinations in misdemeanor cases" across the country. (Docket Entry No. 233 at 1; *see also* No. 255 at *8–9). Most large urban centers appear to hold daily bail hearings, at which arrestees appear before judicial officers within 24 hours of arrest. These occur in New York City; Cook County, Illinois; Maricopa County, Arizona; and Miami-Dade County, Florida. (*See* Docket Entry No. 237). Washington, D.C., holds daily bail hearings except on Sunday, when the courts are closed. Hearing Tr. 2-2:194. Some bail courts run 24 hours a day, (*see* Docket Entry No. 237 (Maricopa County)); others operate during business hours, (*see id*. (Cook County; Miami-Dade County)). New York City holds bail hearings between 9:00 a.m. and 1:00 a.m. every day. (Docket Entry No. 233 at 1).

The defendants note that all of these jurisdictions permit secured money bail. Some broadly permit preventive detention in misdemeanor cases, and all, according to the defendants, permit secured money bail to result in detaining defendants "who pose a risk to the community that cannot be mitigated by conditions or are likely to fail to appear." (Docket Entry No. 255 at *2). The defendants claim that the plaintiffs seek to hold Harris County to an anomalous standard by eliminating secured money bail, while even those jurisdictions that no longer impose secured money bail as a matter of practice still permit it as a matter of law. Hearing Tr. 5:41; (Docket Entry No. 166 at 13–14; No. 255).

As the court surveyed above, some jurisdictions permit secured money bail to result in

pretrial detention, but *only* when that satisfies the due process required of actual detention orders.[70] Although other jurisdictions have timetables and procedures similar to Harris County's, the practical effect of the bail hearings and resulting orders is dramatically different. In Washington, D.C., only 1.5 percent of misdemeanor arrestees are detained until case disposition and virtually none on secured money bail. Hearing Tr. 2-2:149, 154. In New York City, only 3 percent of misdemeanor arrestees are detained until case disposition. (Docket Entry No. 233 at 2). Under New Jersey's recent reforms, statewide, only 8.4 percent of arrestees across all charge categories—including felonies—were detained until case disposition. Pls. Ex. 7(k) at 1. In Kentucky, statewide, 25 percent of both felony and misdemeanor arrestees are detained until case disposition. Pls. Ex. 12(m)(i). The defendants do not identify a jurisdiction that, like Harris County, detains over 40 percent of those charged only with misdemeanor offenses until their cases are resolved. *See* Pls. Ex. 10(c), *2015 Pretrial Services Annual Report* at 8. If there is an anomalous standard here, it is set by Harris County.

The defendants argue, and presented witnesses who testified, that Harris County leads most other jurisdictions in the timeliness of its proceedings because of how quickly district attorneys file charges and make release on secured money bail available. (*See* Docket Entry No. 286 at 3–5); Hearing Tr. 2-1:34–36; 3-2:50; 5:12–13. Arresting officers consult with Assistant District Attorneys over a 24-hour hotline. The Assistant District Attorneys decide whether to accept charges before an arrestee is even booked. Hearing Tr. 2-1:34–36. In other jurisdictions, no arrestees, whether they can make bail or not, are even given the opportunity of release until a next-day or subsequent arraignment hearing, at which district attorneys decide whether to accept charges. *Id*. at 5:12–13;

[70] *See* Part I.C.3–5 *supra*.

(Docket Entry No. 255 at *3–4).

Harris County's speed at processing charges is commendable. When paired with the automatic imposition of secured money bail, however, it exacerbates the wealth-based differential treatment between those able to pay a bondsman to purchase early release and those who cannot. Those who can pay secured bonds are released within hours of arrest. Those who cannot are detained for days or weeks and face intense pressures to accept a guilty plea to end their pretrial detentions.

### H. Proposed Bail Reforms

Dr. Marie VanNostrand, who the County has retained as a consultant on reforming its pretrial processes, testified about the policy changes the County expects to implement between July 1, 2017 and March 2018. For ease of analysis, those changes can be divided into three groups: policy changes affecting the County's risk assessment of misdemeanor defendants; policy changes to enhance the efficiency of the Harris County pretrial system; and policy changes that will affect the combined probable cause and bail-setting hearings.

#### 1. Changes to Risk Assessment

The centerpiece of Harris County's proposed bail reforms is the adoption of the Arnold Tool, a nationally validated risk-assessment tool that will replace the County's current validated risk-assessment tool. While the current risk-assessment tool relies on seventeen indicators of risk, including "background risk factors" such as home and automobile ownership,[71] the Arnold Tool uses only nine indicators of risk. Almost all relate to either past criminal history, past failure to appear, or the severity of the current charge. The only "background factor" is the defendant's age at time

[71] *See* Part I.D.2 *supra*.

of arrest.[72] Def. Ex. 157. Instead of simply adding all indicators up into a single risk score, the Arnold Tool scales and weights the indicators and provides three different scores on a 1- to 6-point scale. The scores are for risk of failure to appear, risk of new criminal activity, and risk of violence. *Id*.; Hearing Tr. 6-1:86–87.

Unlike the County's current risk-assessment tool, the Arnold Tool would not score a misdemeanor defendant as a "moderate" risk based on poverty indicators such as the defendant's educational level, or the lack of a car or land line phone. Def. Ex. 157. Dr. VanNostrand characterized the County's current risk-assessment tool as "resource-based." By contrast, the Arnold Tool is a "risk-based" assessment. Hearing Tr. 6-1:17–19. The substantial research behind the Arnold Tool shows that relying on resource-based factors does not predict failure-to-appear rates or new criminal activity better than excluding those factors and relying instead on the Arnold Tool's nine risk-based indicators. *Id*. at 6-1:77–78.

As a condition of using the Arnold Tool, local jurisdictions must agree that they will not change it or put it to unintended uses. Def. Ex. 62. Local jurisdictions cannot change the risk indicators or how they are scored. *Id*.; Hearing Tr. 6-1:51. What local jurisdictions can control is the consequences that attach to each risk level. Whether a defendant with a low risk score is released without any supervision or with some supervisory conditions, or released on secured money bail, unsecured bail, or no financial conditions, is a matter of local policy. Whether to detain a defendant who has a high risk score, release that defendant on secured money bail, or release that defendant with unsecured or nonfinancial conditions but with demanding supervisory conditions, such as GPS

[72] The nine factors are: current charge of a crime of violence; a pending charge at the time of the offense; a prior misdemeanor conviction; a prior felony conviction; a prior violent conviction; a prior failure to appear in the past two years; a prior failure to appear older than two years; a prior sentence to incarceration; and age at time of arrest. Def. Ex. 157.

monitoring, is also a matter of local policy. Hearing Tr. 6-1:51–52.

At the time of the motion hearing, Harris County had not yet decided what outcomes Pretrial Services would recommend based on various risk scores. *Id*. In general, under the new system, low-risk defendants will be recommended for release on unsecured personal bonds well in advance of their probable cause hearings. High-risk defendants will not have bail set at all until the probable cause hearing. *Id*. at 6-1:52–53. What constitutes low or high risk is not yet defined. *Id*. at 6-1:52, 134. For moderate-risk misdemeanor arrestees, the County plans to continue the current system of setting secured money bail at a scheduled amount when the arrestee is charged. *Id*. at 6-1:141–42. Moderate-risk defendants with access to funds will be able to pay the secured money bail and be released before the probable cause hearing. Moderate-risk defendants without the means to pay a secured money bail will be detained until the hearing. If no changes are made to the bail setting, that misdemeanor arrestee will be detained until case disposition. *Id*. County policymakers have also stated their intention to continue to set secured money bail as a condition of release for high-risk misdemeanor defendants. *Id*. at 6-1:136. After the probable cause hearing, even the highest-risk defendants with the means to do so will be able to purchase release. For those without the means to pay, the secured financial condition will keep them detained, operating as a detention order in all but name and process. *Id*. at 6-1:71.

Like Harris County's current risk-assessment tool, the Arnold Tool is designed only to inform Pretrial Services recommendations. At most, recommendations such as release on personal bonds for low-risk defendants will be presumed in certain cases but required in none. *Id*. at 6-1:53. If judicial officers decide to reject the Arnold Tool's recommendations for release on personal bond—as they currently do in nearly 67 percent of all misdemeanor cases using the County's current

risk-assessment tool[73]—they will not be acting contrary to Harris County policy. The wealth-based disparities will continue, with no empirical basis to conclude that imposing secured money bail promotes better rates of appearance or of law-abiding behavior for those on pretrial release.

**2. Changes to the System's Efficiency**

Unlike the County's current risk-assessment tool, the Arnold Tool will not require a Pretrial Services interview for a bail recommendation. *Id*. at 6-1:123–24. Once an arrestee has been identified, Pretrial Services can pull any prior criminal record, assess the risk score, and generate a release recommendation, in some cases even before the arrestee has been transported from the scene of the arrest to the City or County Jail. *Id*. at 6-1:124. Early presentment of low-risk defendants for a personal bond will no longer depend on the availability of Pretrial Services personnel. Instead, it will be automatic. *Id*. at 6-1:136–37. Dr. VanNostrand estimated that early presentments on paper will allow Hearing Officers to release low-risk defendants on personal bonds within 4 hours of arrest. This would be among the fastest processing speeds in the nation. *Id*. at 6-1:138–39.

Dr. VanNostrand testified that increasing the number of arrestees released at early presentment will reduce jail crowding and speed pretrial release determinations and hearings for other misdemeanor defendants.[74] *Id*. at 6-1:145–46. The County has hired two additional Hearing Officers and will be hiring more Pretrial Services personnel to handle the expedited processing. Def.

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[73] *See* Part I.D.3 *supra*; *see also* Pls. Ex. 10(c), *2015 Pretrial Services Annual Report* at 14.

[74] Whether the number of arrestees released on personal bond will actually increase is unclear. The County's policymakers testified inconsistently on this point. On behalf of herself and another County Judge, Judge Goodhart testified that under the current system, all misdemeanor defendants who "are appropriate for release" on personal bond are released on personal bond, and that she did not know if "once you apply the Arnold Tool if that is going to make a difference." Hearing Tr. 5:142–43. Yet she also testified that she anticipates "a whole lot" more people will be released under the reformed system using the Arnold Tool, even though the population of misdemeanor arrestees in Harris County will not change in terms of charges or risk profile between now and then. *Id*. at 5:139–140, 143.

Ex. 58; Hearing Tr. 3-2:128–30, 6-1:130. For the past year, Harris County has been redesigning its technology infrastructure to support the more streamlined system and to integrate information sources that diverse County agencies rely on. Hearing Tr. 6-1:119, 125, 130. Dr. VanNostrand testified that the current Harris County system "is very paper transport heavy." Information is entered and reentered by hand as cases pass from arresting officers to district attorneys, to court clerks, and to Pretrial Services officers. Hearing Tr. 6-1:139. Infrastructure changes expected by July 1 are designed to cut down on paper transport and centralize more processes online.

Because the new system will aim to make early-release determinations based on a defendant's record rather than on an interview, the current Pretrial Services requirement of having to contact references to verify a defendant's self-reported financial, employment, or other circumstances will apparently be eliminated, at least for defendants determined to be low-risk.[75] *Id.* at 6-1:139–40. Dr. VanNostrand testified that Pretrial Services will continue to interview misdemeanor defendants who are not released at early presentment. Hearing Tr. 6-1: 155–56. Instead of verifying references, however, Pretrial Services will obtain an affidavit of indigence similar to the affidavit used now to determine eligibility for appointment of counsel at a defendant's first appearance before a County Judge. *Id.* at 4-1:48–49; 6-1:136, 161. Under the new system, the same affidavit of indigence will be used for both appointing counsel as well as setting release conditions, including bail. *Id.*

The County is also building a new inmate processing center, scheduled to open in March

[75] As described above, *see* Part I.D.2 *supra*, under the current system, misdemeanor arrestees are not released on personal bond until references verify the arrestee's information provided in the Pretrial Services interview. (Docket Entry No. 162 at 5). Until recently, Pretrial Services and Hearing Officers required two verified references. (Docket Entry No. 166 at 10 n.13). The current unwritten policy is to require one verified reference. (*Id.*); *see also* Def. Ex. 52.

2018. (Docket Entry No. 166 at 19 n.23); Hearing Tr. 3-2:74. The new center will process arrestees both from the City of Houston and from Harris County. It is designed to avoid the current bottlenecks that occur in transporting defendants from one Jail to the other. Hearing Tr. 3-2:71–75.

**3. Changes to the Probable Cause Hearings**

With the adoption of the Arnold Tool, the Harris County policymakers intend to amend the County Rules of Court to issue a new money bail schedule. Def. Ex. 67. While the current bail schedule is calibrated to the defendant's current charge and criminal history, the new schedule will likely be calibrated to the predictive risk scores generated by the Arnold Tool. Hearing Tr. 6-1:151–52. The amended bail schedule will call for release on unsecured personal bonds for defendants with low-risk scores. *Id*. Those with moderate-risk scores will have a secured money bail set pending the probable cause hearing. Pretrial Services will recommend conditions of supervision during release, which the Hearing Officers may impose at the hearing. *Id*. at 6-1:142–43, 151–55. Those with high-risk scores will have no bond set pending the probable cause hearing, with more stringent conditions of supervised release and the possible imposition of secured money bail to be considered at the hearing. *Id*. at 6-1:143, 153–54.

On February 28, 2017, the Harris County Commissioners approved a pilot program to provide public defenders at the probable cause hearings before the Hearing Officers. Def. Ex. 59. As presently conceived, the public defender will help misdemeanor arrestees raise objections and provide relevant information about their inability to pay money bail, without risking incriminating statements.[76] Hearing Tr. 1:103, 145–46. The pilot program is expected to launch by July 1, 2017,

[76] The current plan is for a public defender to staff all cases at the probable cause and bail-setting hearing, regardless of a defendant's indigence. The attorney assigned to a defendant's case will continue to be appointed to represent indigent defendants at their first appearances before a County Judge. *See* Hearing Tr. 1:145.

the same date the Arnold Tool and new bail schedule are planned to go into effect. Def. Ex. 59.

It is unclear whether having defense counsel at the probable cause and bail-setting hearing will significantly change the procedures or outcomes. Hearing Officers do not conduct proceedings of record under Texas law. Hearing Tr. 1:145–46. The Hearing Officers do not have to state findings or conclusions on the record for review by another judicial officer. Sheriff Gonzalez and Judge Jordan testified that the practical sustainability and impact of having counsel at probable cause hearings is doubtful. *Id*. at 3-1:113–14, 3-2:22. Judge Jordan opined that until Hearing Officers stop treating the County Judges' bail schedule as a requirement to be applied in almost all cases on a secured basis, having defense counsel at the bail-setting hearing is unlikely to make a meaningful difference in the availability of release on unsecured or nonfinancial conditions. *Id*. at 3-1:114.

**4. Texas House Bill 3011 / Senate Bill 1338**

Bills have been introduced in the Texas Legislature proposing wide-ranging amendments to Article 17 of the Texas Code of Criminal Procedure, which regulates bail. House Bill 3011, and its companion Senate Bill 1338, if enacted as proposed, would permit pretrial preventive detention if a magistrate "determines by clear and convincing evidence that requiring bail and conditions of pretrial release are insufficient to ensure" the defendant's appearance in court or the safety of the community. Pls. Ex. 16 at 1.

Proposed Article 17.028 would set a statewide standard of 48 hours after arrest, within which a magistrate would have to make an initial release decision, considering "any credible information provided by the defendant." *Id*. at 3. Magistrates would be required to impose "the least restrictive conditions and the minimum amount or type of bail necessary to reasonably ensure" the defendant's appearance and the safety of the community. *Id*. at 4. The legislation would forbid "requir[ing] a

defendant to provide a monetary bail bond for the sole purpose of preventing the defendant's pretrial release." *Id*. A magistrate who denied pretrial release would have to issue a reasoned opinion with written findings within 24 hours of the decision, subject to review on appeal. *Id*.

Under proposed Article 17.034, defendants who are released and fail to appear must again be released on personal bond if they can show good cause for their failure to appear. *Id*. at 8. Even if they cannot show good cause, magistrates "must set the amount of bail at the minimum amount" need to assure reappearance. *Id*.

"As soon as practicable" after a magistrate denies release, but no later than ten days after the decision, all defendants still detained would be entitled to an adversarial, counseled bail-review hearing, at which they would be able to put on evidence, testify, and call witnesses. *Id*. at 8–10. The reviewing judge must find by clear and convincing evidence "that monetary bail and conditions of release are insufficient to reasonably ensure the defendant's appearance in court as required or the safety of the community" for the pretrial detention to continue. *Id*. at 11. The judge would have to issue that finding in a reasoned opinion, subject to appellate review. *Id*. at 12.

Proposed Article 17.20 provides that in misdemeanor cases, "[n]otwithstanding a bail schedule or any standing order entered by a judge," a sheriff or other jailer "after considering the defendant's pretrial risk assessment, may . . . take the bail of the defendant in accordance with [proposed] Article 17.028." *Id*. at 14. Proposed Article 17.028 is the article that requires release on the least restrictive condition. *See id*. at 4. Article 17.20 would confirm that sheriffs have independent judgment and authority to release misdemeanor arrestees on less restrictive conditions than provided by a secured money bail schedule. *Cf. id.* at 14–15 (providing that in felony cases, a sheriff must deliver an arrestee to a court to make the pretrial-release decision under Article 17.028

and permitting the sheriff to take the defendant's bail only if the court so orders).

If enacted as proposed, the legislation would likely address many of the plaintiffs' concerns. Under the Code as revised, Hearing Officers would not be authorized to exclaim "based on your priors!" at a one-to-two-minute hearing before imposing secured money bail that the defendant cannot pay, resulting in that defendant's detention. The Hearing Officers would have to find and state the clear and convincing evidence supporting the specific reasons why paying a nonrefundable premium to a bail bondsman is reasonably necessary to ensure that the misdemeanor defendant will appear and refrain from new criminal activity while on pretrial release, and why no less restrictive condition is reasonable. The written findings would be reviewed in an adversarial, counseled hearing before County Judges, who must also apply the exacting clear-and-convincing evidence standard. Notwithstanding the County's bail schedule, the Sheriff would be authorized to assess a misdemeanor defendant's risk and release the defendant on an unsecured personal bond, with or without enhanced conditions for supervision. Bail could not be set to achieve pretrial detention without following the procedures required for a valid detention order under State law.

The defendants argue that because the Texas legislature has proposed these changes, it is the only body that can make them. (Docket Entry No. 266 at 9); *see also* Hearing Tr. at 3-1:72–73. But nothing in the current Code of Criminal Procedure prevents Harris County from imposing the least restrictive conditions on pretrial release, deciding those conditions by clear and convincing evidence, or making written findings and issuing reasoned opinions at bail reviews. Nothing in Texas state law permits, much less requires, Harris County judges to impose secured money bail for the purpose of detaining those who cannot pay it. A sheriff's role in releasing misdemeanor defendants on bail

is already provided for under the current version of Article 17.20.[77] The proposed legislation represents an acknowledgment that at least some jurisdictions in Texas are imposing secured money bail to detain misdemeanor arrestees because they cannot pay it, without the process a detention order requires. The proposed legislation makes explicit the due process requirements for setting bail under Texas law and sets boundaries on the procedures and time frames to meet those requirements.

## I. Conclusions on Findings of Fact

Historically, bail has served as a mechanism of release from pretrial detention. Recently, many jurisdictions have acknowledged and repudiated long-standing practices of imposing, whether by intent or indifference, secured money bail that misdemeanor defendants are clearly unable to pay, resulting in pretrial detention of defendants otherwise eligible for release. Encouraged in their reforms by the American Bar Association and the U.S. Department of Justice, among others, these jurisdictions have followed two approaches to reforming the use of secured money bail for misdemeanor defendants. Some take the approach that a secured financial condition cannot result in the pretrial detention of misdemeanor defendants who cannot pay it, and who are otherwise eligible to be released. Other jurisdictions permit secured financial conditions of release to result in detention only when the process due before imposing a pretrial preventive detention order is

[77] "BAIL IN MISDEMEANOR. In cases of misdemeanor, the sheriff or other peace officer, or a jailer licensed under Chapter 1701, Occupations Code, may, whether during the term of the court or in vacation, where the officer has a defendant in custody, take of the defendant a bail bond." TEX. CODE CRIM. PRO. art. 17.20; *cf. id*. art. 17.21 ("BAIL IN FELONY. In cases of felony, when the accused is in custody of the sheriff or other officer, and the court before which the prosecution is pending is in session in the county where the accused is in custody, the court shall fix the amount of bail, if it is a bailable case and determine if the accused is eligible for a personal bond; and the sheriff or other peace officer, unless it be the police of a city, or a jailer licensed under Chapter 1701, Occupations Code, is authorized to take a bail bond of the accused in the amount as fixed by the court, to be approved by such officer taking the same, and will thereupon discharge the accused from custody. The defendant and the defendant's sureties are not required to appear in court."); *see also* Texas Attorney General Opinion No. H–856 (1976) ("[S]ince article 17.20 authorizes the sheriff or other peace officer to take bail in misdemeanor cases, article 17.15 compels the conclusion that such officer is also to regulate the amount of bail in such cases.").

provided. This includes timely, counseled, adversarial hearings at which the defendant may present evidence and the judge must issue a reasoned opinion with written findings explaining why the secured financial condition of release is the only reasonable way to assure the defendant's appearance at hearings and law-abiding behavior before trial. The first approach recognizes that releasing those who can pay while detaining those who cannot pay would violate the Equal Protection Clause. The second approach recognizes that when secured money bail functions as a detention order against an indigent defendant, procedural protections are required under the Due Process Clause.

Texas law does not provide for pretrial release on no financial conditions. Texas law permits Harris County's Hearing Officers and County Judges to choose between making financial release conditions secured—requiring a misdemeanor defendant or a surety to pay the amount up front to be released from jail—or unsecured—allowing release with the bond coming due only if the defendant fails to appear at hearings and a magistrate orders the bond forfeited. In setting the bail amount, whether secured or unsecured, Texas law requires Hearing Officers to consider five factors, including the defendant's ability to pay, the charge, and community safety. A federal court consent decree requires Hearing Officers to make individualized assessments of each misdemeanor defendant's case and adjust the scheduled bail amount or release the defendant on unsecured or nonfinancial conditions.

Harris County Hearing Officers and County Judges follow a custom and practice of interpreting Texas law to use secured money bail set at prescheduled amounts to achieve pretrial detention of misdemeanor defendants who are too poor to pay, when those defendants would promptly be released if they could pay. Complying with the County Judges' policy in the bail

schedule and the County Rules of Court, Harris County Assistant District Attorneys apply secured bail amounts to the charging documents. The schedule is a mechanical calculation based on the charge and the defendant's criminal history. Although Texas and federal law require the Hearing Officers and County Judges to make individualized adjustments to the scheduled bail amount and assess nonfinancial conditions of release based on each defendant's circumstances, including inability to pay, the Harris County Hearing Officers and County Judges impose the scheduled bail amounts on a secured basis about 90 percent of the time. When the Hearing Officers do change the bail amount, it is often to conform the amount to what is in the bail schedule, if the Assistant District Attorneys have set it "incorrectly." The Hearing Officers and County Judges deny release on unsecured bonds 90 percent of the time, including in a high majority of cases in which Harris County Pretrial Services recommends release on unsecured or nonfinancial conditions based on a validated risk-assessment tool. When Hearing Officers and County Judges do grant release on unsecured bonds, they do so for reasons other than the defendant's inability to pay the bail on a secured basis.

The Hearing Officers and County Judges follow this custom and practice despite their knowledge of, or deliberate indifference to, a misdemeanor defendant's inability to pay bail on a secured basis and the fact that secured money bail functions as a pretrial detention order. The Hearing Officers follow an unwritten custom and practice of denying release on unsecured bonds to all homeless defendants. Those arrested for crimes relating to poverty, such as petty theft, trespassing, and begging, as well as those whose risk scores are inflated by poverty indicators, such as the lack of a car, are denied release on unsecured financial conditions in the vast majority of cases, when it is obvious that pretrial detention will result. Hearing Officers style their orders as findings of "probable cause for further detention," when the only condition of further detention is the

misdemeanor defendant's inability to pay secured money bail. Pls. Ex. 9.

As a result of this custom and practice, 40 percent of all Harris County misdemeanor arrestees every year are detained until case disposition. Most of those detained—around 85 percent—plead guilty at their first appearance before a County Judge. Reliable and ample record evidence shows that many abandon valid defenses and plead guilty in order to be released from detention by accepting a sentence of time served before trial. Those detained seven days following a bail-setting hearing are 25 percent more likely to be convicted, 43 percent more likely to be sentenced to jail, and, on average, have sentences twice as long as those released before trial.

Harris County is required by Texas and federal law to provide a probable cause and bail-setting hearing for those arrested on misdemeanor charges without a warrant within 24 hours of arrest. At the hearing, Hearing Officers are supposed to provide "a meaningful review of alternatives to pre-scheduled bail amounts." *Roberson* Order at 1. Although Texas law requires Harris County to release misdemeanor defendants who have not had a hearing within 24 hours, over 20 percent of detained misdemeanor defendants wait longer than 24 hours for a hearing. In some, but not all, of these cases, the Hearing Officers determine probable cause in the defendant's absence, but the Hearing Officers admit that they do not provide a meaningful bail setting in absentia. For those misdemeanor arrestees who are detained for significant periods by the City of Houston Police Department before they are transported to the Harris County Jail, or for those booked into the Harris County Jail on a Friday, the Next Business Day Setting before a County Judge will not occur until after three or four days in pretrial detention.

The record shows that County Judges adjust bail amounts or grant unsecured personal bonds in fewer than 1 percent of the cases. Prosecutors routinely offer, and County Judges routinely accept,

guilty pleas at first setting and sentence the misdemeanor defendants to time served, releasing them from detention within a day of pleading guilty. Those who do not plead guilty remain detained until they have a lawyer who can file a motion to contest the charge or the bail setting and request a motion hearing. These hearings are generally held one or two weeks later. The record shows that the motion hearing is the first opportunity a misdemeanor defendant has to present evidence of inability to pay and to receive a reasoned opinion explaining the bail setting. Testimony from the defendants' expert on Harris County court administration establishes that the Next Business Day Setting rule codifies, rather than alters, these customs and practices.

The court finds and concludes that Harris County has a custom and practice of using secured money bail to operate as de facto orders of detention in misdemeanor cases. Misdemeanor arrestees who can pay cash bail up front or pay the up-front premium to a commercial surety are promptly released. Indigent arrestees who cannot afford to do so are detained, most of them until case disposition. Because the County Judges know and acquiesce in this custom and practice in their legislative capacity as rulemakers, this consistent custom and practice amounts to an official Harris County policy.

Harris County does not compile comparative data on failures to appear by release on different bond types. No Harris County policymaker or judicial officer has attempted to examine the relative pretrial success or failure rates of misdemeanor defendants released on secured money bail versus those released on unsecured bail. The reliable, credible evidence in the record from other jurisdictions shows that release on secured financial conditions does not assure better rates of appearance or of law-abiding conduct before trial compared to release on unsecured bonds or nonfinancial conditions of supervision. Harris County's proxy data for failure-to-appear is consistent

with these studies. The information Harris County does keep shows no significant difference in appearance rates between those released on secured money bail and those released on unsecured appearance bonds, when properly controlling for the differences in risk profiles of the population.

The reliable evidence in the present record shows no meaningful difference in pretrial failures to appear or arrests on new criminal activity between misdemeanor defendants released on secured bond and on unsecured financial conditions. But even a few days in pretrial detention on misdemeanor charges correlates with—and is causally related to—higher rates of failure to appear and new criminal activity during pretrial release and beyond. Misdemeanor pretrial detention is causally related to the snowballing effects of cumulative disadvantage that are especially pronounced and pervasive for those who are indigent and African-American or Latino.

Harris County commendably plans to revise its pretrial processes and bail schedule by July 1, 2017. The County proposes to provide early release on unsecured bonds to "low-risk" misdemeanor defendants and to hold "high-risk" defendants—regardless of ability to pay money bail—until the probable cause hearing. "Moderate-risk" defendants will be granted release on a secured money bail, if they can pay the scheduled amount. The County plans to implement the Arnold Risk-Assessment Tool and integrate its information technology systems to avoid the delays that booking procedures and Pretrial Services interviews create. But Harris County's policymakers and judicial officers have made clear their intent to continue imposing secured money bail on "high-risk" and "moderate-risk" defendants, categories as yet undefined. Those who can pay the secured money bail, no matter their level of risk, will be released. Those who cannot will remain detained.

Except in the narrow case of defendants charged with a crime of family violence after violating a previously imposed condition of release, Texas law does not permit orders of pretrial

preventive detention. Proposed legislation would permit magistrates to order preventive detention in certain cases, but only with procedural safeguards, and would forbid the use of secured money bail to accomplish preventive detention based on inability to pay. But for now, Harris County effectively gets around the Texas prohibition on pretrial detention by imposing secured money bail against indigent misdemeanor defendants knowing that they cannot pay. Harris County has its own extra-legal system of pretrial preventive detention through secured money bail that operates on the basis of wealth. It accomplishes this without providing the procedural safeguards typically required of pretrial preventive detention orders.

## II. Conclusions of Law

### A. The Legal Standards

To obtain a preliminary injunction, the plaintiffs must establish "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011); *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008). "[A]t the preliminary injunction stage, the procedures in the district court are less formal, and the district court may rely on otherwise inadmissible evidence, including hearsay evidence." *Sierra Club, Lone Star Chapter v. F.D.I.C.*, 992 F.2d 545, 551 (5th Cir. 1993).

Summary judgment is appropriate if "no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). Rule 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case,

and on which the party will bear the burden of proof at trial." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). "The movant bears the burden of identifying those portions of the record it believes demonstrates the absence of a genuine issue of material fact." *Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 261 (5th Cir. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–25 (1986)). If the burden of proof at trial lies with the nonmoving party, the movant may satisfy its initial burden by "'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. While the party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, it does not need to negate the elements of the nonmovant's case. *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005) (citation omitted).

In deciding a motion for summary judgment, the court draws all reasonable inferences in the light most favorable to the nonmoving party. *Connors v. Graves*, 538 F.3d 373, 376 (5th Cir. 2008). When the moving party has met its Rule 56 burden, the nonmoving party must identify specific evidence in the record and articulate how that evidence supports that party's claim. *Baranowski v. Hart*, 486 F.3d 112, 119 (5th Cir. 2007). "This burden is not satisfied with some metaphysical doubt as to the material facts, by unsubstantiated assertions, or by only a scintilla of evidence." *Little*, 37 F.3d at 1075 (internal quotation marks and citations omitted). Factual controversies resolve in the nonmoving party's favor, "but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Id.*

**B. Likelihood of Success on the Merits**

**1. The Standard of Review**

Federal courts "generally analyze the fairness of relations between the criminal defendant and

the State under the Due Process Clause, while [they] approach the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause." *Bearden v. Georgia*, 461 U.S. 660, 665 (1983). The Supreme Court has noted that in cases of detaining the indigent, "[d]ue process and equal protection principles converge in the Court's analysis." *Id*. (citing *Griffin v. Illinois*, 351 U.S. 12, 17 (1956)).

Although the legal standards and analysis overlap, the plaintiffs present one claim that is more appropriately analyzed under equal protection principles, and another claim more appropriately analyzed under due process. First, the plaintiffs allege that Harris County maintains a "wealth-based detention system" by setting secured money bonds higher than indigent misdemeanor defendants can pay, creating de facto orders of detention. (Docket Entry No. 54 at 9; No. 92 at 19). These detention orders operate only against the indigent, because defendants who receive the same or similar secured bail but who can pay the bond or bondsman's premium can be promptly released, regardless of the risk of nonappearance or new criminal activity. (Docket Entry No. 54 ¶ 42). Second, the plaintiffs allege that Harris County delays or fails to provide procedural protections required for a meaningful bail review. They allege that misdemeanor arrestees are frequently detained for days or even weeks before they can obtain any meaningful review of their bail setting in a counseled, adversarial hearing with findings on the record. (Docket Entry No. 54 ¶¶ 51, 82, 104; No. 92 at 21). Many plead guilty to obtain release rather than wait for a bail review that may, but likely will not, result in release.

The threshold question is what standard of review applies under either equal protection or due process analysis—rational basis, strict scrutiny, or something in between.

**a. Equal Protection**

In its Memorandum and Opinion on the defendants' motions to dismiss, the court reviewed

the Supreme Court's trilogy of cases, *Williams v. Illinois*, 399 U.S. 235 (1970), *Tate v. Short*, 401 U.S. 395 (1971), and *Bearden v. Georgia*, 461 U.S. 660 (1983), along with the Fifth Circuit's panel and en banc decisions in *Pugh v. Rainwater*, 557 F.2d 1189 (5th Cir. 1977), *vacated at* 572 F.2d 1053 (5th Cir. 1978) (en banc), to conclude that "[t]he 'careful inquiry' the [Supreme] Court requires in this type of case calls for a more demanding review" than rational basis. *ODonnell*, 2016 WL 7337549 at *15. The court invited briefing from the parties on the standard of review. *Id*. at *39.

The County argues that rational basis review is the appropriate standard because the *Williams-Tate-Bearden* line of cases is limited to detention for defendants who do not pay post-conviction fines, and does not extend to detention for those who do not pay secured pretrial bail. (Docket Entry No. 162 at 12). The County relies on cases holding that wealth-based distinctions are subject only to rational basis review because "[g]enerally speaking, an individual's indigence does not make that individual a member of a suspect class for equal protection purposes." *Driggers v. Cruz*, 740 F.3d 333, 337 (5th Cir. 2014) (citing *Maher v. Roe*, 432 U.S. 464 (1977)); *see also San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Carson v. Johnson*, 112 F.3d 818, 821–22 (5th Cir. 1997) ("neither prisoners nor indigents constitute a suspect class").

The Supreme Court and Fifth Circuit cases reviewed at the dismissal stage make clear that detention based on wealth is an exception to the general rule that rational basis review applies to wealth-based classifications. In *Williams*, the Supreme Court ruled that "[o]nce the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency." 399 U.S. 241–42. In *Tate*, the Court extended the rule, holding that

> the same constitutional defect condemned in *Williams* also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine. In each case, the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.

401 U.S. at 671 (quoting *Morris v. Schoonfield*, 399 U.S. 508, 509 (1970) (plurality)). The *Bearden* Court reaffirmed that "if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it." 461 U.S. at 667–68. *Bearden* made finding the least-restrictive alternative a constitutional requirement in cases in which inability to pay a fine results in imprisonment. "[T]he court must consider alternative measures of punishment other than imprisonment. Only if alternative measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay." *Id*. at 672; *see also Frazier v. Jordan*, 457 F.2d 726 (5th Cir. 1972) (invalidating a law requiring certain defendants to choose between "a $17 fine or 13 days in jail" because it created two disparately treated classes defined by wealth without a compelling state interest justifying the practice).

When the Supreme Court ruled in *San Antonio School District v. Rodriguez* that wealth-based classifications ordinarily require rational basis review, the Court specifically excepted the wealth-based detentions at issue in *Williams* and *Tate*. 411 U.S. at 20. The Court recognized that in *Williams* and *Tate*, "[t]he individuals, or groups of individuals, who constituted the class discriminated against . . . shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." *Id*. The *Williams-Tate*

exception did not apply to a case in which some could afford better schooling than others, but no one was completely cut off from public education by poverty. *Id.* at 25. In that case, wealth classifications did not create a suspect class and rational basis review applied. *Id.* at 28–29. But here, the plaintiffs' claim is not that some are able to afford better conditions of pretrial release than others. The claim is that misdemeanor defendants who can pay secured money bail are able to purchase pretrial liberty, while those who are indigent and cannot pay are absolutely denied pretrial liberty and detained by their indigence. Under *Williams*, *Tate*, and *Bearden*, an absolute deprivation of liberty based on wealth creates a suspect classification deserving of heightened scrutiny.[78]

The defendants' argument that *Williams*, *Tate*, and *Bearden* are limited to detention for failure to pay post-conviction fines is unpersuasive. Although state and local governments have compelling interests in punishing and deterring violations of court orders, including the failure to pay court-ordered fines, the Supreme Court limits post-conviction detention of indigent defendants who cannot pay fines. The Court held that detention may be imposed only as a last resort, after a court carefully reviews the alternatives and makes findings on the record that detention is the least restrictive option. *Bearden*, 461 U.S. 671–72. By contrast, pretrial bail is not intended to be punitive. *See, e.g.*, *Brown*, 338 P.3d. at 1291 ("Bail is not pretrial punishment and is not be set solely on the basis of an accusation of a serious crime."). The defendants have argued that the government's interest in setting bail is to ensure that misdemeanor arrestees return for court appearances, not to protect public safety or to deter crime. (*See* Docket Entry No. 101 at 7, 13). In the absence of a greater penological interest, and given the presumption of innocence for those

[78] As the court noted in its earlier Memorandum and Opinion, this distinction arises in the due process analysis as well. *ODonnell*, 2016 WL 7337549 at *17 n.19. Challenges to the conditions of detention receive rational basis review. *Bell v. Wolfish*, 441 U.S. 520 (1979). Challenges to the decision to detain itself are accorded the full complement of due process protections. *Salerno*, 481 U.S. at 748–51.

awaiting trial, a government policy of wealth-based classifications for pretrial detention for misdemeanor offenses deserves, if anything, less deference than post-conviction detention.[79]

That conclusion is supported by the Fifth Circuit's *Rainwater* decisions. The class plaintiffs in *Pugh v. Rainwater* alleged that Florida's imposition of secured money bail without regard for an arrestee's ability to pay violated equal protection. 557 F.2d at 1190. The panel decision explicitly applied strict scrutiny, reasoning that "the [Supreme] Court has been extremely sensitive to classifications based on wealth in the context of criminal prosecutions" and concluding from *Williams-Tate* that "the wealth classification in the instant case warrants close judicial scrutiny" by creating a suspect class. 557 F.2d at 1197. The panel also stated that "[s]trict scrutiny is appropriate also because the inability to raise money bail necessarily affects fundamental rights of the indigent defendant. Foremost among these rights is the presumption of innocence." *Id.* Pretrial detention based on inability to pay money bail also implicated and threatened "an accused's right to a fair trial," because "the 'right to freedom before conviction permits the unhampered preparation of a defense.'" *Id*. (quoting *Stack*, 342 U.S. at 4).

The en banc court vacated the panel decision as moot because, while the appeal was pending, Florida issued a new written bail policy. 572 F.2d 1053. Although the en banc court did not comment on the scrutiny standard to be applied, it cited *Williams* and *Tate*, stating that "[a]t the outset we accept the principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." *Id.* at 1056. The court viewed pretrial

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[79] *See* U.S. Dept. of Justice Statement of Interest, *Varden v. City of Clanton, Alabama*, Civil No. 15-34, Docket Entry No. 26 at 8 (M.D. Ala. Feb. 13, 2015) ("Although much of the Court's jurisprudence in this area concerns sentencing or early release schemes, the Court's Fourteenth Amendment analysis applies in equal, if not greater force to individuals who are detained until trial because of inability to pay fixed-sum bail amounts.").

confinement "of one who is accused but not convicted of a crime as presenting a question having broader effects and constitutional implications than would appear from a rule stated solely for the protection of indigents." *Id.*

*Williams*, *Tate*, *Bearden*, and *Rainwater* remain good law, neither overruled nor limited. The Supreme Court in *San Antonio School District v. Rodriguez* specifically excepted *Williams* and *Tate* from the general rule that wealth-classifications are reviewed under a rational basis standard. 411 U.S. at 20. *Bearden*, decided a decade after *San Antonio School District*, confirmed that using wealth-based classifications that result in detention for inability to pay a fine "requires a careful inquiry into such factors as 'the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose.'" 461 U.S. at 666–67 (quoting *Williams*, 399 U.S. at 260 (Harlan, J., concurring)). The en banc court in *Rainwater*—also decided well after *San Antonio School District*—applied *Williams* and *Tate* to the pretrial bail context. *Rainwater* supports applying a standard of review more exacting than rational basis.[80]

At a minimum, heightened scrutiny requires a court to evaluate the government's legitimate interest in a challenged policy or practice and then inquire whether there is a sufficient "fit" between

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[80] The defendants note that in *Broussard v. Parish of Orleans*, 318 F.3d 644 (5th Cir. 2003), the Fifth Circuit applied rational basis review to a § 1983 challenge to "bail-fee statutes" that imposed $5 to $15 fees for filing and serving process, including the processing of bail bonds. *Id.* at 647. The court found that in many cases the nominal fees were refunded upon request, mitigating due process concerns. *Id.* at 566. Most importantly, the arrestees challenging the fees did not allege, and the evidence did not show, that they were detained or that their release was even delayed by the imposition of the fees. *Id.* at 662.

*Broussard* does not help the defendants here. Like the Louisiana jurisdictions challenged in *Broussard*, Harris County imposes nominal fees of $20 or 3 percent of the bond principal on arrestees released on personal bond. Hearing Tr. 1:121; 2-1:47. The witnesses consistently testified that these fees are discretionary, and no arrestee is denied release for failure to pay the fee up front. *Id.* at 2-1:47, 53, 102–03; 3-2:145. Because these fees do not absolutely deprive indigent arrestees of liberty before trial, they would not be reviewed under heightened scrutiny. *San Antonio Sch. Dist.*, 411 U.S. at 20. But the plaintiffs do not challenge these fees. *Broussard* does not apply.

the government's means and ends. *Cf. Harris v. Hahn*, 827 F.3d 359, 365 (5th Cir. 2016) ("Classifications survive rational basis review 'even when there is an imperfect fit between means and ends.'" (quoting *Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993))). At a maximum, "[c]lassifications created by state action which disadvantage a 'suspect class' or impinge upon the exercise of a 'fundamental right' are subject to strict scrutiny, and will be upheld only when they are precisely tailored to serve a compelling state interest." *Clark v. Prichard*, 812 F.2d 991, 995 (5th Cir. 1987).

State and local governments have "a compelling interest in assuring the presence at trial of persons charged with a crime."[81] *Rainwater*, 572 F.2d at 1056 (citing *Stack*, 342 U.S. at 1). As a matter of law, Harris County has met its burden to show a compelling state interest. The question is what level of tailoring heightened scrutiny requires in this case, and whether the plaintiffs have

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[81] It is unclear whether community safety is also a compelling government interest in setting bail for misdemeanor defendants. The defendants did not brief public safety as a government interest, but they frequently pressed that point at the preliminary injunction hearing. *See, e.g.*, Hearing Tr. 1:95–96, 194–95; 4-1:140–42; 144–45; 5:34, 69–70; (*cf.* Docket Entry No. 101 at 2, 13; No. 161 at 1; No. 162 at 2, 22). The defendants note that one of the five Article 17.15 factors judicial officers must consider is the safety of the alleged victim and of the community. Hearing Tr. 4-1:17–18, 144; 5:69–71.

The U.S. Department of Justice argues that "[i]f a court finds that no other conditions may reasonably assure an individual's appearance at trial, financial conditions may be constitutionally imposed—but 'bail must be set by a court at a sum designed to ensure that goal, and *no more*.'" Pls. Ex. 12(dd) at 18 (quoting *Salerno*, 481 U.S. at 754). The American Bar Association's *Standards for Criminal Justice, Pretrial Release* emphasize that financial conditions of release "should not be employed to respond to concerns for public safety." Pls. Ex. 12(ff) at 12, (quoting Standard 10-1.4(d)). The vacated *Pugh v. Rainwater* panel concluded based on still-valid Supreme Court precedent that "[t]he sole governmental interest served by bail is to assure the presence of the accused at trial." 557 F.2d at 1198, *vacated by* 572 F.2d 1053 (citing *Stack*, 342 U.S. at 5; *Duran v. Elrod*, 542 F.2d 998, 999 (7th Cir. 1976)).

The court need not decide at this stage whether protecting the community from new criminal activity during pretrial release is a compelling government interest in setting money bail for misdemeanor defendants. The government's compelling interest in assuring the defendants' appearance satisfies the government's burden under heightened scrutiny. The government's interest does not become more compelling by having an additional policy reason for setting bail, and the tailoring analysis is not affected. Appearing at hearings and refraining from criminal activity are two forms of pretrial law-abiding behavior. The present record does not show that financial conditions of release addresses one better than the other. Whether the government's interest is in law-abiding behavior broadly defined or only in a defendant's appearance, the government's policies must be narrowly tailored to meet that interest.

demonstrated a likelihood of showing that Harris County does not meet that standard. In *Bearden*, after the parties extensively argued about whether rational basis review or strict scrutiny applied, the Supreme Court cautioned that "[w]hether analyzed in terms of equal protection or due process, the issue [of detention based on indigence] cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into such facts as the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose." 461 U.S. at 666–67 (internal footnotes, quotation marks, and citation omitted). The *Rainwater* panel interpreted *Williams* and *Tate* to require strict scrutiny in a challenge to a pretrial system of detaining indigent defendants because they could not pay secured money bail. 557 F.2d at 1197. The en banc court vacated on other grounds, without commenting on the scrutiny standard. *See* 572 F.2d at 1053.

The plaintiffs have suggested that "intermediate" scrutiny is the most conservative application of these precedents that recognizes both the government's and the individual arrestee's weighty interests. Hearing Tr. 1:73–75; *see also Salerno*, at 750–51 ("On the other side of the scale, of course, is the individual's strong interest in liberty. We do not minimize the importance and fundamental nature of this right. But, as our cases hold, this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society.") "Narrow tailoring under intermediate scrutiny is different from strict scrutiny's narrow-tailoring requirement. Strict scrutiny requires the government to show that it has used the least restrictive means of advancing a compelling interest." *Lauder, Inc. v. City of Houston, Texas*, 751 F.Supp.2d 920, 933 (S.D. Tex. 2010). As applied in free expression First Amendment case law, "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial

government interest that would be achieved less effectively absent the regulation." *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

In light of the plaintiffs' burden to show a likelihood of success on the merits, the court applies the tailoring requirement of intermediate scrutiny. This standard is appropriately deferential towards the County and appropriately protective of the misdemeanor defendants.

**b. Due Process**

In reviewing facial challenges to statutes regulating pretrial-confinement conditions, the Supreme Court evaluates whether "conditions and restrictions of pretrial detainment" impermissibly "amount to punishment of the detainee." *Bell*, 441 U.S. at 533, 535. The Court focuses "on whether the restrictions were imposed for a punitive purpose and, if not, on whether the restrictions are excessive in relation to a legitimate regulatory purpose." *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 778 (9th Cir. 2014) (en banc) (collecting cases).

In *United States v. Salerno*, 481 U.S. at 739, the Court reviewed a challenge to a provision of the federal Bail Reform Act of 1984 that permitted pretrial detention of arrestees charged with serious felonies if the government demonstrated by clear and convincing evidence, at an adversarial hearing, that no release conditions would "reasonably assure" the safety of the community. 18 U.S.C. § 3142(e). Under *Bell*'s first prong, the Court found no evidence that Congress had intended pretrial detention to operate for a punitive purpose. 481 U.S. at 747. Under *Bell*'s second prong, the Court upheld the preventive detention portion of the Act because it "carefully limits the circumstances under which detention may be sought to the most serious of crimes." *Id.*

Having concluded that the challenged provision of the Bail Reform Act was regulatory and not punitive, the Court evaluated whether the Act's procedures sufficiently protected "the

individual's strong interest in liberty." *Id*. at 750. The Court upheld the provision under this standard because: (1) "[d]etainees have a right to counsel at their detention hearing; (2) "[t]hey may testify in their own behalf, present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing"; (3) the judicial officer "is guided by statutorily enumerated factors"; (4) "[t]he Government must prove its case by clear and convincing evidence"; and (5) "the judicial officer must include written findings of fact and a written statement of reasons for a decision to detain." *Id*. at 751.

The Ninth Circuit, sitting en banc, interpreted *Salerno* to require strict scrutiny of pretrial detention conditions. *Lopez-Valenzuela*, 770 F.3d at 781 & n.3 (*Salerno*'s "heightened scrutiny" standard requires that pretrial detention policies be "narrowly tailored to serve a compelling state interest"). The *Salerno* Court itself did not describe its analysis as strict scrutiny or invoke the narrow-tailoring standard. But the Court did make clear that under the Due Process Clause, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." 481 U.S. at 755. *Salerno* involved a facial challenge to a federal law under the Due Process Clause, requiring a more demanding burden for the plaintiffs than that involved here.[82] Here, the plaintiffs' due process challenge is to Harris County's bail system as applied.

**2. The Constitutional Requirements**

**a. Equal Protection**

"The rule of *Williams* and *Tate*, then, is that the State cannot 'impos[e] a fine as a sentence

[82] "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *Salerno*, 481 U.S. at 745 (citing *Schall v. Martin*, 467 U.S. 253, 269 n.18 (1984)).

and then automatically conver[t] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.'" *Bearden*, 461 U.S. at 667 (quoting *Tate*, 401 U.S. at 398) (alterations in original). The *Bearden* Court concluded that while a state has broad discretion to decide what penalties satisfy its clear interest to deter and punish crime, once the state "determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it," unless a court finds either that (1) the defendant was not actually indigent and was refusing to pay in bad faith, or (2) "alternative measures are not adequate to meet the State's interests in punishment and deterrence." *Id*. at 667–68, 674.

Applying *Williams* and *Tate* to the pretrial bail context, as *Rainwater* did, (and by extension, the post-*Rainwater Bearden* decision), the court concludes that Harris County has broad discretion to impose pretrial release conditions that meet the compelling interest of assuring a misdemeanor defendant's appearance at trial. But once the County has chosen to impose a financial condition of pretrial release, the County may not use that condition to imprison defendants before trial because they lack the means to pay it. *Rainwater*, 572 at 1056. To do so impermissibly conditions "an absolute deprivation of a meaningful opportunity to enjoy [the] benefit" of liberty before trial or conviction on the basis of a defendant's poverty. *San Antonio School District*, 411 U.S. at 20.

Under the Equal Protection Clause as applied in the Fifth Circuit, pretrial detention of indigent defendants who cannot pay a financial condition of release is permissible only if a court finds, based on evidence and in a reasoned opinion, either that the defendant is not indigent and is refusing to pay in bad faith, or that no less restrictive alternative can reasonably meet the government's compelling interest. *Bearden*, 461 U.S. at 674. In this case, the plaintiffs bear the

burden of meeting the preliminary injunction requirements, but at the trial on the merits, the County will have the burden under heightened scrutiny to show that there is no reasonable alternative to a policy, custom, and practice of setting money bail on a secured basis in misdemeanor cases. *See, e.g.*, *Lauder*, 751 F.Supp.2d at 933. The judicial defendants bear the burden to show that they make a finding of no reasonable alternative to imposing money bail on a secured, prescheduled basis for indigent defendants.

**b. Due Process**

In *Turner v. Rogers*, 564 U.S. 431 (2011), the Supreme Court held that a state court's detention order for civil contempt violated the Due Process Clause. *Id*. at 449. The Court reasoned that while a civil contempt proceeding exposing the defendant to detention for up to one year did not require the assistance of counsel, the state had to provide "alternative procedural safeguards" such as "adequate notice of the importance of ability to pay [as an element to prove at the hearing], fair opportunity to present, and to dispute relevant information, and court findings." *Id*. at 448. The Court made clear that these were examples, not a complete description of what was needed for due process. The state could provide different procedures "equivalent" to those the Court listed. *Id.*

*Turner* is a helpful starting point for examining the plaintiffs' likelihood of succeeding on their due process claim. Although the Supreme Court has not defined with precision the federal due process requirements for pretrial detention of misdemeanor defendants, at a minimum, state or local governments must provide notice of the importance of ability to pay in the judicial determination of detention, a fair opportunity to be heard and to present evidence on inability to pay, and a judicial finding on the record of ability to pay or a reasoned explanation of why detention is imposed despite an inability to pay the financial condition. *Turner* clarified that these procedures are required by the

Due Process Clause even when the Sixth Amendment does not guarantee a right to counsel. Courts are divided over whether an initial bail-setting is a "critical stage" in the criminal process requiring counsel. *See, e.g.*, *Ditch v. Grace*, 479 F.3d 249 (3rd Cir. 2007); *Gonzalez v. Comm'r of Corr.*, 68 A.3d 624 (Conn. 2013); *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010); *State v. Fann*, 571 A.2d 1023 (N.J.Super.L. 1990). Harris County does not currently provide counsel at the probable cause and bail-setting hearing but is exploring a pilot program to do so in July 2017.[83]

The defendants cite many cases for the proposition that "a bail setting is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement." *See, e.g., McConnell*, 842 F.2d at 107. These cases in fact support the plaintiffs' due process claims. The cases the defendants cite involve serious felony charges with potentially lengthy sentences. The appellate courts affirmed the imposition of secured money bail that a defendant could not pay. But the bail was imposed only *after* at least one counseled adversarial hearing, at which the defendant had an opportunity to present evidence and to be heard, with the court stating its findings on the record that either the defendant had not presented evidence of indigence or that no other condition could reasonably assure the defendant's appearance at future hearings or protect the community from additional felony crimes.[84]

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[83] *See* Part I.H.3 *supra*.

[84] *See, e.g.*, *United States v. Cordero*, 166 F.3d 334 (Table), 1998 WL 852913 at *2 (4th Cir. 1998) (statutory presumption that defendant was a flight risk when the potential sentence exceeded ten years; district court expressly addressed ability to make bail in a reasoned opinion); *Lee v. Evans*, 41 F.3d 1513 (Table), 1994 WL 651959 (9th Cir. 1994) (defendant presented no evidence on ability to pay at the hearing); *Hood v. Evans*, 37 F.3d 1505 (Table), 1994 WL 526973 (9th Cir. 1994) (same); *United States ex rel. Fitzgerald v. Jordan*, 747 F.2d 1120, 1133 (7th Cir. 1984) ("In this case [charging attempted murder and armed robbery], the amount of the petitioner's bail was reviewed twice by Illinois trial courts and twice by the Illinois Supreme Court."); *State v. Pratt*, — A.3d —, 2017 WL 894414 (Vt. 2017) ("bail requirements at a level a defendant cannot afford should be rare" and "courts should be particularly circumspect in exercising their discretion to set bail at a level that a defendant cannot meet"; a defendant with fourteen pending charges, including violent felonies fell within the rare exception); *see also* Part I.C.2–3 *supra* and

The defendants cite only one case relating to detention on a misdemeanor charge, *Fields v. Henry County, Tennessee*, 701 F.3d 180 (6th Cir. 2012). But in *Fields*, the defendant could afford to pay money bail, and he was not detained because he was unwilling or unable to pay. *See id.* at 183 (the defendant was released on a $5,000 bail bond). Instead, the defendant objected to Tennessee's policy of detaining all those charged with family-violence offenses for 12 hours and the county's policy of using a bail schedule. *Id*. at 184–85. Because the misdemeanor defendant failed "to point to any inherent problem with the dollar amount set in his case," the Sixth Circuit held that the bail schedule was not per se unconstitutional. *Id*. at 184 ("That is not to say that using a bond schedule can never violate the Excessive Bail Clause.").

The plaintiffs here do not challenge the bail schedules as per se unconstitutional. *See also Terrell v. City of El Paso*, 481 F.Supp.2d 757, 766–67 (W.D. Tex. 2007) (use of a bail schedule not inherently unconstitutional). Nor do the plaintiffs challenge the Texas statute allowing transparent pretrial detention orders in certain family-violence cases. Aside from this one case involving a misdemeanor defendant but not involving the same issues, the defendants rely exclusively on serious felony cases that permitted detention for failure to pay a financial condition only after a counseled, adversarial hearing with findings on the record that no alternative to secured money bail could reasonably assure the defendant's appearance given the potential for a prison sentence of ten years to life and the resulting risk of flight.

Most importantly, in almost every case the defendants cite, the trial court could have—and sometimes did—order preventive detention, but ultimately set a secured financial condition with the

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cases cited therein.

possibility of release as a less restrictive alternative to preventive detention.[85] In Texas, however, pretrial preventive detention is not available in misdemeanor cases except for those arrested on charges of family violence who have already violated a condition of pretrial release. *See* TEX. CONST. art. 1 §§ 11b–11c.

The defendants argue that the Texas ban on preventive pretrial detention in most misdemeanor cases is not relevant because the plaintiffs are alleging violations only of federal law and have not pleaded state-law claims. (Docket Entry No. 266 at 3–5); Hearing Tr. 8-2:69–71. But federal due process protects state-created liberty interests. Liberty interests protected by the Due Process Clause "may arise from two sources—the Due Process Clause itself and the laws of the States." *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989) (quoting *Hewitt v. Helms*, 459 U.S. 460, 466 (1983)). The Supreme Court recognizes "that states may, under certain circumstances, create liberty interests which are protected by the Due Process Clause" and which entitle prisoners "to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that this state-created right is not arbitrarily abrogated." *Madison v. Parker*, 104 F.3d 765, 767 (5th Cir. 1997) (citing *Sandin v. Conner*, 515 U.S. 472 (1995); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974)).

"The Supreme Court has adopted a two-step analysis to examine whether an individual's procedural due process rights have been violated. The first question 'asks whether there exists a

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[85] *See, e.g.*, *McConnell*, 842 F.2d at 105; *United States v. Tirado*, 72 F.3d 130 (Table), 1995 WL 684553 (6th Cir. 1995); *Mantecon-Zayas*, 949 F.2d at 550 ("because the Bail Reform Act authorizes judicial officers to order pretrial detention where no condition or combination of conditions can 'reasonable assure' the defendant's presence," the court may set an unpayable bail if it concludes "that detention is necessary until trial"); *United States v. Jessup*, 757 F.2d 378, 388–89 (1st Cir. 1985) ("the basic purpose of the [Bail Reform] Act [is] to detain those who present serious risks of flight or danger *but not* to detain those who simply cannot afford a bail bond"), *abrogated on other grounds by United States v. O'Brien*, 895 F.2d 810 (1st Cir. 1990).

liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient.'" *Meza v. Livingston*, 607 F.3d 392, 399 (5th Cir. 2010) (quoting *Ky. Dep't of Corr.*, 490 U.S. at 460). "State law creates protected liberty interests only when (1) the state places substantive limitations on official conduct by using explicitly mandatory language in connection with requiring specific substantive predicates," and (2) the state law requires a specific outcome if those substantive predicates are met." *Fields*, 701 F.3d at 186. A "narrowly limited modicum of discretion" permitted to judicial officers does not deprive prisoners of a constitutionally protected right to be released. *Teague v. Quarterman*, 482 F.3d 769, 776 (5th Cir. 2007).

The Texas Constitution prohibits pretrial preventative detention orders in most misdemeanor cases. TEX. CONST. art. 1 §§ 11, 11b–11c; *Ex parte Davis*, 574 S.W.2d at 169. Texas has created a liberty interest in misdemeanor defendants' release from custody before trial. Under Texas law, judicial officers, as all parties admit, have no authority or discretion to order pretrial preventive detention in misdemeanor cases with a narrow exception for certain family-violence cases.[86]

To determine whether the procedures used sufficiently protect state-created liberty interests under the Due Process Clause, the Fifth Circuit applies the balancing test articulated in *Matthews v. Eldridge*, 424 U.S. 319 (1976). *See Meza*, 607 F.3d at 402. A federal court must consider:

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

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[86] To use the Sixth Circuit's terms, the substantive predicates are clear: any misdemeanor charge outside of the single enumerated exception. And the required outcome is specific: no pretrial preventive detention. *See Fields*, 701 F.3d at 186.

*Id*. (quoting *Matthews*, 424 U.S. at 335).

In this case, the private interest affected by Harris County's policy is the misdemeanor defendant's interest in release from custody before trial. That interest implicates fundamental constitutional guarantees: the presumption of innocence and the right to prepare for trial. *See Salerno*, 481 U.S. at 749–51; *Stack*, 342 U.S. at 4; *Rainwater*, 572 F.3d at 1056–57. The record evidence shows that misdemeanor defendants in Harris County who are detained until case disposition are convicted at higher rates and given sentences twice as long as those released before trial.[87] They plead guilty at rates much higher than those who are able to secure early release from pretrial detention.[88] Detained misdemeanor defendants experience the multiplying effects of "cumulative disadvantages" when they lose jobs, places to live, or family visitation rights because of pretrial detention.[89]

The risk of an erroneous deprivation of this liberty interest through the imposition of secured money bail is high. For the indigent, the risk of pretrial liberty deprivation because of the inability to pay secured money bail is certain. That deprivation is erroneous because the record evidence shows that secured money bail is not more effective at increasing the likelihood of appearance or law-abiding behavior before trial than release on an unsecured or nonfinancial condition. The record evidence shows that nearly 85 percent of those released in Harris County on an unsecured personal bond or other nonfinancial conditions do not forfeit their bonds for failing to appear or for

[87] *See* Part I.D.5; Part I.E.3 *supra*.

[88] *See id*.

[89] *See* Part I.F *supra*.

committing new criminal activity.[90] The rate is substantially the same as those released on secured money bail.[91]

As for the third factor, the defendants argue that alternatives to their system of detaining misdemeanor arrestees on secured financial conditions would be prohibitively expensive for the County. The defendants argue that adopting the Washington, D.C. system of releasing almost all misdemeanor arrestees before trial would cost the County tens or hundreds of millions of dollars. Def. Ex. 26 at 13–14; (Docket Entry No. 166 at 13–14). Mr. Banks testified that implementing the relief the plaintiffs seek would cost Harris County Pretrial Services $30 million annually. The current Harris County Pretrial Services budget is $7.5 million. Def. Ex. 46; Hearing Tr. 4-1:29–38.

The testimony relating to this argument is far from credible. Mr. Banks's calculations assumed that this court would order *every* misdemeanor defendant released on personal bond, even if a defendant could pay a secured money bond. *See* Def. Ex. 46; Hearing Tr. 4-1:36–37. Mr. Banks not only assumed that the County would absorb the costs of supervising every arrestee before trial, he also made the unwarranted assumption that 58.7 percent of those released would require GPS monitoring—the most restrictive form of supervision—and that over 10,000 arrestees—18.4 percent of all arrestees—would require alcohol-intake ignition locks, even though only about 6,000 arrestees—15 percent—are charged with misdemeanor driving-while-intoxicated offenses each year. Def. Ex. 46; Hearing Tr. 4-1:37–38; Pls. Ex. 10(c), *2015 Pretrial Services Annual Report* at 12.

Mr. Banks greatly overstated the costs of pretrial supervision of misdemeanor defendants. Dr. VanNostrand's work has shown that low-risk defendants require little to no supervision. Indeed,

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[90] *See* Part I.E.5 *supra*.

[91] *See id*.

oversupervising misdemeanor defendants on pretrial release by, for example, subjecting them to frequent check-ins and drug tests, increases nonappearance rates. Pls. Ex. 12(j), Marie VanNostrand, *Pretrial Risk Assessment in the Federal Court* at 5 (U.S. Department of Justice, Apr. 2009). Dr. VanNostrand criticized Harris County Pretrial Services because of unnecessary—and unnecessarily costly—oversupervision. Hearing Tr. 6-1:155. Mr. Banks testified that the County likely oversupervises by automatically requiring drug tests of every defendant released on personal bond, even if the defendant's misdemeanor charge is unrelated to drugs and his background shows no prior drug offenses. *Id*. at 3-2:143–44; 4-1:32. Neither Texas law nor the County Rules of Court require this approach.

The credible evidence shows that, while Pretrial Services might incur some additional costs in supervising those who are now detained on a secured money bail they cannot pay, those costs are far less than the costs of detention. The issue is not added costs, but, more precisely, shifted costs. *See, e.g.*, Pls. Ex. 12(kk), 12 (jj), 12(ww); Pls. Ex. 13(k); Heaton Study at 45–46; Hearing Tr. 3-2:19. Mr. Banks estimated costs only for Harris County Pretrial Services. He did not estimate the costs the County would save by detaining far fewer people and for shorter periods. The contrary testimony relating to this factor is credible. Judge Morrison testified that most of the costs of the D.C. system arise from running a state-of-the-art drug-testing lab and paying all D.C. pretrial services officers at the federal salary payscale. Hearing Tr. 2-2:165–68. Neither is required for Harris County. The court concludes that the defendants' testimony and evidence on the County's costs of releasing misdemeanor defendants on alternatives to secured financial conditions is unreliable.

In *Meza*, the Fifth Circuit ruled that a parolee who had not been convicted of a sex offense had a Texas-created liberty interest in being free from requirements to register as a sex offender and

to participate in sex-offender therapy. 507 F.3d at 401. Applying the *Matthews* balancing test, the court concluded that the parolee was owed "at least the same [due] process of an inmate, but as a parolee, he should generally be entitled to more favorable treatment than inmates." *Id*. at 409. Applying *Wolff v. McDonnell*, 418 U.S. at 539, on the process required to protect an inmate's state-created liberty interests, the Fifth Circuit held that the parolee was owed "at a minimum: (1) written notice that sex offender conditions may be imposed as a condition of his mandatory supervision, (2) disclosure of the evidence being presented against [him] to enable him to marshal the facts asserted against him and prepare a defense, (3) a hearing at which [the parolee] is permitted to be heard in person, present documentary evidence, and call witnesses, (4) an impartial decision maker, and (5) a written statement by the factfinder as to the evidence relied on and the reasons it attached sex offender conditions to his mandatory supervision." (citing *Wolff*, 418 U.S. at 560–62).

Under the federal case law defining due process for detention orders in general, as well as case law defining due process for state-created liberty interests, the court concludes that Harris County, in order to detain misdemeanor defendants unable to pay a secured financial condition of pretrial release, must, at a minimum, provide: (1) notice that the financial and other resource information its officers collect is for the purpose of determining the misdemeanor arrestee's eligibility for release or detention; (2) a hearing at which the arrestee has an opportunity to be heard and to present evidence; (3) an impartial decisionmaker; and (4) a written statement by the factfinder as to the evidence relied on to find that a secured financial condition is the only reasonable way to assure the arrestee's appearance at hearings and law-abiding behavior before trial.

The due process required for pretrial detention orders based on an indigent misdemeanor defendant's failure to pay a secured financial condition of release is similar to the equal protection

standard that prevents the government from converting financial conditions or penalties into detention orders without the following: a hearing with notice that pretrial liberty is at stake; with the opportunity to present evidence and to be heard; before a judge who must make findings on the record that either the arrestee has the ability to pay the amount needed for release, or that the government has no reasonable alternative to imposing detention for the failure to pay.

Due process also requires timely proceedings. In the context of misdemeanor arrests, pretrial detention of even three or four days can significantly increase the rates of nonappearance, recidivism, and the cumulative disadvantages of lost employment, leases, and family custody rights.[92] Due process protections are meaningless if they are provided only after defendants effectively serve their sentences.

Texas and federal law provide guidance that due process requires the necessary hearing to be within 24 hours of arrest in misdemeanor cases. Texas law requires that a misdemeanor defendant arrested without a warrant must be released "not later than the 24th hour after the person's arrest" if a probable cause hearing has not been provided. TEX. CODE CRIM. PRO. art. 17.033(a). "If the person is unable to obtain a surety for the bond or unable to deposit money in the amount of the bond, the person must be released on personal bond." *Id*. In *Sanders*, the federal district court applied the 24-hour standard to setting bail in the City of Houston. 543 F.Supp. at 704. In the *Roberson* order, the federal district court required "a meaningful review of alternatives to pre-scheduled bail amounts" to be held within 24 hours from arrest. Agreed Final Judgment, No. 84-2974 at 1.

The defendants argue that evidentiary hearings with findings on the record are generally not

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[92] *See* Part I.F *supra*.

possible within 24 hours because the available "information is necessarily limited" when the bail-setting hearings occur. They also argue that evidentiary hearings are not required because *Gerstein* permits jurisdictions to meet a less demanding due process standard in finding probable cause and in setting bail. (Docket Entry No. 166 at 16; No. 286 at 15). These arguments are unpersuasive. *Sanders* and *Roberson* were issued thirty years ago, before networked computing and communications technologies made it relatively fast and easy to transmit information. Those orders nonetheless set a 24-hour boundary on the time to complete the administrative incidents to arrest in misdemeanor cases in the City of Houston and in Harris County. Under *Roberson*, the County Judges are supposed to direct Pretrial Services "to make every effort to insure that sufficient information is available . . . to determine an accused's eligibility for a personal bond or alternatives to prescheduled bail amounts" for a hearing to be held within 24 hours of arrest. Agreed Final Judgment, No. 84-2974 at 4. Thirty years later, this 24-hour period is enough for Harris County to gather information on a misdemeanor defendant's ability to pay secured money bail, compile his or her criminal history and any other pending charges or holds, and make a finding as to whether secured money bail or a less restrictive alternative is needed to meet the government's interests.

As for *Gerstein*, the defendants conflate two separate parts of the Supreme Court's opinion. The Court reasoned that "[b]ecause of its limited function and its nonadversary character, the probable cause determination is not a 'critical stage' in the prosecution that would require appointed counsel." 420 U.S. at 123. Elsewhere, the Court noted that states are free to develop different pretrial processes. Some states may choose "to make the probable cause determination at the suspect's first appearance before a judicial officer, or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release." *Id*. at 123–24 (internal

citations omitted). That does not mean, as the defendants appear to assume, that the minimal procedural protections for finding probable cause under the Fourth Amendment become the maximum procedures required for arraignments, bail-settings, or other proceedings a state chooses to combine with probable cause determinations. *See id*. at 125 n.27 (explaining that the majority opinion addressed due process only under the Fourth Amendment and that the "probable cause determination is in fact only the *first* stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct").

Harris County may combine probable cause and bail-setting determinations in the same hearing. But the County must provide the procedures necessary *both* under the Fourth Amendment for the probable cause determination *and* under the Due Process and Equal Protection Clauses for setting bail and for ordering detention for indigent misdemeanor defendants unable to pay secured money bail.

**c. Excessive Bail**

As they did at the dismissal stage, the parties dispute whether this case is properly analyzed under the Eighth Amendment's prohibition on excessive bail. (*See* Docket Entry No. 101 at 18; No. 263). For the same reasons stated in its Memorandum and Opinion on the motions to dismiss, the court concludes that this is not an Eighth Amendment case. *See ODonnell*, 2016 WL 7337549 at *13. As explained above, Texas law does not facially provide for release on no financial conditions. *See* TEX. CODE CRIM. PRO. arts. 17.01, 17.03. The requirement that magistrates consider five factors in setting the bail amount applies equally to secured and unsecured financial conditions of release. *See id*. arts. 17.01, 17.15. The plaintiffs do not challenge the existence of Harris County's bail schedule, the scheduled amounts, or the amounts the Hearing Officers and County

Judges arrive at in applying the Texas-law factors. The plaintiffs do object to Harris County's customs, practices, and policies of setting money bail amounts on a secured basis for all but a few misdemeanor defendants, effectively detaining without due process those who would be released if they could pay, but who cannot and so are deprived of their pretrial liberty. These claims are not about the scheduled bail amounts in themselves. The claims are about the necessary procedures for requiring those amounts on a secured basis, the fact that those who can pay are promptly released, and the fact that those who cannot pay the secured bail suffer pretrial detention for their misdemeanor charges as a result.

The County Judges argue that the plaintiffs' claims must be analyzed under the Eighth Amendment because when "a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. 266, 273 (1994). But the plaintiffs' claims and the court's conclusions do not rely on substantive due process. *Williams*, *San Antonio School District*, and *Rainwater* make clear that detention based on wealth classifications triggers heightened scrutiny for suspect class discrimination under the Equal Protection Clause. *See* 399 U.S. at 242; 411 U.S. at 21–22; 572 F.2d at 1056. *Salerno*, *McConnell* and the cases on state-created liberty interests require procedural, not substantive, due process analysis. *See* 481 U.S. at 746; 842 F.2d at 109 n.5; *see also Matthews*, 418 U.S. at 560–62.

Even if the plaintiffs were bringing an excessive bail claim, the analysis and outcome remain the same. *Salerno* and *McConnell* applied due process principles to analyze an Eighth Amendment claim that bail was excessive when it resulted in the automatic detention of a defendant who could

not afford to pay. *See generally* 481 U.S. at 739; 842 F.2d at 105. *Rainwater* applied equal protection principles to scrutinize a pretrial bail system that allegedly resulted in the system-wide detention of indigent arrestees. 572 F.2d at 1056–57. The defendants assume that if this is an Eighth Amendment case, the plaintiffs' claims are defeated by *McConnell*'s reasoning that "a bail setting is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement." 842 F.2d at 107; (*see* Docket Entry No. 101 at 18; No. 262 at 3). But the Eighth Amendment cases consistently hold that detention for failure to pay a financial assessment is permissible: (1) for dangerous felonies, in which the potential sentence ranges from ten years to life in prison to capital punishment; (2) after a judicial officer provides due process, including a counseled, adversarial, evidentiary hearing with findings on the record and a reasoned opinion; (3) with a finding that no alternative to the secured financial condition can reasonably meet the government's interests.[93] To the extent they apply, the Eighth Amendment cases support the plaintiffs' arguments. Nonetheless, these cases are not the basis of the claims or of the court's findings and conclusions.

### 3. Harris County Policies that Violate Constitutional Requirements

#### a. Municipal Liability under § 1983

A local government may be sued under § 1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the [plaintiffs'] injury. . . ." *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 691 (1978). Relief under § 1983 against a municipality requires "a plaintiff [to] show that (1) an official policy (2) promulgated by the municipal policymaker (3) was the

[93] *See* Part I.C.2–3, Part II.B.2.b *supra*.

moving force behind the violation of a constitutional right." *Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009).

An official policy can be "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by [the municipality's] officers," or a "governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Monell*, 436 U.S. at 690–91. "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). "[A] municipal judge acting in his or her judicial capacity to enforce state law does not act as a municipal official or lawmaker" for purposes of § 1983 liability. *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992). A municipality may be held liable for "deprivations resulting from the decisions of its duly constituted legislative body." *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 403 (1997). A claim against a municipal defendant in her official capacity is the equivalent of a claim against the municipality itself. *See Kentucky v. Graham*, 473 U.S. 159, 165 (1985).

"Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986)) (internal quotation marks omitted). "[S]tate and local positive law, as well as 'custom or usage' having the force of law" determine whether a person is final policymaker. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) (quoting *Praprotnik*, 485 U.S. at 124 n.1). "[M]unicipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from

among various alternatives by the official or officials responsible for establishing the final policy with respect to the subject matter in question." *Pembaur*, 475 U.S. at 483.

**b. The County Judges' Policies and Customs: Equal Protection**

Harris County is not liable for the actions of the Hearing Officers or County Judges taken in a judicial capacity in adjudicating individual cases. *See Johnson*, 958 F.2d at 94. Nor is the County liable for policies that are set by the State of Texas and do not allow County officials to choose among alternatives. *Pembaur*, 475 U.S. at 483. The County argues that it has no liability because the policies at issue are created by judges acting in their judicial capacities or are required by Texas law. (Docket Entry No. 266 at 9–11).

The record evidence, however, shows customs and practices, amounting to policy, that are neither created by judges in their judicial capacity nor mandated by Texas state law. By an uncodified policy and practice, the County does not permit misdemeanor arrestees to be released on unsecured personal bonds until references are verified.[94] By unwritten policy and practice, Pretrial Services asks misdemeanor arrestees for information on their ability to pay without informing them that the purpose is to determine their eligibility for release on nonfinancial or unsecured financial conditions.[95] Pretrial Services does not ask what bond arrestees are able to pay.[96] None of these unwritten rules, customs, or practices is required by State law.

In its Memorandum and Opinion on the County's motion to dismiss, the court ruled that the County can be liable under § 1983 for the policy choices made by the County Judges in their capacity

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[94] *See* Part I.D.2 *supra*.

[95] *See id*.

[96] *See id*.

as legislators and as administrative rulemakers. *ODonnell*, 2016 WL 7337549 at *27, 34–35. The County's August 2016 letter changing the unwritten rule from requiring two verified references to requiring one verified reference of financial resources shows that the County Judges are final policymakers over this rule and that the policy is promulgated in their legislative or administrative capacity, not their judicial capacity in adjudicating specific cases in their courts.[97] *See* Def Ex. 52; *ODonnell*, 2016 WL 7337549 at *33 n.33. The *Roberson* order—which ran against the County Judges only—required the County Judges to "direct the Pretrial Services Agency to make every effort to insure that sufficient information is available at the time of the hearings required herein for the Judicial Officer to determine an accused's eligibility for a personal bond or alternatives to prescheduled bail amounts." Agreed Final Judgment, No. 84-2974 at 4; Def Ex. 159. The *Roberson* order shows that the County Judges are final policymakers who, in an administrative capacity, direct Pretrial Services to gather misdemeanor arrestees' financial information and present it to the Hearing Officers.

The plaintiffs allege that the County Judges promulgate an unwritten policy by knowingly acquiescing in and ratifying the Hearing Officers' systemic custom and practice of setting money bail on a secured basis, following the bail schedule, without considering the misdemeanor arrestee's inability to pay. (Docket Entry No. 54 ¶¶ 19, 56, 84–85, 103). The defendants argue that the Hearing Officers do consider ability to pay as one of the state-law factors in setting bail. (Docket Entry No. 166 at 9, 17–18). But because the record evidence showed that the Hearing Officers almost automatically set secured money bail at unpayable amounts in cases clearly involving indigent misdemeanor defendants, the plaintiffs argue that the County Judges promulgate an unwritten policy

[97] *See* Part I.D.2 *supra*.

permitting Hearing Officers to use secured money bail as de facto pretrial detention orders, without providing due process and contrary to Texas's ban on pretrial detention in all but one category of misdemeanor cases.[98] (Docket Entry No. 161 at 7; No. 189 at 4–5; No. 190 at 11).

The court finds and concludes on the present record that the plaintiffs have demonstrated a clear likelihood of success on the merits of their allegations. Based on the Pretrial Services monthly and annual public reports, the court finds and concludes that the County Judges know that Harris County detains over 40 percent of all misdemeanor defendants until the disposition of their cases.[99] The County Judges know that Hearing Officers deny Pretrial Services recommendations for release on unsecured and nonfinancial conditions around 67 percent of the time.[100] They know that Hearing Officers deviate from the bail schedule—up or down—only about 10 percent of the time.[101] The County Judges understand—because all but one of them share the same view—that what Hearing

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[98] The defendants argue that the plaintiffs have shifted their grounds between their amended complaint and the evidence and arguments presented at the preliminary injunction hearing. *See, e.g.*, Hearing Tr. 8-2:36–37; (Docket Entry No. 260 at 9; No. 266 at 2–3). The argument is overstated. The plaintiffs have not altered their essential claims—that Harris County's policies violate the Equal Protection and Due Process Clauses—or the relief they seek—a preliminary injunction to restrain those violations. All parties had ample notice of the issues raised in the briefing, including the plaintiffs' argument that if Harris County judges were in fact "considering" misdemeanor defendants' ability to pay but setting secured financial conditions of release beyond the defendants' ability to pay, such policies, customs, and practices amounted to invalid pretrial detention orders under the Equal Protection and Due Process Clauses. (*See* Docket Entry No. 143 at 9). The court permitted all parties ample opportunity to conduct discovery and revise and rebut expert reports over the course of the eight-day hearing, with a week-long recess in between sessions. What has changed since the plaintiffs' amended complaint is not the plaintiffs' essential legal theories, but the factual evidence produced at trial. Under Rule 15(b), pleadings may be freely amended to conform to the evidence at trial. FED. R. CIV. PRO. 15(b)(1)–(2). The defendants' argument is without merit.

[99] *See* Part I.D.5 *supra*. *Cf. Peterson*, 237 F.3d at 579 (twenty-seven incidents of excessive force "do not suggest a pattern so common and well-settled as to constitute a custom that fairly represents municipal policy" (internal quotation marks and citation omitted). The evidence here shows tens of thousands of constitutional violations.

[100] *See* Part I.D.3 *supra*.

[101] *See id*.

Officers mean when they say they "consider" an arrestee's ability to pay is that they disregard inability to pay if any other factor in the arrestee's background provides a purported basis to confirm the prescheduled bail amount and set it on a secured basis.[102] Harris County's Director of Pretrial Services testified that there is an "[u]nwritten custom" to deny all homeless arrestees release on unsecured or nonfinancial conditions. The County Judges know that Pretrial Services and the Hearing Officers treat homeless defendants' risk of nonappearance as a basis to detain them on a secured financial condition of release they cannot pay.[103] Hearing Tr. 4-1:43–44. The County Judges testified that they could change these customs and practices legislatively in their Rules of Court, but that they choose not to. Hearing Tr. 5:49–50, 150–51.

These legislative rulemaking choices are not required by Texas law. The Texas Code of Criminal Procedure makes ability to pay one of five factors to consider in setting the bail amount, but the Code does not require bail to be set on a secured basis and does not require that the five factors be used to decide whether to set bail on a secured basis. *See* TEX. CODE CRIM. PRO. art. 17.01, 17.15. The parties agreed that in County Court No. 16, Judge Jordan follows a different practice.[104] Judge Jordan does not set bail on a secured basis if it would operate to detain an indigent misdemeanor defendant. If a defendant has the means to pay some bail on a secured basis, Judge Jordan considers the five factors to set bail within an amount the defendant can pay. If a defendant cannot pay a financial condition up front, Judge Jordan considers the five factors, sets the bail amount on an unsecured basis, and orders nonfinancial conditions of pretrial supervision to release

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[102] *See* Part I.D.6 *supra*.

[103] *See id*.

[104] *See* Part I.D.4 *supra*.

the defendant while addressing the defendant's risk of nonappearance or of new criminal activity.[105] Judge Jordan's judicial practice is consistent with Texas law and, when done timely, is consistent with equal protection and due process. But as a legislative body that votes to enact policy by a two-thirds majority, the County Judges knowingly acquiesce in and ratify customs and practices so consistent and widespread as to have the force of a policy. That policy is to detain misdemeanor defendants before trial who are otherwise eligible for release, but whose indigence makes them unable to pay secured financial conditions of release.

This policy is not narrowly tailored to meet the County's compelling interest in having misdemeanor defendants appear for hearings or refrain from new criminal activity before trial. Even applying the less stringent standard of intermediate scrutiny, the present record does not show that rates of court appearance or of law-abiding behavior before trial would be lower absent the use of secured money bail against misdemeanor defendants. *See Lauder*, 751 F.Supp.2d at 933 (under intermediate scrutiny, "the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation") (internal quotations marks and citation omitted). Recent rigorous, peer-reviewed studies have found no link between financial conditions of release and appearance at trial or law-abiding behavior before trial.[106] Harris County policymakers have not attempted to collect, much less review, the County's own data to determine whether secured financial conditions of release work better in Harris County than unsecured or nonfinancial conditions.[107] That lack of inquiry is one indication

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[105] *See id*.

[106] *See* Part I.F *supra*.

[107] *See* Part I.E.5 *supra*.

the policy is not narrowly tailored. The other indication is that both parties' experts evaluated Harris County's data and found no significant difference in appearances at hearings or in new arrests between misdemeanor defendants released on secured money bail and those released on unsecured personal bonds.[108]

To be sure, requiring secured money bail for misdemeanor defendants does not run afoul of equal protection principles when those defendants are actually released. If two defendants take advantage of similarly timed opportunities for pretrial release on secured money bail, the fact that it may be harder for one to come up with the money than the other does not create a suspect classification between the two and does not trigger heightened scrutiny. *See San Antonio Sch. Dist*, 411 U.S. at 23–24. But when a secured financial condition of release works an absolute deprivation of pretrial liberty because a defendant is indigent or so impecunious that he or she cannot pay even a bondsman's premium required for release, the County must show that requiring a secured money bail is at least more effective than a less restrictive alternative at meeting the County's interests, even if it is not the least restrictive means to do so. *See id*. at 20–22; *Bearden*, 461 U.S. at 672.

Based on the present record, the court finds and concludes that, as a matter of law, Harris County cannot make this showing. The cases in which the government is able to show no reasonable less restrictive alternative to detaining an indigent defendant by imposing a secured money bail all involve charges for serious felonies that carry lengthy potential sentences. The Harris County Criminal Courts at Law have jurisdiction only over misdemeanor cases. The plaintiffs were charged only with misdemeanor offenses and have no pending felony charges. Texas law forbids pretrial preventive detention of misdemeanor arrestees in all but one category of cases—those who are

[108] *See id*.

arrested on family violence charges and who have violated a prior family violence protective order while released before trial. In that narrow category, the State provides enhanced procedures to protect the defendant's liberty interests. *See* TEX. CONST. art. 1, §§ 11b–11c; TEX. CODE CRIM. PRO. art. 17.29–292. Outside that category, Texas law does not distinguish among misdemeanor arrestees in terms of their eligibility for pretrial release. Hearing Officers recognize this approach whenever they permit release on secured money bail. A defendant who can pay is released regardless of risk. Once deemed eligible for release, indigent misdemeanor defendants who cannot pay the secured financial condition of release cannot be detained on that basis without a hearing and judicial findings on the record that no other reasonable alternative is available. In Harris County misdemeanor cases, reasonable alternatives to continued detention are readily available for indigent defendants unable to pay a secured money bail. Those alternatives include reducing the bail amount, as Judge Jordan does, imposing unsecured money bail, or releasing on nonfinancial conditions of pretrial supervision. Hearing Tr. 3-1:62–66.

Harris County is not liable for the individual adjudications of its Hearing Officers and County Judges in specific cases, even if those orders detain indigent arrestees because these cannot pay secured money bail. *See Johnson*, 958 F.2d at 94. But the County is liable for the legislative and administrative policies of its County Judges who knowingly or with reckless indifference acquiesce in and ratify a custom and practice that achieves pretrial preventive detention on secured financial conditions that defendants cannot pay in over 40 percent of all Harris County misdemeanor cases. *See ODonnell*, 2016 WL 7337549 at *27, 34–35. The court concludes that the plaintiffs are likely to succeed in proving that the County has a policy of violating equal protection by detaining indigent misdemeanor arrestees before trial.

### c. The County Judges' Policies and Customs: Due Process

Due process requires: (1) notice that the financial and other resource information Pretrial Services officers collect is for the purpose of determining a misdemeanor arrestee's eligibility for release or detention; (2) a hearing at which the arrestee has an opportunity to be heard and to present evidence; (3) an impartial decisionmaker; (4) a written statement by the factfinder as to the evidence relied on to find that a secured financial condition is the only reasonable way to assure the arrestee's appearance at hearings and law-abiding behavior before trial; and (5) timely proceedings within 24 hours of arrest.[109] (Docket Entry No. 286 at 12-13, 16).

The court concludes that the plaintiffs are likely to succeed on at least parts of their due process claim. Of the requirements listed above, Harris County meets only one at the probable cause and bail-setting hearing: an impartial decisionmaker. The County usually provides the hearing within 24 hours, but 20 percent of misdemeanor defendants who remain detained until the hearing wait longer than 24 hours for that hearing.[110] The record evidence shows that misdemeanor defendants are sometimes confused about the financial and other resource information they are asked to provide and how it will affect their eligibility for release,[111] and Hearing Officers do not make written findings or give reasons for their decisions.[112]

The rule requiring a Next Business Day Setting before a County Judge recently came into effect. *See* Rules of Court 4.3.1. Depending on the timing of arrest and booking, this first

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[109] *See* Part II.B.2.b *supra*.

[110] *See* Part I.E.1 *supra*.

[111] *See* Part I.D.2 *supra*.

[112] *See* Part I.D.3 *supra*.

appearance may occur within 24 hours after arrest, but the record does not indicate how often that happens. Harris County's former court administrator testified that the Next Business Day setting is not a rule change, but a codification of prior practice.[113] The record shows that the practice is for County Judges to routinely deny reductions in the bail amount and to refuse release on unsecured financial conditions in more than 99 percent of cases.[114] The record does not show written findings made by County Judges explaining why money bail must be imposed on a secured basis in any specific case.

Except for the Texas Code requirement that misdemeanor defendants be released 24 hours after arrest if probable cause has not been found, the timing of County procedures is regulated by the County Judges' Rules of Court promulgated by the County Judges in their legislative capacity. *See* TEX. CODE CRIM. PRO. art. 17.033. The record evidence shows that thousands of misdemeanor defendants each year are detained longer than 24 hours before they have a bail-setting hearing.[115] Instead of releasing defendants who have not had a probable cause hearing within 24 hours, the County follows an unwritten policy of determining probable cause in absentia, using only the charging papers. The Harris County judicial officers agreed that bail is not meaningfully considered at these in absentia hearings.[116]

The court concludes that Harris County does not provide due process for indigent or impecunious misdemeanor defendants it detains for their inability to pay a secured financial

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[113] *See id.*

[114] *See* Part I.E.2 *supra*.

[115] *See* Part I.E.1 *supra*.

[116] *See* Part I.D.2, I.E.1 *supra*.

condition of release. Those who cannot pay the secured money bail set at the probable cause hearing before a Hearing Officer must wait days, sometimes weeks, before a County Judge provides a meaningful hearing to review the bail determination.[117] Harris County is liable for the County Judges' policies issued in their legislative or rulemaking capacities that result in systemwide delays in any meaningful determination of the conditions for release.

If the County complied with equal protection requirements, part of the plaintiffs' concerns about due process would be mitigated. If Hearing Officers, as they are supposed to do under the *Roberson* order, tailored nonfinancial release conditions to address through supervision each defendant's risk of nonappearance or new criminal activity, and then released those defendants, the need to present evidence and make written findings about financial conditions would be less urgent. Hearing Officers do not need to issue reasoned opinions explaining their decision to detain someone using secured money bail if the Officers cannot use secured money bail to detain indigent defendants in the first place.

**d. The Sheriff's Policies under Equal Protection and Due Process**

"The sheriff's acquiescence in unsound and legally insufficient procedures effectively create[s] a county policy for which the county is liable" under § 1983. *Doe v. Angelina County*, 733 F.Supp. 245, 257 (E.D. Tex 1990). Whether a sheriff's deliberate indifference gives rise to liability for a municipal policy, including an unconstitutional custom or practice, is determined by "an

[117] Because it can take days or weeks for misdemeanor defendants to receive a formal adversarial hearing with the opportunity to present evidence and receive a reasoned opinion with findings on the record, this case is not, as the defendants argue, meaningfully different from other cases finding due process violations in the timing of bail settings and bail review. *See Walker*, 2016 WL 361612 (weekly bail hearings); *Cooper*, 2015 WL 10013003 at *1 (detention "for as long as a week" before meaningful bail hearing); *Snow*, No. 15-567 (M.D. La. 2016) (detention up to five days before a meaningful bail hearing); *Jones*, 2015 WL 5387219 (weekly bail hearings); *Thompson*, No. 15-182 (S.D. Miss. 2015) (weekly bail hearings); *Pierce*, No. 15-570 (E.D. Mo. 2015) (detention for three days awaiting a bail hearing).

objective [standard]; it considers not only what the policymaker actually knew, but what he should have known, given the facts and circumstances surrounding the official policy and its impact on the plaintiff's rights." *De Luna v. Hidalgo County*, 853 F.Supp.2d 623, 641 (S.D. Tex. 2012) (quoting *Lawson v. Dallas County*, 286 F.3d 257, 264 (5th Cir. 2002)); *see also Dodds v. Logan County Sheriff's Dept*, Civil No. 8-333, 2009 WL 8747487 (W.D. Okla. Aug. 3, 2009) (the sheriff was liable for his "deliberate indifference to the due process rights of arrestees whose bail had been pre-set" by acquiescing in a policy set by the local judges); *Blumel v. Mylander*, 954 F.Supp. 1547, 1557 (M.D. Fla. 1997) (a sheriff and jailer were liable for violating the right to pretrial release after 48 hours from arrest with no probable cause finding when they were "actually and constructively aware" that the 48-hour requirement had been exceeded).

In its Memorandum and Opinion on the County's motion to dismiss, the court held that under Fifth Circuit case law, a Texas county may be liable for its sheriff's policies of detaining arrestees and enforcing orders the sheriff knows or should reasonably know are unconstitutional. *ODonnell*, 2016 WL 7337549 at *30–31. At the hearing on the plaintiffs' application for a preliminary injunction, the Harris County Sheriff testified that he knows that every day, misdemeanor arrestees who would be released if they could pay a secured financial condition of release are detained in the Harris County Jail solely because poverty prevents them from paying. Hearing Tr. 3-2:8–9, 18–19, 22–24. A major from the Sheriff's Office testified about the delays in presenting arrestees at their probable cause hearings and confirmed that in many cases of arrest by the City of Houston Police Department, the Harris County Sheriff may not even take custody of arrestees within 24 hours and does not present those arrestees at probable cause and bail-setting hearings within 24 hours. *Id*. at 3-2:64, 67–71, 83. In his declaration, Sheriff Gonzalez stated that "[i]ndividuals should not be held

in our Harris County jail just because they cannot pay an amount of money set according to an arbitrary schedule. In my view, this practice violates the U.S. Constitution." Pls. Ex. 7(r) at 2.

The Sheriff's detention of misdemeanor defendants while knowing: (1) that the misdemeanor defendants are detained because their indigence prevents them from paying secured money bail to obtain release, and (2) that this practice violates equal protection and due process principles, is a policy choice the Sheriff makes on Harris County's behalf. That policy is not narrowly tailored to meet the County's compelling interests in ensuring misdemeanor defendants' court appearances and law-abiding conduct before trial. The plaintiffs have demonstrated a clear likelihood of success on the merits of their claim that the Sheriff, as a County policymaker, knowingly detains misdemeanor defendants on constitutionally invalid bases.

**4. Judicial Conduct that Violates Constitutional Requirements**

Section 1983 does not permit injunctive relief against judicial officers acting in a judicial capacity unless either: (1) they violate a declaratory decree; or (2) declaratory relief is unavailable. 42 U.S.C. § 1983. Declaratory relief is available in this case; preliminary injunctive relief is not.[118] *See, e.g.*, *MacPherson v. Town of Southampton*, 664 F.Supp.2d 203, 211–12 (E.D.N.Y. 2009) ("Plaintiffs cannot allege that declaratory relief is unavailable because Plaintiffs can, and indeed have, pursued a claim seeking a declaration"); *Besaro Mobile Home Park, LLC v. City of Fremont*,

[118] In *Family Trust Foundation of Ky., Inc. v. Volnietzek*, 345 F.Supp.2d 672 (E.D. Ky. 2004), the court granted preliminary injunctive relief against judicial officers on the reasoning that declaratory relief was "unavailable" until after a trial on the merits. *Id*. at 682, 689. *Family Trust* involved a claim for relief against an ethical provision in a state code of judicial conduct. *Id*. at 676–77. The court assumed the rule was enforced in a judicial capacity for the purpose of § 1983, but out-of-court conduct by judicial officers is clearly different from the in-court adjudications that are at issue in this case. A merely temporal unavailability of declaratory relief in this case would defeat Congress's purpose in amending § 1983 to prohibit injunctive relief against judges except in extraordinary cases of recalcitrance against clearly defined court declarations. *See* S. Rep. No. 104-66 at 36–37 (1996) ("[t]his section restores the doctrine of judicial immunity to the status is occupied prior to the Supreme Court's decision" in *Pulliam v. Allen*, 466 U.S. 522 (1984)).

Civil No. 10-478, 2010 WL 2991592 at *2 (N.D. Cal. July 29, 2010) (declaratory relief is unavailable when as a matter of law no cause of action for declaratory relief is provided by statute). The record evidence shows that in individual adjudications, Harris County Hearing Officers and County Judges set secured financial conditions of release in order to detain misdemeanor defendants before trial. These de facto orders of pretrial preventive detention operate only against indigent misdemeanor defendants who are unable to pay the financial condition. The minimum due process protections required to issue a pretrial detention order are not provided in these hearings. The plaintiffs have demonstrated a clear likelihood of success on their claims for declaratory relief, but a preliminary injunction against the judicial officers in their judicial capacity is not available.

**5. Conclusion on Likelihood of Success on the Merits**

Harris County is liable for the unconstitutional acts of the County Judges when they act as final policymakers in their legislative and administrative capacities. The County Judges are final policymakers who administratively direct Pretrial Services to gather information on misdemeanor arrestees and to present the information to the Hearing Officers. As a legislative and administrative body, the County Judges sitting en banc knowingly acquiesce in and ratify customs and practices so consistent and widespread as to have the force of policy. These policies systematically detain misdemeanor defendants who are otherwise eligible for release before trial but whose indigence makes them unable to pay a secured financial condition of release. These de facto detention orders are not narrowly tailored to meet a compelling government interest. The evidence shows that secured financial conditions of release are not more effective at meeting the County's interests than unsecured or nonfinancial conditions of release in misdemeanor cases. Instead, secured money bail operates to detain the impoverished while releasing those able to pay. This liberty deprivation based

on wealth violates the Equal Protection Clause.

Harris County does not provide misdemeanor defendants notice of the significance of the financial information they are asked to give in order to even be considered for release from pretrial detention on unsecured or nonfinancial conditions. Harris County does not provide timely hearings at which misdemeanor defendants can be heard, can present evidence of their inability to pay, or can receive reasoned opinions with written findings on why a secured financial condition of release, and not a less restrictive condition, is the only reasonable means to assure their appearance at trial or law-abiding conduct before trial. The lack of adequate procedures violates the Due Process Clause.

Harris County is also liable for the unconstitutional acts of its Sheriff when he acts as a final policymaker for, and administrator of, the Harris County Jail. The Sheriff's policy and practice of detaining misdemeanor defendants knowing that they are eligible for release, but are detained on secured money bail, is not narrowly tailored to meet the County's compelling interests in assuring misdemeanor defendants' appearance at trial and law-abiding conduct before trial.

The plaintiffs have demonstrated a clear likelihood of success on the merits of their equal protection and due process claims against Harris County. That showing weighs heavily in favor of granting the requested preliminary injunctive relief.[119] *See Rodriguez v. Providence Comm. Corr., Inc.*, 155 F.Supp.3d 758, 771 (M.D. Tenn. 2015), *appeal dismissed*, No. 16-5057 (6th Cir. Mar. 15,

[119] The County Judge defendants summarily re-urge all of their arguments from their motion to dismiss. (Docket Entry No. 166 at 8 n.9, 25 n.26). The court denied the motion to dismiss on grounds of *Younger* abstention, the plaintiffs' standing, and the identification of municipal policymakers with prejudice. *ODonnell*, 2016 WL 7337549 at *39. The County Judges' arguments fail for all the reasons identified in the court's Memorandum and Opinion on the motion to dismiss. In particular, the defendants' claim that the plaintiffs have adequate remedies at law—both for purposes of *Younger* abstention as well as for irreparable injury analysis—is denied because "the adequacy of a timely hearing[] is precisely what the plaintiffs are challenging in this case." *ODonnell*, 2016 WL 7337549 at *20. "*Gerstein* stands for the principle that when it comes to the adequacy of the state court proceedings as an opportunity to address constitutional harms, the opportunity must be available *before* the harm is inflicted." *Rodriguez*, 155 F.Supp.3d at 766 (citing *Gerstein*, 420 U.S. at 107 n.9).

2016) ; *Walker*, 2016 WL 361612 at *14, *rev'd on other grounds*, — F.App'x —, 2017 WL 929750; *see also Jones*, 2015 WL 5387219; *Cooper*, Civil No. 15-425 (M.D. Ala. June 18, 2015); *Pierce*, Civil No. 15-570 (E.D. Mo. June 3, 2015); *Thompson*, Civil No. 15-182 (S.D. Miss. Nov. 6, 2015).

**C. Irreparable Injury**

"When an alleged deprivation of a constitutional right is involved, . . . most courts hold that no further showing of irreparable injury is necessary." 11A WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE, § 2948.1 (3d ed. 1998). The plaintiffs have shown that Harris County detains misdemeanor defendants who are otherwise eligible for release because they cannot pay the secured financial condition necessary for release. Both the Harris County Sheriff and a County Judge credibly testified that without an injunction from this court, Harris County's policies, practices, and customs will continue and misdemeanor defendants will be unnecessarily incarcerated. Hearing Tr. 3-1:52–53; 3-2:22–24. The incarceration deprives misdemeanor defendants of their state-created liberty interest. "Freedom from imprisonment—from government custody, detention, and other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.").

The record evidence shows that the plaintiffs' injury is irreparable. Misdemeanor defendants detained before trial face significant pressure to plead guilty, and in fact do so at much higher rates than those released before trial, in order to obtain release.[120] Pretrial detention of misdemeanor defendants, for even a few days, increases the chance of conviction and of nonappearance or new

[120] *See* Part I.D.5 *supra*.

criminal activity during release.[121] Cumulative disadvantages mount for already impoverished misdemeanor defendants who cannot show up to work, maintain their housing arrangements, or help their families because they are detained.[122] This factor weighs strongly in favor of granting the plaintiffs' request for the injunctive relief. *See also Rodriguez*, 155 F.Supp.3d at 771 (irreparable harm from jailing probationers on secured money bonds for probation violations supported injunction); *Walker*, 2016 WL 361612 at *14 (irreparable harm from jailing a misdemeanor defendant "simply because he could not afford to post money bail"), *rev'd on other grounds*, — F.App'x —, 2017 WL 929750.

**D. Balancing the Harms**

Courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 542 (1987). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312 (1982) (citation omitted).

The defendants argue that proposed reforms expected to be implemented by July 1, 2017 will adequately address the plaintiffs' injuries and that a court order could disrupt implementing these reforms. (Docket Entry No. 166 at 17–23); Hearing Tr. 8-2:25–26. The defendants note that they have been working on the reforms for eighteen months. The reforms require a bottom-up "buy-in" from Harris County's "various criminal justice stakeholders" to be successful, not a top-down order

[121] *See* Part I.F *supra*.

[122] *See id*.

imposed from outside.[123] (Docket Entry No. 166 at 17–18); Hearing Tr. 8-2:95.

Harris County's adoption of the Arnold Tool and other reforms are commendable.[124] But, as noted above, the reforms will not address the plaintiffs' allegations that Harris County imposes secured financial conditions of release to detain indigent misdemeanor defendants who cannot pay, despite Texas state-law prohibitions of pretrial detention orders for all but one narrow category of misdemeanor defendants.[125] The use of bail to detain, rather than release, misdemeanor defendants based on their poverty is not just a possibility under the new system; it is Harris County's stated policy purpose to use secured money bail to detain "high-risk" defendants, an as yet undefined category.[126]

The record evidence also calls into question the extent to which the forthcoming reforms will remedy the County's due process violations. The Harris County Sheriff and one County Judge testified that counseled hearings are unlikely to change the Hearing Officers' practice and custom of ordering indigent misdemeanor defendants to pay secured money bail, knowing that the orders operate as de facto pretrial detention orders. Hearing Tr. 3-1:113–14, 3-2:22. The record evidence shows that despite changing the County Rules of Court to presume release on personal bonds is appropriate in twelve offense categories, Hearing Officers and County Judges continue to detain misdemeanor defendants, including the indigent, at the same rate as they did in the two years before

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[123] Among the Harris County criminal justice stakeholders the defendants list the Public Defender's Office, the District Attorney's Office, the County Attorney's Office, the District Court Judges, the County Judges, the Sheriff's Office, the Houston Police Department, and the County Budget Office. (Docket Entry No. 166 at 22).

[124] *See* Part I.H *supra*.

[125] *See id*.

[126] *See* Part 1.H.1 *supra*.

the rule change.[127] Hearing Officers and County Judges reject the recommendations the Pretrial Services officers make using the County's current validated risk-assessment tool to release misdemeanor defendants on unsecured personal bonds about 67 percent of the time.[128] The reformed system will permit Hearing Officers and County Judges to continue rejecting the recommendations that result from the County's new validated Arnold Risk-Assessment Tool at the same rate.[129] Although the new inmate-processing center may help the County to provide bail-setting hearings in 24 hours after arrests for more, or even all, misdemeanor defendants, the center will not be complete until March 2018.[130]

The court does not intend or want to interfere with the laudable reforms that will improve the fairness of the County's pretrial arrest system. The proposed reforms will not take effect for months. The present system will continue during that time, detaining over 100 misdemeanor defendants every day in the Harris County Jail, defendants who are eligible for release but whose indigence makes them unable to pay a secured financial condition of release. The record shows that after July 1 (or the date the reforms are in fact implemented), the County's system will not remedy the constitutional infirmities of its current policies. The County Judges suggest that the court should "craft any relief to work in conjunction with these new changes, rather than . . . wholly enjoining the present system." (Docket Entry No. 166 at 28). That is the better approach. With carefully tailored relief, the balance of the harms between granting or denying a preliminary injunction strongly favors the plaintiffs.

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[127] *See* Part I.E.3 *supra*.

[128] *See* Part I.H.1 *supra*.

[129] *See id*.

[130] *See* Part I.H.2 *supra*.

### E. The Public Interest

"It is always in the public interest to prevent the violation of a party's constitutional rights." *Simms v. District of Columbia*, 872 F.Supp.2d 90, 105 (D.D.C. 2012) (collecting cases). In an amicus brief, the Harris County District Attorney emphasizes that "[h]olding un-adjudicated misdemeanor offenders in the Harris County Jail solely because they lack the money or other means of posting bail is counterproductive to the goal of seeing that justice is done. . . . It makes no sense to spend public funds to house misdemeanor offenders in a high-security penal facility when the crimes themselves may not merit jail time." (Docket Entry No. 2016 at 1–2). The court agrees. Texas state law treats misdemeanor defendants, with one narrow exception, as eligible for pretrial release. The public interest is not served by incarcerating misdemeanor defendants who, because of poverty, are unable to pay secured money bail. This factor weighs strongly in favor of granting the plaintiffs' request for relief.

### F. Bond

A federal court may waive the bond requirement. FED. R. CIV. PRO. 65(c); *City of Atlanta v. Metro. Atlanta Rapid Transit Auth*., 636 F.2d 1084, 1094 (5th Cir. Unit B 1981); *Corrigan Dispatch Co. v. Casaguzman, F.A.*, 569 F.2d 300, 303 (5th Cir.1978). The court finds that waiving the bond is appropriate in this case; the plaintiffs are indigent, *see Wayne Chem., Inc. v. Columbus Agency Serv. Corp*., 567 F.2d 692, 701 (7th Cir. 1977), and the plaintiffs have brought this suit to enforce constitutional rights, *see City of Atlanta*, 636 F.2d at 1094. No bond is imposed.

## III. Remedy

"In view of the fact that plaintiffs established a constitutional violation, . . . the task of fashioning a proper remedy is one that should be performed by the District Court after all interested

parties have had an opportunity to be heard. The judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large." *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 309 n.22 (1986); *see also Swamm v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15–16 (1971); *Gates v. Collier*, 501 F.2d 1291, 1320 (5th Cir. 1974). "Every order granting an injunction . . . must: (A) state the reasons why it issued; (B) state its terms specifically; and (C), describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." FED. R. CIV. P. 65(d)(1). "Rule 65 protects those who are enjoined by informing them of . . . exactly what conduct is proscribed and ensures informed and intelligent appellate review." *Walker*, 2017 WL 929750 at *2 (internal quotation marks and citation omitted; alteration in original); *see also Hornbeck Offshore Serv., LLC v. Salazar*, 713 F.3d 787, 792 (5th Cir. 2013). The court has explained in detail its reasons for issuing preliminary injunctive relief. Several principles inform and guide the court in exercising its discretion and adhering to the record evidence and the law to fashion a suitable remedy.

First, because the plaintiffs have not alleged the facial unconstitutionality of Texas statutes or the County Rules of Court, the court will not require relief that is inconsistent with Texas law or the County Rules as written. (*See* Docket Entry No. 145 at 7; No. 288 at 10–11). Both Texas law and the County Rules provide for setting money bail in specific amounts, but neither requires that money bail be set in misdemeanor cases on a secured, rather than unsecured, basis.[131] Using a bail schedule is not inherently unconstitutional. *See Fields*, 701 F.3d at 184; *Terrell*, 481 F.Supp.2d at 766–67. The constitutional problem in this case arises from rigid adherence to imposing secured

[131] *See* Part II.B.2.b *supra*.

money bail when that will obviously result in, and is often intended to effect, pretrial detention of indigent defendants charged only with misdemeanors who are eligible for release under Texas law.

Second, the court does not enjoin judicial officers acting in a judicial capacity, as prohibited by 42 U.S.C. § 1983. The County Judges argue that they are immune from an injunction in their legislative capacity as well. (Docket Entry No. 166 at 15 n.20). The court rejected that argument in its Memorandum and Opinion on the County Judges' motion to dismiss. *ODonnell*, 2016 WL 7337549 at *36. Nevertheless, the only relief against the County Judges in their legislative capacity required at this time is that they do not legislate policy that contradicts this court's order.

Third, as much as possible, the court avoids interfering with the salutary reforms the County is proposing to implement by July 2017. The court has worked with the parties' briefs and arguments as guidance in fashioning relief that is consistent with, and can be implemented alongside, the proposed reforms. Additionally, the court will provide the County over fourteen days from the date of the Order of Preliminary Injunction to implement the ordered relief.

Fourth, the relief must be effective to address the serious constitutional violations proven at the motion hearing. The defendants propose that the court should substantially repeat the *Roberson* order and require the Hearing Officers to "consider[] an arrestee's ability to pay if they impose secured bail." (Docket Entry No. 259 at 3). That approach appears to enjoin judicial officers acting in judicial capacities, contrary to 42 U.S.C. § 1983. The approach would also permit Harris County to continue imposing secured money bail in order to detain indigent misdemeanor defendants who, if they could pay, would be released. These bail orders operate as de facto orders of pretrial preventive detention, without the procedures due process requires and in violation of equal protection. Adequate relief requires that those eligible for release before trial under state and federal

law are released and not detained because their indigence makes them unable to pay a secured financial condition required for release.

Fifth, while relief must be effective, it must also balance the competing interests. The plaintiffs contend that no amount of differential treatment is tolerable under the Equal Protection Clause and that indigent misdemeanor arrestees must be released at substantially the same time as those who are able to pay secured money bail. (*See* Docket Entry No. 257, Ex. 1 at 1, 4). Various parties also suggest changing the timeline of the arrest process. The County Judges argue that the Sheriff should be compelled to book misdemeanor arrestees at the County Jail within 18 hours of their arrest. (Docket Entry No. 259 at 3). The plaintiffs suggest various limits on sobriety periods and on the time it takes to process misdemeanor arrestees when they bond out of jail. (Docket Entry No. 257, Ex. 1 at 4–5). The parties did not provide detail on how to set and implement the precise timing and speed of various procedures. Those questions are more appropriately resolved at the trial on the merits.

With these principles in mind, the court will order the following relief, to take effect by May 15, 2017, unless those enjoined move for more time and show good cause for a reasonable, brief extension. Any motions for extension will be set for prompt hearing and resolution.

- Harris County and its policymakers—the County Judges in their legislative and rulemaking capacity and the Harris County Sheriff in his law-enforcement capacity—are enjoined from detaining indigent misdemeanor defendants who are otherwise eligible for release but are unable because of their poverty to pay a secured money bail.
- Pretrial Services officers, as County employees and subject to its policies, must verify an arrestee's ability to pay a secured financial condition of release by an affidavit, and must

explain to arrestees the nature and significance of the verification process.

- The purpose of the explanation is to provide the notice due process requires that a misdemeanor defendant's right to liberty before trial is at stake in the proceedings. Pretrial Services may administer either the form of the affidavit currently used to determine eligibility for appointed counsel or the adapted form that Dr. VanNostrand testified is being prepared for Pretrial Services to be administered by July 1, 2017. *See* Hearing Tr. 6-1:136; *see also id*. at 4-1:48–49. Pretrial Services must deliver completed affidavits to the Harris County Sheriff's Office before a declarant's probable cause hearing.
- The affidavit must give the misdemeanor arrestee sufficient opportunity to declare under penalty of perjury, after the significance of the information has been explained, the maximum amount of financial security the arrestee would be able to post or pay up front within 24 hours of arrest. The question is neither the arrestee's immediate ability to pay with cash on hand, nor what assets the arrestee could eventually produce after a period of pretrial detention. The question is what amount the arrestee could reasonably pay within 24 hours of his or her arrest, from any source, including the contributions of family and friends.
- The purpose of this requirement is to provide a better, easier, and faster way to get the information needed to determine a misdemeanor defendant's ability to pay. The Hearing Officers and County Judges testified that they presently do not know who has the ability to pay. Hearing Tr. 4-1:141; 4-2:16; 5:72. The requirement is for a form of verification that Harris County already uses to determine who is indigent and therefore eligible for appointed counsel. Hearing Tr. 2-1:60–61. The affidavit can be completed within 24 hours after arrest; the current process of verifying references by phone extends for days after arrest. (*See*

Docket Entry No. 166 at 10 n.13).

- The court does not order relief against the Hearing Officers or against the County Judges in their judicial capacities. The court does not order relief against the County Judges or Sheriff in their capacities as state actors, except that they may not legislate policies that directly conflict with this court's order.
- Misdemeanor defendants who are not subject to: (1) formal holds preventing their release from detention; (2) pending mental-health evaluations to determine competency; or (3) pretrial preventive detention orders for violating a condition of release for a crime of family violence, have a constitutionally protected state-created liberty interest in release before trial. If a misdemeanor defendant has executed an affidavit showing an inability to pay secured money bail and the Hearing Officer does not order release either: (1) on an unsecured personal bond with nonfinancial conditions of release; or (2) on a secured money bond for which the defendant could pay a commercial surety's premium, as indicated on the affidavit, then the Harris County Sheriff must treat the financial condition as unsecured and release the misdemeanor defendant promptly after the probable cause hearing. All nonfinancial conditions of release ordered by the Hearing Officers, including protective orders, drug testing, alcohol intake ignition locks, or GPS monitoring, will remain in effect. The bail amount determined by the Hearing Officer will remain the bail required of the misdemeanor defendant, but the Sheriff must require it on an unsecured, rather than a secured, basis. An indigent defendant's inability to pay secured money bail cannot be the basis for the Sheriff to continue to detain that defendant.
- The purpose of this requirement is to provide timely protection for the state-created liberty

interest in pretrial release and to prevent the pretrial detention of a misdemeanor defendant on a financial condition when that defendant would be able to obtain release by paying but is unable to do so. By "promptly," the court means on the same time frame of release that a defendant who paid a secured money bail would receive.

- The Sheriff must release on unsecured or nonfinancial conditions misdemeanor defendants identified above—those without holds preventing prompt release; pending competency evaluations; or preventive family violence detention orders—who have not had a bail-setting hearing before a Hearing Officer within 24 hours of arrest. In absentia hearings "on the papers" will not satisfy this requirement. If the City of Houston Police Department has detained a misdemeanor defendant more than 24 hours after arrest, the Sheriff must promptly release the defendant on unsecured or nonfinancial conditions when he takes custody of the defendant, on the same time frame and procedures as if the defendant had paid a secured financial condition of release. The bail amount set by Assistant District Attorneys according to the County Judges' bail schedule will remain the bail required of the misdemeanor defendant, but the Sheriff must require it on an unsecured, rather than a secured, basis.
- The purpose of this requirement is to give timely protection to the state-created liberty interest in release before trial and to enforce state and federal standards holding that, in Harris County, 24 hours is the outer boundary for completing the administrative incidents to arrest in misdemeanor cases. *Sanders*, 543 F.Supp. at 704; *Roberson*, Agreed Final Judgment, No. 84-2974 at 1. The 24-hour requirement is particularly intended to address the endemic problem of misdemeanor arrestees being detained until case disposition and pleading guilty to secure faster release from pretrial detention.

- The Sheriff may not alter nonfinancial conditions of release ordered by Harris County judicial officers. The Sheriff may not alter the bail amount determined by Harris County judicial officers. The only determination the Sheriff must make under this order is the decision to require bail on a secured or unsecured basis. The decision is an objective one. If the misdemeanor defendant's affidavit shows that the defendant is unable pay the bail up front or pay a bondman's premium for the principal sum required by the Hearing Officers, the Sheriff must require the bail amount, but on an unsecured basis. The Sheriff may release misdemeanor defendants on an unsecured bond without a Hearing Officer's signature on the release order. The Sheriff's acceptance of bail on an unsecured basis accords with his authority to accept bail and release misdemeanor defendants under Article 17.20 of the Texas Code of Criminal Procedure.[132]
- Texas law provides a significant role for sheriffs in setting and taking bail in misdemeanor cases. Sheriffs ordinarily defer to magistrates in setting bail, unless "no magistrate is available." *Hokr*, 545 S.W.2d at 463. And a sheriff executes "legal process which it is made his duty by law to execute." TEX. CODE CRIM. PRO. art. 2.16; *see also* TEX. LOCAL GOV'T CODE § 85.021. The purpose of this order is to inform the Harris County Sheriff that,

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[132] *See Burkett v. City of El Paso*, 513 F.Supp.2d 800, 815 (W.D. Tex. 2007) ("[T]he State of Texas, among other states, allows persons other than a neutral and detached magistrate to set bail. In Texas, individuals allowed to set bail include police officers, in various situations) (citing TEX. CODE CRIM. PRO. arts. 17.20, 17.22); *State v. Martin*, 833 S.W.2d 129, 133 (Tex. Cr. App. 1992) (officers can release misdemeanor defendants on unsecured bonds without a magistrate's order); Texas Attorney General Opinion No. H–856 (1976) ("[S]ince article 17.20 authorizes the sheriff or other peace officer to take bail in misdemeanor cases, article 17.15 compels the conclusion that such officer is also to regulate the amount of bail in such cases."). In *Hokr v. State*, 545 S.W.2d 463 (Tex. Cr. App. 1977), the Texas Court of Criminal Appeals held that, ordinarily, "an officer's authority to set the amount of bail should be limited to situations in which no magistrate is available." *Id*. at 465. For purposes of this order, the Harris County Sheriff must deem a magistrate to be unavailable if a Harris County magistrate has not provided release on unsecured or nonfinancial conditions to a misdemeanor defendant who cannot pay a secured financial condition of release as evident in the affidavit.

as Sheriff Gonzalez recognized in his declaration, orders to detain misdemeanor defendants on a secured financial condition of release that they cannot pay because of their poverty are unconstitutional and invalid under federal law. *See* Pls. Ex. 7(r). Harris County and Sheriff Gonzalez as its policymaker are liable for, and enjoined from, executing invalid orders from the Hearing Officers or County Judges that operate to detain indigent misdemeanor defendants who are otherwise eligible for release if they cannot pay a secured financial condition of release.

- For misdemeanor defendants who are subject to formal holds and who have executed an affidavit showing an inability to pay the secured financial condition of release, the Sheriff must treat the limitations period on their holds as beginning to run the earliest of: (1) after the probable cause hearing; or (2) 24 hours after arrest. The purpose of this requirement is to ensure that misdemeanor defendants are not prevented from or delayed in addressing their holds because they are indigent and therefore cannot pay a secured financial condition of release.
- Misdemeanor defendants who do not appear competent to execute an affidavit may be evaluated under the procedures set out in the Texas Code of Criminal Procedure Article 16.22. If competence is found, the misdemeanor defendant is covered by the relief the court orders, with the exception that the 24-hour period begins to run from the finding of competence rather than from the time of arrest. As under Article 16.22, nothing in this order prevents the misdemeanor arrestee from being released on secured bail or unsecured personal bond pending the evaluation.
- The court's relief applies to misdemeanor arrestees who are re-arrested on misdemeanor

> charges only or on warrants for failure to appear while on pretrial release for their misdemeanor charges. Texas does not permit preventive pretrial detention orders in misdemeanor cases, even for multiple failures to appear or for new criminal activity before trial. Misdemeanor defendants unable to pay a secured financial condition of release do not lose their state-created liberty interest in release before trial by failing to appear or by committing new misdemeanor criminal activity. Those defendants may, of course, face additional charges and exposure to longer sentences, as well as enhanced nonfinancial conditions of release, such as more demanding supervisory techniques, for their pretrial misconduct.

The court concludes that this relief strikes an equitable balance between the parties' interests in this case. The plaintiffs seek to eliminate entirely any differential treatment between those able to pay secured money bail and those unable to do so. (*See* Docket Entry No. 188 at 19; No. 257, Ex. 1 at 1, 4). The defendants argue that a judicial officer should assess nonfinancial conditions of release and that both the judicial officer and the misdemeanor defendant require time to prepare for a full bail-setting hearing. (Docket Entry No. 260 at 5; No. 286 at 6–7, 15–16). Under the court's relief, some misdemeanor defendants may be able to pay a secured financial condition and be released between having their charges formalized (about 15 hours after arrest, *see* Hearing Tr. 3-2:85) and appearing before a Hearing Officer (usually within 19 to 24 hours after arrest, if the defendant remains detained, *see* Def. Ex. 28 at 14–15). The court considers this difference de minimis at this stage, although the plaintiffs may re-urge their position at the merits trial. The time frames are expected to substantially decrease as the County implements its reforms. *See* Hearing Tr. 6-1:138–39, 145–46. And the court has tailored relief to address one significant cause of the

differential treatment—extended periods of detention by the City of Houston Police Department before Harris County takes custody of arrestees.

The defendants' many objections to relief as proposed by the plaintiffs do not apply to the relief as ordered by the court. The court is not striking down the use of secured money bail. (*Cf.* Docket Entry No. 161 at 8; No. 26 at 23–24). The court is not permitting arrestees to "set their own bail." (*Cf.* Docket Entry No. 266 at 7; Hearing Tr. 6-1:159–60). Bail amounts—and the County's right to collect forfeited bail—remain within the discretion Harris County officers have under state law. The County may continue to release defendants on secured financial conditions if those conditions serve to release, rather than detain, misdemeanor defendants before trial. What the County is enjoined from doing is setting the amount of bail on a secured basis in a way that detains, rather than releases, misdemeanor defendants who would be released if they could pay but who are unable to do so, in violation of the Constitution. And Harris County has long used affidavits of indigence as the basis to appoint publicly funded counsel. Hearing Tr. 2-1:60–61; 6-1:160–61. That is not a means of letting defendants confer public benefits on themselves. *See, e.g.*, *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 339 (1948). In the context of pretrial bail, affidavits of indigence have been used in the United States for over 150 years.[133]

The defendants argue that the administration of criminal justice is a police power granted to state and local governments by the Tenth Amendment. (Docket Entry No. 259 at 4). It is. They argue that judicial officers must exercise discretion in setting conditions of release before trial. (*Id.* at 6, 9–10). They must. But neither police power nor judicial discretion are boundless. "Congress enacted § 1983 to enforce provisions of the Fourteenth Amendment against those who carry a badge

[133] *See* Part I.C.2 *supra*; 1857 Mass. L. 489–97.

of authority and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Hafer v. Melo*, 502 U.S. 21, 28 (1991) (internal quotation marks and citation omitted). That enactment would be meaningless if the Tenth Amendment exempted state officers from liability under the Fourteenth Amendment.

The defendants argue that the putative plaintiff class is bound by the *Roberson* order issued in 1987 and that the consent decree can only be modified under Rule 60(b). (Docket Entry No. 264 at 10–11). But a consent decree does not bind nonparties. *See, e.g.*, *Martin v. Wilks*, 490 U.S. 755, 761–62 (1989). On the defendants' side, Harris County, the Hearing Officers, and the Sheriff were not parties to the *Roberson* litigation. *See* Def. Ex. 159. The *Roberson* defendants were twelve County Judges sued in their personal and official capacities. *See id*. The plaintiffs in this case do not seek relief against the *Roberson* County Judges in their personal capacities, and the number of County Judges acting in an official capacity has grown by four since 1987. On the plaintiffs' side, the *Roberson* class did not include misdemeanor defendants arrested on a warrant, as this one does. *See* Def. Ex. 160. The *Roberson* class did include misdemeanor defendants asserting Fourth and Sixth Amendment claims against the County Judges; this class does not. *See id*.

For the reasons explained above, the *Roberson* order does not require the conduct the plaintiffs challenge.[134] The relief ordered here is not inconsistent with *Roberson* and is not a modification of the consent decree. And even if the parties were identical and the relief here was inconsistent with that ordered in *Roberson*, courts have held that, in the context of civil-rights litigation, a "modern successor" class action better serves the public interest and is better at resolving the parties' disputes than a Rule 60(b) modification of a decades-old consent decree. *See Coffey v.*

[134] *See* Part I.C.2, Part I.D.6 *supra*.

*Braddy*, 88 F.Supp.3d 1283, 1299 (M.D. Fla. 2015), *aff'd*, 834 F.3d 1184, 1193 (11th Cir. 2016).

Finally, the defendants object that they cannot implement a rule against using secured financial conditions of release as de facto orders of pretrial preventive detention, as other jurisdictions do, because Texas does not permit transparent orders of pretrial preventive detention in misdemeanor cases that are available in other jurisdictions. (*See, e.g.*, Docket Entry No 159 at 9–10; No. 166 at 13; Hearing Tr. 8-2:24–25). The defendants' dissatisfaction is with Texas law, not with the plaintiffs' claims or the relief this court ordered. It may indeed be wise to keep risky defendants, including misdemeanor defendants, in jail from arrest forward. But Texas law makes a different choice. It prohibits pretrial preventive detention of all but one category of misdemeanor cases, and in that exceptional category it provides nonfinancial conditions of pretrial detention with extra procedural safeguards. Jailing the indigent by setting secured money bail that they cannot pay makes an end run around a Texas-created liberty interest without providing due process. If the defendants believe that some misdemeanor defendants present such a high risk of nonappearance or of new criminal activity as to require pretrial preventive detention, the defendants' proper recourse is to petition the Texas Legislature to amend the Texas Constitution, not to accomplish a de facto amendment through imposing secured financial conditions of release that operate as detention orders only against those who cannot pay.

## IV. Conclusion

### A. Summary Judgment

In their motion for summary judgment, the defendants argue that: (1) there is no constitutional right to "affordable bail"; (2) the Harris County Rules of Court pass rational basis review; and (3) the County's arrest procedures satisfy due process as a matter of law. (Docket Entry

No. 101). The court has addressed at length the standard of review required by the Supreme Court and the Fifth Circuit in this case,[135] and the reasons that Harris County's procedures violate the Equal Protection and Due Process Clauses as a matter of law.[136]

As explained in detail above, the issue in this case is not the right to "affordable bail." As cases and commentaries make clear, courts may impose secured money bail beyond a defendant's ability to pay: (1) in cases of dangerous felony; (2) after finding that no alternative to secured money bail can reasonably assure the defendant's appearance or public safety; (3) with the due process of a detention order if the secured money bail in fact operates to detain the defendant. Those factors do not apply to this case.[137] Misdemeanor charges are not dangerous felonies. The credible and reliable record evidence shows that, in misdemeanor cases, secured money bail is not the only reasonable alternative to assure appearance and law-abiding conduct before trial.

That does not amount to a "right to affordable bail." Under Texas law, Harris County magistrates—the Hearing Officers and County Judges—may weigh the state-law factors to arrive at a high amount of bail. TEX. CODE CRIM. PRO. art. 17.15. But they cannot, consistent with the federal Constitution, set that bail on a secured basis requiring up-front payment from indigent misdemeanor defendants otherwise eligible for release, thereby converting the inability to pay into an automatic order of detention without due process and in violation of equal protection. *See Bearden*, 461 U.S. at 672; *Rainwater*, 572 F.2d at 1056. The motion for summary judgment is denied.

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[135] *See* Part II.B.1 *supra*.

[136] *See* Part II.B.3 *supra*.

[137] *See* Part I.C.3–4, Part II.B.2 *supra*.

### B. Preliminary Injunction

"Rules under which personal liberty is to be deprived are limited by the constitutional guarantees of all, be they moneyed or indigent, befriended or friendless, employed or unemployed, resident or transient, of good reputation or bad." *Rainwater*, 572 F.2d at 1057. Misdemeanor arrestees are often, as Judge Truman Morrison testified, people "living on the edge at the point in their lives that intersects with getting involved in an arrest." Hearing Tr. 2-2:135. In Harris County, they may be homeless. They may lack family, friends, and "co-indemnitors." Some are, no doubt, of bad reputation and present a risk of nonappearance or of new criminal activity. But they are not without constitutional rights to due process and the equal protection of the law.

The court has considered an extensive record consisting of hundreds of exhibits, thousands of hearing recordings, and eight days of arguments and briefing at the motion hearing. The record evidence, the arguments of able counsel, and the extensive case law and commentary on bail and pretrial detention all show that the plaintiffs are entitled to preliminary injunctive relief. Harris County's policy is to detain indigent misdemeanor defendants before trial, violating equal protection rights against wealth-based discrimination and violating due process protections against pretrial detention without proper procedures or an opportunity to be heard.

This case is not easy. Institutions charged with safeguarding the public have an extraordinary trust and a difficult task. The difficulty and importance of the task cannot defeat an equally important public trust, which the court and the defendants share—to enforce the Constitution. The court has done its best to recognize and work toward both. Harris County is changing its bail procedures. That is commendable. The relief ordered here is intended to fit into that work, to discharge the responsibilities the court and the parties share.

The plaintiffs' clear likelihood of success on the merits of their claims at trial, the irreparable injuries they will suffer without an order of relief from this court, the public interest, and the relative weight of the harms should the court refuse relief all weigh strongly in the plaintiffs' favor. The Order of Preliminary Injunction is separately entered.

SIGNED on April 28, 2017, at Houston, Texas.

Lee H. Rosenthal
Chief United States District Judge

# TAB 9

*Letter of Transmittal*

**Nevada Advisory Committee to the**
**U.S. Commission on Civil Rights**

The Nevada Advisory Committee to the U.S. Commission on Civil Rights submits this advisory memorandum regarding the potential for disparate impact on the basis of race, color, or other federally protected category in the enforcement of municipal fines and fees. The Committee submits this advisory memorandum as part of its responsibility to study and report on civil rights issues in the state of Nevada and to supplement the 2017 statutory enforcement report. The contents of this advisory memorandum are primarily based on testimony the Committee heard during public meetings on March 15, 2017 held simultaneously in Las Vegas and Reno.

This advisory memorandum begins with a brief background on the topic to be considered by the Committee. It then presents an overview of the testimony received. To conclude, this memorandum identifies recommendations for addressing civil rights concerns directed to various stakeholders at the federal and state level. In recognition of the Commission's continued study on this topic and in lieu of providing a detailed discussion of each finding presented, the Committee offers findings and recommendations for addressing this problem of national importance.

**Nevada Advisory Committee to the**
**U.S. Commission on Civil Rights**

Wendell Blaylock, *Chair, Nevada Advisory Committee*, Las Vegas

Bob Beers, Las Vegas

Kathleen Bergquist, Las Vegas

Sondra Cosgrove, Las Vegas

Carol Del Carlo, Incline Village

Debra Feemster, Sparks

David Fott, Las Vegas

Emma Guzman, Reno

Kara Jenkins, Las Vegas

Kay Kindred, Las Vegas

Theresa Navarro, Reno

Jon Ponder, Las Vegas

Matthew Saltzman, Las Vegas

Ed Williams, Las Vegas

## Advisory Memorandum

**To:** The U.S. Commission on Civil Rights
**From:** The Nevada Advisory Committee to the U.S. Commission on Civil Rights
**Date:** June 13, 2017
**Subject:** Municipal Fines and Fees in the State of Nevada

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On March 15, 2017, the Nevada Advisory Committee (Committee) to the U.S. Commission on Civil Rights convened public meetings held simultaneously in Las Vegas and Reno to hear testimony to examine the potential for disparate impact on the basis of race, color, or other federally protected category in the enforcement of municipal fines and fees. The following advisory memorandum results from the following sources: (i) testimony provided during the March 15, 2017 meeting of the Nevada Advisory Committee, (ii) supplementary testimony provided during a March 29, 2017, meeting of the Nevada Advisory Committee, and (iii) written testimony and comment submitted to the Committee during the thirty-day public comment period. It begins with a brief background of the topic to be considered by the Committee. It then presents an overview of the testimony received. To conclude, this memorandum identifies recommendations for addressing civil rights concerns directed to various stakeholders at the federal and state level. This memo, including the recommendations within it, was adopted by the Committee on May 25, 2017.

### Background

The shooting death of unarmed teenager Michael Brown by police in Ferguson, Missouri, on August 9, 2014, started a national conversation on policing which led to a report released by the U.S. Department of Justice (DOJ), Civil Rights Division analyzing the practices of the Ferguson Police Department. Among its findings, the report revealed that Ferguson's law enforcement efforts were focused on generating revenue by enforcing municipal fines and fees at the expense of ensuring public safety needs.[1] Further, the report found that the practice of raising revenue through the court system challenges the independent role of the judiciary, shifts the essential functions of the courts, and adversely impacts the most vulnerable communities, especially those living in or near poverty.[2] To address these issues, the DOJ issued five resources, four of which were addressed to chief justices and state court administrators,[3] and one addressed to recipients

[1] U.S. DEP'T OF JUSTICE, C.R. DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 42 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf [hereafter INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT].
[2] *Ibid.*
[3] Press Release, U.S. Dep't of Justice, Off. of Pub. Aff., Justice Department Announces Resources to Assist State and Local Reform Fine and Fee Practices (Mar. 14, 2016), https://www.justice.gov/opa/pr/justice-department-announces-resources-assist-state-and-local-reform-fine-and-fee-practices (last visited April 10, 2017).

of financial assistance from various federal agencies dealing with juvenile justice matters.[4] These resources are:

1. Dear Colleague Letter[5] from the Civil Rights Division and the Office for Access to Justice to provide greater clarity to state and local courts regarding their legal obligations with respect to the enforcement of court fines and fees.

2. Announcement of $2.5 million in competitive grants[6] through the Bureau of Justice Assistance (BJA) to state, local or tribal jurisdictions that, together with community partners, want to test strategies to restructure the assessment and enforcement of fines and fees.

3. BJA support for the National Task Force on Fines, Fees, and Bail Practices that will be responsible for drafting model statutes, court rules and procedures, and development of an online clearinghouse of best practices.

4. A resource guide compiled by the Office of Justice Programs Diagnostic Center that highlights issue studies and other publications related to the assessment and enforcement of court fines and fees.

5. Advisory letter for recipients of financial assistance to remind them of their constitutional and statutory responsibilities related to collecting fines and fees from youth involved with the juvenile justice system. Akin to the Dear Colleague Letter, this correspondence offers recommendations to improve the administration of juvenile fines and fees.

The U.S. Constitution along with other federal law protect citizens from government systems that raise revenue from its citizens. The Due Process Clause of the Fourteenth Amendment[7] bars criminal adjudication by individuals who have a financial stake in cases they decide.[8] Secondly, the Equal Protection Clause of the Fourteenth Amendment ensures that no state shall deny any persons "the equal protection of the laws."[9] The Eighth Amendment to the U.S. Constitution forbids the excessive levying of fines.[10] Finally, the Title VI of the Civil Rights Act of 1964, as

[4] U.S. DEP'T OF JUSTICE, ADVISORY FOR RECIPIENTS OF FINANCIAL ASSISTANCE FROM THE U.S. DEP'T OF JUSTICE ON LEVYING FINES AND FEES ON JUVENILES (2017), https://ojp.gov/about/ocr/pdfs/AdvisoryJuvFinesFees.pdf.
[5] Letter from the U.S. Dep't of Justice (Mar. 14, 2016), https://www.justice.gov/crt/file/832461/download (last visited April 10, 2017).
[6] U.S. DEP'T OF JUSTICE, OFF. OF JUSTICE PROGRAMS, BUREAU OF JUSTICE ASSISTANCE, THE PRICE OF JUSTICE: RETHINKING THE CONSEQUENCES OF JUSTICE FINES AND FEES (2016), https://www.bja.gov/funding/JRIpriceofjustice.pdf (last visited April 10, 2017).
[7] U.S. CONST. amend. XIV, § 1.
[8] *See* Tumey v. Ohio, 273 U.S. 510, 523 (1927) and Caperton v. A.T. Massey Coal Co., 556 U.S. 883-884 (2009).
[9] U.S. CONST. amend. XIV, § 1.
[10] U.S. CONST. amend. VIII.

amended, prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving federal financial assistance.[11]

The Committee is aware that the U.S. Commission on Civil Rights (Commission) is presently studying the issue of municipal fines and fees and the effectiveness of DOJ's enforcement efforts. To fulfill this study, the Commission has invited its advisory committees to consider undertaking studies on the civil rights implications of the enforcement of municipal fines and fees. As such – and in keeping with their duty to inform the Commission of: (ii) matters related to discrimination or a denial of equal protection of the laws and (ii) matters of mutual concern in the preparation of reports of the Commission to the President and the Congress, the Committee submits the following findings and recommendations to the Commission regarding the potential for disparate impact on the basis of race, color, or other federally protected category in the levying of fines and fees Nevada. These findings and recommendations are intended to highlight the most salient civil rights themes as they emerged from the Committee's inquiry. In recognition of the Commission's continued study on this topic and in lieu of providing a detailed discussion of each finding presented, the Committee offers findings and recommendations, along with supplementary resources, as topics of reference for the Commission's 2017 statutory enforcement report. The complete meeting agenda, minutes, and transcripts are included in Appendix A and B for further reference.

## Overview of Testimony

The Committee approached this project from a neutral posture and sought input from local, state, and national stakeholders representing various perspectives on the topic. During the March 15, 2017 Committee meetings in Las Vegas and Reno, the Committee heard testimony regarding potential disparities in the administration of fines and fees on the basis of race or color,[12] as well as recommendations to address any related concerns regarding equal protection and the right to due process of law. The Committee heard from government officials and law enforcement who have specific knowledge of the administration of fines and fees; policy experts who offered the national, state, and local trends; and community members directly impacted by municipal fines and fees. The Committee also heard testimony from elected officials and community advocates on their efforts to address disparate impact of fines and fees affecting individuals of federally protected classes. To accommodate a scheduled panelist who was unable to attend the live hearing, the Committee heard from a policy expert who analyzes fines and fees levied on juveniles and their families on March 29, 2017. In addition, the Committee received written statements offering supplemental information on the topic.[13] Notably, despite several outreach attempts, no other State officials or State representatives were able to participate to explain the

[11] 42 U.S.C. § 2000(d). (2012).
[12] Testimony was also heard on the treatment of individuals with mental health issues and their interaction with the law enforcement and the court system.
[13] Written testimony submitted can be found in Appendix D.

fiscal matters related to fines and fees or matters related to potential reform efforts. Additionally, Chief Justice James Hardesty of the Nevada Supreme Court was invited to provide testimony, but due to his involvement with the Nevada Advisory Commission on the Administration of Justice and the National Task Force on Fines and Fees, and Bail Practices, he was unavailable to provide comments related to state efforts. It is within this context that the Committee presents the findings and recommendations that follow.

## Findings

The section below provides findings received and reflects views of the cited panelists. While each assertion has not been independently verified by the Committee, panelists were chosen to testify due to their professional experience, academic credentials, subject expertise, and firsthand experience with the topics at hand. A brief biography of each panelist and his or her credentials can be found in Appendix C.

1. Testimony indicated the following concerns regarding a severe deficit of demographic data collection and tracking:

    a. Nevada courts and law enforcement are not required to collect demographic information regarding who utilizes the court system and who interacts with law enforcement. Information is not recorded and readily accessible from the courts regarding who (i) have paid off fines and fees, (ii) are on a payment plan, (iii) were given the alternative to perform community service in lieu of paying off fines and fees, and (iv) was given a hearing and of what type. Similarly, law enforcement do not maintain demographic information for individuals (i) with a bench warrant as a result of the inability to pay, (ii) who are being held in jail as a result of inability to pay and for how long, and (iii) who are being stopped and for what violations.[14] As such, it is not possible to monitor or assess the potential for disparate impact on the basis of race, color, disability, or other federally protected category.

    b. Widely used case management databases by courts and law enforcement are largely outdated and do not have the appropriate fields to enter demographic categories. Efforts to upgrade these systems would require significant funding. This poses a challenge for potential state reform efforts that would require courts and law enforcement to collect demographic information.[15] Additionally, there is concern

[14] Public Meeting: Municipal Fines & Fees in Nev.: Hearing Before the Nevada Advisory Committee to the U.S. Commission on Civil Rights 180 lines 13-20 (Nev. 2017) (statement of Amy Rose, Legal Director, American Civil Liberties Union, Nev.), https://database.faca.gov/committee/meetingdocuments.aspx?flr=147607&cid=261 [hereafter Transcript].
[15] Transcript (statement of Leisa Moseley, Founder, The Action Company) 105 lines 9-23.

regarding how a potential statewide system upgrade would be funded as taxes are largely unpopular among Nevada residents.[16]

c. Incomplete, missing, and inaccurate demographic data shared between courts and law enforcement[17] make it difficult to ascertain the extent to which disparate impact affects a federally protected category. However, an advocate warned that if data driven law enforcement efforts are pursued as a result of collecting demographic information, it may be used to reinforce racial profiling in predominantly minority communities.[18]

2. There is consensus in research and testimony that explains individuals impacted by fines and fees are overwhelmingly poor. While there is insufficient demographic data collected by law enforcement and the courts[19] to assess whether federally protected categories of individuals are impacted, research and testimony indicate there is reason for concern.

   a. In 2015, the Las Vegas Review-Journal investigated law enforcement data and found that residents living in the seven poorest, statistically African-American and Hispanic zip codes account for nearly two-thirds of traffic citations.[20]

   b. According to the Kenny Guinn Center for Policy Priorities, North Las Vegas – a city with a high rate of poverty and high concentration of minority communities – collected $10.7 million in fines, fees, and assessments out of the $13.2 million originally imposed.[21]

   c. A 2002 study, Commissioned by the Nevada Legislature, found that African-American and Hispanic residents in Nevada are more likely to be pulled over for traffic stops than White residents. African-American residents also were more likely to be searched statewide. Across all participating law enforcement agencies, African-American drivers were searched at a high rate, more than twice the rate of White drivers (9.5 percent to 3.9 percent).[22]

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[16] Transcript (statement of Dustin Marcello, Esq., Def. Att'y, Pitaro & Fumo Law) 218 line 23-219 line 16; Transcript (statement by Hannah Brown, President Emeritus, Urban Chamber of Commerce) 219 lines 17-23.
[17] Transcript (statement of Dana Hlavac, Ct. Adm., L.V. Mun. Ct.) 12 lines 16-20.
[18] Transcript (statement of Marcello) 205.
[19] Transcript (statement of Hlavac) 11 lines 14-13 line 2.
[20] James DeHaven, *Poor Residents Take Brunt of Planned Vegas Muni Court Payments*, L.V. Rev. J, Jun. 15, 2015, https://www.reviewjournal.com/local/local-las-vegas/poor-residents-take-brunt-of-planned-vegas-muni-court-payments/.
[21] Transcript (statement of Megan Rauch, 114 lines 5-14.
[22] RICHARD C. MCCORKLE, NEVADA OFFICE OF THE ATT'Y GEN. & U. OF NEVADA., LAS VEGAS., DEP'T OF CRIM. JUSTICE, A.B. 500 TRAFFIC STOP DATA COLLECTION STUDY: A SUMMARY OF FINDINGS (U. of Nev., Las Vegas, Dept. of Crim. Just. 2003); *Blacks, Hispanics in Nevada More Likely to be Pulled Over for Traffic Stops*, Las Vegas Sun, Jan. 31, 2003, https://lasvegassun.com/news/2003/jan/31/blacks-hispanics-in-nevada-more-likely-to-be-pulle/.

d. According to a report written by the Juvenile Law Center, youth of color were more likely than their White counterparts to have unresolved fines or fees after closed cases, which relate to higher recidivism rates. It notes that the fees structures that include a failure to pay requirement may contribute to racial disparities in the juvenile justice system nationally. [23]

e. The National Council on Crime and Delinquency conducted a study on racial and ethnic disparities in the U.S. Criminal Justice System and found that African-Americans comprise 13 percent of the population but 28 percent of those arrested and 40 percent of those incarcerated. Notably, African-Americans are also almost five times more likely than White defendants to rely on indigent defense counsel.[24]

3. Out of eight possible fines and fees, Nevada youth and their families are required to pay up to six types of fines and fees as they move through the juvenile justice system. Of the six fines and fees, three are mandatory and the remaining are made by judicial determination.[25] Collection of these legal financial obligations raise concerns about (i) its practicability as youth have limited or no access to money, (ii) its rehabilitative purpose, and (iii) its disparate impact on youth of color in the justice system.[26]

4. Testimony indicated the following concerns regarding due process of law in imposing and resolving fines and fees:

   a. The use of counsel to challenge fines and fees is costly. In many cases, the fee amount is significantly more than the actual fine. It is often not logical to hire an attorney to represent the individual, especially if the individual is indigent, because the legal costs would be too expensive.[27] As a result, defense lawyers have turned away individuals dealing with high fines and fees which leave individuals with few options to address their debt.[28]

   b. In some cities, traffic commissioners are appointed by city council members to address minor traffic violations and conduct indigency inquiries. These individuals

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[23] ALEX R. PIQUERO & WESLEY G. JENNINGS, JUSTICE SYSTEM–IMPOSED FINANCIAL PENALTIES INCREASE THE LIKELIHOOD OF RECIDIVISM IN A SAMPLE OF ADOLESCENT OFFENDERS (Youth Violence and Juvenile Just. 2016).
[24] CHRISTOPHER HARTNEY & LINH VUONG, CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE U.S. CRIM. JUSTICE SYSTEM (Nat'l Council on Crime and Delinquency 2009), http://www.nccdcrc.org/nccd/pdf/CreatedEqualReport2009.pdf. (last visited April 14, 2017).
[25] Transcript (statement of Rauch) 109 lines 1-24.
[26] Nevada Advisory Committee to the U.S. Commission on Civil Rights Meeting Minutes, March 29, 2017 (Nev. 2017) 5-6 (statement by Jessica Feierman, Associate Director, Juvenile Law Center) https://database.faca.gov/committee/meetingdocuments.aspx?flr=147671&cid=261 [hereafter Transcript 2].
[27] Transcript (statement of Marcello) 195 line 16-196 line 19.
[28] Transcript (statement of Joseph Maridon, Esq., Las Vegas) 245 lines 6-11.

have the authority to waive a defendant's rights to trial and allow him or her to pay for the fine and fee, or determine alternative payment options.[29] Without judicial oversight, it is difficult to ensure that these duties are done in a manner consistent with due process and equal protection. Additionally, this may pose a conflict as there is no political recourse if a defendant feels these individuals dealt with their case unfairly.[30]

c. Data indicating the sources of fines and fees revenue contributing to the operating budgets of courts is limited. The first and only time that the Nevada Judicial Branch produced a report clearly presenting its funding sources and operations was in 2003.[31] Strikingly, 71 percent of collected fines and 100 percent of state-mandated administrative assessments funded municipal courts.[32]

d. State-mandated administrative assessment fees are used to pay for special projects such as upgrading case management systems [33] and operating specialty courts.[34] For the City of Las Vegas, in particular, administrative assessment fees are used to pay for the construction of the Regional Justice Center until the year 2045.[35]

e. To address unsuccessful attempts at recovering originally imposed fines and fees, cities across the state use varying collection methods such as organizing "warrant amnesty" events,[36] offering payment plan options, and outsourcing to private collection agencies.[37] Local media reporting brought attention to the increased revenue flowing into the courts, which advocates warn exacerbates community and police tensions.[38]

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[29] Transcript (statement of Bill Zihlmann, Ct. Admin., Henderson Muni Ct.) 29 lines 18-22.
[30] Transcript (statement of Marcello) 197 lines 8-10.
[31] SUP. CT. OF NEVADA, CT. FUNDING COMMISSION, NEVADA JUDICIAL BRANCH FUNDING: RESOURCES AND OPERATIONS DURING FISCAL YEAR 2003, A REPORT OF THE SUP. CT. OF NEVADA CT. FUNDING COMMISSION, iv (2005) nvcourts.gov/AOC/Documents/Court_Funding_Commission_Report/ (last visited April 5, 2017).
*The report was created by the Commission of the Supreme Court of Nevada to assess the level of funding and resources in, and services offered by, each court within the Nevada Court system. It noted, "Never before in the history of Nevada has anyone known at any particular point in time, by any estimate, the cost of operating the courts in Nevada or what we get for our money." A Message from Deborah A. Agosti, Senior Justice and Chair of Court Funding Commission.
[32] Transcript (statement of Dr. Nancy E. Brune, Executive Director, Kenny Guinn Center for Pol'y Priorities) 111 line 10-112 line 7.
[33] Transcript (statement of Dexter Thomas, Ct. Admin., Reno Just. Ct.) 45 lines 18-21.
[34] Transcript (statement of Hlavac) 14 lines 17-22.
[35] *Ibid.*, lines 12-16.
[36] Transcript (statement by Thomas Harvey, Executive Director, ArchCity Defenders) 147, line 12 -148 line 11; Transcript (statement by Thomas) 45 line 22-46 line 8.
[37] Transcript (statement by Zihlmann) 30 lines 23-25.
[38] Transcript (statement by Harvey) 147 line 12-149 line 7.

f. As cities struggle to collect from citizens, especially juveniles and/or indigents, panelists questioned the sustainability of the State's long-standing fiscal model to fund city agency operations through fines, fees, and administrative assessment fees.[39]

5. Testimony indicated the following concerns regarding the ability-to-pay determination and equal protection of the law in resolving fines and fees:

   a. *Gilbert v. Nevada*[40] the Nevada Supreme Court ruling held that an individual should be given an opportunity to explain his or her inability to pay before being jailed, in what is known as "Gilbert hearing." However, some judges across the state may still not allow individuals to explain their financial circumstances and are continuing to sentence them to jail for failure to pay.[41]

   b. Nevada law does not provide a grace period for individuals on payment plans. Therefore, individuals who are late on fines and/or fees payments can still be arrested, even if past payments were made on time.[42] Individuals who are arrested in this way may be victims of an unconstitutional deprivation of liberty.

   c. Administrative assessment fees enforced by the State are required to be paid off before fines. For an individual who has committed multiple offenses, each offense is assigned a separate case and consequently, a separate administrative assessment fee is applied.[43] This compounding of fees may cause increased hardship for indigent defendants to pay off fees even before attempting to pay off the remainder of fines associated to each offense. This is particularly challenging as individuals must pay these fees before they can appeal their case before a judge requesting for an alternative payment option.

   d. Community service is not a widely used payment alternative across courts,[44] but if granted, the pay-off for performing community service is paltry. In Las Vegas, one

[39] Transcript (statement by Marcello) 206 line 6 -207 line 1; Transcript 2 (statement by Feierman) 5 ¶ 4.
[40] See Gilbert v. State, 669 P.2d 699 (Nev. Sept. 27, 1983).
[41] Written Testimony before the Nevada Advisory Committee to the U.S. Commission on Civil Rights, March 15, 2017, (Nev. 2017) 13 (statement by Jeffrey Barr, Esq.). https://database.faca.gov/committee/meetingdocuments.aspx?flr=147607&cid=261 [hereafter Written Testimony]; Transcript (statement by Jesiah Dechanel, Las Vegas) 238 line 19- 241 line 13.
* A 73-year-old Nevada woman was jailed for 21 days for failure to pay for fines and fees over a civil lawsuit with her neighbor. She initially was given the option to perform community service to pay down the amount, but due to her health condition and the extreme desert heat, it was out of the question. While in jail, she was among others who faced a similar burden of inability to pay down their fines and fees.
[42] Transcript (statement by Moseley) 85 lines 12-18.
[43] Transcript (statement by Marcello) 201 lines 2-10.
[44] Written Testimony (statement by Michael Bluestein, Las Vegas) 15.

hour of community service equates to ten dollars.[45] This alternative may leave individuals, especially those with unpredictable work schedules and/or are minimum wage earners, struggling to pay off their fines and fees. Similarly, it causes an additional financial and scheduling burden on parents who must pay and arrange for childcare while they perform community service.

6. State officials and lawmakers have been involved in reform efforts that address fines and fees, but little progress has been made to date.

    a. In the last two legislative sessions, lawmakers attempted to address the classification of traffic violations. Thirty-seven states across the country consider these violations civil matters. In Nevada, traffic violations are treated as criminal infractions which are subject to a bench warrant for failure to appear in court. Due to its contentious language surrounding reclassification and its implications regarding the sustainability of court operations, legislation to decriminalize traffic violations into a civil matter was unsuccessful.[46] In its recent legislative session, a concurrent resolution was introduced in the Nevada Assembly that directs the Nevada Legislative Commission to conduct an interim study concerning treating certain traffic and related violations as civil infractions and is awaiting Senate approval.[47]

    b. The Nevada Advisory Commission on the Administration of Justice is currently reviewing the State's administration of fines and fees practices by identifying areas for reform consideration and is an active member of the National Task Force on Fines and Fees, and Bail Practices. At this writing, the Nevada Advisory Commission on the Administration of Justice has not released any official statements or findings related to their review.

**Recommendations**

The recommendations below are not listed by preference of suggested action.

1. The U.S. Commission on Civil Rights should issue a formal request to the U.S. Department of Justice to:

    a. Require consistent and complete reporting of demographic information by state and local courts and law enforcement. Where possible, such data should include, but are not limited to: (i) race, (ii) color, and (iii) veteran status. Such data should

[45] Transcript (statement by Rauch) 114 lines 23-25.
[46] Transcript (statement by Michele Fiore, Former Assemblywoman, District 4) 78 line 3-80 line 2.
[47] Assemb. Con. Res. 9, 79th Leg., Reg. Sess. (Nev. 2017). https://www.leg.state.nv.us/Session/79th2017/Reports/history.cfm?BillName=ACR9 (last visited May 11, 2017).

reference the zip code where the violation occurred and type of violation. Additionally, this information should be made publicly available, and disaggregated by court cases.

b. Require the Department to keep their commitment to supporting state judges, court administrators, policy makers and advocates in ensuring justice for all people, regardless of their financial circumstance, by upholding its initial guidance and resources. This entails keeping the "Dear Colleague" letter visible and available on the Department of Justice website and recirculating it to state and local courts.

c. Continue funding the grant program, *The Price of Justice: Rethinking the Consequences of Justice Fines and Fees,* administered by the BJA, in the next fiscal year in hopes that Nevada and other states may have the opportunity to compete for funding. In addition, the Committee recommends that grantees are given the opportunity to showcase their strategies to states to support best practice sharing.

d. Require that individuals be afforded the right to court-appointed counsel.

2. The Commission should issue a formal recommendation to the Governor and State of Nevada Legislature urging the state to:

a. Require mandatory annual reporting of revenue generated from fines and fees to be submitted to the Administrative Office of the Courts as was done in 2003.

b. Increase annual funding for the Administrative Office of the Courts grant program[48] to ensure courts can address their infrastructural technology needs.

c. Eliminate the use of failure-to-pay warrants and any associated fees.

d. Institute mandatory training of all judges, court staff, law enforcement, prosecutors and public defenders on the use of the bench card.[49]

[48] Sup. Ct. of Nevada, Admin. Office of the Courts, AOC Grant Program Overview, Projects & Programs Page, http://nvcourts.gov/AOC/Programs_and_Services/AOC_Grant_Program/Overview/ (last visited April 5, 2017).

[49] NATIONAL TASK FORCE ON FINES, FEES AND BAIL PRACTICES, CONFERENCE OF CHIEF JUSTICES & CONFERENCE OF ST. CT. ADMIN., LAWFUL COLLECTION OF LEGAL FINANCIAL OBLIGATIONS: A BENCH CARD FOR JUDGES (2017) http://www.ncsc.org/~/media/Images/Topics/Fines%20Fees/BenchCard_FINAL_Feb2_2017.ashx (last visited April 5, 2017).

e. Develop and implement clear standards for court administrators and judges to determine an individual's inability to pay.

f. Institute a limitation on jail for nonpayment.

g. Commission a state study to identify alternative funding streams which courts may use to operate to reduce the dependency on revenue collected from fines and fees.

h. Submit report to all municipal and justice courts for review.

**Appendix**

A. Hearing Agenda & Minutes

B. Hearing Transcripts

C. Panelist Profiles

D. Written Testimony

**Appendix A**

## Nevada Advisory Committee to the U.S. Commission on Civil Rights
## Municipal Fines and Fees Hearing
## March 15, 2017

**Opening Remarks and Introductions** (9:00 am – 9:15 am)

**Government and Law Enforcement Panel** (9:15 am – 10:30 am)
Dana Hlavac, Court Administrator, Las Vegas Municipal Court
Bill Zihlmann, Court Administrator, Henderson Municipal Court
Earl Mitchell, Constable, City of Henderson Township
Sam Diaz, Commission Officer and Government Liaison, and Kelly McMahill, Lieutenant, Las Vegas Metropolitan Police Department
* Dexter Thomas, Court Administrator, Reno Justice Court

**Elected Officials Panel** (10:45 am – 11:45 am)
* Dina Neal (D), Assemblywoman, District 7
Michele Fiore (R), Former Assemblywoman, District 4
* Leisa Moseley, Founder, The Action Company

**Break** (11:45 am – 1:15 pm)

**Policy Experts Panel** (1:15 pm – 2:30 pm)
*Egan Walker, Justice, Second Judicial District Court
Jessica Feierman, Associate Director, Juvenile Law Center
Dr. Nancy E. Brune, Executive Director and Megan Rauch, Director of Education Policy, Kenny Guinn Center for Policy Priorities
Nicole Austin-Hillery, Director and Counsel, Brennan Center for Justice at New York University
Thomas Harvey, Executive Director, ArchCity Defenders

**Advocates and Community Members Panel** (2:45 pm – 4:00 pm)
Amy Rose, Legal Director, American Civil Liberties Union, Nevada
Alex Cherup, Vice President, National Association for The Advancement Of Color People, Las Vegas
Dustin Marcello, Defense Attorney, Pitaro & Fumo Law
Hannah Brown, President Emeritus, Urban Chamber of Commerce

**Open Forum** (4:15 pm – 5:00 pm)

**Closing Remarks** (5:00 pm – 5:15 pm)

* Panelists joining via teleconference in Reno, Nevada

**NEVADA ADVISORY COMMITTEE TO**
**THE U.S. COMMISSION ON CIVIL RIGHTS**
**MEETING MINUTES**

March 15, 2017

The Nevada Advisory Committee to the U.S. Commission on Civil Rights (Committee) convened at two locations to hear testimony to determine if the use of municipal fines and fees disproportionately affect members of a federally protected class and to identify what solutions exist to remedy its impact. The primary location was at the Nevada Department of Employment, Training and Rehabilitation at 2800 E. St. Louis Ave., Las Vegas, NV 89104 and at Nevada Department of Employment, Training and Rehabilitation at 1325 Corporate Blvd., Reno, NV 89502 via video conference. Wendell Blaylock chaired the meeting and performed the initial roll call of committee members present. The meeting was open to the public and took place from 9:00 AM to 4:39 PM PDT.

**State Advisory Committee Members:**

**Present:**

- Sondra Cosgrove
- Carol Del Carlo
- Wendell Blaylock
- Theresa Navarro (in Reno)
- David Fott
- Kay Kindred
- Jon Ponder
- Kathleen Bergquist
- Kara Jenkins

**Absent:**

- Emma Guzman
- Bob Beers
- Matthew Saltzman
- Debra Feemster
- Ed Williams

**Commission Staff present:**

- David Mussatt, Supervisory Chief, Regional Programs Unit
- Ana Victoria Fortes, Civil Rights Analyst
- Angelica Trevino, Support Specialist
- Carolyn Allen (in Reno), Administrative Assistant

**Members of the Public present:**

- Lonnie Feemster
- Pat Lynch
- Joseph Maridon
- Lucy Hood
- Jo Cato
- Gloria Yasal
- Jesiah Yasal

**Meeting Notes/Decisions Made:**

The Committee heard testimony from the following individuals according to the agenda noted:
*Opening Remarks and Introductions (9:00 am – 9:15 am)*

*Government and Law Enforcement Panel (9:15 am – 10:30 am)*

- Dana Hlavac, Court Administrator, Las Vegas Municipal Court
- Bill Zihlmann, Court Administrator, Henderson Municipal Court
- Earl Mitchell, Constable, City of Henderson Township
- Sam Diaz, Commission Officer and Government Liaison and Kelly McMahill, Lieutenant, Las Vegas Metropolitan Police Department
- *Dexter Thomas, Court Administrator, Reno Justice Court

*Elected Officials Panel (10:45 am – 11:45 am)*

- *Dina Neal (D), Assemblywoman, District 7
- Michele Fiore (R), Former Assemblywoman, District 4
- *Leisa Moseley, Founder, The Action Company

*Policy Experts Panel (1:15 pm – 2:30 pm)*

- *Egan Walker, Justice, Second Judicial District Court
- Dr. Nancy E. Brune, Executive Director and Megan Rauch, Director of Education Policy, Kenny Guinn Center for Policy Priorities
- Nicole Austin-Hillery, Director and Counsel, Brennan Center for Justice at New York University
- Thomas Harvey, Executive Director, ArchCity Defenders

*Advocates and Community Members Panel (2:45 pm – 4:00 pm)*

- Amy Rose, Legal Director, American Civil Liberties Union, Nevada
- Alex Cherup, Vice President, National Association for The Advancement Of Color People, Las Vegas
- Dustin Marcello, Defense Attorney, Pitaro & Fumo Law
- Hannah Brown, President Emeritus, Urban Chamber of Commerce

*Open Forum (4:15 pm – 5:00 pm)*

*Closing Remarks (5:00 pm – 5:15 pm)*
* Panelists joining via video conference in Reno, Nevada

Also invited to testify were Nevada Supreme Court Justice James Hardesty, Associate Director for the Juvenile Law Center Jessica Feierman, and Partner for Ashcraft & Barr LLP Jeffrey Barr were unable to attend.

Testimony focused on determining if the use of municipal fines and fees disproportionately affect members of a federally protected class. It also discussed what solutions exist to remedy its impact.

At the conclusion of testimony given on each panel, Committee members had the opportunity to ask questions of the panelists.

No decisions were made and no votes taken. A transcript of the proceedings will be available and included with meeting records within 30 days.

**Public Comment:**
During the Open Forum session listed on the above agenda, the meeting welcomed for comments from members of the public. During the session, testimony was received from:

- Lonnie Feemster
- Pat Lynch
- Joseph Maridon
- Jesiah Yasal

Written testimony from members of the public will continue to be accepted until April 14, 2017. For more information contact the USCCR Western Regional Office at (213) 894-3437.

**Adjournment:**
Meeting adjourned at 4:39 PDT.

## Appendix B

### Nevada Advisory Committee March 15 Briefing Transcript

The full transcript of the Nevada Advisory Committee to the U.S. Commission on Civil Rights Hearing held on March 15, 2017 is available at https://database.faca.gov/committee/meetingdocuments.aspx?flr=147607&cid=261

### Nevada Advisory Committee March 29 Briefing Transcript

The full transcript of the Nevada Advisory Committee to the U.S. Commission on Civil Rights Public Meeting held on March 29, 2017 is available at https://database.faca.gov/committee/meetingdocuments.aspx?flr=147671&cid=261

## Appendix C

### Nevada Advisory Committee March 15 Briefing Panelists Biographies

The Panelists' Biographies of the Nevada Advisory Committee to the U.S. Commission on Civil Rights Hearing held on March 15, 2017 is available at https://database.faca.gov/committee/meetingdocuments.aspx?flr=147607&cid=261

## Appendix D

### Nevada Advisory Committee March 15 Public Briefing Written Testimony

The full written testimony for the Nevada Advisory Committee to the U.S. Commission on Civil Rights Public Hearing on Municipal Fines and Fees in the State of Nevada, held on March 15, 2017 is available at https://database.faca.gov/committee/meetingdocuments.aspx?flr=147607&cid=261

# *Informational Materials*

# 2015-2016 Policy Paper

# The End of Debtors' Prisons: Effective Court Policies for Successful Compliance with Legal Financial Obligations


Conference of State Court Administrators

**Author**

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

A special thanks to Steve Canterbury, Administrative Director of the Courts, West Virginia, for editing the paper.

## Table of Contents

# I. Introduction

The law of unintended consequences states that unwanted outcomes result from actions that logically aim to achieve desired results.[1] This law is at work in the unwanted results of collection of court costs, fines, and fees. State legislatures and county or city governments have enacted fines as punishment and imposed an expansive array of fees intended to defray the costs of operating courts, jails, public defender and prosecutor offices, police agencies, probation services, as well as a variety of government programs unrelated to criminal justice. While courts do not enact the fines and fees, courts are required to order defendants to pay them. The imposition of these legal financial obligations (LFOs)[2] too often results in defendants accumulating court debt they cannot pay, landing them in jail at costs to the taxpayers much greater than the money sought to be collected. Late or missed payment penalties, daily fees for the cost of time in jail, and monthly fees for contract probation supervision are just a few of the add-on costs and fees that escalate the cycle of debt. The consequence is incarceration at public expense for LFOs that can never be paid, trapping many in a modern-day version of debtors' prison.

This paper examines the growth of debt imposed by legislative bodies through courts and the incarceration that results from failure to pay as well as significant collateral consequences incarceration brings to those unable to pay. The paper discusses the issues created by reliance on funding courts through fine and fee revenue and the impact of using private for-profit entities to collect court-related LFOs.

The focus of this paper is a set of recommendations from COSCA regarding specific policies and practices that courts can adopt to minimize the negative impact of LFOs while ensuring accountability for individuals who violate the law.

[1] *See* Robert K. Merton, "The Unanticipated Consequences of Purposive Social Action," *American Sociological Review*, Volume 1, Issue 6 (December 1936), pp. 894-904.

[2] The term "Legal Financial Obligation," or LFO, is generally used to include fines, court costs and fees as well as the many add-on fees that are common such as monthly probation/supervision fees, payment for drug and alcohol testing, interest on the LFO, a fee to implement a payment plan, charges for daily jail costs, a charge for a public defender, fees for missing court, warrant fees, charges for mandatory classes, and many others. The terms "LFOs," "court LFOs," and "court debt" are used in this sense throughout this paper.

## II. How Court Legal Financial Obligations Lead to Imprisonment of Defendants

Punishment for wrongdoing that includes some financial penalty is a consequence within the authority of state legislators as well as county commissions, municipal councils, and other elected officials.[3] When fees proliferate and fines are disproportionately high relative to the offense, courts can be placed in the position of becoming a revenue source to fund government operations. This can burden defendants charged with low-level offenses with high-level court debt. Court practices to enforce appropriately scaled fines and fees are an important part of enforcing the consequences of misconduct and may include incarceration after an effective assessment of willful refusal to pay.

In policy papers endorsed by the Conference of Chief Justices, the Conference of State Court Administrators (COSCA) has for a long time advocated reducing or eliminating court funding through fees. In 2003, COSCA warned that "The judiciary must guard against sending the message that courts are somehow responsible for funding themselves and generating revenue to support their own operations."[4] In 2011, COSCA adopted a policy paper entitled "Courts are not Revenue Centers" which advocated as Principle 1 that "Neither courts nor specific court functions should be expected to operate exclusively from proceeds produced by fees and miscellaneous charges."[5] More specifically, COSCA found that "The proliferation of these fees and costs as chargeable fees and costs included in the judgment and sentence issued as part of the legal financial obligation of the defendant has recast the role of the court as a collection agency for executive branch services."[6] In 2014, COSCA adopted the policy that a necessary component of judicial independence for courts of limited jurisdiction is segregation of court funding from fee generation, to avoid the perception of conflict of interest and provide for judicial independence.[7]

This paper reiterates, relies upon, and extends those prior statements of policy in addressing persistent issues resulting from LFOs. Beyond the dangers inherent in funding courts through fees is the practice of using courts to generate revenue for other elements of the justice system and also for activities unrelated to courts. Often judges are given little discretion to modify or waive fees they are required by law to impose. Courts can work toward legislative reform of fines and fees in cooperation with legislative bodies. However, given the reality that legislative bodies have and will continue to require that courts impose fees, COSCA and the courts we serve must adopt appropriate practices in the assessment and collection of fees.

In July 2015, COSCA directed its Policy Committee to develop this policy paper to build on principles long advocated by COSCA and endorsed by the Conference of Chief Justices. On November 23, 2015, the Conference of Chief Justices and COSCA announced the formation of a joint Task Force on Court Fines, Fees and

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[3] Ann Cammett and William S. Boyd, "Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt," 117 *Penn State Law Review* 349, 378-79 (2012).

[4] COSCA Policy Paper, "State Judicial Branch Budgets in Times of Fiscal Crisis," (December 2003), p. 14.

[5] COSCA Policy Paper, "Courts Are Not Revenue Centers," (2011), p. 7, accessed at http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/CourtsAreNotRevenueCenters-Final.ashx

[6] "Courts Are Not Revenue Centers," *supra,* note 5, p. 9.

[7] COSCA Policy Paper, "Four Essential Elements Required to Deliver Justice in Limited Jurisdiction Courts in the 21st Century" (2014), p. 12, note 28, accessed at http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/2013-2014-Policy-Paper-Limited-Jurisdiction-Courts-in-the-21st-Century.ashx

Bail Practices. Since then, the voices of many state and national leaders have joined the growing chorus advocating for best practices in the imposition and collection of LFOs. Contemporaneous with a meeting at the White House in December 2015 on "A Cycle of Incarceration: Prison, Debt, and Bail Practices," the Council of Economic Advisers Issue Brief on Fines, Fees, and Bail surveyed these issues with particular emphasis on the disparate impact on the economically disadvantaged.[8] The United States Department of Justice followed the December 2015 working session convened by DOJ on "Poverty and the Criminal Justice System: The Effect and Fairness of Fees and Fines" with a March 14, 2016, letter to state chief justices and state court administrators further illuminating this area. COSCA seeks to advance this national conversation and highlight practices that will enhance LFO compliance.

In addition to the disparate impact LFOs appear to have on the economically disadvantaged, they also appear to be inefficient as a means of producing revenue. Research in Alabama resulted in advocating for reform of "ever-rising charges, fees and fines" that attempt to shift the cost burden of court funding and "threaten the independence and effective functioning of courts," with the unintended effect of impairing collections; the highest collection rates for court LFOs in Alabama counties is less than 50% and collection rates in the largest counties are about 25%.[9] In Florida, clerk performance standards rely on the assumption that just 9% of fees imposed in felony cases can be expected to be collected.[10] Reports in Virginia show an annual collection rate on LFOs between 2008 and 2015 of between 47% and 58%.[11] Collection data published by the Pennsylvania Supreme Court show that of all LFOs assessed by general jurisdiction courts in 2007, the collections rate to date is 47%.[12]

The low collection rates on LFOs bring into question the viability of fees and cost assessments as a cost recoupment tool. "A true cost-benefit analysis of user fees would reveal that costs imposed on sheriffs' offices, local jails and prisons, prosecutors and defense attorneys, and the courts themselves surpass what the state takes in as revenue."[13] The poor LFO collection rate may be attributable to ineffective collection mechanisms or to courts not accurately determining the ability of defendants to satisfy the LFOs with the frequent consequence that defendants serve jail time for failure to comply with a court order requiring payment. However, incarceration tends to aggravate criminal behavior. A study of more than 2.6 million criminal court records for 1.1 million defendants in Harris County, Texas, that investigated jail data, unemployment insurance claims, wage records, public assistance benefits, and

[8] Council of Economic Advisers Issue Brief, "Fines, Fees, and Bail: Payments in the Criminal Justice System that Disproportionately Impact the Poor" (December 2015).

[9] Public Affairs Research Council of Alabama, "Unified But Not Uniform: Judicial Funding Issues In Alabama," PARCA Court Cost Study (August 2014), pp. 2, 4, accessed at https://www.alabar.org/assets/uploads/2015/03/PARCA-Court-Cost-Study-FINAL-3-5-15.pdf

[10] Rebekah Diller, "The Hidden Costs of Florida's Criminal Justice Fees," Brennan Center for Justice (March 23, 2010) at p. 8, available at https://www.brennancenter.org/sites/default/files/legacy/Justice/FloridaF&F.pdf?nocdn=1

[11] "Commonwealth Court Collections Review," Virginia Auditor of Public Accounts (April 2013), available at https://www.justice4all.org/wp-content/uploads/2014/12/APA-Report-CourtsAccountsReceivableSR2012.pdf; "FY15 Fines and Fees Report," Virginia Compensation Board (December 1, 2015), accessed at http://www.scb.virginia.gov/docs/fy15finesandfeesreport.pdf

[12] Administrative Office of Pennsylvania Courts, *Collection Rate of Payments Ordered by Common Pleas Courts* (2012) available at http://www.pacourts.us/news-and-statistics/research-and-statistics/collection-rate-of-payments-ordered-by-common-pleas-courts

[13] "Shadow Citizens," *supra,* note 3, p. 383.

recidivism after release found, "The empirical results indicate that incarceration generates net increases in the frequency and severity of recidivism, worsens labor market outcomes, and strengthens dependence on public assistance."[14]

The United States Supreme Court has twice addressed jailing individuals for failure to pay LFOs. In 1971, the Supreme Court held in *Tate v. Short* that converting an individual's fine to a jail term solely because the individual is indigent violates the Equal Protection Clause of the United States Constitution.[15] The Court in *Tate* stated that courts may jail an individual when an individual with means to pay refuses to do so.[16] The Supreme Court in *Bearden v. Georgia* ruled in 1983 that courts cannot revoke probation for failure to pay a fine without first making an inquiry into facts that demonstrate the defendant had the ability to pay, willfully refused to pay, and had access to adequate alternatives to jail for non-payment.[17]

*Bearden* received a suspended sentence of three years' probation as a first offender, as well as a fine of $500 and restitution of $250 for burglary and receiving stolen property. After this illiterate and unemployed defendant notified the court he could not keep up with payments on his court debt, he went to prison in 1981 for the remainder of his sentence, a period of more than two years, due to the $550 he still owed. His incarceration was illegal because the Georgia court had no evidence the failure to pay was willful or that Bearden had failed to make good faith efforts to pay, a practice that "would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment."[18]

In addition to the direct consequences of imposing high fees, there are collateral consequences. Penalties for failure to pay LFOs may include suspensions of drivers' licenses that make it much more difficult for defendants to work, issuance of arrest warrants, extensions of supervision/probation solely to collect debt, and garnishments that can be as high as 65% of wages.[19]

A probation or parole violation resulting from missed or late payments on LFOs disqualifies an individual under federal law from receiving Temporary Assistance to Needy Families (TANF), Food Stamps, low income housing and housing assistance, and Supplemental Security Income (SSI) for the elderly and disabled.[20] State laws may further add to the list of collateral consequences. In Pennsylvania, courts may deny parole to offenders who are unable to pay a $60 fee in anticipation of release, while numerous federal court decisions have upheld the constitutionality of state statutes that payment of LFOs is a prerequisite to restoration of voting rights.[21]

As with other actions that may aid in enforcement of court orders to pay LFOs, suspension of a driver's license may encourage payment by those with an ability to pay.

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[14] Michael Mueller Smith, "The Criminal and Labor Market Impacts of Incarceration," Columbia University Job Market Paper abstract (November 14, 2014), p. 1 accessed at http://www.columbia.edu/~mgm2146/incar.pdf

[15] *Tate v. Short*, 401 U.S. 395, 398 (1971).

[16] *Tate*, 401 U.S. at 400.

[17] *Bearden v. Georgia,* 461 U.S. 660, 662-63 (1983).

[18] *Bearden,* 461 U.S. at 672-73.

[19] Mitali Nagrecha and Mary Fainsod Katzenstein with Estelle Davis, *When All Else Fails, Fining the Family: First Person Accounts of Criminal Justice Debt*, Center for Community Alternatives (2013), p. 6.

[20] Alicia Bannon, Mitali Nagrecha and Rebekah Diller, *Criminal Justice Debt: A Barrier to Reentry*, Brennan Center for Justice (2010), p. 28, citing: 42 U.S.C. section 608(a)(9)(A); 7 U.S.C. section 2015(k)(1); 42 U.S.C. section 1437d(l)(9); and 42 U.S.C. section 1382E(4)(A)(ii).

[21] "Shadow Citizens," *supra,* note 3 at p. 390, n. 235.

However, automatic license suspension for failure to pay LFOs without the option of a license to permit a defendant to work greatly reduces an offender's ability to work or creates the risk of further criminal involvement if the offender continues to drive in an effort to satisfy court LFOs. Virginia is among the many jurisdictions that suspend an offender's driver's license until all court debt is satisfied. As a result, a 2015 snapshot showed more than 2.6 million orders suspending the drivers' licenses of 914,450 individual Virginians due to unpaid court LFOs.[22] According to the Legal Aid Society report, "Approximately 1 in 6 Virginia drivers has had their license suspended for non-payment of court costs or fines and, therefore, cannot drive to work, medical appointments, the grocery store, church, of their children's schools."[23] [24]

A study of New Jersey drivers found that 42% of suspended drivers lost their jobs and 45% remained unemployed throughout the period of suspension even though less than 6% of the suspensions were tied directly to driving offenses.[25] In 2004 in New Jersey, 105,971 drivers had their licenses suspended for failure to appear in court, comprising 41% of all active suspensions.[26] As the Brennan Center for Justice found,

> License suspension also increases the risk that people will be re-arrested (and incur new fees) for driving with a suspended license. Unable to legally drive to work, people face a choice between losing a job and suffering increased penalties for nonpayment. One study found that failure to pay fines was the leading cause of license suspensions. The same study found that 80 percent of participants were disqualified from employment opportunities because their license was suspended. In states where licenses may be suspended without an adequate determination of a person's ability to pay the underlying fees, poor people are disproportionately affected by suspensions and suspension-related unemployment. Because of the detrimental effects suspensions have on the employment prospects of indigent people and because debt-related suspensions have no relation to driver safety, the practice of suspending licenses for failure to pay fees is completely lacking in rehabilitative or deterrent value.[27]

In August 2016 the Arizona Task Force on Fair Justice for All issued a comprehensive report with 65 recommendations to improve court practices on court-ordered fines, penalties, fees, and pretrial release that included the recommendations that a driver's license suspension be "a last resort, not a first step" and that a first offense for driving on a suspended

[22] Angela Ciolfi, Pat Levy-Lavelle, and Mario Salas, "Driven Deeper Into Debt: Unrealistic Repayment Options Hurt Low-Income Court Debtors," Legal Aid Justice Center (5/4/2016), p. 7.

[23] *Id.* It should be noted that Virginians with licenses suspended for these reasons can petition for and receive a restricted license allowing them to drive to work, school, church, etc., legally.

[24] The Legal Aid Justice Center recently filed a class action challenging the constitutionality of automatic suspension of a driver's license for failure to pay court LFOs. *Stinnie v. Holcomb,* No. 3:2016cv00044 (W.D.Va. July 6, 2016).

[25] *N.J. Motor Vehicles Affordability and Fairness Task Force, Final Report* (2006), pp.12, 38, accessed at http://www.state.nj.us/mvc/pdf/About/AFTF_final_02.pdf.

[26] *Id.* at p.32.

[27] *Criminal Justice Debt*, *supra,* n.20 at 19, citing Rebekah Diller, Brennan Cntr. For Justice, *The Hidden Costs of Florida's Criminal Justice Fees* (2010), pp. 20-21, accessed at http://www.brennancenter.org/page/-/Justice/FloridaF%26F.pdf?nocdn=1

license be a civil violation rather than a criminal offense.[28]

Recognition of the collateral consequences of LFOs, such as automatic suspension of a driver's license, along with isolated but spectacular examples of abusive courts motivated to maximize revenue, as well as abuses by for-profit private probation services, have generated significant attention in the press.[29]

The increased public attention to incarceration as a consequence of inability to pay court LFOs amplifies what the United States Supreme Court found several decades ago in *Bearden*: jail should be for those able but unwilling to pay and not for those unable to pay.

Today an estimated 10 million people owe more than $50 billion in LFOs.[30] COSCA urges its members and other state court system leaders to work to ensure that incarceration for that debt follows only upon a finding of willful failure to pay and after reasonable alternatives are offered to satisfy court obligations imposed by the law. A discussion of how we arrived at this point is followed by recommendations for how COSCA members can work to move court practices even closer to the letter and spirit of *Bearden*.

### A. State and Local Legislative Bodies Have Multiplied Fees as a Substitute for Adequately Funding Courts, Other Justice Entities, and Non-Judicial Government Activities

In almost all cases, court fines and fees are set by state and local legislative bodies and not by the courts. Many jurisdictions now have an array of fees that courts are required to impose and collect for criminal justice activities as well as government programs unrelated to courts.

- A Texas Office of Court Administration study listing the various criminal court costs and fees, excluding fines, found 143 separate costs and fees that can be assessed against defendants and found that "1) some fees and costs have no stated statutory purpose; 2) court fees and costs collected from users of the court system are oftentimes used to fund programs outside of and unrelated to the judiciary; and 3) many court fees and

[28] Report and Recommendations of the Task Force on *Fair Justice for All: Court-Ordered Fines, Penalties, and Pretrial Release Policies*, Supreme Court of Arizona (August 12, 2016), recommendations 26 and 27, p. 22.

[29] See, *e.g.*, "The Town that Turned Poverty into a Prison Sentence" (how the Harpersville, Alabama, court became a "judicially sanctioned extortion racket" ensnaring the poor), Hannah Rappleye and Lisa Riordan Sevelle, *The Nation*, March 14, 2014; "Get Out of Jail, Inc.: Does the Alternatives-to-Incarceration Industry Profit from Injustice?" (describes judicially-approved abuses of those unable to pay court debt by private probation corporations, including Judicial Correction Services and Sentinel, among others); "For Offenders Who Can't Pay, It's a Pint of Blood or Jail Time" (reports of an Alabama judge threatening jail for those unable to pay fines and fees, but offering $100 credit and no jail for those who donate blood), Campbell Robertson, *New York Times* (10/19/2015); "Jail Fail: How Not Paying Your Fines Could Land You Behind Bars," (surveying a litany of practices and examples of court debt leading to "debtors' prisons"*)* Olivia C. Jerjian, *American Criminal Law Review Online* (4/27/2015), accessed at http://www.americancriminallawreview.com/aclr-online/jail-fail-how-not-paying-your-fines-could-land-you-behind-bars/; "Municipal Violations," *Last Week Tonight with John Oliver*, HBO (18-minute broadcast story of excessive fines, fees, and incarceration for municipal violations broadcast March 22, 2015), accessed on YouTube at https://www.youtube.com/watch?v=0UjpmT5noto

[30] Douglas N. Evans, "The Debt Penalty, Exposing the Financial Barriers to Offender Reintegration," John Jay College of Criminal Justice (August 2014), p. 7, accessed at http://justicefellowship.org/sites/default/files/The%20Debt%20Penalty_John%20Jay_August%202014.pdf, citing Alexes Harris, Heather Evans, and Katherine Beckett, "Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary Untied States," *American Journal of Sociology*, Volume 115, number 6 (2010), pp. 1753-1799.

costs are collected for a purpose but not dedicated or restricted to be used exclusively for that intended purpose." [31]

- A Brennan Center report on fees assessed in Florida courts includes a seven-page appendix listing more than 60 statutory fees that apply in different types of cases and circumstances.[32]

- A Brennan Center study of 15 states that together account for more than 60% of all criminal filings found fees that range from the pre-adjudication phase, such as an application fee for a public defender and a jail fee for pretrial incarceration, to sentencing fees for court costs, fees to fund court and non-court programs, and reimbursement fees to the public defender and prosecution. Post-adjudication-added fees included jail costs, probation supervision, drug testing, and mandatory classes, followed by the imposition of interest, late fees, payment plan fees, and collection fees on the accumulated court debt.[33]

- A Pennsylvania docket sheet that illustrates the impact of legislatively-required LFOs shows that a woman convicted of a drug crime received, in addition to a sentence of between 3 and 23 months imprisonment, a $500 fine and $325 restitution, plus 26 different fees totaling $2,464.[34]

- An Alabama study found that for a defendant arrested for possession of one ounce of marijuana in Shelby County "[a] conservative estimate of the court costs, fees and fines on this single charge would be $2,611" followed by post-adjudication probation fees at $40 per month plus drug testing and counseling fees as well as a six-month suspension of the driver's license with a $300 reinstatement fee.[35] The same study found that "59% of responding attorneys in Alabama reported they had a client who was jailed for non-payment of heavy court costs, fees and fines. In most cases it was failure to pay a monthly probation supervision fee ($40) that led to the jailing."[36]

- In Washington 28 separate fines and fees can be assessed and the State imposes a 12% interest penalty on unpaid LFOs from the date they are assessed.[37]

- Florida law allows private debt collection agencies to add a 40% surcharge to collection of court debt.[38]

- North Carolina charges a $25 late payment fee and a $20 charge for making installment payments on court debt.[39]

A series aired by National Public Radio reported that an NPR survey of states found that laws permit charges in at least 43 states and the District of Columbia for a public defender; at least 41 states allow charges to inmates for room

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[31] *Study of the Necessity of Certain Court Costs and Fees in Texas,* Office of Court Administration (September 2014), accessed at http://www.txcourts.gov/media/495634/SB1908-Report-FINAL.pdf.

[32] Rebekah Diller, *The Hidden Costs of Florida's Criminal Justice Fees*, Brennan Center for Justice (2010), pp. 27-33.

[33] *Criminal Justice Debt, supra*, note 20, pp. 7-10 and notes 18-20 (listing statutes and fee amounts).

[34] *Criminal Justice Debt, supra,* note 20, p.9.

[35] PARCA *Court Cost Study, supra ,* note 9, pp. 17-18.

[36] PARCA Court Cost Study, *supra,* note 9, p. 19.

[37] "In for a Penny, The Rise of America's New Debtors' Prisons," *American Civil Liberties Union* (October 2010), p. 65.

[38] *Criminal Justice Debt, supra,* note 20, p. 17.

[39] "The Debt Penalty," *supra,* note 30, p.3.

and board for jail and prison stays; at least 44 states allow charges to offenders for their own probation and parole supervision; in all states except Hawaii and the District of Columbia a fee can be imposed for electronic monitoring devices courts order defendants to wear, and it is common for laws to provide for defendants to "pay for their own arrest warrants, their court-ordered drug and alcohol-abuse treatment and to have their DNA samples collected."[40] A study published by the University of Washington in May 2010 found

> [M]onetary sanctions are now imposed by the courts on a substantial majority of the millions of U.S. residents convicted of felony and misdemeanor crimes each year. We also present evidence that legal debt is substantial relative to expected earnings and usually long term. Interviews with legal debtors suggest that this indebtedness contributes to the accumulation of disadvantage in three ways: by reducing family income; by limiting access to opportunities and resources such as housing, credit, transportation, and employment; and by increasing the likelihood of ongoing criminal justice involvement. . . Our findings indicate that penal institutions are increasingly imposing a particularly burdensome and consequential form of debt on a significant and growing share of the poor.[41]

In addition to statutory and ordinance requirements to impose fees, the extent to which judges may consider a defendant's ability to pay and exercise discretion in determining whether to impose LFOs varies from jurisdiction to jurisdiction. Whether a judge has this discretion often depends on the type of LFO and whether the ability to pay is considered at the time of sentencing or at a post-sentencing hearing.

### B. Limited Jurisdiction Courts Are Especially Vulnerable to *Bearden* Violations in the Assessment and Collection of LFOs

A few appalling examples illustrate the worst outcome when the collection of fees becomes the focus of court operations, resulting in improper zealotry to collect at the cost of basic fairness. These examples have arisen most recently in limited jurisdiction courts that are largely funded by fees created by the municipality or county.

A disheartening example is found in the town court of Harpersville, Alabama. Before being sanctioned and eventually closed after a superior court found it was a "judicially sanctioned extortion racket," the town court generated revenue from fines and fees three times greater than the town received from sales taxes.[42] The court worked in partnership with Judicial Correction Services, a private, for-profit probation services company. JCS charged those owing LFOs a monthly fee between $35 and $45, with additional charges for court-mandated classes and electronic monitoring. When a probationer failed to pay, JCS would send a letter demanding immediate payment under the threat of jail time, which the court would order following issuance of an arrest warrant. Those arrested were charged $31 per day to offset jail costs, adding to a spiraling cycle of mounting court LFOs and incarceration in jail.[43] There

[40] Joseph Shapiro, "As Court Fees Rise, The Poor Are Paying The Price," *All Things Considered* , National Public Radio (May 19, 2014), print version at http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor

[41] Alexes Harris, Heather Evans and Katherine Beckett, "Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary Untied States," *American Journal of Sociology*, Volume 115, Number 6 (2010), p. 1756.

[42] Hannah Rappleye and Lisa Riordan Sevelle, "The Town That Turned Poverty Into A Prison Sentence," *The Nation*, March 14, 2014.

[43] "The Town that Turned Poverty into a Prison Sentence," *supra,* note 42, p. 4.

was no record showing the court ever considered a defendant's ability to pay court LFOs.

In Ferguson, Missouri, the United States Department of Justice found unlawful enforcement practices by the police that disproportionately harmed minority community members and eroded the trust in the police and courts. At the center of these practices, DOJ found a municipal court exploiting unlawful police conduct to maximize court revenue: "The municipal court does not act as a neutral arbiter of law or a check on unlawful police conduct. Instead, the court primarily uses its judicial authority as the means to compel the payment of fines and fees that advance the City's financial interests."[44]

The actions of the Harpersville and Ferguson courts are extreme examples. However, as COSCA recognized in 2014, "funding courts through fines and fees that flow to the local town or county that pays court staff and judges creates at least the perception that judicial independence is diminished."[45] The persistence of such challenges is exemplified by a class action complaint filed by the Southern Poverty Law Center in June 2016 alleging that Judge Robert J. Black and the Bogulasa, Louisiana, City Court "operate a modern-day debtor's prison, jailing the poor for their failure to pay" motivated at least in part by a "conflict of interest" funding structure that "creates an incentive for Defendant Black to find individuals guilty and to coerce payment through the threat of jail" because "[w]ithout this money, the City Court could not function."[46]

A similar class action lawsuit charges that municipalities in Arkansas "have turned to creating a system of debtors' prisons to fuel the demand for increased public revenue from the pockets of their poorest and most vulnerable citizens" by having local and municipal courts use "the threat and reality of incarceration to trap their poorest citizens in a never-ending spiral of repetitive court proceedings and ever-increasing debt."[47] The validity of these allegations remains to be determined but the claims and their causes echo proven misconduct in the limited jurisdiction courts in Harpersville and Ferguson.

COSCA condemns the isolated instances in Harpersville and Ferguson as gross distortions that result from the combination of fee funding and willful misconduct by those who fail in their duty to seek justice. It would be unfair and unsupported to view such instances as representative of the great majority of local and municipal courts. However, as discussed in the 2014 COSCA policy paper, fee funding is among the several practices that require reform to foster judicial independence in limited jurisdiction courts.

### C. Contracts with Private For-Profit Corporations to Manage Probation to Collect Court LFOs Can Be Susceptible to Abuse of Those Unable to Pay

Courts may have little ability to influence the fines and fees they must impose through statutes and ordinances passed by legislative bodies, but often courts can directly affect the way fines and fees are collected. One practice that requires careful consideration is collection of LFOs

[44] "Investigation of the Ferguson Police Department," United States Department of Justice Civil Rights Division, March 4, 2015, p. 7.

[45] "Courts are not Revenue Centers," *supra,* note 5, p. 12.

[46] *Roberts v. Black,* No. 2:16-cv-11024, filed June 21, 2016, US District Court for the Eastern district of Louisiana, accessed at https://www.splcenter.org/sites/default/files/bogalusa-splc-filing-debtorsprison.pdf

[47] *Dade et al. v City of Sherwood*, Arkansas, *et al*., No. 4.16cv602-JM (E.D.Arkansas), filed August 23, 2016, paragraph 2, p. 1.

through contracts with for-profit private collection agencies monthly charges of which aggravate the financial burdens on those already struggling to pay.

In March 2015 in Alabama, the Southern Poverty Law Center (SPLC) sued Judicial Corrections Services (JCS), which charged those who were too poor to pay their initial court LFOs a start-up fee of $10 and a $35 monthly fee that is paid first from any payment made by the debtors. SPLC alleged racketeering, extortion, and abuse of process due to excessive incarceration of indigent defendants for failure to pay private probation costs.[48] According to the SPLC lawsuit, this practice left thousands of marginally employed defendants to accumulate greater and greater court debt even when they made regular payments, because payments that might only satisfy the JCS monthly fee did nothing to satisfy the LFOs and resulted in a slow decline into mounting LFO debt fueled by late fees and missed payment penalties.

In June 2015, SPLC settled with the city of Clanton, Alabama, which terminated its JCS contract and directed the city court to supervise those on probation for payment of fines and fees.[49] As reported by SPLC, 72 of 100 Alabama cities with a JCS contract have cancelled the contracts as have eight cities with contracts with other private probation corporations.[50] The litigation continues against JCS, which SPLC says it seeks to prohibit from operating "a racketeering enterprise that is extorting money from impoverished individuals under threat of jail and from using the criminal justice system and probation process for profit."[51]

The real-life impact of outsourcing to a for-profit corporation the collection of LFOs is well illustrated by a simple example. "An offender who requires 24 months on probation to pay off a $1,200 fine, with a $35 monthly supervision fee, would be financially better off taking out a $1,200, 24-month loan with an APR of 50 percent. She would also not have to face the direct threat of incarceration over missed payments, as she would while on probation." The authors note that the two-year interest at 50% would be $721 instead of the two-year probation costs of $840.[52]

A for-profit corporation may use the threat of incarceration that is cost-free to the corporation as pressure to coerce payment of the corporation's $40 monthly supervision fee upon threat of going to jail for non-payment. This amounts, in the assessment of Human Rights Watch, to "a discriminatory tax that many offenders are required to pay precisely because they cannot afford to pay their court-ordered fines, with all of the revenues going directly to private companies instead of public treasuries ."[53]

[48] *Roxanne Reynolds, et al. v. Judicial Corrections Services, Inc., et al.*, USDC Middle District of Alabama No. 2:15-cv-00161-MHT-CSC (March 12, 2015).

[49] *Reynolds v. JCS*, *supra*, note 48, Settlement Agreement filed June 16, 2015.

[50] "Private Probation Company's Decision to Leave Alabama is Welcome News for Indigent," *SPLC News*, (10/19/2015) accessed at https://www.splcenter.org/news/2015/10/19/splc-private-probation-company%E2%80%99s-decision-leave-alabama-welcome-news-indigent

[51] *Reynolds v. JCS, supra,* note 48.

[52] "Profiting from Probation: America's 'Offender-Funded' Probation Industry," *Human Rights Watch Report* (2/5/2015), p. 23.

[53] "Profiting from Probation," p. 22.

## III. COSCA Recommends Practices that Make *Bearden* Effective and Minimize Imprisonment for Court Debt

As the earlier review of policy papers from 2003 through 2014 demonstrates, COSCA and the Conference of Chief Justices have long advocated for reducing or eliminating court funding through fees. Examples of the impact of excessive LFOs on vulnerable populations also argue for reform and reduction of fees that use courts in an effort to raise revenue for a variety of government activities. These reforms can be accomplished only through legislation. COSCA recognizes there are significant challenges to statutory reform of fee-generating legislation. Given the reality that courts are required to impose LFOs, COSCA advocates for state court systems to emphasize practices that maximize LFO compliance while reserving jail for those who willfully refuse to pay despite alternative non-monetary methods for satisfying court obligations.

### A. Streamline and Strengthen the Ability of Courts to Assess Ability to Pay

COSCA fully supports the *Bearden* requirement for all courts to assess ability to pay before imposing incarceration for failure to pay. However, many courts face a blank canvass when making such an assessment. Lacking information about a defendant's financial circumstances, courts may be tempted to determine that failure to pay is willful because the defendant smokes cigarettes, is wearing an expensive-looking pair of shoes, or drove a car to court. It is incumbent on court administrators to establish ways for courts to assess the ability to pay accurately rather than leaving judges to such haphazard indications of means.

Some states have tried to codify the assessment of ability to pay LFOs. The 2014 session of the Colorado Assembly passed a bill that permits jail for willful failure to pay but requires procedural protections, including the requirement of findings on the record after notice and a hearing, and specifically prohibiting an arrest warrant for failure to pay as well as revocation of probation and incarceration if the offender made a good faith effort to pay.[54]

Rhode Island by statute requires ability to pay be considered by a court in remitting fines and fees and also requires that ability to pay be determined by use "of standardized procedures including a financial assessment instrument" completed under oath in person with the offender and "based upon sound and generally accepted accounting principles."[55] In addition, "the following conditions shall be prima facie evidence of the defendant's indigency and limited ability to pay," including receipt of TANF, SSI or state supplemental income payments, public assistance, disability insurance, or food stamps.[56]

In June 2014, the Michigan Supreme Court convened the Michigan Ability to Pay Workgroup through the State Court Administrative Office to develop guidelines for judges addressing how to determine ability to pay. On April 20, 2015, the Workgroup published its results recommending use of payment plan calculators, suggesting language to inform litigants of their entitlement to an ability-to-pay assessment, and recommending reference to federal poverty guidelines when

[54] HB14-1061, Colorado General Assembly, signed into law June 10, 2014.

[55] R.I.G.L., Section 12-21-20 (2013).

[56] R.I.G.L., Sections 12-20-10 (2012).

determining ability to pay.[57] The Guidelines and appendices provide practical, step-by-step examples of forms and procedures that any court can adopt to inform ability-to-pay determinations and what type of payment plan should result.

In many courts the majority of criminal defendants will apply and qualify for indigent public defense services, providing some disclosure of income and assets in order to qualify. California has an "Information Sheet on Waiver of Superior Court Fees and Costs" as well as forms to request waiver of court fees based in part on receipt of food stamps, SSI, TANF, and various other means-tested state public benefits programs.[58] The Arizona Supreme Court's recent "Fair Justice for All" report recommends adoption of automated tools to assist in determination of ability to pay; creation of a statewide, simplified payment ability form; and reference to qualification for means-tested public assistance as evidence of limited ability to pay.[59]

Non-court entities may also provide assistance, such as the *Interest Waiver Guide* published by the ACLU of Washington to provide information and forms for obtaining a court order to waive or reduce the 12% interest required by statute for court LFOs in Washington.[60]

**B. Adopt Evidence-Based Practices that Reduce Failure to Appear and that Improve Compliance with Court Orders, Including Orders Imposing Fines and Fees**

The fact that courts usually do not control the amount or kinds of LFOs creates a challenge when courts assess whether LFOs are reasonable or excessive and whether a court debtor can afford to pay. If courts do not have statutory authority to reduce or eliminate fees, courts should advocate for judicial discretion to mitigate fines and fees based on a defendant's ability to pay. (This issue is discussed further in section D.) In addition, courts should adopt evidence-based practices that improve opportunities for compliance by those whose ability to pay is limited.

Courts recognize and embrace the need to collect fees both to ensure compliance with court orders and to execute their responsibility to enforce fees the law imposes. The Conference of Chief Justices in January 2003 adopted a resolution "that allowing court-ordered penalties, fees and restitution surcharges to be willfully ignored diminishes public respect for the rule of law, and recognizes that it is in the interest of the courts that their orders be honored."[61] Updating an original guide published in 1994, a second edition guide published by the National Center for State Courts in 2009 provides detailed examples of best practices in collecting court debt that

[57] Chief Judge John A Hallacy, Chair, Ability to Pay Workgroup, *Tools and Guidance for Determining and Addressing an Obligor's Ability to Pay* (April 20, 2015), appendices A, E, F and G, accessed at http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Reports/AbilityToPay.pdf

[58] "Information Sheet on Wavier of Superior Court Fees and Costs," Judicial Council of California, FW-001-INFO (revised July 1, 2015), accessed at http://www.ventura.courts.ca.gov/form_packets/fee_waiver.pdf

[59] *Fair Justice for All*, *supra,* note 28, recommendations 2, 3, and 4, pp. 14-15.

[60] *Interest Wavier Guide: A Guide on How to Obtain a Court Order Waiving or Reducing Interest on Legal Financial Obligations*, ACLU of Washington (January 2012), accessed at

https://www.acluwa.org/sites/default/files/attachments/LFO%20Interest%20Waiver%20Guide%20%28January%202012%29.pdf

[61] *Tax Refund Intercept Proposal to Further Compliance with Court Orders,* Proposal of the Public Trust and Confidence Committee, Conference of Chief Justices, Resolution 15 (January 30, 2003).

include the requirement of alternatives for those unable to pay such as community service as a way for "defendants to accept and pay for their mistakes in a manner appropriate to their means" that "goes to the heart of maintaining the credibility of the justice system and ensuring that justice is fairly and evenly administered."[62]

State courts have established guides and handbooks for courts to maximize collection of court debt within a context that accounts for ability to pay and provides alternatives such as community service and payment over time. Examples can be found in Michigan,[63] Texas,[64] California,[65] and Virginia.[66]

In assessing and collecting fines and fees, courts can adopt the following practices that strengthen compliance with *Bearden*, improve compliance with court orders, and reserve jail for those able but unwilling to satisfy LFOs.

### *1. Simplify and clarify court LFOs and their application*

Courts can clarify and simplify court debt and its consequences. The National Center for State Courts included among its recommendations made after studying the Missouri courts in 2015, "Fees and miscellaneous charges should be simple and easy to understand with fee schedules based on fixed or flat rates, and should be codified in one place to facilitate transparency and ease of comprehension."[67]

Confusion about what fees apply is not a recent phenomenon. A 2006 report found, "California now has dedicated funding streams for over 269 separate court fines, fees, forfeitures, surcharges, and penalty assessments that may be levied on offenders and violators. These fines, fees, forfeitures (bail defaults or judgments and damages), surcharges, and penalties appear in statutes in 16 different government codes and are in addition to the many fees, fines, and special penalties that local governments may impose on most offenses."[68]

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[62] Editor Charles F. Campbell, *et al, Current Practices in Collecting Fines and Fees in State Courts: A Handbook of Collection Issues and Solutions, Second Edition*, National Center for State Courts (2009), p. 20.

[63] Michigan Supreme Court State Court Administrative Office Collections Work Group, *Trial Court Collections Standards & Guidelines* (July 2007), p. 6 ("Financial penalties should be assessed based on the litigant's financial situation and ability to pay").

[64] Carl Reynolds, Mary Cowherd, Andy Barbee, Tony Fabelo, Ted Wood, and Jamie Yoon, *A Framework to Improve How Fines, Fees, Restitution, and Child Support are Assessed and Collected from People Convicted of Crimes*, Council of State Governments Justice Center, Texas Office of Court Administration (2009), pp. 9-12) ("Court officials should consider the defendant's financial situation when assessing court costs, fines, fees, probation supervision fees, and restitution" and urging automation of forms to assess ability to pay uniformly).

[65] Jessica Sonora, *California's Enhanced Collections Unit, Judicial Council of California, Administrative Office of the Courts* (2008), p.125 (listing among best practices, "Include financial screening to assess the ability to pay prior to processing installment payment plans and receivables").

[66] *Commonwealth Court Collections Review*, Auditor of Public Accounts, Commonwealth of Virginia (April 2013) pp. 8, 11 ("A financial evaluation should be a mandatory process throughout the court system and a payment plan established if fines and costs are not paid upon disposition" and establishing best practices for community service programs and their accountability within the court system).

[67] Gordon Griller, Yolande E. Williams, and Russell R. Brown, *Missouri Municipal Courts: Best Practice Recommendations,* National Center for State Courts (November 2015), p.27.

[68] Marcus Nieto, *Who Pays for Penalty Assessment Programs in California?,* California Research Bureau (February 2006), at p. 1, citing California State Controllers' Office, Manual of Accounting and Audit Guidelines for Trial Courts-Revision 16, Appendix C, California Codes. The State Controller's January 2004.

The Ohio Supreme Court brought clarity to the confusion over LFOs and their consequences in February 2014, when it issued an annotated, two-page bench card summarizing a defendant's obligations and rights regarding LFOs, including the right not to be jailed except for willful failure to pay, limiting use of contempt to failure to appear but not to collect LFOs, and defining credit for community service and limits on hours per month.[69] The bench card includes the admonition that among the methods of collection that are not permitted is to find a violation of parole or extend parole for non-payment. The Alabama Supreme Court adopted a similar bench card in November 2015.[70]

The Municipal Court of Biloxi, Mississippi, also adopted a bench card setting forth the procedures for collecting LFOs and community service options as part of a settlement of federal litigation.[71] In another case settlement, the City of Montgomery, Alabama, agreed to provide each defendant with "Form One" that explains court processes, including

> If you indicate that you are unable to pay your fines and costs, the Court will order you to complete an Affidavit of Substantial Hardship and other forms as deemed necessary, and may inquire about your finances, to include but not be limited to: income, expenses (i.e. rent, childcare, utilities, food, clothing, medical condition/bills, transportation, etc.), bank accounts, and other assets. In some circumstances, the Court may also inquire about your efforts to obtain the money to pay, including your job skills and efforts to apply for jobs. You should present any documents that you have to the Court during this inquiry. If you cannot afford an attorney, the Court will provide a Public Defender to represent you.[72]

Rather than awaiting the outcome of litigation based at least in part on confusion engendered by multiple statutes and ordinances imposing court fees, courts should actively "clarify and consolidate the spreading variety of state and local fees and costs into a comprehensible package."[73]

When the Washington Supreme Court ruled in 2015 in *State v. Blazina* that state courts must consider a defendant's ability to pay when imposing LFOs, the court also described ways to determine a defendant's inability to pay:

> [T]he court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry,

[69] Supreme Court of Ohio, Office of Judicial Services, *Collection of Fines and Court Costs* (February 2014).

[70] Bench card issued by the Supreme Court of Alabama, "Collections of Fines and Court Costs, Developed for Alabama Judges by the Alabama Access to Justice Commission," accessed at http://nacmconference.org/wp-content/uploads/2014/01/Bench-Card-11-10-15.pdf

[71] Bench card, "Biloxi Municipal Court Procedures for Legal Financial Obligations & Community Service, "provided by the ACLU as Exhibit B in settlement of Kennedy*, et al.* v. City of Biloxi, CIV 1:15-cv-00348-HSO-JCG, on March 15, 2016, resolving allegations challenging the jailing of poor people in Biloxi without a hearing or representation by counsel, accessed at https://www.aclu.org/sites/default/files/field_document/exhibit_b_biloxi_municipal_court_bench_card_03152016.pdf

[72] Settlement Agreement, *Cleveland v. Montgomery*, Case 2:13-cv-00732-MHT-TFM, Document 56-1 (filed 9/12/2014), p. 8, accessed at https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/case/exhibit_a_to_joint_settlement_agreement_-_judicial_procedures-_140912.pdf

[73] Carl Reynolds, *et al.*, *A Framework to Improve How Fines, Fees, Restitution, and Child Support are Assessed and Collected from People Convicted of Crimes,* Council of State Governments Justice Center, Texas Office of Court Administration (March 2, 2009) p. 25.

> the court must also consider important factors, as amici suggest, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.
>
> Courts should also look to the comment in court rule GR 34 for guidance. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. Id. (comment listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. Id. Although the ways to establish indigent status remain nonexhaustive, see id., if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.[74]

Following *Blazina*, the Washington Supreme Court Minority and Justice Commission published updated reference guides for all levels of trial courts to use in determining indigence, and, thus, grounds for finding inability to pay.[75] The guides identify mandatory and discretionary LFOs, and re-state the *Blazina* finding that a court should seriously question ability to pay if an offender is indigent, as indicated by receipt of means-tested public benefits; an income below 125% of the federal poverty level (FPL) (identifying the FPL income for 2015 for an individual and for a family of 2, 3, 4, 5 or 6); an income above the FPL but basic living expenses that render the defendant unable to pay, including shelter, food, utilities, health care, transportation, clothing, loan payments, support payments, and court imposed obligations; or other compelling circumstances that include incarceration or other LFOs such as restitution.[76] "The court may presume indigence if a person has been screened and found eligible for court-appointed counsel."[77]

The Texas Judicial Council recently adopted a series of proposed amendments to the Collection Improvement Program (CIP), where "[t]he primary goal of the proposed amendments is to provide procedures that will help defendants comply with court ordered costs, fines and fees without imposing undue hardship on defendants and defendants' dependents."[78] The CIP requires each court to have a local collection improvement program with at least one staff person to monitor defendants' compliance with court LFOs and payment plans.[79] The amendments add requirements for staff to obtain a statement with information about a defendant's ability to pay, report to a judge when it appears that compliance may impose undue hardship on the defendant or the defendant's dependents, and require that before referring a non-compliant defendant to a judge staff must make efforts to contact a defendant and explain steps to take if

[74] *State v. Blazina*, 182 Wn.2d 827, 839 (2015) (*en banc*).

[75] Washington State Minority and Justice Commission, *Updated Reference Guides* (2015), accessed at https://www.courts.wa.gov/content/manuals/Superior%20Court%20LFOs.pdf for superior court, https://www.courts.wa.gov/content/manuals/Juvenile%20LFOs.pdf for juvenile court, and https://www.courts.wa.gov/content/manuals/CLJ%20LFOs.pdf for courts of limited jurisdiction.

[76] *Id.*

[77] *Id.*

[78] Memorandum from Texas Administrative Director David Slayton, "Analysis of Proposed Amendments to Texas Administrative Code, Chapter 175, Collections Improvement Program" (May 27, 2016), p. 1.

[79] Texas Administrative Code, Title 1, Part 8, Chapter 175.3.

the defendant is unable to pay.[80] A proposed amendment to the compliance review standards makes it clear that the purpose of the CIP is not to measure performance based on how much money a court collects, but instead to "confirm that the county or municipality is conforming with requirements relating to the CIP" including the amendments' emphases on assessment and consideration of ability to pay.[81]

The Washington reference guides, as well as the bench cards in Ohio and Alabama, efforts in Texas, and other court initiatives provide templates to consolidate and explain mandatory and discretionary court LFOs while giving to courts the tools and resources needed to guide decisions about scaling court LFOs to a defendant's ability to pay.

***2. Adopt practices that minimize failure to appear and failure to pay***

For low-level offenders, there are two paths to almost certain imprisonment related to court debt. The first is to fail to appear in court, resulting in an arrest warrant and added fees. The second is to fail to pay immediately upon conviction, resulting in a payment plan that may include added fees and a greater risk of non-compliance that can also lead to an arrest warrant. The most direct step to mitigate the impact of court LFOs that is within the ability of courts may be to minimize the incidence of failure to appear or failure to pay. Evidence-based practices can significantly mitigate both. There is an abundance of useful information about the successful reduction of failure-to-appear rates through reminders. In 2004, 33% of the Jefferson County, Colorado, jail inmate population consisted of defendants who failed to comply with court orders such as failure to appear, failure to pay, or failure to comply with a condition of release, an increase from 8% in 1995. Of this population, 75% were arrested on failure to appear warrants for misdemeanor, traffic, or municipal offenses.[82]

The County's Criminal Justice Coordinating Committee implemented a pilot project to call offenders seven days before a scheduled court appearance. The success of the pilot program resulted in a funded permanent program including two permanent staff at the Jefferson County Sheriff's Office, with "exceptional" results:

> The successful-contact rate has risen from an initial rate of 60% in the Pilot Project to 74% in 2010 for the Duty Division, and from 78% in 2009 to 80% in 2010 for Division T. In 2007, the court-appearance rate for defendants who were successfully contacted was 91%, compared to an appearance rate of 71% for those who were not. In 2010, combining all statistics from both Duty Division and Division T, the court-appearance rate for defendants who were successfully contacted was 92%, compared to an appearance rate of 73% for those who were not. These increases have significantly reduced the costs of FTAs, including the somewhat intangible costs to victims and society in general. Moreover, although not empirically tested, these numbers indicate that the use of a live caller appears to have permitted experimentation and "tweaking" of the process, which has, in turn, fostered steady improvement.[83]

[80] Memorandum, *supra,* note 78, pp. 2-4.

[81] *Id.* at 4; proposed amendment to Chapter 175.5(d).

[82] Timothy R. Schake, Michael R. Jones, and Dorian M. Wilderman, "Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Reminder: The Jefferson County, Colorado, FTA pilot Project and Resulting Court Date Notification Program," Court Review Volume 48 Issue 3 (2012), at p. 86.

[83] "Increasing Court-Appearance Rates," *supra,* note 82, at p. 92.

When Coconino County, Arizona, officials discovered that 22.9% of the jail population consisted of those arrested for failure to appear, including 33.6% of the misdemeanor population, the Flagstaff Justice Court instituted a pilot project to make phone calls to remind defendants of upcoming court dates. The result was a failure to appear rate for the control group (not called) of 25.4% but just 12.9% for the called group, including just 5.9% for those personally contacted.[84] A study of the Flagstaff project found

> The problem of non-compliance with court orders, including failing to appear for court hearings, is endemic across the country. Failure to appear for court causes increased workloads for court staff, issuance of misdemeanor arrest warrants, incarceration on minor offenses for the non-compliant defendant, and longer jail stays for those defendants in connection with the present offense or future offenses. One of the factors considered by the courts in determining conditions of release is a defendant's past history of failing to appear. Failure to appear on misdemeanor cases also results in the loss of revenues from unpaid fines and fees.[85]

When the Los Angeles Superior Court instituted the Court Appearance Reminder System (CARS) to make automated calls for the 9,000 monthly scheduled court appearances for traffic cases, the court realized a 22% decrease in traffic failures to appear, an increase in revenue, and avoided costs associated with reduced clerk time required for these cases.[86] One-time start-up costs for the program were between $29,000 and $30,000 in each court, with an average monthly cost of approximately $1,200, while the annual cost saving from reduced failures to appear alone was more than $30,000, resulting after payment of start-up costs in cost-neutral enhancement of public service and better outcomes for offenders.[87]

Similarly, a pilot program costing $40,000 in 2005 for automated phone reminders to defendants in Multnomah County Circuit Court in Portland, Oregon, reduced failures to appear by almost one-half, leading to full funding of phone reminders for all 72,000 people charged with a crime in the county and an expected savings in staff time and resources of up to $6.4 million annually.[88]

An effective alternative to phone reminders can be written postcard reminders. A study of more than 7,000 misdemeanor defendants in 14 Nebraska counties for cases from March 2009 to May 2010 demonstrated that the risk of failure to appear is reduced with a postcard reminder system and that including written information about possible sanctions for FTA makes the reminders more effective than just a reminder.[89]

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[84] Wendy F. White, Criminal Justice Coordinating Council, and Flagstaff Justice Court, Coconino County, "Court Hearing Call Notification Project" (May 17, 2006), p. 1.

[85] *Id.*, p.4.

[86] Judicial Council of California Report, *Court Appearance Reminder System (CARS), Los Angeles Superior Court* (2010), p.2 accessed at http://www.courts.ca.gov/27771.htm

[87] *Id.*, pp. 3-4.

[88] Aimee Green, "Your Court Date Is Nearing, Automated Reminder Warns," Newhouse News Service (October 1, 2007), accessed at http://www.chron.com/news/nation-world/article/Your-court-date-is-nearing-automated-reminder-1612333.php

[89] Brian H. Bornstein, Alan J. Tomkins, Elizabeth M. Neely, Mitchel N. Heian, and Joseph A. Hamm, "Reducing Courts' Failure-to-Appear Rate by Written Reminders," *Psychology, Public Policy, and Law* 19:1 (2013), pp. 70-80, at p. 2 78-79, accessed at http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1601&context=psychfacpub

In addition, the study demonstrated that defendants who appeared in court had more confidence in the courts and a greater sense of procedural justice than those who did not appear.

In an effort to reduce FTA rates, New York City worked with ideas42, a non-profit behavioral design lab, to redesign the city's summons to make the information regarding the court date easier to understand. In 2016 New York City began testing a reminder system that uses automated telephone calls and text messages to remind defendants about court dates and improve appearance rates.[90]

Failures to appear might also be caused by a lack of knowledge by individuals charged with offenses who believe that the only option is to pay the fines or fees for the offense or go to jail. Courts can explain the available options for defendants to encourage their appearance. This information could be provided in written citations or summonses, on the court's website, and in personal communication with defendants in court.

A sense of personal responsibility should encourage those accused of an offense to mind their court dates and appear to resolve the charges. The high rates of failure to appear indicate that this idea is not acted upon by many offenders. Courts can adopt cost-effective reminder practices and information-sharing practices that substantially increase attendance in court, save staff time, reduce added fees for non-appearance, and increase revenue collected. Achieving these goals should not be inhibited by the reasonable, but unsupported, notion that people should be responsible enough to get themselves to court.

***3. Eliminate additional fees for collections-related supervision/probation and cease extensions of supervision/probation solely to achieve payment of fines and fees or the equivalent in community service***

The for-profit supervision industry has become embedded in a number of court systems as a way to achieve payment of LFOs that is "free" to taxpayers. However, touting this process as "free" is misleading because the arrangement masks costs to the taxpayer. When the private contractor's fees are unpaid, the defendant can be incarcerated at taxpayer expense. When supervision fees are added to the LFOs of those who need time to pay court-imposed debt, the risk of jail becomes greater. It can be dangerous to create a profit motive for lengthening the period and cost of supervision. Even without abuses, it is contradictory to impose supervision fees of $40 per month on defendants who are unable immediately to pay as little as a few hundred dollars in LFOs.

An in-depth examination of data on LFOs concludes, "If the policy goal is to improve the lives of victims, recoup state expenditures, and reduce crime, our findings suggest that the imposition of monetary sanctions is very likely a policy failure" in large part due to the increasing imposition of the costs of incarceration and supervision on offenders.[91] Whether from a private company or to reimburse the state, imposition of incarceration and supervision costs on those already struggling to satisfy court debt increases the likelihood of continued failure by offenders at unnecessary cost to the courts and jails.

The risks of abuse when a court delegates to a private corporation the supervision of an offender for a monthly fee collected by the company are discussed at Section 2C above. This practice provides a financial incentive for

[90] Mayor's Office of Criminal Justice, *Streamlining the Summons Process*, accessed at http://www1.nyc.gov/site/criminaljustice/work/summons_reform.page

[91] "Drawing Blood from Stones," *supra,* note 41, p.1792.

the company to keep those with LFOs under the company's supervision. Combined with the dedication of the debtor's very scarce resources not to pay the court, but to pay the supervising company, the cycle of never-ending LFOs traps those least able to pay, often leading to intermittent jail terms. At the very least, close monitoring of private companies tasked with supervision and collection of LFOs for profit is needed. At best, courts can scale court LFOs to levels that allow payment with minimal court supervision, provide alternatives to payment such as community service, and take the profit motive out of supervision for court debt.

In some jurisdictions, courts do not directly supervise collections and these contracts are entered into by the county or municipality. It is important for courts to be aware of such contracts and their consequences to ensure enforcement of court-ordered LFOs is lawful. Judges may be subject to judicial sanctions for abusive enforcement practices by contract LFO collectors because the judge is ultimately responsible for the practices adopted by these companies, even when the judge is a part-time municipal judge with limited administrative authority.[92]

Faced with concerns about reports of abuses, courts have taken steps to manage practices relating to collecting LFOs. After the New Jersey Assembly passed a statute authorizing municipalities and counties to enter into contracts with private collection firms for municipal LFOs, the New Jersey Supreme Court adopted procedures requiring all payment amounts to be remitted to courts which would then pay the contractor's fees as limited by statute, with documentation and oversight by the Administrative Director of the Courts.[93] In 2015 the Virginia Supreme Court re-issued Master Guidelines for agreements with entities, including private collections agencies, for collection of unpaid fines, court costs, forfeitures, penalties, statutory interest, restitution, and restitution interest, with explicit guidance on the maximum amount payable to such contractors and describing the processes for oversight by the Commonwealth's Attorney and courts.[94] As provided by statute, low risk offenders in Colorado may be supervised by use of contract probation services within restrictions established by Chief Justice Directive 16-01.[95]

At least 13 states have a statute that permits extending probation for failure to pay court debt, which "creates a system where people who have met the other terms of their sentence, satisfied the conditions of probation, and paid their debt to society remain under supervision by criminal justice authorities because of a monetary violation. Extending the supervision of people for criminal justice debt creates an unnecessary financial burden on states and actually reduces public safety."[96] Both Ohio (by rule) and Virginia (by statute) prohibit keeping offenders on extended supervision for failure to pay court debt.[97] The Brennan Center suggests model language to require an end to supervision based

[92] Alabama Judicial Inquiry Commission, Advisory Opinion 14-926 (March 4, 2014) (Part-time judge with no ability to hire or fire city clerk and with no involvement in the selection of a private probation company has "ethical accountability" for the actions of the company if the judge should have known "company employees were failing to perform their duties in a manner consistent with the high standards required of judges and the court").

[93] New Jersey Supreme Court Procedures Governing the Private Collection of Municipal Court Debt Under L. 2009, C. 233 (March 31, 2011), p. 3.

[94] Virginia Supreme Court, *Master Guidelines Governing Collection of Unpaid Delinquent Court-Ordered Fines and Costs Pursuant to Virginia Code §19.2-349* (July 1, 2015).

[95] Colorado Supreme Court Chief Justice Directive 16-01, effective January 1, 2016, accessed at https://www.courts.state.co.us/Courts/Supreme_Court/Directives/16-01%20Initial%20Web.pdf

[96] *Criminal Justice Debt*, *supra*, note 20, p. 20, citing *Barrier to Reentry supra,* note 7 at p.7.

[97] Ohio Admin. Code, section 5120:1-1-02(K); Va. Code Annot., section 19.2-305 (2012).

solely on failure to pay court debt.[98] Along with a creative approach to alternatives to payment, an end to supervision when the only remaining debt a defendant has is court LFOs would be an important step toward divorcing court LFOs from unnecessary and counterproductive incarceration.

### C. Expand and Improve Access to Alternatives to Satisfy Court LFOs

The drumbeat of studies and reports about debtors' prisons for those too poor to pay court LFOs makes it unnecessary to linger over the need for alternatives to a post-adjudication "pay or go to jail" approach. Recent examples include a 2015 report by the ACLU on "Debtors' Prisons in New Hampshire" and a 2016 report by the Legal Aid Justice Center, "Driven Deeper into Debt: Unrealistic Repayment Options Hurt Low-Income Court Debtors."[99] When considering court LFOs, it is important to focus on the goal of offender compliance, especially when the offense is minor and the offender has limited financial means. To this end, courts should establish an alternative to the cycle of offender-funded supervision and its threat of continuing and growing debt by providing community service and other options through which the offender can earn credit at a reasonable rate against LFOs.

#### *1. Community Service*

As long ago as 1991, the National Center for State Courts endorsed community service after verification of indigence as a necessary alternative to criminal fines.[100] Community service options seem to be mandated by the requirement in *Bearden* to consider reasonable alternatives to payment for those unable to pay court LFOs. For this reason many states have statutes such as that in New Mexico:

> The person may also be required to serve time in labor to be known as "community service" in lieu of all or part of the fine. If unable to pay the fees or costs, he may be granted permission to perform community service in lieu of them as well. The labor shall be meaningful, shall not be suspended or deferred, and shall be of a type that benefits the public at large or any public, charitable or educational entity or institution and is consistent with Article 9, Section 14 of the constitution of New Mexico [anti-donation clause]. . . [A] person who performs community service shall receive credit toward the fine, fees or costs at the rate of the prevailing federal hourly minimum wage.[101]

There is an administrative burden to the verification and tabulation of community service credits against LFOs. However, many communities have non-profit organizations eager to provide work opportunities in return for tracking the hours provided by community

[98] *Criminal Justice Debt*, *supra*, note 20, p. 21.

[99] American Civil Liberties Union of New Hampshire, *Debtors' Prisons in New Hampshire* (9/23/2015), accessed at http://aclu-nh.org/wp-content/uploads/2015/09/Final-ACLU-Debtors-Prisons-Report-9.23.15.pdf; Angela Ciolfi, Pat Levy-Lavelle, and Mario Salas, "Driven Deeper into Debt: Unrealistic Repayment Options Hurt Low-Income Court Debtors," Legal Aid and Justice Center (5/4/2016), accessed at https://www.justice4all.org/wp-content/uploads/2016/05/Driven-Deeper-Into-Debt-Payment-Plan-Analysis-Final.pdf

[100] Brian Lynch, William H. Rousseau, George F. Cole, and Thomas A Henderson, "Compliance with Judicial Orders: Methods of Collecting and Enforcing Monetary Sanctions," Project Monograph (December 31, 1991), p.8.

[101] NMSA 1978, Section 31-12-3 (1993).

service workers at no cost to the organization. Instead of tracking jail time served for non-payment of LFOs, clerks can enter data reported by service organizations that benefit from community service. An example is found in the ReFinement Program in Penobscot County, Maine, where the non-profit Volunteers for America tracks, monitors, and supervises offenders in community projects with credit against LFOs at a rate of $10 per hour.[102] In a number of states the rate of credit toward LFOs for community service is specified by statute. Georgia, New Mexico, and Washington specify minimum wage credit.[103] Some states provide, as does Iowa, instead of a flat rate of credit, the court has discretion to establish a number of community service hours required to satisfy LFOs.[104] There is support for the view that courts should be authorized to take into account an offender's employment status and other factors in setting a requirement for community service that will satisfy LFOs:

> The design of community service programs also matters. For example, defenders in Illinois observed that when community service is imposed on individuals who are otherwise employed, it can be difficult for them to complete the necessary hours. For this reason, community service should only be imposed at the defendant's request, or when an unemployed defendant has been unable to make payments. Similarly, judges should have discretion as to how many hours of community service should be required to pay off criminal justice debt, rather than mandating by statute a fixed dollar value per hour. If a person faces thousands of dollars of debt, a fixed dollar equivalent of service hours may not be realistic.[105]

When NCSC recommended that Missouri municipal courts expand and coordinate community service opportunities in lieu of LFOs, it also recognized that many courts lack resources to track community service and so recommended that the Office of the State Court Administrator "pinpoint close geographic clusters of municipal courts regardless of their jurisdictions that could benefit from working together to access local diversion and community service programs, and provide such information to the affected presiding judges of the circuit courts and municipal judges for further action."[106] Such a creative approach may be necessary and may require dedication of state and local resources to implement community service effectively as a means to satisfy LFOs that is more productive than jail for non-payment.

Where permitted by statutes and ordinances that otherwise mandate LFOs, a Community Court may provide an alternative to incarceration designed to intervene in a defendant's cycle of criminal conduct.[107] Community Courts are an effort to substitute restorative justice alternatives, such as removal of graffiti, cleaning neighborhood parks, and helping maintain public spaces while also linking offenders to drug treatment, mental health services, job training, and other services.[108] One example can

[102] Volunteers for America, *ReFinement Program Model* Requirements, accessed at http://www.mainecounties.org/uploads/1/8/8/6/18869398/penobscot_refinement_program_model.pdf

[103] Ga. Code Annot., Section 17-10-1(d); NMSA 1978, Section 31-12-3 (1993); Wash. Rev. Code Section 10.01.160 (2015).

[104] Iowa Stat. Section 910.2.

[105] *Criminal Justice Debt, supra,* note 20, p. 15.

[106] *Missouri Municipal Courts: Best Practice Recommendations, supra,* note 67, pp.28-29.

[107] *Id.*

[108] Center for Court Innovation, (2016), accessed at http://www.courtinnovation.org/mentor-community-courts

be found in the Atlanta Municipal Court.[109] Another is San Francisco's Community Justice Center[110] Where permitted as an alternative to LFOs, a Community Court may provide a cost-effective alternative to incarceration for low-level offenders who otherwise might not be able to satisfy LFOs.

***2. Day Fine***

One alternative approach that could reduce incarceration for LFOs, but is not now widely used in United States courts, is the day fine. A "day fine" sets the fine based on an offender's daily income and the gravity of the offense. "Once these two factors have been determined, the officer calculates the amount of fine imposed by multiplying the fine units an offender receives by his or her daily income (adjusted for family and housing obligations)."[111] In advocating for consideration of day fines as an alternative to high LFOs, the Council of Economic Advisers in December 2015 stated, "Evaluation research has shown that 'day' fine systems without statutory maximums have the additional potential to increase collection rates, as all defendants should be capable of paying proportional fines, to increase total fine revenue collected, and to reduce arrest warrants for outstanding debt."[112]

Pilot efforts to use day fines in the late 1980s in cities in New York, Iowa, and Connecticut reported promise but did not develop ongoing momentum. Analysis of these efforts by the Bureau of Justice Assistance in 1996 found that, for successful day fine programs, "a great deal of up-front policy formulation and program planning is necessary. Time must be spent on education and training, both before implementation and on a continuing basis." A court willing to undertake these challenges might find day fines a useful tool in enforcement of LFOs.

***3. Non-Financial Compliance to Satisfy LFOs***

Another option would be to focus non-monetary compliance options on efforts that would improve the defendant's financial situation. A court could provide credit for GED preparation classes, work-skills training, or other non-traditional types of options to ensure compliance with LFOs while providing defendants with viable options to improve their future prospects.

The Michigan Workgroup report discussed with regard to assessing ability to pay also provides examples of approaches to reduce court LFOs when they are overly burdensome given an individual's circumstances. The report provides examples of payment alternatives, including community service that targets having offenders provide services tied to an ability or interest of the offender, attendance in school, or completion of classes or education requirements, with program materials and data on cost savings from saved jail use totaling $749,160 in the 61st district court in fiscal year 2013-2014.[113] There are documents from the Third Circuit Court Family Division program for negotiating reduction and waiver of non-mandatory fees after a good faith effort to pay as well as model policy on debt inactivation for court LFOs.[114]

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[109] Atlanta Municipal Court Community Court Office of Court Programs, accessed at http://restorativejusticecenter.org/RTF1.cfm?pagename=Leadership

[110] Beau Kilmer and Jesse Russell, *Does San Francisco's Community Justice Center Reduce Criminal Recidivism?* Rand Corporation (2014), p. 7.

[111] Edwin W. Zedlewski, "Alternatives to Custodial Supervision: the Day Fine," National Institute of Justice Discussion Paper (April 2010), p. 2, accessed at https://www.ncjrs.gov/pdffiles1/nij/grants/230401.pdf

[112] Issue Brief, *supra,* note 8, p. 5.

[113] *Michigan Ability to Pay Workgroup, supr,* note 57, Appendix I.

[114] *Id.*, Appendices J and K.

In addition to other provisions in the Biloxi, Mississippi, Municipal Court Bench Card, judges are required to consider "completion of approved educational programs, job skills training, counseling and mental health services, and drug treatment programs as an alternative to, or in addition to, community service."[115] The San Diego, California, Homeless Court Program provides credit in place of fines for the completion of various activities including life skills training, chemical dependency/AA meetings, computer and literacy classes, employment training, and counseling.[116]

When courts assess an offender's ability to pay and determine that something less than payment of 100% of otherwise applicable LFOs is appropriate, judges need to have the authority to provide at least limited relief from the consequences that actually impair the goals of the criminal justice system, including a meaningful opportunity to avoid future criminal sanctions. The Uniform Collateral Consequences of Conviction Act provides an "order of limited relief" when the individual establishes that granting the relief will assist the individual in obtaining or keeping employment, education, housing, public benefits, or occupational licensing; the individual has a substantial need for the relief in order to live a law-abiding life; and granting the relief will not pose an unreasonable risk to the safety of the public or any individual.[117]

Leadership is required to shift from a collections focus to permit satisfaction of court LFOs through alternative opportunities for those with limited ability to pay. An editorial by Collee Station, Texas, Municipal Judge Ed Spillane described the difficulties of assessing an individual's economic hardship, but also the ways community service and alternative sanctions benefit the individual and community much more than jail for non-payment. His alternatives include payment plans with regular, very small payments, attendance at parenting and child safety classes in return for debt waiver, assignment to DWI impact panels, anger management training, and warrant amnesty programs for those who agree to resolve outstanding LFOs without arrest.[118] Especially for low-level offenders, an approach that emphasizes a consequence related to the offense and that is within the offender's means adheres to the requirement to assess willfulness and ability to pay and more probably deters criminal behavior than hundreds or thousands of dollars in court LFOs.

Some recent legislative activity recognizes the need for courts to have the authority to mitigate LFOs and their consequences. For example, in Oklahoma where court LFOs can require $3,000 to reinstate a driver's license, a statute adopted in 2013 allows those with suspended or revoked licenses to get a provisional license for $25 per month that allows the person to drive to a place of employment, religious service, court-ordered treatment, or other limited locations while the $25 monthly fee is applied toward outstanding costs owed by the offender.[119]

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[115] Biloxi Municipal Court Bench Card, *supra*, note 71, p. 3.

[116] Homeless Court 2016 program description, accessed at http://www.homelesscourtprogram.com/

[117] See American Bar Association resolution, February 9, 2010, adopting Uniform Collateral Consequences of Conviction Act, accessed at http://www.uniformlaws.org/Shared/Docs/ABA%20Approval%205-11-2010.pdf

[118] Ed Spillane, "Why I Refuse to Send People to Jail for Failure to Pay," *Washington Post* (April 8, 2016).

[119] Clifton Adcock, *Ex-Offenders Face Steep Price to Reinstate Driver's License* (2/24/2015), Oklahoma Cure accessed at http://nationinside.org/campaign/oklahoma-cure/posts/ex-offenders-face-steep-price-to-reinstate-drivers-licenses/

The Washington Supreme Court held that due process is violated by an automatic suspension of a driver's license without providing an opportunity to be heard at an administrative hearing.[120] In Maryland, an administrative hearing at which a driver can establish inability to pay in order to avoid suspension is required by statute.[121] An option provided in Indiana permits a restricted license for work, church, or participation in court-ordered activities.[122]

**D. Ensure Judges Have the Authority to Modify, Mitigate, or Waive Fees for Those Unable to Pay Despite Good Faith Efforts**

Many states have mandatory LFOs that a judge is required to impose on the defendant, regardless of ability to pay. [123] For example, in New York, judges are required by statute to impose a sex offender registration fee, DNA databank fee, and crime victim assistance fee on defendants who are convicted of particular types of offenses.[124] Judges are not permitted to waive or mitigate these fees, at sentencing or any other time, because of the defendant's inability to pay.[125] Similarly, in California, judges are only permitted to consider a defendant's ability to pay when determining whether certain fines should be imposed in excess of a statutory minimum: "The court must impose the minimum fine even when the defendant is unable to pay it."[126] Judges may waive fines only if there are compelling and extraordinary reasons, and "inability to pay is not an adequate reason for waiving the fine."[127] Mississippi is another state that prohibits judges from reducing or suspending mandatory fines.[128]

Other states require mandatory LFOs to be imposed, but allow them to be reduced or waived at a post-sentencing hearing upon a showing of inability to pay. In Washington State, judges are required to impose crime-specific mandatory LFOs such as victim penalty assessments, DNA collection fees, felony restitution, and others.[129] Although these crime-specific LFOs are mandatory at the time of sentencing, judges have discretion to waive, in whole or in part, many of these LFOs at a post-sentencing hearing.[130]

In *Bearden* the United States Supreme Court held that it is unconstitutional to put a person in jail who, despite good faith efforts, is unable to

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[120] *City of Redmond v. Moore*, 151 Wash.2d 664, 667 (Wash. 2004).

[121] Md. Code Annot., section 12-202.

[122] Ind. Code, section 9-24-15-6.7 (2012).

[123] A study of fifteen states by the Brennan Center for Justice concluded that at least one mandatory LFO existed in fourteen of the fifteen states. Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* (2010). Many, if not most, states allow judges to waive or reduce discretionary LFOs, although judges may decline to exercise their authority to waive discretionary LFOs. *Id* at 13-14. *See also* Shalia Dewan, "Driver's License Suspensions Create a Cycle of Debt," *NewYork Times* (April 14, 2015), accessed at http://www.nytimes.com/2015/04/15/us/with-drivers-license-suspensions-a-cycle-of-debt.html?_r=0 ("In Tennessee, judges have the discretion to waive court fees and fines for indigent defendants, but they do not have to, and some routinely refuse.")

[124] N.Y. Crim. Proc. Law § 420.35(2). The court may waive the crime victim assistance fee, but not the other fees, only if the defendant is an eligible youth and the fee would constitute an unreasonable hardship.

[125] *Id.*

[126] California Administrative Office of the Courts, Benchguide 83 § 83.16 (2014), available at http://victimsofcrime.org/docs/default-source/restitution-toolkit/benchguide2014.pdf?sfvrsn=2 (citing Cal. Penal Code § 1202.4(c)).

[127] *Id.* at § 83.21.

[128] See Biloxi Municipal Court, LFO, and Community Service Benchcard (2016), available at http://www.biloxi.ms.us/wp-content/uploads/2016/03/BenchCard.pdf ("The Court may not reduce or suspend any mandatory state assessments, including those imposed under Miss. Code Ann. § 99-19-73").

[129] See Wash. Rev. Code § 7.68.035; WASH REV. CODE § 43.43.7541; Wash. Rev. Code § 9.94A.753(5).

[130] Wash. Rev. Code § 9.94A.6333.

pay LFOs. As discussed in section C.3 above, there are ways for judges to create alternatives to financial payment that can satisfy LFOs. Where legislation or local ordinances disavow the authority of judges to exercise such discretion, it is important to reform the law. Not only is it important in order for the statute or ordinance to be consistent with *Bearden*; judges are in the best position to determine if an alternative to payment or waver of part of the LFOs following a good faith effort to pay is appropriate when the goal is compliance and not fundraising upon threat of incarceration. Legislation has created this myriad of fees, and legislation will be required to reduce or properly scale them to an offender's misconduct. In 2016, Maine passed Senate Paper 666, which authorizes judges to suspend or reduce LFOs, including mandatory LFOs, and in doing so to consider various factors including "reliable evidence of financial hardship."[131]

COSCA members and other state court leaders should work with legislative bodies to recognize and encourage judicial discretion to allow judges to tailor LFOs to an offense and mitigate or waive LFOs when there has been a good faith effort to pay or otherwise comply, and the defendant is unable to pay.

**E. Impose Jail Time for Willful Refusal to Pay, and Provide Credit at a Rate that Results in Reasonable Satisfaction of Court Obligations**

Despite the best efforts of courts to assess ability to pay fairly and provide alternatives to court debt that accommodate an individual's circumstances, there will remain those who willfully refuse to pay. A court may reasonably conclude that these individuals have earned the consequence of incarceration. Even at this stage, however, the result of an offender's loss of liberty should be satisfaction of the offender's obligations to the court and not additional punishment through the accumulation of additional LFOs. A range of offenses result in unpaid LFOs, but the focus in obtaining satisfaction of LFOs in each case is compliance with the law and not justice-for-profit.

One of the ironies of court LFOs is observed when a court debtor "volunteers" to serve jail time as the best option to satisfy court debts. When faced with court LFOs totaling thousands of dollars compounded by late fees, Homer Stephens asked a judge in the Oklahoma City Municipal Court to send him to the jail where he eliminated the debt after 17 days.[132] In many jurisdictions, offenders who spend time in jail earn credit against court LFOs, such as $50 per day in Montgomery, Alabama, that increases to $75 per day if the offender works while in jail or $50 to $100 per day in Texas counties.[133] The status of such "volunteers" may merit closer scrutiny if a statute could be interpreted to give judges the authority to apply jail time as credit toward LFOs without a *Bearden* hearing.[134]

Confronted by an offender who has the ability to pay but has not done so, courts may consider a process of graduated sanctions short of jail since incarceration will likely frustrate the offender's ability to pay while adding to the cost to taxpayer-funded jails. The range of sanctions can include mandatory budget classes; mandatory service in the community or at a restitution center; special appearances before a

[131] S.P. 666, section 13, 127th Leg., Reg. Sess. (Me. 2016), amending 17-A MRSA section 1300(3), accessed at http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=SP0666&item=1&snum=127.

[132] Clifton Adcock, "*Offender's Story: Untying the Bonds of Court Debt,"* Prisoners of Debt Series, *Oklahoma Watch* (February 26, 2015), accessed at http://oklahomawatch.org/series/prisoners-of-debt/

[133] Andrea Marsh and Emily Gerrick, "Why Motive Matters: Designing Effective Policy Responses to Modern Debtors' Prisons," 34 *Yale Law and Policy Review* 93, p. 103 (Fall 2015).

[134] *See* Missouri Code: Mo. Rev. Stat. § 543.270.1.

judge; revocation of driving, hunting, and fishing licenses with exceptions to maintain employment; and restricted liberty without full incarceration, such as curfews or electronic monitoring.[135] The Adult Probation Department in Maricopa County, Arizona, has a Financial Compliance Program with a graduated list of responses to nonpayment of Court LFOs depending on the number of days delinquent, including a written reminder at 15 days, a 7-page Payment Ability Evaluation at 30 days, mandatory 5-week budgeting class at 60 days, referral to a collection agency at 90 days, and probation revocation at 180 days.[136] Probation officers report "that the use of incentives and sanctions of personal importance to the individual has been a particularly effective enforcement strategy."[137]

When jail, where the loss of freedom is aggravated by the risks of lost employment and housing, is the best option for satisfying court LFOs, it is time to reexamine the fees, late penalties, and add-on costs that make other options unattractive. Nonetheless, when a court finds an individual has the means to pay and refuses to do so, and the court has exhausted reasonable alternatives that include community service, incarceration remains the court's consequence of last resort. With reasonable credit against court debt for time served, incarceration is the ultimate tool available to judges for satisfaction of LFOs.

[135] Rachel L. McLean and Michael D. Thompson, *Repaying Debts,* Council of State Governments (2007), pp. 2 35-36.

[136] *Id.* at p. 36.

[137] *Id.*

## IV. Conclusion

Three decades ago, the United States Supreme Court in *Bearden* held it is unlawful to incarcerate an offender for court debt absent proof of willful failure to pay. Today the members of COSCA dedicate our efforts to assisting the judges and court staff we support to achieve routinely what is stated in *Bearden.* This paper cites many examples of state and local court efforts to assess ability to pay, scale consequences to the offender and the offense, and break the cycle of court LFOs leading to a debtors' prison. Consistent with the practices advocated in this paper, the members of COSCA will work to achieve the promise of *Bearden* more closely and reserve jail for those who willfully fail to pay court LFOs.

In summary those practices are

A. Streamline and Strengthen the Ability of Courts to Assess Ability to Pay

B. Adopt Evidence-Based Practices that Reduce Failure to Appear and that Improve Compliance with Court Orders, Including Orders Imposing Fines and Fees
    1. Simplify and clarify court LFOs and their application
    2. Adopt practices that minimize failure to appear and failure to pay.
    3. Eliminate additional fees for collections-related supervision/probation and cease extensions of supervision/probation solely to achieve payment of fines and fees or the equivalent in community service.

C. Expand and Improve Alternatives to Satisfy Court LFOs
    1. Community Service
    2. Day Fine
    3. Non-Financial Compliance to Satisfy LFOs

D. Ensure Judges Have the Authority to Modify, Mitigate, or Waive Fees for Those Unable to Pay Despite Good Faith Efforts

E. Impose Jail Time for Willful Refusal to Pay, and Provide Credit at a Rate that Results in Reasonable Satisfaction of Court Obligations